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PRACTICE

AT TRIAL AND ON APPEAL

—FOR—

MINNESOTA.

—BY—

CHARLES B. ELLIOTT,

JUDGE OF THE DISTRICT COURT, FOURTH JUDICIAL DISTRICT, OF MINNESOTA.

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A few words only are necessary with reference to the scope of this work. It treats of local practice in civil actions and hence excludes a full consideration of the practice in special proceedings. To cover the subjects of justice court practice and the various special and collateral proceedings would require a book of more than twice the size of this volume.

If in its present form the book proves to be a useful handbook, I shall feel fully repaid for the labor devoted to its preparation.

I am under great obligation to Mr. Seldon Bacon of the New York bar for the use of a course of lectures prepared and delivered by him at the University of Minnesota. These lectures began with the return of a verdict and contained a very full citation of cases reported in the first 49 volumes of the reports.

Minneapolis, July 15, 1900.

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BEFORE TRIAL—GENERAL PROVISIONS.

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1. Issues.

An issue arises when a fact or conclusion of law is maintained by one party and controverted by the other. An issue of law arises upon a demurrer to the complaint, answer or reply. An issue of fact arises (1) upon a material allegation in the complaint controverted by the answer; (2) upon new matter in the answer controverted by the reply; (3) upon new matter in the reply, except when an issue of law is joined thereon. Issues of both law and fact may arise upon different and distinct parts of the same pleading in the same action.[1]

2. The Manner of Trying Issues.

An issue of law must be tried by the court,

[1] Gen. St. 1894, § 5355 et seq.

or by a referee, to whom it is referred as provided by statute.[2] An issue of fact may be tried by a court, referee, or jury. An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from a marriage contract on the ground of adultery, are required to be tried by a jury unless a jury trial is waived, or a reference ordered, as provided by law.[3] All other issues of fact shall be tried by the court subject to the right of parties to consent, or of the court to order that the whole issue, or any specific question of fact involved therein, be tried by a jury or referee.[4] An action of replevin is triable by a jury although there is an issue as to the existence of a secret trust.[5]

3. Issues Primarily Triable by a Jury.

It will thus be seen that cases in which a party may demand a jury are specifically named by the statute, i. e. they are excepted out of the general mass of issues of fact, the trial of which is under the control of courts. Thus, an issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a "divorce from the

[2] Gen. St. 1894, § 5359.
[3] Gen. St. 1894, § 5360.
[4] Gen. St. 1894, § 5361.
[5] Blackman v. Wheaton, 13 Minn. 326 (Gil. 299).

marriage contract on the ground of adultery," must necessarily be tried by a jury unless the jury is waived by the parties, or a reference is ordered under the provisions of the statute.[6]

4. Issues Primarily Triable by a Court.

All issues of fact except such as are enumerated in the preceding section are required to be tried by the court, subject, however, to the right of the parties to consent, or the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury or referee.[7]

5. Settlement of Issues for Jury.

The authority of the court to settle specific issues for a jury remains the same as when law and equity were administered by separate courts. The court may thus direct specific issues in an equitable action to be submitted to a jury,[8] and it may do this upon the applica-

[6] Gen. St. 1894, § 5360.

[7] Gen. St. 1894, § 5361; Sumner v. Jones, 27 Minn. 312.

[8] Cobb v. Cole, 44 Minn. 278.

In cases where the issues of fact are not provided for by Gen. St. 1894, § 5361, Dist. Ct. Rule XXIX. provides that "if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a motion to be made upon the pleadings, that the whole issue or any specific

tion of either party, or on its own motion. The notice of motion to frame issues must be given within ten days after issue joined. Thus, an action for specific performance of a contract is triable to a court, but the court may submit specific issues of fact arising therein to a jury.[9] Where this is done, a formal order, stating the issues, should be entered before the trial is commenced.[10] Considerable laxness, however, has been allowed in this respect in practice. Where an action was brought to have a policy of insurance reformed, and enforced as reformed, the jury was impaneled, and the evidence on both

question of fact involved therein, be tried by a jury. With the notice of motion shall be served a distinct and brief statement of the questions of fact proposed to be submitted to the jury for trial, in proper form, to be incorporated in the order, and the court or judge may settle the issues, or may refer it to a referee to settle the same. The court or judge may, in his discretion, thereupon make an order for trial by jury, setting forth the questions of fact as settled, and such questions only shall be tried by the jury, subject however to the right of the court to allow an amendment of such issues upon the trial in like manner as pleadings may be amended upon trial." See Judd v. Dike, 30 Minn. 380, 385.

[9] Piper v. Packer, 20 Minn. 274 (Gil. 245).

[10] The jury trial must be directed "before the trial is entered on." Berkey v. Judd, 14 Minn. 394 (Gil. 300).

branches introduced, without an order or consent as to the issues they should try. It was held that the proper practice was for the court to take the testimony upon and determine the issues of reformation, and then submit the remaining issues of fact to the jury. Until the preliminary question was determined, there was nothing for the jury to try.[11] Where the whole case is not presented to the jury, the court should, by an order, reserve the questions, not thus submitted for its further consideration. The failure to do so, however, is not fatal, where it is substantially cured by the subsequent action of the court. Thus, where the whole case was presented at the trial, but a part of the issues only were submitted to the jury, the court made no order reserving the case for further consideration, but, some time after the return of the verdict, it made findings of fact upon the essential matters not included in the findings of the jury, and ordered judgment to be entered upon such findings, and the findings of the jury, and it was held sufficient.[12]

An action was brought for the abatement

[11] Guernsey v. American Ins. Co., 17 Minn. 104 (Gil. 83).

[12] Schmidt v. Schmidt, 31 Minn. 106. This was an action for divorce on the ground of cruelty. No general verdict was returned.

of a dam as a nuisance, an injunction against its continuance, and for damages for the overflow of lands, and the cause was tried without objection by a jury, without formal consent or settlement of issues, and submitted under instructions to bring in a general verdict as to damages. It was held that the action was of a mixed nature, the issues of fact triable by the court, subject to the right of the parties to consent, or the court to order the whole issue, or any specific question of fact, to be tried by a jury, and that there was substantial consent to submit to a jury the question of the nuisance and the amount of damages.[13] On an appeal from the probate court involving the disposition of an estate, which turned upon the fact of a common-law marriage, the court submitted to the jury the single question of the genuineness of a signature to a written contract of marriage, and reserved all other issues to be tried by the court. The court said:[14] "Exception is taken by the appellants to the action of the court in submitting this question to a jury. But upon the record no such objection is open to the appellants, because it appears that this is one of the very questions, but better expressed, which they themselves asked to be thus submitted. The court, however, had

[13] Finch v. Green, 16 Minn. 355 (Gil. 315).
[14] Hulett v. Carey, 66 Minn. 327, 332.

a right to do this on its own motion. This practice is as old as courts of chancery themselves." The fact that the question submitted to the jury is broader than the issue, as where it includes a question of law, cannot prejudice anyone, and hence cannot support a motion for a new trial.[15]

6. Issues on Appeal from Probate Court.

After the return upon an appeal from the probate court has been duly made and filed, the cause may be brought on for trial before the district court by either party upon eight days' notice to the adverse party. The statute provides that, in all cases of appeal from the allowance or disallowance of a claim against an estate, the district court shall, on or before the second day of the term, direct pleadings to be made up as in civil actions, "but no allegations shall be permitted, except such as are essential to the specific matter to which the appeal relates, and thereon the proceeding shall be tried. All questions of law arising on the cause shall be summarily heard and determined upon the same pleadings. The issues of fact shall be tried as other issues of fact are tried in the district court." [16]

The complaint filed in the district court

[15] McArthur v. Craigie, 22 Minn. 351.
[16] Gen. St. 1894, § 4673.

should conform to the claim as filed in the probate court. Considerable latitude, however, is allowed in this respect, as the statute is not intended to restrict the claimant to the technical type and cause of action which he presented to the probate court. He must, however, present the same matter or transaction.[17] When the cause is placed upon the calendar, the court will hear, try, and determine it in the same manner as if originally commenced in the district court.[18] All appeals other than from the allowance or disallowance of claims against the estate are required to be tried by the court without a jury, "unless the court orders that the whole issue, or some specific question of fact involved therein, be tried by a jury or referee." [19]

A party has no constitutional right to a jury trial on an appeal from an order of the probate court admitting or refusing to admit a will to probate.[20]

[17] Stuart v. Stuart, 70 Minn. 46.

[18] Gen. St. 1894, § 4672. Marvin v. Dutcher, 26 Minn. 407, In re Post, 23 Minn. 478, and Schmidt v. Schmidt, 46 Minn. 451, were decided before the adoption of the present probate Code.

[19] Gen. St. 1894, § 4674.

[20] Schmidt v. Schmidt, 47 Minn. 451. But such an issue is an eminently proper one to be submitted to a jury.

7. Dismissal of Probate Appeal.

The statute [21] provides that on an appeal from the probate court, the appellant shall cause the same to be placed on the calendar for trial on or before the first day of the term at which the cause is noticed for trial, and, if this is not done, "the appeal shall be dismissed." The district court may, for cause shown, relieve the appellant from his default in not complying with this statute. "The right of a respondent to have such an appeal dismissed upon the failure of the appellant to enter the cause on the calendar on the first day of the term for which the cause is noticed is prima facie absolute; but the district court, in the exercise of its discretion, may, for cause shown, refuse to dismiss the appeal, and direct the case to be placed upon the calendar for trial." [22]

8. Framing Issues in Insolvency Proceedings.

The rules of court provide [23] for an appeal to the court by the insolvent or creditor from the action of the assignee or receiver in allowing or disallowing a claim against the estate. "If such appeal be not noticed for trial and placed upon the calendar by the appellant at the first

[21] Gen. St. 1894, § 4671.
[22] Hintermeister v. Brady, 70 Minn. 437.
[23] Dist. Ct. Insolvency Rule VIII.

general term of the court appointed to be held within the county, not less than twenty days after the taking of the appeal, the adverse party may have the same entered upon the calendar during that or some succeeding term, and have such appeal dismissed, or the action of the assignee affirmed." Rule IX. provides that, "upon an appeal, the pleadings shall be the same as in civil actions. The first pleading shall be the complaint of the claimant, which shall be filed in the office of the clerk of the court, and a copy thereof served upon the adverse party, within five days after service of the notice of appeal. If subsequent pleadings have not been made before the first day of the term, the court shall fix the time within which the same shall be made."

9. Waiver of Right to have Issues Framed.

The right to have issues framed for a jury may be waived by failing to demand it at the proper time. Thus, where a bank claiming to be a creditor of the insolvent made a motion, supported by affidavits, for leave to participate, and the court ordered the hearing adjourned to a certain time, and further ordered "that said application be heard at the time and place aforesaid, upon such competent oral, documentary, and other evidence, and such depositions as may be then adduced by the re-

spective parties," it was held that the right to have issues framed was waived by failing to make the demand, or object to the order which provided for such trial without the framing of issues. "It was too late for him to make such objection for the first time on such trial, which was had some five weeks after such order was made." [24]

10. Notice of Trial.

After a case is at issue, either party may notice it for trial at least eight days before the term.[25] In Ramsey county, by special statute, twelve days' notice is required.[26] The phrase "the term" for which notice of trial may be given includes a special term at which the action, under section 4850, might be properly tried.[27] A party is entitled as of right to a notice of trial. Hence, after a cause on the calendar of the district court has been tried, and a verdict rendered, if the court grants a new trial, from which the adverse party appeals to the supreme court, the cause must be again noticed for trial after an affirmance of the order appealed from, and the remanding of

[24] Swedish American Nat. Bank v. Davis, 69 Minn. 182. Dist. Ct. Rule XXIX.

[25] Gen. St. 1894, § 5362.

[26] Gen. St. 1894, § 4861.

[27] Colt v. Vedder, 19 Minn. 539 (Gil. 469).

the case to the district court. The court said: "It must be admitted that the proper construction [of section 5362] is not very plain; but it seems to us that the provision that a cause shall remain on the calendar from term to term, until finally disposed of, was intended to apply to causes the trial of which should be pending in that court, and which the court might try, and not to causes removed from that court by appeal to the supreme court, pursuant to a statute which, in effect, declared that, pending the appeal, and until the proper determination of the supreme court affirming the order appealed from, the district court should not proceed to the trial of the case." [28]

A party does not waive the objection that the court has no jurisdiction over the subject-matter of the action by admitting service of a notice of trial, and by not objecting to the case being set down for trial at the call of the calendar.[29] But where a cause is at issue, noticed for trial, and placed upon the calendar, an amendment of the pleadings does not render another notice of trial necessary.[30] The right to have a cause stricken from the calendar because proper notice of trial was not given is

[28] Mead v. Billings, 43 Minn. 239.

[29] Hagemeyer v. Board of County Com'rs, 71 Minn. 42.

[30] Stevens v. Curry, 10 Minn. 316 (Gil. 249). § 14.

not waived by proceeding to trial after the court has denied a motion to strike.[31]

11. Note of Issue.

The party giving the notice of trial shall furnish the clerk of the court, at least seven days before the term, with a note of issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar *according to the date of the joinder of issue.* If not tried at the term for which the notice was given, the cause need not be noticed for a subsequent term, but shall remain upon the calendar from term to term until finally disposed of or stricken off by the court. The party upon whom notice of trial is served may also file a note of issue, and cause the action to be placed upon the calendar without further notice on his part.[32] In Hennepin county, "all notes of issue

[31] Mead v. Billings, 43 Minn. 239.

Where, in the notice of trial and note of issue, the plaintiff's name was given as "Jacob," instead of "Frederick," and defendant admitted that he had not been misled, a motion to strike from the calendar was properly denied. Homberger v. Brandenberg, 35 Minn. 401.

[32] Gen. St. 1894, § 5362. In Ramsey county the court is authorized to prescribe the contents of the note of issue. Section 4861.

hereinafter filed with the clerk of this court for the general terms thereof shall contain a statement showing whether said cause is a court or jury case; and where said cause is a default divorce case, the words 'default divorce' shall be entered upon said note of issue." The clerk is ordered "not to receive any note of issue which does not disclose the date of the service of the last pleading, and which does not show whether the issues in said cause are for trial by the court or jury." [33]

12. Proceedings where there is no Appearance.

The statute also provides that either party, after notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with the case, and take a dismissal of the action, or a verdict or judgment, as the case may require.[34] Where the plaintiff's claim or defendant's counterclaim is denied, and the opposite party fails to appear, the court cannot direct judgment against the party failing to appear without hearing evidence.[35]

[33] Order filed June 26, 1899. See note *, p. 51.

[34] Gen. St. 1894, § 5364.

[35] Newmann v. Newmann, 68 Minn. 1; Strong v. Comer, 48 Minn. 66.

13. Service of Notice of Trial.

The manner of serving the notice of trial is prescribed by the statute.[36] Where, after the commencement of the action, the defendants and their attorney remove from the state, the notice of trial may be served on the attorney at his place of residence in the other state.[37]

14. Amendment of Pleadings after Notice of Trial.

Where a cause is at issue noticed for trial, and placed on the calendar, an amendment of the pleadings does not render another notice of trial necessary. "An amendment of pleadings is not a final disposition, although it may be a change of the issues in an action, and does not, under our statute, require a new notice of trial." [38]

15. Special Term Calendar—Proceedings at Special Term.

Special term calendars are required to be prepared by the clerk, and in the larger counties a special term is held each Saturday. The prac-

[36] Gen. St. 1894, § 5217.

[37] Olmstead v. Firth, 64 Minn. 243. As to whether Gen. St. 1894, § 5217, would apply where it affirmatively appeared that the attorney had abandoned the case, and so notified the other party, is questioned.

[38] Greggs v. Edelbrok, 59 Minn. 485; Stephens v. Curry, 10 Minn. 316 (Gil. 249).

tice of having one judge in chambers in Ramsey and Hennepin counties has not led to the abolition of the regular weekly special terms. Motions may be made, and orders made returnable, either at chambers or at special term, and matters made returnable at chambers are often set over for hearing at special term.

Rule XIII. provides: "The clerk in each county shall keep a special term calendar, on which he shall enter all actions or proceedings noticed for special term, according to the date of issue or service of notice of motion. Notes of issue of all matters for special term shall be filed with the clerk one day before the term; and no case shall be entered upon the calendar unless such note of issue shall have been filed." Rule XIV. provides that "all affidavits, notices, and other papers, designed to be used in any cause at special term, shall be filed with the clerk at or before the hearing of the cause, unless otherwise directed by the court." Rule I. of the special Hennepin county rules provides as follows: "Special terms will be holden every Saturday (except on holidays) at 9 o'clock in the forenoon. The preliminary call of the calendar will be followed at once by the peremptory call, at which hearing will be had, and causes finally disposed of as reached. No hearing will be set down for the afternoon, nor continued beyond the morning session, un-

less for urgent reasons. Only causes properly on the calendar when the court opens will be heard, unless they have been omitted by mistake or inadvertence of the clerk. All pleadings, orders, notices, affidavits, and other papers proper to be filed must, to entitle them to be read, be filed with the clerk before the day on which the special term is held, unless for some reason, other than neglect, the paper could not have been sooner filed, or unless the occasion for the use of the paper arises at the hearing from some causes not previously apparent. The strict enforcement of the provisions of this rule may be relaxed in favor of attorneys from other counties."

16. General Term Calendar.

Prior to the first day of each general term, the clerk of the district court prepares and has printed a calendar of causes for hearing and determination during that term. The calendar is arranged and printed by the clerk under the direction of the judges, and all cases wherein notes of issue have been properly filed after notice of trial properly given, or which have been continued from a former calendar, should appear upon this calendar. No cases can be heard during the term that are not upon the calendar, except default divorce cases, which may be placed thereon at any time dur-

ing the term, when so ordered by the court. In Hennepin county, special rule V., adopted September 22, 1899, provides: "No default divorce case not upon the calendar on the first day of the term shall be tried during the term, unless so ordered by three of the judges, including the judge having charge of the court calendar; and no such order shall be made except upon a showing that great prejudice will result to the plaintiff if such order is not made, which showing must be by petition verified by the plaintiff, setting out in detail the facts relied upon to obtain the order sought. No such order shall be made except upon a showing that the complaint in said action has been filed, and has remained on file continuously, for at least 30 days prior to the date of the application for such order."

17. Call of Calendar.

It is customary, in most of the districts, to call the entire calendar on the first day of the term, and to set the cases for trial on days then designated, during the term. Cases are called by their calendar numbers, and distributed to the proper court or jury call calendar, where they are set for a day certain by the judge in charge of that calendar. By a rule recently adopted in Hennepin county, this practice is changed, and the cases are now set

by the clerk in the order of the joinder of issues, as shown by the notes of issue filed in his office.

18. Justice Court Appeals.

Upon an appeal from a justice court, the appellant shall cause an entry of the appeal to be made by the clerk of the district court upon the calendar of actions for trial on or before the second day of the term, unless otherwise ordered by the court. The plaintiff in the court below shall be the plaintiff in the district court. If the appellant fails or neglects to thus enter the appeal, the appellee may have it entered at any time during that or any succeeding term, and the judgment of the court below shall be entered against the appellant for the same, with interest and the costs of both courts: Provided that it shall not be necessary for either party to notice the appeal for trial, or file a note of issue with the clerk.[39] Appeals on questions of law alone may be brought on for hearing before the court at any time. Such a hearing may be noticed for

[39] Gen. St. 1894, § 5072. The absolute right of the appellant to enter his appeal terminates with the second day of the term, and does not continue until the respondent has exercised his right to have the judgment of the justice affirmed and entered against the appellant. Sundet v. Steenerson, 69 Minn. 351.

trial at chambers.[40] The failure of the appellant to cause an entry of the appeal on the calendar on or before the second day of the term does not affect the jurisdiction of the district court over the action. Jurisdiction is fully acquired when the appeal is perfected, and the justice's return filed in the district court. The court then "becomes possessed" of the action, and may proceed in the same manner as near as may be as in actions originally commenced in that court. The district court may therefore relieve the appellant from the consequences of his omission to enter the appeal, and try the case on its merits.[41] If such relief has been improvidently granted, the order may be revoked, and the respondent reinstated in his right to judgment against the appellant.[42]

19. Proceedings on Dismissal of Justice Court Appeal.

Where an appeal has been allowed by a justice of the peace in any case, and return thereof made to the district court, and said appeal is for any cause dismissed, the district court shall nevertheless enter its judgment in said action, affirming the judgment of the court

[40] Rawlings v. Nolting, 53 Minn. 232.

[41] Christian v. Dorsey, 69 Minn. 346. See Hintermeister v. Brady, 70 Minn. 437.

[42] Sundet v. Steenerson, 69 Minn. 351.

below, and the costs of both courts may be taxed before the clerk of the district court, and entered in said judgment, and the respondent have execution therefor against the appellant and his sureties upon the appeal bond, as in other cases.[43] Under this statutory provision, the district court cannot, upon the dismissal of the appeal, enter judgment of affirmance, and include therein the supposed amount of the judgment of the justice court in a case where no return has been made from the justice court.[44]

20. Motions at Call of the Calendar—Resetting of Cases—Continuance.

At the call of the general term calendar, it is customary to hear and determine various summary motions, such as for a continuance to strike from the calendar, and to transfer from one calendar to another. Until the adoption of the recent change in the manner of setting the calendar in Hennepin county, all such motions were noticed in open court at the

[43] Gen. St. 1894, § 5071, as amended by Laws 1895, c. 24.

[44] Roswell v. Zier, 66 Minn. 432. No appeal will be dismissed for want of a bond or because of a defective bond, if the appellant will before the motion is determined execute a satisfactory bond. This applies to an action for forcible entry and unlawful detainer. Mills v. Wilson, 59 Minn. 107.

call of the calendar on the first day of the term, and set for hearing on the following Thursday. No other notice was required, than the announcement in open court of the notice of the motion proposed to be made. In practice, almost all kinds of motions are heard in this way, even for judgment on the pleadings, without regard to the eight days' notice prescribed by statute. This is commonly by consent, or at least without objection, and, if more time is required for preparation, the case is transferred to a future special term calendar, where it appears without further action by the parties. Cases are frequently set for trial on a day certain, subject to the determination of such motion. Motions to frame issues for a jury in equity cases, and upon appeals from probate courts, if within Rule XXIX., are also properly made on the first day of the term. The new Hennepin county rule has made no change in reference to motions, except that, by reason of the saving of time in calling the calendar, such motions are now generally disposed of on the term day. The practice with reference to these matters is largely governed by the convenience of court and counsel. The rules for Hennepin county provide that "all motions shall be heard on the first day of the term, and upon said day applications for a resetting of cases will be heard;

but applications for resettings will only be granted upon a legal showing which would entitle the party to an adjournment."

Rule XXXVII. provides that all motions for continuance shall be made on the first day of the term, unless the cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day. And in all affidavits for continuance on account of the absence of a material witness, the deponent shall set forth particularly what he expects and believes the witness would testify to were he present and orally examined in court.

21. Filing Pleadings.

Rule XVI. of the district court provides: "Whenever any party to an action fails to file any pleading therein as required by section 80 of chapter 66, General Statutes 1878 [Gen. St. 1894, § 5220], the action shall, upon the application of the adverse party, be continued to the next general term of said court, and, if both parties fail to so file their pleadings, the action shall be stricken from the calendar." This rule has in recent years been strictly enforced, at least in Hennepin county. Neither the statute nor the rule of court has any application to a case which has not been noticed for trial. The failure to file the pleading cannot

"affect the validity of the judgment, even if the section cited had any application to a case in which there was no appearance by defendant, and which was therefore not noticed for trial." [45] The delivery of a paper to a clerk of court, not in his office, and the making of an indorsement by the clerk in proper form, the paper not, however, being deposited in his office, nor any entry of a filing being made therein, does not constitute a filing of the paper in such office.[46]

22. Filing Orders, Bonds, and Affidavits.

In addition to the statute and the rule referred to in the preceding section, there is a rule of court which provides that "all orders, together with the affidavits and other papers upon which the same are based, which orders are not required to be served, shall, within one day after the making thereof, be filed in the office of the clerk by the party applying for such orders. Orders required to be served shall be so filed within five days after the service thereof." [47] This rule should be strictly observed.

[45] Young v. Young, 18 Minn. 90 (Gil. 73).

[46] Schultz v. First Nat. Bank of Minneapolis, 34 Minn. 48.

[47] Dist. Ct. Rule XV.

23. Order of Disposition of Issues.

The statute provides that the issues on the calendar shall be disposed of in the following manner, unless, for the convenience of parties or the dispatch of business, the court otherwise directs: First, issues of fact to be tried by a jury; second, issues of fact to be tried by the court; third, issues of law.[48]

In the counties where there are a number of judges, this order is often varied. Thus, in Hennepin and Ramsey counties, and probably elsewhere, the court and jury calendars are in charge of different judges, while cases involving only issues of law are commonly heard at special term, or by a judge in chambers. In Hennepin county, by an order of court made June 26, 1899, the clerk, in making up the calendar, was directed hereafter to set the cases in the following order: (1) All tax cases, both real and personal, shall be set for the first day of the term. (2) All default divorce cases shall be set for Tuesday, Wednesday, Thursday, and Friday of the first week of such term, or on such days, beginning with Tuesday, as shall be necessary to fully set said cases. (3) All continued cases shall be set, eight cases each day upon the jury calendar, and eight cases each day upon the court calendar, begin-

[48] Gen. St. 1894, § 5363.

ning on the second Monday of the term, in the order in which they appeared on the last term calendar. (4) All new civil cases, not default divorce cases, shall be set, eight cases each day, in the order of joining issues in said cases, as shown by the notes of issue.

24. Demand for Jury—Waiver.

Upon the call of the calendar, the parties must announce to the court whether the cause is for trial by the court or jury, and the case is thereupon entered upon the proper call sheet, and set for trial on a day certain. Any controversy as to the nature of the action is determined after hearing at the time by the court. The statute provides that a jury may be waived by the several parties to an issue of fact on actions arising on contracts, and with the consent of the court, in other actions (1) by failing to appear at the trial; (2) by written consent in person or by attorney filed with the clerk; (3) by oral consent in open court entered in the minutes.[49]

At the call of the calendar it is the duty of the party or his attorney to demand a jury, and a statement or announcement that the case is a jury case is sufficient. The rule is that, "where a party is entitled to a jury trial, he

[49] Gen. St. 1894, § 5385. Newman v. Newman, 68 Minn. 3. See Wittenberg v. Onsgard, 81 N. W. 14.

waives it by failing to demand it when the case is called for trial, and by proceeding to trial without objection before the court without a jury." [50] In another case it is said: "If the defendant desired a jury trial on any of the issues, it should have distinctly advised the court of the fact." [51]

In one case, Chief Justice Gilfillan said: [52] "It appears from the settled case that at a previous term of the district court at the time, as we infer when the general calendar was called to ascertain what causes were to be tried by the court, and what causes by a jury, this case was, by the consent of all the parties, placed upon the calendar of causes to be tried by the court, and was continued, and, at the term to which it was continued, it was by consent set down for trial by the court on a day certain, which consents were entered in the minutes of the court. It was not until the cause came on for

[50] Banning v. Hall, 70 Minn. 89.

[51] Levine v. Lancashire Fire Ins. Co., 66 Minn. 148. Waiver by conduct, see Smith v. Barclay, 54 Minn. 47.

[52] St. Paul Distilling Co. v. Pratt, 45 Minn. 219. Where the motion is made before the commencement of trial, the question must be determined on the pleadings, and the decision cannot be affected by the character of the case as subsequently developed by the evidence. Greenleaf v. Egan, 30 Minn. 316.

trial on the day so set that defendants demanded a jury trial. It is not claimed, and could not be claimed, that ordinarily after such consents either party could insist on a jury trial. The defendant claims, however, that his consents to a trial by the court could not be taken as a waiver of a jury trial, because, when they were given, the cause was one for trial by the court, and he could not then insist on a jury trial, but that, when the cause was reached on the day of trial, it had changed in that respect, so that it was a proper case for a jury; and that his demand, being made on the first opportunity after he was entitled to a jury trial, ought to have been granted; but there had been no change in the character of the action or of the issues to be tried."

But if, by amendment of the pleadings, new issues are raised, the party is entitled to a jury trial upon those issues, although he may have waived a jury before the amendments were made.[53] The waiver of a jury on the first trial of an action in ejectment is not a waiver of the right to a jury on the second trial allowed by the statute.[54]

[53] McGeagh v. Nordberg, 53 Minn. 235.

[54] Cochran v. Stewart, 66 Minn. 152. A waiver should plainly and explicitly appear, and every reasonable presumption should be against it. St. Paul, etc., R. Co. v. Gardner, 19 Minn. 132 (Gil. 99). See

25. Jury Fee.

The legislature may require, as a condition to the right to a jury in a civil case, that the party demanding a jury shall pay a reasonable jury fee in advance.[55] The statute provides that, "before the jury is sworn, the plaintiff shall pay to the clerk three dollars as a jury fee, which shall be immediately paid by the clerk to the treasurer of the county."[56] In a justice court, a party calling for a jury must pay the jury fee into court in advance, and, if he refuses to do so, the justice may proceed and try the case without a jury. The fee "should accompany the demand for a jury, or at least be made on request of the justice, and, until the amount is deposited, the justice is not required to take any steps toward issuing a venire. A refusal to pay the fee when thus demanded amounts to a waiver of the right to a jury trial."[57] In the municipal court of Minneapolis, the jury fee must be tendered at the

Deering v. McCarthy, 36 Minn. 302. A party waives the right to object to a case being tried by a jury by not objecting until after the jury is sworn. Brown v. Lawler, 21 Minn. 325, followed in Brown v. Nagle, 21 Minn. 415.

[55] Adams v. Carriston, 7 Minn. 456 (Gil. 365).

[56] Gen. St. 1894, § 5368.

[57] Rollins v. Nolting, 53 Minn. 233, citing Randall v. Kehlor, 60 Me. 37.

time the jury trial is demanded.[58] Where a jury cause is called, jury fee paid, verdict rendered, and a new trial granted, a further jury fee must be paid when the case is called for another trial, before the jury can be sworn. The several fees thus paid are properly taxed against the losing party on the entry of judgment.[59] But where the jury fee is paid, and the jury fail to agree upon a verdict, and are discharged, an additional fee need not be paid when another jury is sworn.

20. Rules of Court.

The present rules governing the practice of the district courts of the state were adopted at a meeting of the judges on August 24, 1893, in accordance with the provisions of chapter 44 of the General Laws of 1875. In some districts, additional rules in force in those districts only have also been adopted. Rules of court are for the guidance of the court, and may be disregarded by the court when, in its judgment, the interests of justice and the public business will thereby be advanced. In one case, the supreme court said: "Assuming that the rule of the district court as to an affidavit of merits is applicable to such a case, the insufficiency of the affidavit in this case affords no sufficient

[58] McGeagh v. Nordberg, 53 Minn. 235.
[59] Schultz v. Bower, 66 Minn. 281.

reason for reversing the order, for the court had power to dispense with a compliance with the rule, and there seems to have been no impropriety in the action of the court." [60] In another case it was said: "Such rules are very proper for courts to adopt for the orderly discharge of business, and if the court had sustained the objection, and refused the application, without prejudice, this court would doubtless not have interfered. But in its discretion the court saw fit to suspend their operation in this particular instance, and dispose of the application on its merits. It was competent for the court to do this." [61]

27. Change of Venue—As of Right.

A change of the place of trial may be had in all civil actions upon the consent in writing of the parties or their attorneys. When the county designated in the complaint is not the proper county, the action may nevertheless be tried there, unless a proper demand is made for its removal to the proper county. This is done by a demand in writing that the trial be had in the proper county. This written demand must be accompanied by an affidavit of the attorney or agent as to the actual residence of the de-

[60] Nye v. Swan, 42 Minn. 243.

[61] Gillette & Herzog Manuf'g Co. v. Ashton, 55 Minn. 75.

fendant at the time of the commencement of the action. On the filing of the proof of the service of such demand and affidavit upon the attorney in the office of the clerk of the district court in the county in which such action is commenced, the action shall thereupon be transferred, and the place of trial thereof changed, to the county in which the defendant is resident, without any other steps or proceedings whatever. If there are several defendants residing in different counties, the action may be tried in a county upon which the majority of such defendants shall unite in such demand.[62] When the proof of service of the demand and affidavit is filed in the office of the clerk, it is his duty to forthwith transfer to the proper county all the files and records in the case, as no order of court is necessary.[63]

[62] Laws 1895, c. 28, amending Gen. St. 1894, § 5188. As to place of trial, see Gen. St. 1894, § 5182 et seq.

[63] Flowers v. Bartlett, 66 Minn. 213. As to change of venue from one justice court to another, see Gen. St. 1894, § 4974, as amended by Laws 1897, c. 136. Anderson v. Hanson, 28 Minn. 400, reversing Rahilly v. Lane, 15 Minn. 447 (Gil. 361). See, also, McGinty v. Warner, 17 Minn. 41 (Gil. 23); Altman v. Yost, 62 Minn. 261; Altman v. Yost (Minn.) 64 N. W. 564; State, etc., Ins. Co. v. Grau (Minn.) 78 N. W. 862. Statute regulating changes of venue in justice court provides that application must be made "before the trial commences." An action being at

If the plaintiff desires to move for an order designating the county named in the complaint as the place of trial, on the ground of convenience of witnesses, the motion must be made in the county to which the clerk has thus transferred the record.

28. Change of Venue—Continued.

Where an action was commenced in Le Sueur county, and removed to Hennepin county, in a different judicial district, by filing the demand required by the statute, a motion was made in Le Sueur county for an order requiring the clerk to transmit the files to Hennepin county, which was denied. A demurrer was then interposed, and was noticed for hearing in Sibley county. The defendants appeared specially, and objected to it being heard there, on the ground that the action had been already

issue, and called for trial, a jury was demanded and granted, and the cause continued to a future day, when the jury was returnable. An application for a change of venue on the latter day was held too late. Lueck v. St. Paul, etc., Ry. Co., 57 Minn. 33.

As to change of venue from a municipal court, see Gen. St. 1894, § 5191. The provision that no justice is required to transfer a civil action until all his costs are paid does not apply to a change of venue from one municipal court to another (Laws 1893, c. 51), where the judge is a salaried officer, and has no personal interest in the costs of the suit. Lueck v. St. Paul &c. Ry. Co., 57 Minn. 30.

removed to Hennepin county. The court overruled this objection, and filed an order overruling the demurrer, from which the defendants appealed to the supreme court. The respondents contended that "the former order of the court denying the motion to change the place of trial cannot be reviewed on this appeal; that an appeal from an order does not, like an appeal from a judgment, bring up for review the regularity of prior orders or rulings of the court. This is undoubtedly true; and if the order denying the motion to change the place of trial had the effect of retaining the case in Le Sueur county for trial, and the place of trial is in that county until the order is reversed or set aside, then respondent's objection is well taken." After holding that the case was ipso facto removed to Hennepin county by the filing of the proper papers with the clerk, the court said that, nevertheless, "we are not ready to hold that the court in Sibley county (same district as Le Sueur county) had no jurisdiction to hear the demurrer, even if the case had been removed to Hennepin county;[64] but, if the case had been so removed, it was irregular to bring the demurrer on for hearing in Sibley county. * * * Appellants had a right to object to the hearing of the demurrer on the

[64] State v. District Court, 52 Minn. 283.

ground that Sibley county was not the proper county in which to hear it. If the court erred in overruling this objection, the error is reviewable on this appeal." [65]

20. When Motion Must be Made.

The motion for a change of venue on the ground that the county designated in the complaint is not the proper county must be made before the time for answering expires. In a recent case it appeared that neither of the defendants resided in the county in which the action was brought. Due demand was made for a change to the proper county, but before the hearing on the motion it was abandoned. An answer was filed, and the case went to trial, and a verdict was rendered against the defendants. On their appeal it was held that the complaint did not state a cause of action. An amended complaint was then served, and the defendant was given 20 days within which to answer. Within the 20 days, but 3 years after the action was commenced, the defendants demanded a change of the place of trial under chapter 28 of the Laws of 1895, which had been enacted in the meantime. It was held that "the time for answering" within which the demand must be made had long since expired, and that the amendment of the

[65] Flowers v. Bartlett, 66 Minn. 213.

complaint did not revive nor extend the time to make the demand. It is the intent of the statute that the plaintiff shall know promptly and with certainty where the place of trial is to be.[66]

30. Change by Order of Court.

The place of trial of a civil action may also be changed by the court (1) when there is reason to believe that an impartial trial cannot be had in the county in which the action is then pending; (2) when the convenience of witnesses and the ends of justice would be promoted by the change: Provided, that when the defendant is, upon proper demand made, entitled to a change of the place of trial from the county in which the action against him was commenced to the county in which he resides, upon the ground that the county designated in the complaint is not the proper county, such action cannot, for any of the reasons or upon any of the grounds specified in this section, be retained for trial in the county where the same was commenced, but can only be tried therein upon removal thereto from the proper county, upon the order of the district court in and for such proper county.[67] An order refusing to change the place of trial for the convenience

[66] Potter v. Holmes, 72 Minn. 153.

[67] Laws 1895, c. 28. See Laws 1899, c. 335.

of witnesses will not be disturbed unless there was an abuse of discretion.*

31. Waiver of Right to Have Venue Changed.

The right to have the place of trial changed because the action was not brought in the proper county may be waived by neglect to move until the time to answer has expired. The right to a change upon other grounds may be lost by neglect to make the application within a reasonable time. "It may be stated, as a general rule, that the application should be made at the earliest opportunity, or at least within a reasonable time after acquiring knowledge of the existence of the ground on which the application is based; it being incumbent upon the applicant to explain any seeming lack of diligence on his part." [68]

32. Motions—Notice.

A motion is merely an application for an order.[69] When a notice of motion is necessary, it must be served eight days before the time appointed for the hearing, but the time for hearing may be shortened by an order to show

* Sims v. Am. Steel Barge Co., 56 Minn. 68.

[68] 4 Enc. Pl. & Prac. 421, quoted in Potter v. Holmes, 72 Minn. 157. See, also, Waldron v. St. Paul, 33 Minn. 87; McNamara v. Eustis, 46 Minn. 311. Dist. Ct. Rule XXVIII. See 82 N. W. 1023.

[69] Gen. St. 1894, § 5225.

cause.[70] An order made without notice to the opposite party is merely irregular, but not void.[71] The rules provide that when any party applies to any judge or court commissioner for any order to be granted without notice, except an order to show cause, he shall state in his affidavit whether he has made any previous application for such order, and if such previous application has been made upon the same state of facts, every subsequent application shall be refused.[72]

[70] Gen. St. 1894, § 5226. In computing the eight days, the day of service is excluded, and the first day of the term included. Notice that a motion will be made "at the next special or adjourned term" of the district court for Olmstead county, to be held on the 28th day of January, 1867, contains a sufficient designation of the term. Blake v. Sherman, 12 Minn. 420 (Gil. 305).

[71] Danner v. Capehart, 41 Minn. 294.

[72] Dist. Ct. Rule XVII. See post, par 39.

"A notice of motion should be entitled in the cause; should state the time and place of the application to the court or judge; should designate the papers on which the application will be made; should specify the exact relief to which the moving party supposes himself entitled, with a notice of a demand for other and further relief, when a prayer for general relief is advisable; and should be signed by the moving party, and addressed to the attorney of the adverse party" 2 Waite, Prac. p. 499.

33. Notice of Motion—Accompanying Papers—Grounds of Motion.

The rules of court require that notices of motion shall be accompanied with copies of the affidavits and other papers on which the motions are made; provided that papers in the action of which copies shall have theretofore been served, and papers other than such affidavits which have theretofore been filed, may be referred to in such notice, and read upon the hearing, without attaching copies thereof. When the notice is for irregularity, the notice must set forth particularly the irregularity complained of. In other cases, it shall not be necessary to make a specification of points, but it shall be sufficient if the notice states generally the grounds of the motion.[73]

The notice of motion must in all cases state the grounds of the motion. Thus, where, on appeal, the paper book contained a notice of motion for a new trial, which did not state the grounds for the motion, the decision of the lower court was affirmed.[74] Under Hennepin County Additional Rule 2, an order to show cause which shortens the time of notice must be accompanied by a notice of motion setting forth the grounds upon which the relief is sought.

[73] Dist. Ct. Rule VIII.

[74] Spencer v. Stanley, 74 Minn. 35.

34. Motions and Orders—How Made Returnable.

All orders to show cause and motions must be made returnable or be noticed for hearing before the court at a designated time and place. Orders returnable in vacation should be made returnable before the court, but such as are returnable at chambers should be before a designated judge. In districts where there are a number of judges, such orders may properly be made returnable before "the judge of the district court at chambers," and it may then be heard before any judge of the district who is in chambers at that time. An order to show cause in matters proper for the district court in vacation, but not for a judge at chambers, is not rendered invalid by requiring the party to show cause before the judge at chambers, as it will be construed to designate merely the place where the judge will hold court.[75] An order returnable before the court may be legally made returnable "before the judge of the district court in and for said county," as this expression is synonomous with the with the word "court." [76]

[75] Yale v. Edgerton, 11 Minn. 271 (Gil. 184).

[76] Ib. See Marty v. Ahl, 5 Minn. 27 (Gil. 14). A garnishee summons which requires the garnishee to appear at a time and place named, at a special term of a particular court, then and there to be held, sufficiently designates the court or officer. Northwestern Fuel Co. v. Kofod, 74 Minn. 448.

35. Place of Hearing a Motion.

All motions must be made in the district in which the action is pending, or in an adjoining district; provided, that no motion shall be made in an adjoining district which shall require the hearing of such a motion at a greater distance from the county seat where the action is pending, in which such motion is made, than the residence of the judge of the district wherein such motion is pending from such county seat, unless the place where such motion is made in such adjoining district is nearer by direct railway communication to said county seat than said residence of the judge of the district is by such railway communication. When any motion is made in a district court other than that in which the action is pending, the order, determination, or judgment thereon is to be entered in the same manner, and have the same force and effect, as when made in and by the judge of the district, and in the county in which the action is pending.[77]

[77] Gen. St. 1894, § 5227. As to hearing before different judges, see State v. District Court, First Judicial Dist., 52 Minn. 283. See Flowers v. Bartlett, 66 Minn. 213. Where two judges of the Hennepin county district court sit together, and there is a difference of opinion, the opinion of the senior judge in office is the opinion of the court. In re State Bank, 57 Minn. 361. When two judges sit together, the senior judge may decide the case after

36. Procedure on the Hearing of a Motion.

The procedure upon the hearing of a motion is regulated by Rule X., which provides that, upon motion or order to show cause, the moving party shall have the opening and the closing of the argument. Before the argument shall commence, the moving party shall introduce his evidence to support the application, the adverse party shall then introduce his evidence in opposition, and the moving party may then introduce evidence in rebuttal or avoidance of the new matter offered by the adverse party. On hearing such motion or order to show cause, no oral testimony shall be received. There are some exceptions to the rule that oral evidence will not be heard on a motion or order to show cause. It is commonly done upon the hearing of a motion to remove an assignee, or for leave to share in the distribution of the assets of an insolvent estate without filing releases. The matter rests in the discretion of the court.*

37. Relief when there is no Appearance.

Whenever notice of a motion shall be given, or an order to show cause served, and no one shall appear to oppose the motion or applica-

his associate has resigned. Darelius v. Davis, 14 Minn. 345.

* State v. Egan, 62 Minn. 280.

tion, the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear, or shall decline to proceed, the opposite party, upon filing like proof of service, shall be entitled to an order of dismissal.[78]

38. Orders to Show Cause.

The court is allowed by the statute to shorten the time of notice of a motion by an order to show cause. When such an order is made, it will be presumed to have been made in a proper case, and in the exercise of a proper discretion.[79] The use of the order to show cause is largely within the discretion of the court, and it was formerly granted in many cases which should more properly have been the subject of a motion. But the rules of court [80] now provide that orders to show cause will only be granted when a restraining order is necessary, or some exigency is shown to exist which would cause injury, or render the relief sought ineffectual, if the moving party were required to give the statutory notice of motion. If, on the hearing, it appears that there was no such ground for the order, it may be discharged, or

[78] Dist. Ct. Rule IX.
[79] Goodrich v. Hopkins, 10 Minn. 162 (Gil. 130).
[80] Dist. Ct. Rule XI.

the hearing continued, in the discretion of the court. Such order must be accompanied by a notice setting forth the grounds on which the relief asked is sought, as in other notices of motion.

The Hennepin County Additional Rules provide for the same proceeding in somewhat greater detail. Rule 2 provides that, whenever a motion can be made upon notice, an order to show cause will not be granted, except upon a showing of some exigency whereby delay for the time prescribed for the notice of motion will cause injury, or render the relief sought ineffectual. Such exigency must also be briefly stated in the order as ground for shortening the notice, and if, on the hearing, it appear that there was no such grounds, the order may be discharged. Such order must be accompanied by notice of motion setting forth the grounds on which the relief asked is sought, and substantially in the ordinary form of such notices, except that the time of hearing, if mentioned in the notice otherwise than by reference to the order, shall be the time fixed by the order, the only scope of the order in such case being to shorten and fix the time for hearing the motion.

39. Renewal of Motion.

The denial of a motion "without prejudice"

is not a bar to a renewal of the same motion. Such an order, by its terms, authorizes the renewal of the motion without the further application to the court for leave.[81] But an order which unconditionally denies the motion to vacate a previous order is, while it remains unchanged, a bar to another application for the same relief.[82] If the defeated party desires to renew the motion, he must obtain permission from the court before he can do so upon the same facts.[83] Where a motion has been denied, a subsequent order to show cause why the same relief should not be granted amounts to permission to renew the motion.[84] Where an application is made to any judge for the approval of a bond or undertaking, for an order to show cause, or any ex parte order, which is denied, the application cannot be renewed before another judge without leave.[85]

Facts determined on the hearing of a motion are res judicata. "The correct rule is that in the case of an order affecting a substantial right and appealable, when a full hearing has been had on a controverted question of fact,

[81] In re Minneapolis Railway Terminal Co., 38 Minn. 157. See Gunn v. Peak, 36 Minn. 177.

[82] Griffin v. Jorgensen, 22 Minn. 157.

[83] Irvine v. Myers, 6 Minn. 558 (Gil. 394).

[84] Goodrich v. Hopkins, 10 Minn. 162 (Gil. 130).

[85] Dist. Ct. Rule XVII.

the decision of a point actually litigated upon the motion is an adjudication binding upon the parties, and conclusive to that extent." [86]

[86] Collins, J., in Truesdale v. Farmers' Loan & Trust Co., 67 Minn. 454, citing Dwight v. St. John, 25 N. Y. 203, and Riggs v. Purcell, 74 N. Y. 370, and overruling the statement in Heidel v. Benedict, 61 Minn. 170, to the contrary.

* In Hennepin County, where the terms begin on Monday, the note of issue must be filed the second Saturday preceding. See § 11.

CHAPTER II.

AT THE TRIAL.

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40. Call and Answer.

When a case is reached for trial, it is called by the clerk or court by number and title, and the parties should answer, if ready for trial. The cases are called and disposed of in their order on the calendar, and, if there is no response by either party on the final call, the case will be stricken from the calendar, unless otherwise directed by the court.[1] If the calendar is behind, as is generally the case in the larger districts, the strict rule is commonly disregarded, and the case carried or reset to accommodate counsel. A case is never called and forced to trial if either attorney is at the time actually engaged in the trial of another case. If attorneys are in cases called on the court and jury calendars on the same day, it is customary for the jury case to have precedence.

[1] Dist. Ct. Rule XXXVII.

41. Impaneling the Jury.

The impaneling of the jury is a part of the trial, and the parties have a strict right to have it done in a legal manner. Considerable diversity of practice exists in different districts, but any method pursued is valid unless objected to, and exception taken at the time. Much greater strictness exists in practice in criminal than in civil cases. In the latter, when the action is called for trial, the clerk draws from the jury box the ballots containing the names of jurors, until the jury is completed, or the ballots exhausted. If the ballots are exhausted before the jury is completed, the sheriff, under the direction of the court, may summon from the bystanders, or the body of the county, so many qualified persons as are necessary to complete the jury.[2] Such talesmen are now seldom called, as litigants have no particular desire for the services of bystanders in this capacity. In Hennepin county, the practice is for the judge in charge of the jury calendar to direct the clerk to draw from the box 18 names, and send such jurors to the courtroom, to which the case is referred for trial. This reference is not made until all preliminary motions have been disposed of, and after the reference to a particular judge for trial motions for continuance or resetting will not be heard.

[2] Gen. St. 1894, § 5367.

The clerk calls the names of the jurors from the 18, until the completed jury is obtained. The practice is somewhat irregular, and should never be followed in criminal cases; but in civil cases it is convenient, and saves much time and annoyance, and is usually not objected to.

42. Care of the Ballots.

When the jury is completed and sworn, the ballots containing the names of the jurors sworn must be laid aside until such jury is discharged, when they must be returned to the box. As soon as the jury is sworn, the names of jurors drawn from the box, but not sworn, must at once be returned to the box.[3]

43. Challenges.

Either party may challenge the jurors, but when there are several parties on either side, they must join in a challenge before it can be made. In practice, much less care and regularity is exercised in the matter of challenging jurors in civil than in criminal cases, but the practice authorized by the statute is the same. Challenges are to the panel and to individual jurors, as in criminal cases; and the causes for challenge are the same, so far as, in the nature of the case, they are applicable. There can,

[3] Gen. St. 1894, § 5369.

however, be but three peremptory challenges on each side.[4]

44. Challenge to the Panel.

A challenge to the panel is an objection made to all the petit or trial jurors returned, and may be taken by either party. It can be founded only on a material departure from the forms prescribed by law in respect to the drawing and return of the jury.[5] It must be taken before the jury is sworn, and must be in writing, and state distinctly the facts constituting the ground of challenge. If the sufficiency of the facts thus alleged is denied, the adverse party may except to the challenge. The exception may be oral, but must be entered in the minutes of the court.[6] This exception is in the nature of a demurrer, and the court proceeds to try the sufficiency of the challenge, assuming the facts alleged therein to be true. If the exception is allowed, the court may permit an amendment of the challenge. If the challenge is deemed insufficient by the court, it may, if justice requires it, allow the party to withdraw the exception, and enter a denial of

[4] Gen. St. 1894, § 5370.

[5] Gen. St. 1894, § 7354; State v. McCarty, 17 Minn. 76 (Gil. 54).

[6] Gen. St. 1894, § 7356; State v. Durnam, 73 Minn. 150.

the facts. The denial of the challenge may also be oral, and must be entered in the minutes. The court must then proceed and try the issue of fact, and may take the testimony of witnesses, including the judicial and ministerial officers whose irregularities are complained of.[7]

45. Challenge to Individual Jurors.

A challenge to an individual juror is either peremptory or for cause, and must be taken when the juror appears, and before he is sworn. The court, may, however, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed.[8]

46. Challenges for Cause—General and Particular.

A challenge for cause is an objection to a particular juror, and is either (1) general,—that the juror is disqualified from serving in any case; or (2) particular,—that he is disqualified from serving in the case on trial.

The general causes of challenge are (1) a conviction for a felony; (2) a want of any of the qualifications prescribed by the law to render a person a competent juror; (3) unsoundness of mind, or such defect in the faculties of the mind or organs of the body as render him

[7] See, generally, Gen. St. 1894, §§ 7353–7359.
[8] Gen. St. 1894, § 7361, 7362.

incapable of performing the duties of a juror. The particular causes of challenge are (1) for such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known as implied bias; (2) for the existence of a state of mind on the part of the juror in reference to the case or to either party which satisfies the triers, in the exercise of a sound discretion, that he cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging, and which is known in this state as actual bias.[9]

In Hennepin county, the fact that a juror has served upon a jury within a year preceding the date of the drawing of the grand list is recognized as a ground of challenge. Under the recent constitutional amendment only full citizens are qualified to serve on a jury, and this is construed to mean that a person must have been a full citizen at the time of the drawing of the grand list. An additional ground of challenge for cause was provided by the recent statute which makes it a misdemeanor for any person directly or indirectly to solicit any officer charged with the duty of preparing any list in this state to put his name or the name of any other person on any jury list provided for under any law of this state. This matter

[9] Gen. St. 1894, §§ 7366–7368.

may be inquired into on a challenge for cause, and if made to appear the challenge shall be allowed.*

47. Causes of Challenge for Implied Bias.

A statute regulating challenges in criminal cases enumerates the causes for challenge for implied bias under eight subdivisions.[10] Of these the first, fourth, sixth, and eighth can have no application to civil cases. Those which remain are:

(1) Standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, to either party. The rest of this paragraph, as it stands in the statute, can refer only to criminal cases; but, so far as enumerated above, the provisions seem to apply to all cases. (2) Being a party adverse to the defendant in a civil action, or having complained against, or been accused by him, in a criminal prosecution. This provision, it seems, applies as well to a civil as a criminal case. (3) Having served as a juror in a civil action brought against the defendant, growing out of the subject-matter of the action. This, as stated, is a paraphrase of the seventh subdivision in the statute, and, as stated, would seem to

* Laws 1897, c. 352.

[10] Gen. St. 1894, § 7369.

apply to a civil case.[11] It will be noted that, on a challenge for implied bias, the law conclusively presumes bias when the existence of the facts is shown.

48. Challenge for Actual Bias.

A challenge for actual bias may be taken for the causes mentioned in the second subdivision of section 7368, and for no other cause. Under such a challenge, a wide range of examination of the proposed juror is permissible, in order that the trier may be able to determine whether the condition of mind is such that he cannot impartially, and without prejudice to the substantial rights of the party challenging, try the issue involved.[12]

49. Exception to Challenge.

The adverse party may except to a challenge to an individual juror in the same manner as to a challenge to the panel, and the same proceedings shall be had thereon as prescribed in the case of an exception to a challenge to the

[11] In Williams v. McGrade, 18 Minn. 82 (Gil. 65), it was held that the fact that one of the jurors was a juror on a former trial of the same case, which was unknown to the parties, is ground for a new trial. The fact that the clerk's minutes contained a list of the jurors at the former trial is not sufficient to charge the parties with negligence.

[12] See Gen. St. 1894, § 7381.

panel, except that, if the challenge is sustained, the juror shall be excluded. The adverse party may also orally deny the fact alleged as the ground of challenge.

50. Trial of Challenge.

When, upon the examination of a juror, facts are denied, a challenge for implied bias shall be tried by the court, and for actual bias by triers, unless, in cases not capital, parties consent to a trial by the court. The failure to demand triers, and a submission of a challenge to the court, is a consent to a trial by the court. Triers are seldom demanded in civil cases. Where a challenge for actual bias is, by consent, tried by the court, its finding is conclusive.[13] On the trial of a challenge to an individual juror, the juror, as well as other witnesses, may be examined, and must answer all pertinent questions. The testimony of the witness is competent evidence of the fact of his naturalization; but the records may be produced to contradict the witness.[14] The ordi-

[13] Hawkins v. Marston, 57 Minn. 323; Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224); State v. Mims, 26 Minn. 183; State v. Durnam, 73 Minn. 150; Perry v. Miller, 61 Minn. 412; Bennett v. Backus L. Co. (Minn.) 79 N. W. 682. As to triers, see Gen. St. 1894, § 7374 et seq. Payment of triers, see Laws 1899, c. 26.

[14] Gen. St. 1894, § 7378.

nary rules of evidence govern the trial of such an issue.

51. Order of Challenges—Necessity for a Challenge.

The order of challenges to individual jurors is under the control of the court, but when a juror is called and sworn to answer questions, the defendant should, if he wishes to question him, first challenge for general disqualifications. The other party may admit or deny the challenge. If it is admitted, there is nothing to try, and the juror must step aside.[15] The challenge cannot be withdrawn after it is admitted.[16] If the challenge is denied, and, after a juror is questioned, is submitted to the court or triers, and found not true, the defendant may then interpose a challenge for implied bias, and subsequently for actual bias; and the same proceedings take place on each challenge. In criminal cases, the defendant must, if he is dissatisfied with the juror, after the challenges for cause are all found not true, use a peremptory challenge. If he does not do so, but accepts the juror, and passes him to the other side for examination, he cannot there-

[15] Morrison v. Lovejoy, 6 Minn. 319 (Gil. 224).

[16] State v. Lautenschlager, 22 Minn. 514. A challenge for actual bias, which has been withdrawn, may be renewed at any time before the jury is complete. State v. Dumphey, 4 Minn. 438 (Gil. 340).

after challenge him peremptorily.[17] The defendant must thus definitely accept or reject each juror before the state is required to do anything more than merely admit or deny the challenge. If the defendant accepts the juror, the state then challenges, and proceeds in the same manner. Each juror is sworn as accepted.

In civil cases, the common practice is to call the full jury into the box. The defendant's attorney then completes his examination of the entire list, without interposing a challenge. If the examination develops something which, in his opinion, justifies a challenge to a certain juror, it is interposed, and admitted or denied. If denied, the juror is sworn and examined on his voir dire. If rejected, another name is drawn from the box, the jury thus being kept full, and the defendant proceeds until he is

[17] See St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 (Gil. 249). The order of challenges are prescribed by Gen. St. 1894, § 7384. See State v. Armington, 25 Minn. 29.

After a party has indicated that he is satisfied with the jury, he cannot thereafter, without leave of court, challenge peremptorily. But if the other party makes a further challenge and a new juror is called, the right to challenge the new juror remains, unless he has exhausted his peremptory challenges. Swanson v. Duluth St. R. Co. (Minn.), May 29, 1900, 82 N. W. 1093.

willing to pass the 12 men for cause. The other side then proceeds in the same manner, until willing to pass the 12 men for cause. As new jurors are drawn to take the place of those excused, they are examined in the same order, and excused or passed for cause. The peremptory challenges are then made alternately, beginning with the defendant.[18] If either party passes a challenge, or declines to exercise it, it is lost, and cannot thereafter be exercised. The jury is then sworn as a whole.

52. Interrogatories before Challenge.

A party has no right to question a juror as to his qualifications before interposing a challenge, although the court may, in its discretion, permit such an examination.[19] It is customary to permit a few general questions, relating to the name, occupation, etc., before requiring a challenge to be interposed. It is entirely within the discretion of the court, and it is not an abuse of discretion in a criminal case to refuse to allow questions preliminary to a challenge, although, at the time, the defendant had exhausted all his peremptory challenges.[20]

[18] Dist. Ct. Rule XXXIX.

[19] State v. Lautenschlager, 22 Minn. 514; State v. Smith, 56 Minn. 78.

[20] State v. Smith, 56 Minn. 78, 83.

53. Error in Excluding the Questions on Voir Dire.

The general rule is that a party has no right to select any particular person as a juror, and hence it is held that the erroneous exclusion of a juror is not prejudicial error, unless it appears affirmatively that the jurors actually accepted were not impartial.[21] This rule is well established in this state, but in a late case it was somewhat limited, and the prior decisions were distinguished. It appeared that, on the impaneling of the jury on the trial of an indictment charging the defendant with keeping a house of assignation, the defendant challenged a juror for actual bias. Defendant's counsel admitted the defendant kept the house specified at the time challenged, and asked the juror if he had heard any statements regarding the character of the house, and from which he formed an opinion as to its character. The exclusion of the question was held reversible error.[22] It did not appear that the juror who served was not impartial, but it was held that the defendant was prejudiced by being deprived of the information which the question

[21] State v. Kluesman, 53 Minn. 541; State v. Smith, 56 Minn. 83; State v. Lawler, 28 Minn. 216.

[22] State v. Bresland, 59 Minn. 281. See State v. Frelinghuysen, 43 Minn. 265.

would have elicited, as a guide in challenging peremptorily.

54. Examination to Determine whether to Challenge Peremptorily.

A party has no right to examine a proposed juror generally, without reference to a specific challenge interposed, for the purpose of determining whether or not to challenge the juror peremptorily; but he has a right, in good faith, to challenge for cause, and, if it is found not true, to avail himself of the facts brought out on the trial of that challenge in determining whether he will challenge peremptorily. If this right is left, and the party has no occasion to exhaust his peremptory challenges, he is not prejudiced by an erroneous ruling of the court, which prevents a proper question from being answered. It was said in a recent case: "It is true that the right to use the information acquired in the trial of a challenge for cause in deciding whether to make a peremptory challenge is a mere incidental right; but, in the way the question arises [in this case], it is a substantial right." [23]

55. Diligence Required in Examination of Proposed Juror — Incompetency of Jurors — Discovery after Verdict.

The effect of the failure of counsel to fully

[23] State v. Bresland, 59 Minn. 281.

examine a proposed juror is illustrated by a recent case.[24] A juror was called and examined by defendant's counsel as to his residence, business, and whether he had any acquaintance or business relations with counsel for the state. Counsel, without pursuing the examination any further, or interposing any challenge, expressed himself as content with the juror. Counsel for the state, after inquiring briefly of the juror as to his acquaintance or business relations with defendant and certain other parties, expressed himself as content, and the juror was sworn without objection by either party. After the verdict was returned, it was discovered that the juror was not a citizen of the United States, and it was claimed that he had expressed himself unfavorably to the defense before being called as a juror. The court said: "The doctrine is as old as the common law, that no objection could be taken to any incompetency of the juror after he was accepted and sworn.[25] While this doctrine may have been somewhat modified in modern times, yet the general rule, and the better one on principle, still is: First. No objection can be taken to any incompetency in a juror existing at the time he was called, after he is accepted and sworn, if the fact was known to the

[24] State v. Durnam, 73 Minn. 150, 160.
[25] Wharton's Case, Yelv. 24.

party, and he was silent. Second. And, even if not discovered until after the verdict, the cause of challenge will not per se constitute ground for a new trial. In such a case, only the discretion of the court can be appealed to which will consider the nature of the objection to the juror, what diligence the party exercised to ascertain the fact in due time, and the other circumstances of the case.[26]

Some of the cases seem to hold that under no circumstances, even where the objection was not discovered until after the verdict, will the incompetency of the juror be a ground for a new trial. We would not go that far. We think it is a matter addressed to the sound judicial discretion of the trial judge, who should take all the circumstances above referred to into consideration. In this case, although the court permitted defendant's counsel to examine the juror preliminarily, in order to determine whether he would interpose a challenge, yet counsel never made any inquiry as to the citizenship of the juror, but accepted him without interposing any challenge; and

[26] 1 Bish. Crim. Proc. §§ 946, 949a; State v. Davis, 80 N. C. 412; George v. State, 39 Miss. 570; Beck v. State, 20 Ohio St. 228; Gillespie v. State, 8 Yerg. 507; State v. Quarrel, 2 Bay. 150; State v. Jackson, 27 Kan. 581; Chase v. People, 40 Ill. 352; State v. Vogel, 22 Wis. 449.

that, too, at a time when, owing to the recent amendment of our constitution, the question of citizenship was frequently called to the attention of the courts and the bar, in order to ascertain the qualification of both grand and petit jurors. The disqualification by reason of alienage is one that does not go to either the intelligence or the impartiality of a proposed juror. In view of the nature of the objection, and the lack of diligence to ascertain the juror's competency, we are clearly of opinion that the trial court committed no error in denying a new trial on the ground now under consideration."

There is a very clear distinction between waiving a trial by jury and waiving an objection to the competency of a juror. A defendant indicted for a felony can waive the latter, although it may not be competent for him to waive the former. This doctrine does not at all infringe upon the constitutional guaranty that the right of trial by jury shall remain inviolate.[27]

56. The Order of Trial.

The order of trial is to a large extent under the control of the court, but the statute pre-

[27] Kohl v. Lehlbach, 160 U. S. 293. See, also, State v. Sackett, 39 Minn. 69, and State v. Pickett, 103 Iowa, 714.

scribes an order which shall be followed, unless for special reasons changed by the court:[28]

(1) The plaintiff, after stating the issue, shall open the case, and produce the evidence on his part. (2) The defendant may then open his defense, and offer his evidence in support thereof. (3) The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case. (4) When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant shall commence, and the plaintiff conclude, the argument to the jury. (5) If several defendants, having separate defenses, appear by different counsel, the court shall determine their relative order in the evidence. (6) The court may then charge the jury.

57. As Regulated by the Rule of Court.

Various matters relating to the order and conduct of the trial are regulated by rules of court.[29] Thus, on the trial of actions before

[28] Gen. St. 1894, § 5371.

[29] Dist. Ct. Rule XL. In Gran v. Spangenberg, 53 Minn. 42, the court said: "The order in which a trial shall be conducted is to some extent in the discretion of the trial court, and unless its direction as to such order may have prejudiced a party, a

the court, but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the case to the jury, unless the judge who holds the court shall otherwise order. Upon interlocutory questions, the party moving the court or objecting to the testimony shall be heard first. The respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to the respondent's argument. Discussion on the question shall then be closed, unless the court requests further argument.

At the hearing of causes before the court, no more than one counsel shall be heard on each side, unless by permission of the court. The defendant, in opening his case to the jury, shall confine himself to stating the facts which he proposes to prove. In cases where the affirmative of the issue to be tried is upon the de-

new trial will not be ordered because of such direction. The defendant, having the affirmative on the evidence, was strictly entitled to close the arguments to the jury; but the issue was so simple and brief that the closing argument could hardly have been an advantage, and we cannot see that giving the closing to the plaintiffs could have prejudiced the plaintiffs." State v. Ring, 29 Minn. 81; Aultman v. Falkum, 47 Minn. 414; Paine v. Smith, 33 Minn. 495.

fendant, the defendant's counsel shall open the case to the jury, and have the closing argument, as though his client were the plaintiff.

58. View by the Jury.

It often becomes important, in order that the jury may understand the testimony, that they should see the place where a fact occurred, or the property which is the subject of the action. The statute provides [30] that "whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person other than the judge or person so appointed shall speak to them on any subject connected with the trial."

A new trial will be granted where certain jurors make independent investigations for themselves in respect to matters in suit by

[30] Gen. St. 1894, § 5372. See § 143, infra. Hayward v. Knapp, 22 Minn. 5; Rush v. St. Paul City R. Co., 70 Minn. 5, 9; Koehler v. Cleary, 23 Minn. 325; Aldrich v. Wetmore, 52 Minn. 164; Woodbury v. City of Anoka, 52 Minn. 329. See Schultz v. Bower, 57 Minn. 493.

going and examining the place where an act occurred.*

Where the gist of an action on trial is the condition of the locus in quo or where a view of it will enable the jurors to better determine the credibility of the witnesses, or any other disputed facts, if jurors, without the permission of the court or knowledge of the parties, examine the locality for the express purpose of acquiring such information, their verdict will be set aside unless it is clear that such misconduct could not have affected their verdict. But "not every unauthorized view of the locus in quo will require the setting aside of a verdict. Considerations of practical justice forbid it. It would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors or because they were familiar with them. If verdicts were set aside for such reasons there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors personally to view the locality of an accident under consideration. A caution in such cases by the trial court to the jurors at the commencement of the trial not to examine the locality except by order of the court would

* Aldrich v. Wetmore, 52 Minn. 164.

not in all cases prevent such examination, although in the majority of cases it probably would, as no upright juror would disregard the order of the court." **

A jury may be sent out by the court to view the premises, not for the purpose of furnishing evidence upon which a verdict is to be founded, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court.***

Hence a charge which instructed the jury that they might use as evidence what they saw, or learned, upon a view of the premises was held error, although the court in the course of the charge also told the jury in general terms that they should be guided by the evidence.****

59. Disability of Juror—Prejudiced Juror.

If, after a jury is impaneled, and before a verdict is returned, a juror becomes sick, so as to be unable to perform his duties, the court may order him to be discharged. A new juror may then be sworn, and the trial begin anew, or the juror may be discharged, and a new jury then or afterwards be impaneled.[31]

** Rush v. St. Paul City R. Co., 70 Minn. 5.
*** Chute v. State, 19 Minn. 271 (Gil. 230).
**** Schultz v. Bower, 57 Minn. 493.
[31] Gen. St. 1894, § 5373.

Where it appears that there is a prejudiced juror on the panel, the party should ask for the discharge of the whole jury, and that another be impaneled, and not move for a continuance. The omission to do this is negligence or laches, which precludes him from availing himself of the disqualification of the juror as a ground for a new trial. "It is the duty of a party, when he discovers the disqualification of a juror during the trial, to make the objection in the appropriate way at the earliest practicable moment. He cannot be allowed to speculate on the verdict and afterwards move for a new trial if the result is unfavorable to him." *

60. Custody and Care of Jury.

After the jury is sworn, it may be kept together in the custody of an officer during the trial, but this is unusual, except in important criminal cases. It is a matter, however, which rests in the discretion of the court. After the case is submitted, the jury must be kept together, without food or drink, unless otherwise ordered by the court, and not allowed to communicate with any one, except by the order of the judge. But if, while they are kept together, either during the progress of the trial,

* Wells-Stone Merc. Co. v. Bowman, 59 Minn. 364.

or after their retirement for deliberation, the court orders them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.[32]

61. Papers Taken to Jury Room.

When the jury retires for deliberation, they may take with them all papers, except depositions, which have been received in evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.[33]

62. Charge to the Jury.

The judge's charge to the jury need not be reduced to writing unless requests are drawn by counsel, and submitted to the court before the arguments to the jury begin. That an instruction is not sufficiently specific is not available error, where the party excepting did

[32] Gen. St. 1894, § 5374.

[33] Gen. St. 1894, § 5375. The jury may take the pleadings with them to the jury room. Brazil v. Moran, 8 Minn. 236 (Gil. 205).

not ask for further instructions.[34] Nor can error be predicated upon the failure of the court to instruct the jury upon matters which the party thinks important, unless the court has been in a proper manner requested so to charge.[35] The charge should clearly state the issues submitted, and the law applicable to the evidence. The charge will be considered as a whole, and not subjected to undue criticism. "It would be unreasonable," said Justice Mitchell, [36] "to require, in the oral charge of a nisi prius judge, that verbal inerrancy which many theologians do not concede even to inspired writings. All that is required is that the charge, as a whole, shall convey to the jury

[34] McCormick H. Mch. Co. v. McNichols, 66 Minn. 384; Cummings v. Lovett (Minn.) 79 N. W. 99; Lane v. Redway (Minn.) 78 N. W. 868.

[35] Mobile &c. Co. v. Potter (Minn.) 81 N. W. 393. "No exceptions were taken to anything the court did say to the jury, but at the close of the charge the defendant excepted to it for the reason of its insufficieny and failure to give the general principles of the law controlling under the facts of the case, specifying them, to which the court replied: 'You cannot except to that unless you draw up a request before the charge is given. There can be no exception to a failure to charge unless it is a failure to give a written request to charge.' No such request was presented, and the law was correctly stated by the trial court."

[36] Hughley v. City of Wabasha, 69 Minn. 248.

a clear and correct understanding of the law of the case. If it does this, mere verbal inaccuracies ought to be overlooked."

A court is not bound to give special instructions which are fully covered by the general charge.* A written charge prepared by the trial judge who was taken sick after the close of the arguments, cannot be properly read to the jury by another judge of the same court.**

63. Requests for Instructions.

Upon the trial of any civil action before a jury in any district or municipal court, any party thereto having an interest in the result of the trial may, before the commencement of the argument to the jury, tender to the court instructions in writing, properly numbered, to be given to the jury, and require the court to indicate, before the argument, such as will be given, by writing opposite each the words "Given," "Given as modified by the court," or "Refused." If the court desires, it may hear argument thereon by the respective counsel before acting on the instructions tendered. Any instruction so indicated to be given may be read to the jury by counsel as the law of the

* Moratsky v. Wirth, 74 Minn. 146; Schultz v. Bower, 64 Minn. 123; Holm v. Village of Carver, 55 Minn. 199.

** Rossman v. Moffett, 75 Minn. 289.

case, and shall be given by the court when the jury is instructed.

The court may, of its own motion, and shall, upon application of either party before the commencement of the argument, lay before the parties any instructions, properly numbered, which it will give to the jury; and thereupon the same may be read by either counsel as the law, while making an argument to the jury: Provided, however, the court may give to the jury such other instructions, with those already approved, at the close of the argument, as may be necessary to fully present the law to the jury, and secure the ends of justice.[37]

64. Instructions—Opinion of Judge.

As a general rule, the trial judge should refrain from expressing an opinion upon a disputed question of fact. In a civil case, however, it is not error to do so, provided the ques-

[37] Gen. St. 1894, § 5403; Dist. Ct. Rule XLI.

There is a tendency towards making long requests, instructing the jury what effect they should give to certain facts and circumstances in arriving at a conclusion on the general principle "It is frequently, perhaps generally, unsafe to give such requests as it may induce the jury to consider unduly the facts and circumstances specified, and leave out of account others, that may be entitled to materially modify this effect." Watson v. Minneapolis Street R. C., 53 Minn. 551.

tion is fairly left to the jury for their decision.[38] This rule was approved in a recent case, where, upon an issue as to whether the defendants signed a promissory note on a subscription "for shares in a stallion," the defense claimed that the signatures were obtained through a trick on the part of the agent, and the court, in charging the jury, stated that they might take into consideration the difference between the agent and the defendants, "who were farmers, and who probably never had a suspicion of fraud or guile in their hearts." The agent had not been a witness, and, as the judge subsequently came to the conclusion that he had said too much, and withdrew the remark, it was held harmless error; but the court said: "If the agent and defendant had testified in the case, and their evidence had conflicted with that of the other defendants, the instruction would have been prejudicial error, although it was subsequently withdrawn, for it might fairly have been understood as a reflection upon the former, and a commendation of the latter." [39]

65. Exceptions to the Charge.

At the close of the judge's charge, and before the jury retires, counsel must take his ex-

[38] Ames v. Cannon R. Manuf'g Co., 27 Minn. 245.
[39] First Nat. Bank v. Holan, 63 Minn. 525.

ceptions to any instruction which he deems erroneous.[40] A party who takes no exception to the charge cannot afterwards be heard to say that it was erroneous.[41] Where no excep-

[40] Dist. Ct. Rule XLI.

After the charge was given, the defendant's counsel asked permission to take exceptions to the written portions of the charge, when he had examined them, and the court replied: "Certainly, you can do so." The plaintiffs claimed that they did not hear this, although they were present. The jury returned a verdict for plaintiff, and, after the court adjourned for the day, the defendant's counsel dictated certain exceptions which were, at the time of the settlement of the case, allowed and inserted, over the plaintiff's objections. Held unavailing, because not seasonably taken before the jury retired. Howe v. Minneapolis, St. P. & S. St. M. R. Co., 62 Minn. 71. See 52 Minn. 224.

[41] Valerius v. Richard, 57 Minn. 443; Bergh v. Sloan, 53 Minn. 116; Bates v. Lumber Co., 56 Minn. 14; Lawrence v. Bucklen, 45 Minn. 195; Loudy v. Clark, 45 Minn. 477. In Smith v. Kingman, 70 Minn. 453, the court said: "Immediately after the court charged the jury, a juror asked the judge some questions as to the evidence, and the court answered them, and the plaintiff Smith also made a remark. There is no claim that the court did not state truly what the evidence was, which evidence is uncontradicted. The remark claimed to have been made by Smith was of no consequence. But these matters, having occurred in open court, cannot be reviewed, as they were not excepted to and inserted in a settled case on bill of exceptions."

tion was taken, the court said: "The appellant must be deemed to have acquiesced in that statement of the law as applied to this case. The verdict was rightly founded upon that proposition, and a contrary theory of the case cannot now be advanced as a reason for avoiding the result of the trial."[42] Exceptions to instructions given to a jury, made after trial and verdict, are ineffectual, and are not available on a motion for a new trial on appeal.[43]

A verdict may be received in the absence of counsel, and, if the jury come into court, and receive further instructions from the court, and no exceptions thereto are taken, there can be no error predicated upon such instructions, although counsel was not present.[44]

[42] Bergh v. Sloan, 53 Minn. 116; Smith v. Pearson, 44 Minn. 397; Loudy v. Clark, 45 Minn. 477; Coburn v. Life Ins. & I. Co., 52 Minn. 424.

[43] Barker v. Todd, 37 Minn. 370.

[44] Dist. Ct. Rule XLII.; Reilly v. Bader, 46 Minn. 212; Hudson v. Minneapolis &c. R. Co., 44 Min. 42.

"It is further contended by the respondent that no exception was taken by the appellants to the ruling of the court. There appears to be several pages of the record where the appellants repeatedly resisted the attempts on the part of the plaintiff to have the motion for judgment granted on the pleadings, and, at the end of various statements made by the respective counsel and the trial judge, the latter remarked, referring to the case: 'Well, it is no longer on the calendar. Judgment has been

The purpose of an exception is to point out and call the attention of the court to a statement of law which is claimed to be erroneous. The court thus has an opportunity to correct the error if it was due to inadvertence.[45] The exception must therefore be specific, and direct the attention of the court to the particular proposition to which exception is taken.[46] A single general exception to the refusal of the court to charge two or more propositions, one of which is erroneous, is insufficient.[47]

Where, of several requests to charge, some are given, and others satisfactorily covered by

granted. That is the end of it, so far as this matter is concerned,'—to which the defendant duly excepted. This seemed to be about the first opportunity for them to except. They strongly opposed the motions and proceedings upon the part of the plaintiff, and that they were resisting them at every point is quite apparent; and, under the circumstances as disclosed by the record, we think the exception sufficient to raise any question involved." Pioneer Press Co. v. Hutchinson, 63 Minn. 481.

[45] Shell v. Raymond, 23 Minn. 67.

[46] Finance Co. v. Coal Co., 65 Minn. 442; State v. Miller, 45 Minn. 521; Castner v. The Dr. Franklin, 1 Minn. 81 (Gil 59), and many other cases. The trial court cannot excuse the parties from the necessity of making their exceptions specific. Columbia Mill Co. v. Bank, 52 Minn. 224.

[47] Ingalls v. Oberg, 70 Minn. 102; Webb v. Fisher, 57 Minn. 441. See generally § 153, infra.

the general charge, and others are not given, a general exception, without calling the attention of the court to the omissions complained of, is bad.[48] An exception to a refusal to give an instruction consisting of three separate propositions, one of which is clearly erroneous, in the following language, is bad: "Exception to the refusal of the court to give the instructions asked." [49]

Where there are several separate and distinct requests, each containing but a single proposition of law, an exception "to each and

[48] Delude v. St. Paul &c. R. Co., 55 Minn. 63.

[49] Salter v. Shove, 60 Minn. 483. Seven separate requests for instructions were made by defendant, several of which were erroneous, and all were refused, except as given in the general charge. The only exceptions taken were to the refusal to give those portions of the requests which the court refused, and which are not covered by the general charge. "The exception, however, was not to a refusal of the court to give those portions of the requests which were inconsistent with the general charge, but it was to the refusal to give such portions of the requests which were 'not covered by the general charge.' There were several of the requests which were not covered by the general charge which were erroneous. The exception was insufficient as a foundation for an assignment of error." Lane v. Minnesota State Agr. Soc., 67 Minn. 65, citing cases.

all of them is sufficient." [50] If the exception is

[50] In Van Doren v. Wright, 65 Minn. 80, the court said: "According to Rosquist v. D. M. Gilmore Furniture Co., 50 Minn. 192, and Steffenson v. St. Paul &c. Ry. Co., 51 Minn. 531, we suppose that this exception would not be good. But we cannot follow the decisions in those cases to the extent to which they go. The cases cited in the opinions in support of these decisions are not parallel cases, as will be seen by reference to them. Neither are the New York cases cited by plaintiff analogous, notably Walsh v. Kelley, 40 N. Y. 556, Requa v. City of Rochester, 45 N. Y. 129, and Ayrault v. Pacific Bank, 47 N. Y. 570. In each of them there will be found, on examination, a state of facts readily distinguishable from this case. If defendant had said, 'I except to the giving of plaintiff's first request, and I also except to the giving of plaintiff's second request,' and so on, no one would claim that the exceptions were not sufficiently specific. But why require this tautology? How much more specific is this, or why is it more likely to direct the attention of the court to the error excepted to than to say: 'I except to the giving of each and all of the defendant's requests?'

"We therefore held that, where several separate and distinct requests, each containing but a single proposition of law, are given, an exception to 'each of them' is sufficient, and hence that defendant's exception was good as to the fourth request. Whether it would be good as to those requests upon which the court gave comments might be another question, for it might be said that it did not sufficiently indicate whether the exception was aimed at the request, or at the comment."

to the instruction as modified, it should specifically point out the alleged error in the modification.

66. Improper Remarks of Counsel—Exceptions.

Counsel sometimes make improper and prejudicial remarks to the jury, and, if the opposing party wishes to avail himself of the misconduct, he must obtain a ruling, and enter an exception. "When counsel, in their arguments to the jury, make remarks which are foreign to the case, are unwarranted by the testimony, and are calculated to prejudice a party in the minds of the jurors, the attention of the court should be called to the objectionable language, and a ruling obtained. This may be done at the time the words are used, or when the jury is charged upon the law applicable to the pending issues. An exception to the remarks of counsel simply, is insufficient to raise the question on appeal." [51] An instruction to the jury

[51] State v. Frelinghuysen, 43 Minn. 265; Mykleby v. Chicago &c. R. Co., 49 Minn. 457, 461.

Whether improper remarks of counsel are prejudicial to the defeated party is ordinarily for the trial court to determine. Mykleby v. Chicago &c. R. Co., 49 Minn. 457; Louks v. Chicago &c. R. Co., 31 Minn. 526; Riley v. Chicago &c. R. Co., 71 Minn. 425. As to remarks by the court as to materiality of certain evidence, see Haug v. Haugan, 51 Minn. 558.

to disregard erroneous and improper statements of counsel will, except in exceptional cases, cure the error.[52]

66a. Cross-Examination of Adverse Party under the Statute.

A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination, at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.[53]

[52] Johnson v. Chicago &c. R. Co., 37 Minn. 519; State v. Reed, 39 Minn. 277; Riley v. Ry. Co., 71 Minn. 425. See an extension note to People v. Fielding, 158 N. Y. 542, in 46 L. R. A. 641.

Counsel should not be allowed to read law books to the jury. Steffenson v. Chicago &c. R. Co. 48 Minn. 285.

[53] Gen. St. 1894, § 5659; Laws 1885, c. 193, as amended by Laws 1893, c. 105.

This statute was not intended to change the order of trial or the rules of cross-examination so as to permit a party to introduce a part of his own case in chief by cross-examination of his opponent's witnesses.[54] In an action to set aside a deed as fraudulent the defendant was called under this statute. The court said: "Whether a party who calls the opposing party to be examined as a witness under Laws 1885, ch. 193, accredits him, so that he cannot offer evidence to impeach his general character for truth and veracity, we need not in this case consider. He certainly may question the truth of his statements of fact either by independent opposing evidence or arguments drawn from the testimony of the party himself. Thus if, in a case like this, the party so called testify that the conveyance was made in good faith, the party calling him is not concluded by such testimony, but may insist that upon the entire account of the transaction given by the party testifying the inference may be drawn that the conveyance was not bona fide." [55]

In proceedings to probate a will one of the proponents may be called by the contestants under this statute and interrogated concerning statements said to have been made by him

[54] Schmidt v. Schmidt, 47 Minn. 451.
[55] Schmidt v. Durnam, 50 Minn. 96.

to others concerning the mental capacity of the deceased.[56] A party who is called under this statute may be compelled to testify as fully upon all matters material to the issue as any other witness. Thus where parties holding intimate domestic relations are charged in the pleadings with a conspiracy to defraud, great latitude should be allowed in their cross-examination under the statute. The witness "charged with participating in such a fraudulent transaction is entitled to no greater immunity than any other witness testifying directly or on cross-examination." [57] The fact of a conspiracy had not been established when the witness was called.

After a party is called and cross-examined by his adversary, his own counsel is not permitted to examine him further than to have him explain his statements.

[56] In re Brown, 38 Minn. 112.

[57] Pfefferkorn v. Seefield, 66 Minn. 223. The jurisdiction of courts of equity to entertain bills of discovery has been abrogated in this state by the code of civil procedure and the several statutes giving a party to an action the right to call his adversary as a witness, and compel the production of books and documents in his possession. Turnbull v. Crick, 63 Minn. 91.

66b. Examination of Adverse Party—Object of the Statute.

The statute authorizes the examination of a "party to the record" or a "person for whose immediate benefit the action or proceeding is prosecuted or defended," and the "directors, officers, superintendent, or managing agent" of a corporation which is a party to the record. A defendant who has not answered and against whom a judgment by default has been entered cannot be examined under this statute as there are no issues between him and the plaintiff. "The statute must be given a reasonable construction," says Chief Justice Start, "and one in accord with its manifest purpose. The object of the statute was to permit a party to call his adversary at the trial, without making him his own witness, and elicit from him, if possible, material facts within his knowledge by a cross-examination, precisely as if he had already been examined on his own behalf in chief. It was not intended to permit a plaintiff to make one of his own witnesses a nominal party to the record, and then call him and cross-examine him, not as an adverse party, but as a witness against the actual adverse defendants. In equitable actions and actions to enforce liens, it often happens that there are merely nominal defendants, or defendants whose interests are the

same as those of the plaintiff and who join him in demanding the same relief against other defendants, whose interests are adverse to both of them. It would be a perversion of the statute to permit such nominal defendants, or defendants interested with the plaintiff, to be called and cross-examined, for the purpose of proving a case, not against themselves, but against their adversary defendants. The statute means simply this: that any party to the record may be called, as a matter of right, for cross-examination by any other party to the action, where the record shows that there is an issue between them to be tried." [58]

66c. Motion to Dismiss.

The statute provides for judgment (a) of dismissal and (b) on the merits. The first two subdivisions of the section of the statute provides the method by which an action may be dismissed without a final determination of its merits by the parties out of court. Sections three, four and five provide a dismissal by the court at the trial. An action may thus be dismissed by the court:

[58] Suter v. Page, 64 Minn. 444. The question whether this statute authorized the taking of the deposition of the adverse party was raised, but not decided, in Couch v. Steele, 63 Minn. 505. See Bachmeier v. Bachmeier, 69 Minn. 473.

(1) Where upon the trial and before the final submission of the case the plaintiff abandons it or fails to substantiate or establish his claim, or cause of action, or right to recover; (2) when the plaintiff fails to appear on the trial and the defendant appears and asks for the dismissal; (3) on the application of some of the defendants when there are others whom the plaintiff fails to prosecute with diligence.[59]

All other modes of dismissing an action by nonsuit or otherwise are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and a notice served on the adverse party. The statute expressly provides that in every case other than those mentioned in the section above referred to, judgment shall be rendered on the merits.[60]

The dismissal provided for at the trial is not a final determination of the action, but is in effect nothing more than a common-law nonsuit.[61] Hence, a dismissal by the court of an action at law while the same is on trial and before its final submission upon the ground that the plaintiff has failed to establish his cause of action is not a final determination on the merits, and is not a bar to another

[59] Gen. St. 1894, § 5408. See note a, p. 99.
[60] Gen. St. 1894, § 5409.
[61] See Bloom v. St. Paul &c. Co., 33 Minn. 253.

action.[62] A dismissal before final submission is a final determination of the particular suit, but not upon the merits. "Before final submission the court may take a case from the jury and dispose of it upon the evidence without a verdict, which would properly be a dismissal; and so after submission it may order a verdict, which would be a disposition upon the merits." [63]

Where a case was dismissed at the close of the plaintiff's case on the defendant's motion and a judgment was thereafter entered "on the merits," it was held error for the court, on a motion properly made, not to strike out the words, "on the merits." [64]

A motion to dismiss may be made at any time after the commencement of the trial, but properly should be made after the plaintiff rests his case.[65]

"In reviewing a ruling denying a motion to dismiss on the ground of the insufficiency of the evidence, an appellate court will consider all the evidence in the case and will affirm the action of the trial court if sufficient evidence

[62] Craven v. Christian, 34 Minn. 397.

[63] Andrews v. School Dist., 35 Minn. 70; Woodling v. Knickerbocker, 31 Minn. 268.

[64] McCune v. Eaton (Minn.) 80 N. W. 355.

[65] Merriam v. Ames, 26 Minn. 384.

was admitted to sustain the verdict, although not received until after the verdict." [66]

66d. Number of Dismissals.

An action may be dismissed by the plaintiff at any time before trial if a provisional remedy has not been allowed or counterclaim made or affirmative relief demanded in the answer; provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown.[67] This statute is held to be simply prohibitory, and hence a dismissal forbidden thereby does not in itself operate as a determination of the action on its merits.[68]

66e. Directing a Verdict.

At the close of the case either party may move for a directed verdict in his favor. If the defendant wishes to make this motion at the close of the plaintiff's evidence, he must

[66] Ingalls v. Oberg, 70 Minn. 102. See § 310.

[67] Gen. St. 1894, § 5408.

[68] Walker v. St. Paul City R. Co., 52 Minn. 127. In this case it was contended that the second dismissal was tantamount to a common-law retraxit, which was an open and voluntary renunciation by the plaintiff in open court of his suit or cause of action, but the court held otherwise.

first rest his case, and, if the motion is denied, he cannot thereafter as a matter of right introduce evidence. Before resting he should obtain leave from the court to reopen his case if the motion is denied. Such permission is sometimes, but not usually, granted.

The right to direct a verdict is no longer open to controversy in this state, as it is settled that where the case is such that the court would not allow a verdict in favor of a party to stand because not supported by the evidence, it may direct a verdict in favor of the other party. "A court is not required to submit a cause to a jury without direction when a verdict in only one form could be sustained, and when, if a contrary verdict was to be rendered, it would be the plain *duty* of the court, not a matter of *discretion*, to set it aside.[69] As stated in another case: "Where the facts are undisputed or conclusively proved, and there is no reasonable chance for drawing different conclusions from them, then the question, as in any other case, becomes one of law for the court; and even if there be controversy in the evidence as to some facts, yet if those that are uncontroverted clearly and indisputably establish negligence, it is still a question of law for the court. While it is undoubtedly

[69] Thompson v. Pioneer Press Co., 37 Minn. 285.

true that a court might in its discretion set aside a verdict as against the weight of evidence and submit the question to another jury, in a case where it would have no right to take the question entirely away from the jury, yet we apprehend that whenever it would be the bounden duty of the court to set aside a verdict because there is no evidence to sustain it or because it is against the evidence, it would be no error to direct a verdict or grant a nonsuit." [70]

The grounds of the motion should be stated, as "a request made on a particular ground to direct a verdict does not present for decision any question of law not raised by the grounds stated." [71] A motion to direct a verdict against all of several defendants is properly denied where the plaintiff is entitled to a verdict only against some of the defendants.[72]

66f. General Conduct of Trial.

The court must supervise and, within prop-

[70] Abbett v. Chicago &c. R. Co., 30 Minn. 482; Giermann v. St. Paul &c. R. Co., 42 Minn. 85; Chamber of Commerce v. Knowlton, 42 Minn. 229; Hallam v. Doyle, 35 Minn. 337.

[71] Perkins v. Thorson, 50 Minn. 85. See Young v. Ege, 63 Minn. 219; Pound v. Pound, 60 Minn. 214; Boston Real Estate Co. v. Benz, 66 Minn. 99; Hamburg v. St. Paul &c. Co., 68 Minn. 335.

[72] First Nat'l Bank v. Holan, 63 Minn. 525.

er limits, control the trial of causes, in order that justice may be administered in fact as well as in form.[73] Thus it is the duty of the court to preserve order and decorum in the court room, and for this purpose it has the power to punish, summarily, contempts committed in its presence.[74]

The order of proof rests in the sound discretion of the court,[75] as does the granting of permission to reopen the case and offer further testimony.[76] But after a cause has been submitted to the court it cannot on its own motion, and without a hearing, open the same and on verbal notice to the attorney of the party whose interests are to be affected, take further testimony.[77] The question of the admissibility of evidence must be determined by the court; and for this purpose it may hear evidence, if necessary, on the preliminary is-

[73] State v. Ring, 29 Minn. 81.

[74] Gen. St. 1894, § 6155 et seq.; State v. Ives, 60 Minn. 478; State v. District Court, 52 Minn. 295.

[75] Rosquist v. D. M. Gilmore F. Co., 50 Minn. 192; Foster v. Berkey, 8 Minn. 351 (Gil. 310); Crandall v. McIlrath, 24 Minn. 127; Romer v. Conter, 53 Minn. 171; Hale v. Life Ind. & Ins. Co., 65 Minn. 548.

[76] Nelson v. Finseth, 55 Minn. 417; Johnson v. Stillwater, 62 Minn. 60.

[77] Stein v. Roeller, 66 Minn. 283.

sue.[78] Thus, where certain public records were objected to on the ground that they had been incorrectly and fraudulently kept in the surveyor general's office, it was held that the proper practice was for the court to try that collateral issue before ruling upon the question of their admissibility. An equitable action to cancel such record will not lie.[79]

So the court must determine the question of the competency of a witness. Thus, whether "a witness offered as an expert possesses the requisite qualifications is a question of fact to be decided by the trial judge, and his ruling will not be reversed unless it clearly appears that it was not justified by the evidence as presented to him at the time, or that it was based upon some erroneous view of legal principles." [80] Such matters as the asking of leading questions,[81] recalling of witnesses,[82]

[78] State v. Barrett, 40 Minn. 65; King v. McCarthy, 54 Minn. 195.

[79] Turnbull v. Crick, 63 Minn. 91.

[80] Stevens v. City of Minneapolis, 42 Minn. 136; Blondel v. St. Paul City R. Co., 66 Minn. 284; Lawson, Exp. Ev. 236.

[81] "We do not recollect a case in the books in which a trial was ever granted on any such ground." Couch v. Steele, 63 Minn. 504.

[82] Keating v. Brown, 30 Minn. 9.

limiting the number of witnesses on an issue,[83] and allowing experiments in the presence of the jury,[84] rest in the sound discretion of the court. In an action for personal injuries the court has the power, in a proper case and under proper circumstances, to require the plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of his injuries. But the propriety of doing so rests largely in the discretion of the trial court.[85]

[83] Sheldon v. Minneapolis & St. L. R. Co., 29 Minn. 318.

[84] Smith v. St. Paul City R. Co., 31 Minn. 1.

[85] Hatfield v. St. Paul & D. R. Co., 33 Minn. 130. The United States courts have no such power. Railroad Co. v. Botsford, 141 U. S. 250. See articles by Irving Brown on "Practical Tests in Evidence," IV. Green Bag, 510. See, also, Thompson, Trials, § 859.

a See p. 92. Where there is no counterclaim and plaintiff fails to appear at the trial, the court may dismiss the case on defendant's motion, but it cannot try the case and award judgment on the merits. Diment v. Bloom, 67 Minn. 111; Keator v. Glaspie, 44 Minn. 448.

CHAPTER III.

THE VERDICT.

67. The Conclusion of a Jury Trial.
68. Disagreement of Jury—Discharge.
69. Correct Entry of Verdict.
70. Correcting Erroneous Entries.
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79. General Verdict and Special Findings.
80. Failure to Answer Special Findings—Withdrawal.
81. Distinction between Special Verdict and Special Findings.
82. Verdict on Framed Issues.

67. The Conclusion of a Jury Trial.

A trial by jury, when prosecuted to its legitimate conclusion, ends in the recording of a verdict for one party or the other. The trial is not properly concluded until the verdict is recorded, assented to by the jurors, and the jury discharged from the further consideration of

the cause. And it is the duty of counsel to remain in or be represented at the court during its sessions until the trial is ended.[1]

The duty of parties to attend to the case themselves is made a little more emphatic in civil cases by the following rule of practice, changing markedly the common-law rule: "It shall not be necessary to call either party, or that either party be present or represented, when the jury return to the bar to deliver their verdict." [2]

"The convenience of the court and jury cannot be subjected to the will of counsel or parties in a cause. It is the duty of the court, regulated by its discretion, to attend at any proper time to receive the verdict of the jury, or to give such directions as may appear to be necessary; and it would be unreasonable to say that counsel in the cause may, at their own will, by absenting themselves, prevent the court from thus discharging its duty until it shall have first sent notice to all places where they might be expected to be found." *

68. Disagreement of Jury—Discharge.

Until the jury has agreed upon a verdict or

[1] Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Reilly v. Bader, 46 Minn. 212.

[2] Dist. Ct. Rule No. XLII.

* Reilly v. Bader, 46 Minn. 212.

been discharged by the court, the trial is still in progress. When the jury is unable to agree, and is discharged, the case stands on the calendar for trial, but is ordinarily continued until the next term.

Where the jury reports that they cannot agree it is within the discretion of the court to send them out for further deliberation and to urge them to use all reasonable efforts to come to an agreement.**

69. Correct Entry of Verdict.

The provisions for securing a true record of the real verdict of the jury are very efficient if the attorney attends to his case. To make sure that the verdict rendered by the jury is really the determination at which they have arrived, it is provided that, "when a verdict is rendered, and before it is recorded, the jury may be polled, on the request of either party, for which purpose each juror must be asked whether it is his verdict; if any one answers in the negative, the jury shall be sent out for

** Watson v. Minneapolis &c. St. R. Co., 53 Minn. 551. The statute authorizing a justice to discharge a jury when they are unable to agree merely declares the pre-existing rule "that if, after a jury has been out a reasonable time, the court, in the exercise of a sound discretion, if satisfied they cannot agree, may discharge them." Rollins v. Nolting, 53 Minn. 232. Contra in criminal case, see State v. Sommers, 60 Minn. 90. But see Nat. Corp. Rep. Apr. 19, 1900.

further deliberation."[3] Further to secure a sufficient and formal verdict, the verdict as soon as rendered, and before the reading or entry of it, is submitted to the court for examination. Then, "if the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."[4] "When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes and read it to the jury, and inquire of them whether it is their verdict; if any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but, if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case." The jury is rarely polled in civil cases. It may be polled before the verdict is recorded, but not after.[5]

The ordinary but irregular practice in bringing in verdicts is for the foreman of the jury to hand its verdict to the clerk, who hands it unopened to the judge, who examines it to see if it is formal and sufficient. Unless he deems the verdict informal or insufficient, he returns the verdict to the clerk, who thereupon, without stopping to record the verdict, reads the

[3] Gen. St. 1878, c. 66, § 233; Gen. St. 1894, § 5377.
[4] Id.
[5] Steele v. Etheridge, 15 Minn. 501, 511 (Gil. 413).

verdict to the jury, who are called on to listen to it, "as the same will be recorded." This is common practice, and, in a criminal case where it did not appear that the record varied from the verdict, its validity was sustained by our supreme court.[6] But such practice is certainly not commendable. It is settled that the verdict as recorded must govern, and not the verdict as rendered, on the ground that under the statute it is presumably to the verdict as recorded that the jury gave their assent.[7] It would therefore seem wise, and an attorney is always entitled to insist, that this presumption be sustained in point of fact, and that the statutory provisions for securing a correct record of the verdict be complied with.

70. Correcting Erroneous Entries.

After the verdict has been recorded and assented to by the jury, and the jury discharged, it is too late to make corrections in it, and it cannot be aided by any additions or subtractions from any source,[8] except only the face of the record in the suit.[9] But until the formal

[6] State v. Levy, 24 Minn. 362.

[7] Leftwich v. Day, 32 Minn. 512.

[8] Steele v. Etheridge, 15 Minn. 501, 511 (Gil. 413); Dana v. Farrington, 4 Minn. 433, 436 (Gil. 335); Stevens v. Montgomery, 27 Minn. 108.

[9] Fryberger v. Carney, 26 Minn. 84; Jones v. King, 30 Minn. 368; Moriarty v. McDevitt, 46

assent of the jury has been given to the verdict as recorded, or to be recorded,[10] corrections can be made, [11] and this in some cases, even though the jury have rendered a sealed verdict and separated.[12]

The court probably may, even after the discharge of the jury, amend a verdict in some matter of form not affecting the real merits of the controversy.[13] But in such cases the power of correction would seem to be strictly limited to making a more formal or more correct statement of the decision actually reached, and not to include the power of changing the decision,[14] and no reasonable suspicion must attach to the change.[15]

Minn. 136. "A verdict must be confined to the matters put in issue by the pleadings, and if responsive to these issues it is sufficient. It must be construed with reference to the pleadings, and is sufficiently certain if it can be made certain by reference to the record." Moriarty v. McDevitt, supra.

[10] State v. Levy, 24 Minn. 362.

[11] Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122).

[12] Nininger v. Knox, 8 Minn. 140, 149 (Gil. 110); Loudy v. Clarke, 45 Minn. 477, 480.

[13] Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441; Wallace v. Hallowell (Hennepin Co. Dist. Ct. 1894).

[14] Nininger v. Knox, 8 Minn. 140, 149 (Gil. 110).

[15] Nininger v. Knox, 8 Minn. 140 (Gil. 110); Aetna Ins. Co. v. Grube, 6 Minn. 82 (Gil. 32); Loudy v. Clarke, 45 Minn. 477, 480.

The judge may refuse to receive a verdict which is wholly unjustified by the evidence, and may send the jury back to reconsider the verdict.*

71. Kinds of Verdicts.

Verdicts under Minnesota law are of two general kinds, viz. (1) general verdicts, and (2) special verdicts.[16] We may also distinguish two distinct additional varieties of verdicts which are entitled to, and will in course of time receive, some special consideration, viz. (3) general verdicts with special findings, and (4) verdicts on issues framed in court cases, and tried by a jury under direction of the court, or by consent of the parties.

72. General Verdict.

A general verdict is one by which a jury pronounces generally upon all or any of the issues in favor of the plaintiff or defendant.[17] The ordinary form of a general verdict is very simple. The jury do not attempt to state what they find, but say simply, "We, the jury in the above-entitled action, find for the plain-

* Aldrich v. Grand Rapids Cycle Co., 61 Minn. 531; Jasper v. Lano, 17 Minn. 296 (Gil. 273); Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122).

[16] Gen. St. 1878, c. 66, § 235; Gen. St. 1894, § 5379.

[17] Gen. St. 1878, c. 66, § 235; Gen. St. 1894, § 5379. Cf. Cummings v. Taylor, 21 Minn. 366.

tiff [or defendant, as the case may be]." If the decision involve the assessment of damages, there is added the clause, "and assess his damages at $———." A verdict "for the defendants" is a verdict for all the defendants who answered.[18]

73. Presumptions in Favor of General Verdict.

As at common law, many presumptions are indulged. It is deemed that the jury decided every question submitted to them, and necessarily involved in their decision, in such a way as to support the finding. If, in order to have reached such a verdict, it is necessary that they should have found the existence of any number of particular facts, then they are deemed to have found such facts.[19]

A general verdict rarely fails to cover all the issues intended to be covered thereby, but such a result may occur, though ordinarily the court, under the provisions we have already examined, will see to it that the verdict is in proper form before discharging the jury.

A general finding that each and all of the allegations of the complaint are untrue is equivalent to special finding that each allegation is untrue. Therefore, if the finding is justified

[18] Adamson v. Sundby, 51 Minn. 460.

[19] Goltz v. Winona & St. P. R. Co., 22 Minn. 55; Crandall v. McIlrath, 24 Minn. 127, 131.

by the evidence as to one allegation, which alone, and without reference to the others, would justify the conclusions of law, the fact that the finding as to some other allegation is not supported by the evidence is error without prejudice.[20] But a finding that all the material allegations of the complaint are true will not do.[21] A finding by the trial court that the allegations of fact in a complaint are true is insufficient and defective, when there were issues raised by the answer, which the evidence tends to support, to be passed upon. The rule that an application shall be made in such case to the court for amended findings does not apply where there is no opportunity to make such application.[22]

74. Certainty Required.

We have a number of decisions which illustrate the degree of certainty required in a verdict.[23] If the general verdict be so far insuf-

[20] Fidelity & C. Co. v. Crays (Minn.), 79 N. W. 531.

[21] Abrahamson v. Lamberson, 68 Minn. 454; (in pleading) Montour v. Purdy, 11 Minn. 384 (Gil. 278). These cases refer to findings made by the court. See next chapter.

[22] Bahnsen v. Gilbert, 55 Minn. 334. See § 86.

[23] Desnoyer v. McDonald, 4 Minn. 515 (Gil. 402); Fryberger v. Carney, 26 Minn. 84; Leftwich v. Day, 32 Minn. 512; Jones v. King, 30 Minn. 368; Moriarty

ficient as not to determine the issue, it will not support a judgment, and one entered thereon may be reversed on appeal from the judgment, and a new trial ordered.[24]

75. Remedy in Case of Uncertainty.

If a verdict be so ambiguous or uncertain that the decision thereby made cannot be ascertained, it is a mistrial, and a new trial will be granted on account of the insufficiency of the verdict.[25] This would seem to be substantially a motion for a venire facias de novo, under common-law rules, for a defect in the verdict apparent on the face of the record. It apparently is not a motion for a new trial, under our statute.[26]

76. Special Verdict.

The special verdict is also familiar, though our form of special verdict does not necessarily include the extended statements of the old common-law form. Under the Minnesota statute, "a special verdict is that by which the

v. McDevitt, 46 Minn. 136; Adamson v. Sundby, 51 Minn. 460; Hanson v. Bean, 51 Minn. 546.

[24] Fryberger v. Carney, 26 Minn. 84; Pint v. Bauer, 31 Minn. 4; Moriarty v. McDevitt, 46 Minn. 136. See Newman v. Newman, 68 Minn. 1.

[25] Cummings v. Taylor, 21 Minn. 366; Pint v. Bauer, 31 Minn. 4.

[26] Gen. St. 1878, c. 66, § 253; Gen. St. 1894, § 5398.

jury find the facts only, leaving the judgment to the court; it shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing remains to the court but to draw from them conclusions of law." [27] "In every action for the recovery of money only or specific real property, the jury in their discretion may render a general or special verdict; in all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues." [28]

77. Requisites of a Special Verdict.

A special verdict must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict, without looking into the evidence, which party is entitled to judgment; and such facts should be found so clearly and unequivocally as not to leave them to be made out by argument or inference.[29]

When the special verdict contains all the requisite findings of fact, it suffices without a

[27] Gen. St. 1878, c. 66, § 235; Gen. St. 1894, § 5379.

[28] Gen. St. 1878, c. 66, § 236; Gen. St. 1894, § 5380.

[29] Pint v. Bauer, 31 Minn. 4; Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441; Lane v. Lanfest, 40 Minn. 375; Cummings v. Taylor, 21 Minn. 366; Coleman v. St. Paul, M. & M. Ry. Co., 38 Minn. 260.

general verdict.[30] Though the special verdict contain only findings of evidence, without the ultimate facts, yet these may suffice if the ultimate facts necessarily follow,[31] but not otherwise.[32]

An award by the jury is neither a general nor a special verdict.[33]

78. Defective Special Verdicts—Lack of Findings—Uncertain Findings.

While general verdicts ordinarily cover the issues in the case, it is a very common fault in a special verdict that it fails to decide with sufficient definiteness all the issues presented by the pleadings. The defects are of two distinct classes, viz. (a) lack of findings, and (b) uncertainty in the findings.

If the whole case is submitted to the jury and a special verdict returned, the finding of certain facts, without making reference to any

[30] Bixby v. Wilkinson, 27 Minn. 262. Where the special verdict shows that the party is entitled to a general verdict, the court may direct a general verdict on the coming in of the special verdict. But this is mere matter of form, and judgment may be entered on the special verdict.

[31] See Smith v. Conkwright, 28 Minn. 23.

[32] In re Shotwell, 43 Minn. 389; Miller v. Chatterton, 46 Minn. 338; Lesher v. Getman, 28 Minn. 93. These cases construe findings by the court, but the principle is the same.

[33] Cummings v. Taylor, 21 Minn. 366.

other facts, is substantially a finding that there are no further facts, since a mere negative finding is not ordinarily to be expressed in a special verdict of this simple form.[34] Here there is not any real lack of a finding. If the facts so found entitled the plaintiff to judgment, judgment will be entered in his favor, otherwise in favor of the defendant. But in our Minnesota procedure it frequently occurs that a special verdict is, by a relaxation of practice, rendered in the form of answers to specific questions submitted by the court to the jury. If the court omits to submit some material question which is at issue, or the jury fails to find in answer to some question put, we have the case of no finding at all, either express or implied, upon some material issue. In such a case, the verdict will not sustain a judgment.[35]

In such case, no new trial is proper of the issues already determined, in the absence of other error,[36] and the proper remedy would

[34] Mayor of Nottingham v. Lambert, Willes, 117; Graham, Prac. 318; Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441; Pint v. Bauer, 31 Minn. 4; Lane v. Lanfest, 40 Minn. 375.

[35] Lane v. Lanfest, 40 Minn. 375, 377; Meighen v. Strong, 6 Minn. 177 (Gil. 111); Lowell v. North, 4 Minn. 32 (Gil. 15).

[36] Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441, 444; Lane v. Lanfest, 40 Minn. 375, 377;

seem to be a motion for a further trial of the untried issues, and not a motion for a new trial.[37] In case of this defect, the issue as to which the indefiniteness and uncertainty exists must be retried, and a motion for a new trial, or, more properly, for a venire facias de novo upon that issue, on account of the insufficiency of the verdict, would seem the proper remedy, although such a new trial could be granted on appeal from a judgment entered on the verdict.[38]

79. General Verdict with Special Findings.

The Minnesota statute[39] provides for general verdicts with special findings as follows: "The court in all cases may instruct them [the jury], if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes." Such a special finding may be ordered by the court at any time before the jury is discharged, even after they have brought in

Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527; Haynes, New Trials, § 295.

[37] Id.

[38] Pint v. Bauer, 31 Minn. 4.

[39] Gen. St. 1878, c. 66, § 236; Gen. St. 1894, § 5380. This statute does not apply to a criminal case,

a general verdict;[40] but the submission of such special findings, and their form and character, rest in the discretion of the trial court.[41]

In a recent case, it was contended that under section 5380 the jury have an absolute right to render a general or special verdict, and that it is error for the trial judge to interfere with or control that discretion. But the court said,* "Under this provision the judge may in

[40] Jaspers v. Lano, 17 Minn. 296, 301 (Gil. 273). See article in 20 Am. Law, Rev. 366.

[41] Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429; Jaspers v. Lane, 17 Minn. 296 (Gil. 273); McLean v. Burbank, 12 Minn. 530, 536 (Gil. 438).

Under Gen. St. 1894, § 5380, it is discretionary with the trial judge to permit, or refuse to permit, the jury to return a special verdict in an action for the recovery of money or specific real property. Morrow v. St. Paul City Ry. Co., 74 Minn. 480.

* Morrow v. St. Paul City Ry. Co., supra. Unless an order is made reserving the case for further consideration the party in whose favor a general verdict is rendered is entitled to have judgment entered on it. The question whether the special verdict shall prevail can then only be raised on appeal. Newell v. Houlton, 22 Minn. 19.

In an action under Gen. St. 1894, § 7933, to recover a statutory penalty for retailing, compounding, and dispensing drugs, medicines, and poisons, contrary to the statute regulating the practice of pharmacy, the complaint stated two causes of action, and demanded the statutory penalty of $50. The

every case require specific questions of fact to be answered, which will completely cover every issue in the case and amount in all respects to a special verdict. And, if this is done, it is immaterial whether the jury are required to render a general verdict or not, as the special findings will control and supersede such general verdict. The different parts of this section may be reconciled by interpreting the first part to mean that in an action for the

jury rendered a special verdict as follows: "We find that, at the time and place alleged in the first cause of action set forth in the complaint herein, said defendant did compound, dispense, vend, retail, and sell and deliver to said James H. Frost, in said cause of action named, the drugs, medicines, and poisons in said cause of action described."

Upon this verdict, the clerk entered judgment for the sum of $50 and costs. The court said: "This verdict upon its face is a nullity. It contains a finding as to only one of several material issues made by the pleadings, and entirely fails to find whether or not the plaintiff was entitled to recover any penalty against the defendant, as provided in the section of the statute we have quoted. It should have found either by its special verdict sufficient facts warranting the entry of judgment therein either for or against the plaintiff, or else a general verdict one way or the other, unless the jury disagreed. The one found is so incomplete and defective as to render it entirely insufficient upon which to base an entry of judgment against the defendant." State v. Currie, 72 Minn. 402.

recovery of money or specific real property the judge may, in his discretion, instruct the jury that they may, in their discretion, render a general or a special verdict."

80. Failure to Answer Special Findings—Withdrawal.

After the court has submitted a material special question to the jury, the party is entitled to an answer as of right, and if the jury do not agree, and the party insists on his right, the failure to find will be equivalent to finding that the burden of proof is not sustained.[42] When the jury return a general verdict for the plaintiff, but fail to agree upon a specific question submitted to them, the general verdict is properly received unless a finding upon the specific question would be conclusive against the plaintiff's right to recover.[43] But when the jury is directed to bring in a general verdict, and also to answer certain specific questions, and an affirmative answer to both questions is necessary to sustain a general verdict in plaintiff's favor, the court cannot, after the jury has been out many hours, on its own motion, and in the ab-

[42] Nichols, Shepard & Co. v. Wadsworth, 40 Minn. 547, 551. But see Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68.

[43] Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68. The questions need not be answered if the answers would not control the general verdict.

sence of the defendant's attorneys, withdraw the special questions, and then receive a general verdict for the plaintiff.[44]

81. Distinction between Special Verdict and Special Findings.

An important distinction is to be noted between a special verdict and such special findings. As we have seen, it is necessary that the facts found by a special verdict suffice with the pleadings to show who is entitled to judgment. In the case of special findings accompanying a general verdict, the rule is otherwise. In such case, the general verdict supplies by intendment all necessary facts, and the special finding controls and overrules the general verdict only when it is absolutely inconsistent therewith, in which case judgment must follow the special finding and not the general verdict;[45] but, unless there be irreconcilable inconsistency, the general verdict will govern.[46]

From this proposition it follows as a corollary that the general verdict is not prejudiced

[44] Ermentraut v. Providence-Washington Ins. Co., 67 Minn. 451; Elliott v. Village of Graceville (Minn.) 79 N. W. 503.

[45] Gen. St. 1878, c. 66, § 237; Gen. St. 1894, § 5381. See Nettersheim v. Chicago, M. & St. P. Ry. Co., 58 Minn. 10.

[46] Crandall v. McIlrath, 24 Minn. 127, 129; Goltz v. Winona & St. P. R. Co., 22 Minn. 55.

by any uncertainty or ambiguity or lack in a special finding, and if any objection is to be taken on the ground of uncertainty in the special finding, or failure even to make the special finding, it must be taken at once before the jury is discharged, or the defect will be held to have been waived.[47]

It should be noticed that, where there is a general verdict, and also special findings, it is not proper practice to move to set aside a special finding upon an essential issue on the ground that it is contrary to evidence, without asking for a new trial, either of the whole issue, or of the particular question of fact, unless the case called for an instructed finding on that issue. If such a finding could be set aside on such ground, leaving the general verdict and other findings to stand, in any case where setting it aside would be material, it would have the effect of a trial of such question by the court instead of by a jury.[48]

Occasionally a special finding will sustain a general verdict which might otherwise be set aside on motion for a new trial. Thus, where

[47] Manny v. Griswold, 21 Minn. 506; Varco v. Chicago, M. & St. P. Ry. Co., 30 Minn. 18.

[48] Jordan v. St. Paul, M. & M. Ry. Co., 42 Minn. 172. For illustration of a special finding inconsistent with the general verdict, see Twist v. Winona & St. P. R. Co., 39 Minn. 164.

defendant sought to maintain several different defenses, a general verdict having been found in defendant's favor, and there being also a special finding of all the facts constituting one defense, a motion for a new trial would not lie solely on the ground of erroneous instructions to the jury with regard to the other defenses, and the verdict for the defendant will stand, unless there has been error in regard to the matters contained in the special finding.[49]

82. Verdict on Framed Issues.

The remaining variety of verdicts may be considered more properly in connection with trials by the court, to which we may now turn our attention.

[49] Clague v. Washburn, 42 Minn. 371; Whitacre v. Culver, 9 Minn. 295 (Gil. 279). If the jury have made a special finding on a separate and distinct issue, which conclusively disposes of the case, it is immaterial that the judge may have erred in his instructions in submitting to the jury other separate and distinct issues. Maceman v. Equitable Life Assur. Soc., 69 Minn. 285; Elwood v. Saterlie, 68 Minn. 173.

In an action for damages on the ground of negligence either party may require the jury to name fellow servant by whose negligence the injury was caused. See Laws 1895, c. 324.

CHAPTER IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

83. General Provisions—Necessity for Findings.
84. Requisites of Findings.
85. Correction of Clerical Errors — Additional Findings.
86. Form of Findings.
87. Omission of Findings.
88. Verdict on Framed Issues.
89. Conclusions of Law.
90. References.
91. What Constitutes a Decision.
92. Stay of Proceedings.

83. General Provisions—Necessity for Findings.

By our statute, "upon the trial of an issue of fact by the court, its decision shall be given in writing; in giving the decision, the facts found and the conclusions of law shall be separately stated."[1] The natural conclusion of a

[1] Gen. St. 1894, § 5386. The part of this section relating to the time of filing decisions is merely directory. Vogle v. Grace, 5 Minn. 294 (Gil. 232). The provision requiring written findings and conclusions applies to the municipal court of Minneapolis. Brackett v. Rich, 23 Minn. 485.

trial before the court without a jury is the filing of the decision. When an action is tried by a court without a jury, the court has no right to dismiss it without findings, on the ground that the plaintiff has failed to establish a cause of action, except where the evidence adduced by the plaintiff would not justify findings in his favor. If the evidence will justify findings in the plaintiff's favor, it is the duty of the court, under the statute, to give its decision in writing, stating the facts found, and the conclusions of law, separately.[2] Where the trial court makes findings of fact as the basis of its order, although it is unnecessary to do so, and omits to find all facts legally necessary to sustain the order, it will be reversed, unless the record conclusively shows that the order is right.[3]

In a divorce case, the fact that a jury is waived does not remove the necessity of making findings of fact.[4]

[2] Tharalson v. Wyman, 58 Minn. 233. See p. 311.

[3] Sjoberg v. Security Sav. & Loan Ass'n, 73 Minn. 203.

[4] Newman v. Newman, 68 Minn. 1. Cases holding the contrary are based on statute. See 3 Estee, Pl. & Prac. § 4658.

A finding of fact not prejudicial to the appellant cannot be made the basis of a reversal. Giertsen v. Giertsen, 58 Minn. 213.

Where, for the convenience of the court and par-

A fact found by the court, although expressed as a conclusion of law, will be treated as a finding of fact.[5]

84. Requisites of Findings.

The findings of fact in such a decision are required to be as full as the findings of fact in a special verdict. In order to sustain a judgment for the plaintiff, the pleadings and findings of fact must, on their face, show that he is entitled to the judgment entered. Neither the conclusions of law nor the evidence introduced can be looked to to help out the findings of fact.[6] Properly, the findings should be of the issuable facts, and not of the evidence; not mere conclusions of law, but ulti-

ties, findings of fact and conclusions of law are prepared and printed, and amendments thereto proposed and printed, and, on a hearing, the same are allowed by the court, held, that they do not become a part of the record of the court until, after being signed by the judge, they are filed in the clerk's office. Until so signed and filed, the trial court may change them. Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 72.

[5] Cushing v. Cable, 54 Minn. 6.

[6] Miller v. Chatterton, 46 Minn. 338, 342; Hodge v. Ludlum, 45 Minn. 290; Lane v. Lanfest, 40 Minn. 375, 377; Lowell v. North, 4 Minn. 32 (Gil. 15).

In determining whether the evidence justified the finding, evidence offered and erroneously excluded cannot be considered. Sauer v. Flynt, 61 Minn. 109.

mate facts.[7] But if the findings be of evidentiary facts only, but from these the issuable facts necessarily follow, they will suffice.[8] But the findings will not suffice if the issuable fact be only a probable consequence, and not a necessary consequence, of the evidentiary facts. And finding merely of proof sufficient to sustain a finding of the fact will not do in place of that fact ordinarily.[9] It is not necessary to include in the findings of fact such facts as are admitted by the pleadings.[10]

In one case it was held, where all the facts showing negligence were found as facts, and negligence itself was found separately as a conclusion of law, that this was insufficient, as there might have been found other facts obviating the evidentiary facts found.[11] On the other hand, in a later case it was held that, where an unmistakable finding of fact was put by the judge among the conclusions of law, it would nevertheless be treated as a finding of fact.[12] The two cases seem somewhat con-

[7] Butler v. Bohn, 31 Minn. 325; Newman v. Newman, 68 Minn. 1; Conlan v. Grace, 36 Minn. 276.

[8] Smith v. Conkwright, 28 Minn. 23.

[9] Miller v. Chatterton, 46 Minn. 338, 342; In re Shotwell, 43 Minn. 389; Lesher v. Getman, 28 Minn. 93.

[10] Fenske v. Nelson (Minn.) 76 N. W. 785.

[11] Miller v. Chatterton, 46 Minn. 338, 342.

[12] Cushing v. Cable, 54 Minn. 6.

tradictory, for the rule laid down in the later case was urged at the bar in the earlier one. Possibly, however, this distinction may be drawn: In Miller v. Chatterton, this finding was of negligence. While negligence is an issuable fact, and not a conclusion of law, it is nevertheless frequently imagined to be a conclusion of law, and might, perhaps, if placed among conclusions of law, be considered not unmistakably a misplaced finding of fact, but possibly an erroneous drawing of a legal conclusion by the trial judge; while in Cushing v. Cable the finding was unmistakably merely a misplaced finding of fact.

85. Correction of Clerical Errors — Additional Findings.

If the court has failed to find on a material issue, or the finding lacks definiteness, the remedy of the party aggrieved by such failure is a motion for additional findings, or more specific findings, and the supreme court, in case of an appeal, will not supply an omitted finding, where no such application has been made.[18]

[18] Fithian v. Weidenborner (Minn.) 75 N. W. 380; Combination Steel & Iron Co. v. St. Paul City Ry. Co., 52 Minn. 203; Cobb v. Cole, 44 Minn. 278; Smith v. Kipp, 49 Minn. 119; Smith v. Pendergast, 26 Minn. 318; Cummings v. Rogers, 36 Minn. 317; Williams v. Schembri, 44 Minn. 250; Reynolds v. Reynolds, 44

Where the court omitted the amount in its order for judgment, and afterwards directed by a separate order, by its terms a part of the findings, the insertion of the amount, and the clerk attached the second order to the judgment roll, and entered judgment accordingly, it was held the same as if the amount had originally been inserted in the findings.[14] An amendment may be so made after appeal taken, but before the return is made.[15]

In a case where an obvious error was made by omitting a finding in plaintiff's favor, on an admitted cause of action, it was held that the plaintiff should have applied to the court below for correction; but where he failed to do this, but appealed, no statutory costs would be allowed in the supreme court.[16]

The refusal of the trial court to make a

Minn. 132; Warner v. Foote, 40 Minn. 176; Schulte v. First Nat. Bank, 34 Minn. 48; Bradbury v. Bedbury, 31 Minn. 163; Hewitt v. Blumenkranz, 33 Minn. 417. So, also, in similar cases of errors in computation, etc. Knappen v. Freeman, 47 Minn. 491. A court may properly refuse to make additional findings in conflict with those already made. Banning v. Hall, 70 Minn. 89.

[14] Baker v. Byerly, 40 Minn. 489.

[15] State Sash & Door Manuf'g Co. v. Adams, 47 Minn. 399.

[16] Bergh v. Warner, 47 Minn. 250.

finding on a material issue when requested to do so is reversible error.[17]

The supreme court may remand a cause to the trial court, with instructions to amend its findings of fact and conclusions of law, or make additional ones in accordance with the opinion of the supreme court, unless, upon application of either party, the court should, for cause shown ,in its judicial discretion, grant a new trial.[18]

Where the court improperly received certain evidence, it may properly refuse to consider such evidence in making its findings.[19]

86. Form of Findings.

What findings are sufficiently definite in form to support a judgment is a matter passed on a few times by our court. Thus it is held that a finding that the allegations of a certain

[17] Brigham v. Connecticut Mut. Life Ins. Co. (Minn.) 76 N. W. 952; Hall v. Sauntry, 72 Minn. 420; Wagner v. Finnegan, 65 Minn. 115.

[18] Pfefferle v. Wieland, 55 Minn. 202.

[19] Ryan v. Ryan, 58 Minn. 91. The court said: "It was also stated in these findings that all other allegations in the answer, and on which evidence had been received, were not passed on or determined, because deemed immaterial. This was equivalent to determining the admissibility of this evidence, all of which was objected to as it was submitted, the ruling of the court being reserved."

pleading are true or not true, is sufficient.[20] And a finding that there was no evidence on a given issue is a finding against the party having the burden of proof.[21] A general finding that all the allegations of a complaint are true is equivalent to specific findings of each of the facts alleged seriatim. Findings of this general form are not ordinarily to be commended, but "if made in that way (to which the plaintiff does not appear to have objected), it is incumbent on appellant to specify the fact or facts," the finding of which he complains.[22]

87. Omission of Findings.

It frequently happens in the course of a trial before the court without a jury that the court is able, at the close of the trial, to announce its decision, and order judgment for one party or the other. In such case, the find-

[20] School Dist. No. 73 v. Wrabeck, 31 Minn. 77; Hewitt v. Blumenkranz, 33 Minn. 417; Reynolds v. Reynolds, 44 Minn. 132; Crosson v. Olson, 47 Minn. 27; Combination Steel & Iron Co. v. St. Paul City Ry. Co., 52 Minn. 203; Bahnsen v. Gilbert, 55 Minn. 334. But such a general finding is not sufficient when there are issues raised by the answer which there is evidence tending to support.

[21] Watson v. Chicago, M. & St. P. Ry. Co., 46 Minn. 321; Hewitt v. Blumenkranz, 33 Minn. 417

[22] Moody v. Tschabold, 52 Minn. 51; Combination Steel & Iron Co. v. St. Paul City Ry. Co., 52 Minn. 203.

ings of fact and conclusions of law should be reduced to writing, signed, and filed, before any further steps are taken. It has happened in a few cases that this important proceeding has been omitted, and judgment has been entered without findings. This is an irregularity which the trial court can cure (under Gen. St. 1894, § 5264) by filing findings nunc pro tunc.[23] In ordinary cases, application should be made to the trial court to file findings, and the neglect to make such application to the court below should be deemed a waiver of the defect.[24] But if such findings are not, and cannot be, filed nunc pro tunc, an order for judgment containing no findings cannot stand,—as where the trial judge has died in the meantime.[25] But it must be remembered that an order of dismissal at the end of the plaintiff's case needs no findings. It simply decides a question of law,—whether the evidence in the most favorable aspect makes out a case. It differs widely from an order for judgment.[26]

[23] Swanstrom v. Marvin, 38 Minn. 359.

[24] Williams v. Schembri, 44 Minn. 250, 254, and cases there cited.

[25] Chickering & Sons v. White, 42 Minn. 457.

[26] Thompson v. Myrick, 24 Minn. 4; Woodling v. Knickerbocker, 31 Minn. 268; Chickering & Sons v. White, 42 Minn. 457; Miller v. Miller, 47 Minn. 546. The omission of a particular finding from the

This difference is largely explained by the fact that a dismissal in such a way is not a bar to another action.[27]

88. Verdict on Framed Issues.

The trial of issues of fact by the court is "subject, however, to the right of the parties to consent, or of the court to order, that the whole issue or any specific question of fact involved therein be tried by a jury." [28] In these cases, special findings by the jury on the framed issues simply take the place of findings of the court, as far as they go. If all the issues of fact are submitted to and determined by the jury, there will be no findings of fact by the court, for, under our practice, under this section of the statute the verdict of the jury is conclusive, and determines the question of fact, and is not merely advisory, as was the verdict on a feigned issue under the old chancery practice.[29] If there are any issues of fact not submitted to the jury, these should then be separately tried and found upon by the court,

findings has been already discussed under the head of "Correction of Clerical Errors," ante, § 85.

[27] Conrad v. Bauldwin, 44 Minn. 406.

[28] Gen. St. 1894, § 5361.

[29] Marvin v. Dutcher, 26 Minn. 391; Niggeler v. Maurin, 34 Minn. 118; Jordan v. Humphrey, 31 Minn. 495.

as though no jury had been called in the case, and these issues not submitted to the jury were the only open questions of fact in the case.[30]

89. Conclusions of Law.

The conclusions of law in the decision ordinarily are very brief, and consist mainly in a statement of the relief to which the court finds the several parties entitled. These conclusions of law the trial court may change or modify, upon motion, after the findings have been filed, at any time before the entry of judgment thereon, without ordering a new trial of the action.[31] If the findings of fact are not sufficient to sustain the conclusions of law, a new trial should be granted on application of the party against whom the conclusion of law runs,[32] but not on the application of the other party,[33] or the conclusions may be amended. "Though the more correct practice, where it is claimed that the conclusions of law are not justified by the facts found, is to move the court below to correct or modify them, yet the objection to them may be made on a motion for a new trial, and, if satisfied the conclusions

[30] Sumner v. Jones, 27 Minn. 312, 314; Schmitt v. Schmitt, 31 Minn. 106, 108; Sloan v. Becker, 31 Minn. 414, 417.

[31] Jones v. Wilder, 28 Minn. 238.

[32] Benjamin v. Levy, 39 Minn. 11.

[33] Miller v. Chatterton, 46 Minn. 338.

are wrong, the court should then correct or modify them." [34] Upon the trial of an issue of law, there are of course no findings of fact, but merely conclusions of law upon admitted facts.[35]

90. References.

A trial by a referee is substantially similar to a trial by the court, the report of the referee taking the place of the decision. The provisions of the statute on the subject are quite full.[36] The referee, like the court, must find on all the issues of fact made by the pleadings, and state his conclusions of fact and of law separately.[37] If the referee has filed a report, and has failed to find on all the material issues of fact submitted to him, application should be made to the trial court for an order sending the report back to the referee, with instructions to supply the omissions.[38] If he has failed to state his findings of fact and conclusions of law separately, the proper practice is a motion in the court to return the report to the

[34] Farnham v. Thompson, 34 Minn. 330.

[35] Dickinson v. Kinney, 5 Minn. 409 (Gil. 332).

[36] Gen. St. 1878, c. 66, §§ 246–250; Gen. St. 1894, § 5391; Lundell v. Cheney, 50 Minn. 470.

[37] Bazille v. Ullman, 2 Minn. 134 (Gil. 110); Califf v. Hillhouse, 3 Minn. 311 (Gil. 217).

[38] Bazille v. Ullman, 2 Minn. 134 (Gil. 110).

referee for correction.[39] And, in general, in any case where the report of the referee is informal or incomplete, the remedy is an order of the court, returning the report to the referee for correction.[40] And, in general, it may be said that the plain meaning of the statute [41] is that the report of a referee is equivalent to an actual determination by the court, and is to be treated in substantially the same manner.[42]

91. What Constitutes a Decision.

Some question may be raised at times with regard to whether certain papers filed by the court are decisions, within the meaning of the statute allowing applications for new trials. Our supreme court has expressed a very definite opinion on this question as follows: "When any issue or issues under the pleadings are tried and submitted and decided by the court, this is a 'decision,' upon the making of which a motion may be made to vacate, and for a new trial." [43]

92. Stay of Proceedings.

It is almost a matter of course, upon the rendition of a verdict or filing of a decision,

[39] Califf v. Hillhouse, 3 Minn. 311 (Gil. 217).
[40] Griffin v. Jorgenson, 22 Minn. 92.
[41] Gen. St. 1878, c. 66, § 249; Gen. St. 1894, § 5394.
[42] Cooper v. Breckenridge, 11 Minn. 341, 345 (Gil. 241); Lundell v. Cheney, 50 Minn. 470.

that a stay of proceedings is granted, wherein the defeated party may proceed to apply for a new trial, or make some similar motion.[44] In the absence of an agreement to the contrary, the original stay so granted is ordinarily of 20 days only; but, in cases where appeal is definitely proposed, longer or further stays are granted readily. By the rules of court, however, "no stay of proceedings, after the first, will be granted, without notice to the counsel, or consent of counsel for the opposite party."[45] The stay of proceedings so granted practically is a stay of entry of judgment, and is not to be confounded with the stays arising from filing supersedeas bonds, or bonds for staying execution. When one of these stays is granted, wherein to prepare a settled case, and make the motion for a new trial, it does not postpone the running of the time allowed for serving a proposed case, under Gen. St. c. 66, § 255, and Dist. Ct. Rule XLVII., but is simply a separate provision, so that, if a 20-day stay is granted, the time for serving a proposed case is simply 20 days, unless a further stay is granted.

The court may grant a stay upon condition. "That upon an application for a stay of pro-

[43] Ashton v. Thompson, 28 Minn. 330, 335.
[44] Gen. St. 1894, §§ 5384, 5400, 5414.
[45] Dist. Ct. Rule No. XLIII.

ceedings after verdict the court may, in its discretion, require renewal of security for the final judgment as a condition of granting the stay, cannot be doubted. * * * The statute gives the defeated party the absolute right, which he may exercise without leave of the court or a stay of proceedings, to propose and have settled within a specified time a case or bill of exceptions, to move for a new trial, and to appeal within a specified time. His application for a stay is voluntary. If the order on such application requires as a condition of a stay that the party do anything, his doing it is voluntary. He may do it and accept the stay, or refuse to do it, and reject the stay." [46]

The granting of the stay is in the sound discretion of the court.[47]

[46] Dennis v. Nelson, 55 Minn. 144. See Graves v. Backus, 69 Minn. 532.

[47] Dennis v. Nelson, supra. A stay of all proceedings "until the further order of the court" contained in an order to show cause why a stay of proceedings after verdict should not be granted, expires with the filing of an order denying the permanent stay. The order denying the stay is not appealable and hence an attempt to appeal from it does not keep the temporary stay alive.

CHAPTER V.

PREPARATION OF A CASE OR BILL OF EXCEPTIONS.

93. Distinction between a Bill of Exceptions and a Settled Case.
94. Bill of Exceptions.
95. The Settled Case.
96. Necessity for a Settled Case or Bill of Exceptions.
97. Form of Statement in "Case."
98. Proof of what Occurred at the Trial—The Transcript.
99. What the "Case" must Contain.
100. What the "Case" need not Contain.
101. Time of Serving Proposed "Case."
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103. Irregularities—Discretion of Judge in Settling "Case."
104. Settling "Case" after Judgment.
105. Statements Contained in Findings.
106. Appeal from Interlocutory Order—Certificate.
107. Rule of Construction.
108. By Whom "Case" Settled.
109. Conclusiveness of the "Case."
110. The Judge's Certificate.
111. Strictness of the Rule.
112. Compulsory Settlement of Proper "Case."
113. Refusal to Settle any "Case."
114. Settling an Incorrect Statement.

115. Certified Reports of Evidence in Special Proceedings.
116. Filing the Settled Case.
117. Motion on Minutes of Court.

93. Distinction between a Bill of Exceptions and a Settled Case.

A bill of exceptions is a statement of the exceptions taken on the trial to the rulings of the court, with so much of the evidence only as is necessary to explain the ruling. As a rule it does not contain all the evidence. But a settled case is a complete record of the trial, and must contain the entire evidence.[1]

94. Bill of Exceptions.

The bill of exceptions is a formal statement in writing, properly certified by the judge, of the exceptions taken. Under our statutes there are three ways of preparing a bill of exceptions:

(1) A particular statement of the point of the exception may be delivered to the judge, or entered in his minutes, at the time, and immediately corrected or added to until made conformable to the truth.[2] This method, with its separate settlement and certificate of each

[1] Board of Trustees of Ripon College v. Brown, 66 Minn. 179, 183.

[2] Gen. St. 1878, c. 66, § 254 (in Gen. St. 1866).

exception taken, is not in general use since the advent of the official stenographer.

(2) A method substantially similar is provided by another and later statute, as follows: "If during the trial any exception is taken to the ruling of the court, such exception may be forthwith taken and reduced to writing, and allowed and signed by the judge, together with so much of the testimony or charge as to make the ruling and exception intelligible, which shall be made a part of the record, so as to obviate a case or other bill of exception; and on appeal the court shall not infer that any other evidence was introduced to obviate the exceptions." [3] This method, if it vary in reality from the first, is also quite rare.

(3) The third method is under the following statutory provisions: "The point of the exception shall be particularly stated, and * * * it may afterwards be settled in a statement of the case." [4] Even this method of settling a bill of exceptions, although it is the common method of so doing, is very rare; the almost universal method of procedure in civil cases being by "settled case," which, under our practice, varies from the bill of exceptions chiefly in containing properly a statement of all the matters occurring at the trial, including

[3] Gen. St. 1878, c. 66, § 254; Gen. St. 1894, § 5399.
[4] Gen. St. 1878, c. 66, § 251; Gen. St. 1894, § 5396.

the exceptions in their several places. It gives ordinarily a far better view of the connection of the different facts and rulings, without much greater length, if the case has been properly tried, and the "case" is properly prepared. When the bill of exceptions is prepared in this third way, its settlement is sought in the same way as that of a "case."

95. The Settled Case.

A "case," which now almost invariably in civil practice in this state takes the place of a bill of exceptions, is a statement certified by the judge of the trial court of the occurrences of the trial. The preparation of this document is governed by the following statute, and the rules of court in aid thereof: "The party preparing a bill of exceptions or case shall, within twenty days after the trial, serve it upon the adverse party, who may, within ten days after such service, propose amendments thereto; and within fifteen days after service of such amendments, the same, with the amendments proposed thereto, shall be presented to the judge or referee who tried the cause, for allowance or settlement and signature, upon a notice of five days; if not presented within the time aforesaid, or such further time as may be stipulated or granted, the same shall be deemed abandoned. * * *

The case or bill being examined, and found or made conformable to the truth, shall be allowed and signed by the judge, referee, or other officer acting instead of such judge or referee, as provided herein."[5] This section is reasonably clear, but a large number of questions have arisen concerning its construction.

96. Necessity for a Settled Case or Bill of Exceptions.

As to the necessity for a settled case, the supreme court recently said: "It has been the inflexible rule of this court, from Bazille v. Ullman[6] down, that questions arising upon exceptions to the ruling of the court upon the trial cannot be examined upon appeal unless they are presented by a case or bill of exceptions prepared according to the statute; that error cannot be alleged upon, or shown by, any statement of what took place at the trial, contained in the findings of fact, or the memorandum of the court attached thereto."[7]

[5] Gen. St. 1878, c. 66, § 255 (as amended in 1870); Dist. Ct. Rule No. XLVIII.; Gen. St. 1894, § 5400.

[6] 2 Minn. 134 (Gil. 110).

[7] National Inv. Co. v. Schickling, 56 Minn. 283. See also Lawrence v. Dalrymple, 59 Minn. 463; Smith v. Kingman, 73 N. W. 253.

On an appeal from a judgment where there is no

The rule that what occurs at the trial of an action as part thereof cannot be established by means of affidavits, but must be made to appear in a settled case or bill of exceptions, applies upon a motion for a new trial upon the grounds, among others, of the misconduct of a juror. An attempt was made to show by the affidavit of counsel that each and all the jurors were questioned when called as to their knowledge of the facts in such case, and that each and every one denied having any knowledge whatsoever of the facts.[8]

To review an order refusing additional findings, it is necessary that a case be made containing all the evidence, and a copy included in the return to the supreme court on appeal from the judgment.[9]

Where the appellant omits to make a bill of exceptions, or have a statement of the case prepared and settled as required by law, the order or judgment appealed from will be affirmed.[10]

case or bill of exceptions, only the conclusions of law which are embraced in the judgment can be reviewed on the ground that they are not justified by the facts found. Wheadon v. Mead, 71 Minn. 322.

[8] Edlund v. St. Paul City Ry. Co., 81 N. W. 214, citing Ham v. Wheaton, 61 Minn. 212.

[9] Groomes v. Waterman, 59 Minn. 258.

[10] Duncan v. Everitt, 55 Minn. 151; Brigham v. Paul, 64 Minn. 95; Woodbridge v. Selwood, 65 Minn. 135.

Where a motion for a new trial was made on the minutes of the court, and granted on the ground that the court erred in its charge to the jury, the order was affirmed, because the return was insufficient. "There is no bill of exceptions, and no settled case. The procedure preliminary to an appeal in cases where motions for new trials, made on the minutes of the court, are granted or denied, is pointed out in Gen. St. 1894, § 5399. The recitals in the order cannot supply the place of a bill of exceptions or a settled case." [11]

Either a settled case, a bill of exceptions, or certificate of the trial judge as to what affidavits were presented, is necessary on an appeal from an order affirming taxation of costs by the clerk.[12]

Where a motion was made for an order removing an assignee, based on the files, records, and all the proceedings in the insolvency proceedings, and no objection was made to the sufficiency or correctness of the procedure, it was held that, on an appeal from an order refusing to remove the assignee, no "case" or bill of exceptions was necessary. All that was required was the certificate of the trial

[11] Hendrickson v. Back (Minn.) 76 N. W. 1019.
[12] Schultz v. Bower, 66 Minn. 281.

judge that the record contains all that was before him.[13]

If a "case" not properly settled is made a part of the record sent to the supreme court, the court will strike it from the record but will not dismiss the appeal.*

97. Form of Statement in "Case."

In proposing a "case," the statement of the occurrences should be abbreviated as much as possible while showing everything of substance. To this end it was formerly provided by the rules that "the case or bill of exceptions prepared therefrom [i. e. from the reporter's minutes] may be in narrative form." In 1893 the judges of district courts of the state, acting under the authority conferred by Gen. St. 1894, § 4886, adopted a set of rules to govern the practice of their courts. Rule 48 provided, among other things, that "transcripts of the stenographic reporter's minutes shall be in the exact words, and in the form of the original minutes. The proposed case shall not be made in narrative form, but shall be in the form of question and answer, as at the trial." This rule was intended to secure a complete and accurate record, but it imposed

[13] Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183.

* Mower v. Hanford, 6 Minn. 535 (Gil. 372).

much unnecessary expense upon litigants, and was not conducive to the clear and concise presentation of issues. It was also open to the objection that it deprived the appellate court of a certain control over its records. This seems, however, to have been endurable, but when the supreme court found two full pages of a settled case devoted to an alleged humorous story, told by the presiding judge, in the midst of a jury trial, including the "[laughter]," which the reporter felt obliged to insert, it felt that the time for action had arrived. It was therefore held that, "in so far as the rule prohibits a party from preparing a case in a narrative form, it is invalid, and that a trial judge cannot refuse to settle such a case on the sole ground that it is in such form. But when the exact words of the stenographer's minutes will more clearly and fully present the relation and effect of a ruling, and when the nice shades in the testimony are not preserved, or the exact bearing thereof cannot be determined in the absence of both questions and answers, the judge may, in the exercise of a sound discretion, require such part of the proposed case as he deems necessary to be in the form of questions and answers. Such discretion should be exercised so as to exclude from the record all imma-

terial matter, and make it as concise as possible." [14]

98. Proof of what Occurred at the Trial — The Transcript.

Ordinarily no proof is required to be presented to the judge of what were the occurrences at the trial. Under the present method of official stenographers, the minutes of the stenographer are transcribed by him, and furnished to any party requiring the same, on payment of fees therefor. It is provided by rule of court that "transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the original minutes. * * * The party procuring the transcript shall, at or before the time of serving the proposed 'case' or bill of exceptions, file the same with the clerk for the use of parties and the court, and the failure so to file said transcript shall be deemed good and sufficient reason for extending the time within which proposed amendments may be served by the opposite party." [15] In ordinary cases

[14] State v. Otis, 71 Minn. 511.

[15] Dist. Ct. Rule XLVIII. A complete transcript of the testimony need not be filed before proposing a bill of exceptions. Baxter v. Coughlan, Dist. Ct. Hennepin Co., File No. 78,678. A party cannot avoid the expense of procuring a transcript by serving the testimony given on a former trial of the action,

the transcript is not filed, but furnished to the other attorney for greater convenience in examination of the proposed "case." But the practice is irregular, and sometimes leads to serious trouble.

The transcript, when procured, ordinarily furnishes a very satisfactory statement of the occurrences at the trial, but there is apparently no reason why other evidences of what occurred at the trial may not be adduced. In the case of Miller v. Chatterton,[17] the reporter's notes were destroyed by a fire in Minneapolis. Some discussion arose concerning the evidence given, and the court, despite the objection of the defendant, listened to affidavits of persons who were present at the trial as to what testimony was given, as well as examined its own minutes of evidence taken. This would seem proper practice. A similar practice is expressly provided for by statute in cases where the judge or referee who tried the cause cannot settle the "case" by reason of death or disability, and the "case" is to be

and thus force the other party to procure the transcript, in order to prepare his amendments. In a case where this was done, the court refused to settle the case until the cost of procuring the transcript was paid by the proponent. Wallace v. Halliwell, Dist. Ct. Hennepin Co., File No. 54,513.

[17] 46 Minn. 338.

settled before some other judge. In ordinary cases, the settlement is before the judge or referee who tried the case.[18]

90. What the "Case" must Contain.

The settled case must contain the full proceedings at the trial, in order that error predicated thereon can be considered on appeal. Unless it purports to set forth all the evidence taken, the question of the sufficiency of the evidence to support the verdict will not be considered.[19] Hence, where the "case" shows that documentary evidence which might have a bearing on the findings of fact, but which is not made a part of the "case," was received, the supreme court will not review the findings.[20]

Where it is sought to obtain a new trial on the ground that the verdict or findings are against the evidence, or on the ground of newly-discovered evidence, the "case" must

[18] In Reynolds v. Reynolds, 44 Minn. 132, the "case" would seem to have been settled under these provisions.

[19] Lawrence v. Dalrymple, 59 Minn. 463; Mead v. Billings, 40 Minn. 505; Brackett v. Cunningham, 44 Minn. 498.

[20] Clarke v. Cold Spring Opera House Co., 58 Minn. 16, citing Acker Post No. 21, G. A. R., v. Carver, 23 Minn. 567.

be certified to contain all the evidence,[21] even if the findings are upon issues not contained in the pleadings; for it will be presumed that there was consent to try those issues.[22]

On appeal, no ruling can be reversed unless everything is shown to be presented on which the court below based its action,[23] but clearly immaterial matter may be omitted in making the settlement,[24] and the certificate of the judge or referee attesting the "case" is final. No other court can go behind the certificate collaterally,[25] except when the record itself

[21] See post, par. 110. Lundell v. Cheney, 50 Minn. 470; Thomas v. West Duluth L. & W. Co., 51 Minn. 398; Koethe v. O'Brien, 32 Minn. 78; Kohn v. Tedford, 46 Minn. 146; Brackett v. Cunningham, 44 Minn. 498; Boright v. Springfield F. & M. Ins. Co., 34 Minn. 352; Gibson v. Brennan, 46 Minn. 92. Newly-discovered evidence, see Scofield v. Walrath, 35 Minn. 356; State v. Lautenschlager, 23 Minn. 290.

[22] Deiber v. Loehr, 44 Minn. 451; Jones v. Wilder, 28 Minn. 238; In re Post, 33 Minn. 478.

[23] In re Post, 33 Minn. 478; Blake v. Lee, 38 Minn. 478; Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256; Johnson v. Howard, 51 Minn. 170; Mead v. Billings, 40 Minn. 505.

[24] In re Lyons, 42 Minn. 19.

[25] Taylor v. Parker, 18 Minn. 79 (Gil. 63); Steinkraus v. Minneapolis, L. & M. Ry. Co., 39 Minn. 135; Reiff v. Bakken, 36 Minn. 333.

shows the contrary,[26] even where the certificate is simply that the "case" contains "all the proceedings and material evidence."[27] Nothing can be reviewed that is not on the record or in the "case" which, under our practice, becomes part of the record.[28]

The judge and not the clerk must certify that the return contains all that was offered or considered on the hearing.

A "case" may, however, sometimes be treated as a bill of exceptions. Thus in one case the court said:[29] "The 'settled case' on which the motions for new trials were founded, and which has been brought before us on

[26] Acker Post No. 21, G. A. R., v. Carver, 23 Minn. 567; Lundell v. Cheney, 50 Minn. 470; Hill v. Gill, 40 Minn. 441.

[27] Reiff v. Bakken, 36 Minn. 333.

[28] Matters occurring on the trial which do not appear in the settled case cannot be considered. Ham v. Wheaton, 61 Minn. 212; Smith v. Wilson, 36 Minn. 334; Harris v. Kerr, 37 Minn. 537; State v. Framness, 43 Minn. 490; Hempsted v. Cargill, 46 Minn. 141. And there is, in general, serious objection to considering any point not raised below. White v. Western Assur. Co., 52 Minn. 352; Keyes v. Clare, 40 Minn. 84; Johnson v. Sherwood, 45 Minn. 9; Cochrane v. Quackenbush, 29 Minn. 376; Bond v. Corbett, 2 Minn. 248 (Gil. 209).

[29] Gardner v. Fidelity Mut. Life Ass'n, 67 Minn. 207, citing Board of Trustees of Ripon College v. Brown, 66 Minn. 179.

this appeal, does not purport to contain all the evidence received at the trial below, and therefore we are compelled to treat it as a bill of exceptions only. The final ruling, when the court ordered that a verdict for defendant be rendered in each case, cannot be considered; our investigation being confined to an examination of the rulings on the admissibility of testimony alleged to have been erroneously excluded."

100. What the "Case" need not Contain.

The "case" need not contain the findings of the court or the verdict of the jury. These are matters of record in the action, and therefore do not have to be perpetuated or certified in any other way;[80] and, for similar reasons, it need not contain the pleadings or any other matters apparent on the face of the record. When it is sought to review an instruction based on the evidence, the "case" must show what evidence was given, or the instruction cannot be reviewed.[81] Error must be affirmatively shown as the presumption is that the charge was correct.

The same presumption holds where the charge does not purport to be given in full. It

[80] Farnham v. Thompson, 34 Minn. 330.

[81] Desnoyer v. L'Hereux, 1 Minn. 17 (Gil. 1); State v. Brown, 12 Minn. 538 (Gil. 448).

is presumed that any omissions are rectified in the remainder of the charge.[32] Similarly, where the evidence is not given in full, it is presumed that proper foundations were laid for evidence actually admitted, or that none were laid for evidence actually excluded.[33] But a map which was used on the trial for the convenience of counsel, witnesses, and jurors, so that the evidence could be better understood, need not be made a part of the settled case, where any sectional map can be used, and "aid in understanding the evidence, as well as the one used on the trial." This, although the trial judge certified that the "case" as signed contained all the evidence "with the understanding that the map used upon the trial be attached as a part of the 'case'"[34]

The rule that "where the settled case shows that documentary evidence was introduced, which might have a bearing on the findings of fact, but is not made a part of the 'case,' this court will not review the findings," does not apply when the record negatives any presumption that the missing documents con-

[32] Connolly v. Davidson, 15 Minn. 519, 533 (Gil. 428).

[33] State v. Shettleworth, 18 Minn. 208 (Gil. 191); St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500 (Gil. 433).

[34] Baxter v. Great Northern Ry. Co., 73 Minn. 189.

tained anything which could have affected the findings.[35]

Matters which occur out of court, or in another action, have no place in a bill of exceptions, but, for the purpose of a motion for a new trial or appeal, should be presented by affidavit. "The office of a bill of exceptions is to place in the record what occurs before the court on the trial of the action brought up for review." [36]

101. Time of Serving Proposed "Case."

The statute provides that the settled "case" or bill of exceptions shall be served "within 20 days after the trial." * In jury trials, the trial closes, for the purposes of this section, with the entry of the verdict and discharge of the jury, while in court cases it closes with the filing of the decision of the court.[37] But this has been somewhat modified by the District Court Rules of 1893, as follows: "In case of trials by the court or by referees, the time for serving a 'case' or bill of exceptions shall be computed from the date of service of notice of filing the report, decision, or find-

[35] Dunham v. Messing, 68 Minn. 257.

[36] Perry v. Miller, 61 Minn. 412.

* Gen. St. 1894, § 5400. See State v. Powers, 69 Minn. 429; Van Brunt v. Kinney, 51 Minn. 337.

[37] Irvine v. Myers, 6 Minn. 558 (Gil. 394).

ing."[38] An order dismissing the case at the end of the plaintiff's evidence is a termination of a trial, within this section.[39]

It has repeatedly been held that the time for service of the proposed "case" may be extended by order of the court or stipulation of the parties, and this, either under Gen. St. 1894, § 5267, or under the clause in section 5400, providing for settlement within "such further time as may be stipulated or granted."[40] And joining in the settlement without objection probably waives all questions of delay.[41] But the retention of a proposed "case" is not a waiver of the objection that it was not proposed within time, unless there was an admission of "due service,"[42] and an order settling the "case" is ordinarily a granting of further time.[43] But the extent to which

[38] Dist. Ct. Rule No. XLVII.

[39] Volmer v. Stagerman, 25 Minn. 234; McCormick v. Miller, 19 Minn. 443 (Gil. 384); Thompson v. Myrick, 24 Minn. 4.

[40] State v. Powers, 69 Minn. 429; Abbott v. Nash, 35 Minn. 451; Volmer v. Stagerman, 25 Minn. 234; Cook v. Finch, 19 Minn. 407 (Gil. 350); State v. Baxter, 38 Minn. 137.

[41] Abbott v. Nash, 35 Minn. 451.

[42] State v. Powers, 69 Minn. 429; State v. Baxter, 38 Minn. 137.

[43] Volmer v. Stagerman, 25 Minn. 234, 244; Cook v. Finch, 19 Minn. 407 (Gil. 350). But see Van

the time for settlement of a "case" or bill of exceptions may be so extended is limited in one way. Neither the trial court nor the parties nor both can extend the time for appeal from an order or judgment.[44] It is held that it would be an abuse of discretion for the trial court to entertain a motion for a new trial after the time for appeal from final judgment in the action has expired,[45] although in an indirect manner, by vacating an order or judgment, under the provisions of Gen. St. 1894, § 5267, the trial court may sometimes substantially bring about an extension of the time for appeal.[46] Consequently "the right to have a 'case' or exceptions settled, or to move for a new trial, is presumptively gone when the time to appeal from the judgment in the action has expired." [47]

With regard to staying proceedings, it is to be noticed that, by the statute, "no order to

Brunt & Wilkins Manuf'g Co. v. Kinney, 51 Minn. 337, where it was held that without having first relieved a party in default, the court cannot allow a motion to settle a case after the time fixed by statute.

[44] First Nat. Bank v. Briggs, 34 Minn. 266. See next section.

[45] Conklin v. Hinds, 16 Minn. 457, 467 (Gil. 411).

[46] First Nat. Bank v. Briggs, 34 Minn. 266.

[47] Richardson v. Rogers, 37 Minn. 461, 464; Deering v. Johnson, 33 Minn. 97; Bonesteel v. Bonesteel, 30 Wis. 151; Kimball v. Palmerlee, 29 Minn. 302.

stay proceedings for a longer time than twenty days shall be made, except upon notice to the adverse party." [48] This statutory provision is supplemented in the fourth district by the following additional rule of the district court: "Upon the rendering of a verdict of a jury, or the filing of a decision by the court in any case, no stay of proceedings, after the first, will be granted without notice to the counsel, or consent of counsel for the opposite party." [49]

The matter of time for making the motion for a new trial will be considered later.

Of course the time for proposing amendments, and that for bringing on the application for settlement, are governed by the same liberal rules as the time for settlement of the "case." But it would seem that, while the times allowed by this section can be extended, they cannot be shortened by order to show cause without the consent of the party to whom time is allowed.[50]

[48] Gen. St. 1894, § 5227.

[49] Hennepin Co. Ad. Rule 3.

[50] Where an amendment to the "case" is made after a motion for a new trial is decided, the correctness of the court's decision on the motion must be determined by the "case" on which it was made and heard. Riley v. Chicago, M. & St. P. Ry. Co., 71 Minn. 425.

102. Extension of Time to Serve Proposed "Case."

The extension of the time within which to propose and settle a "case" is within the sound discretion of the trial court. A party has no absolute right to propose, serve, and have settled a "case" after the expiration of twenty days after the trial, unless his time to do so has been extended by stipulation, or order of the court.[51] Where the appeal is from the judgment, he cannot, as a matter of right, propose a "case" at any time before the expiration of the six months in which an appeal can be taken.[52] After an appeal from an order denying a motion for a new trial, made on the judge's minutes, is taken, a supersedeas bond is filed, and the time to settle a "case" or bill of exceptions has expired, the trial court may grant leave to serve a proposed "case" or bill of exceptions, extend the time to settle, and settle and allow the same. In Loveland v. Cooley [53] the court said: "The respondent, on the authority of Van Brunt & Wilkins Manuf'g Co. v. Kinney,[54] moved the court to strike the settled case out of the return. In

[51] State v. Powers, 69 Minn. 429.

[52] State v. Powers, 69 Minn. 429; Van Brunt & Wilkins Manuf'g Co. v. Kinney, 51 Minn. 337; Irvine v. Myers, 6 Minn. 558 (Gil. 394).

[53] 59 Minn. 259.

[54] 51 Minn. 337.

that case, after the time to settle the 'case' had expired, the appellant served a proposed 'case,' when he had no right or authority to do so. No order was made extending his time, or giving him leave to serve it. The respondent returned it, as he had a right to do, but the court settled the 'case.' This court struck it out, for the reason that respondent had no opportunity to serve proposed amendments to a proposed 'case,' which he was obliged to recognize, or appellant had a right to serve. This is not such a case. Here the appellant obtained a right to serve his proposed 'case' before he served it. The court below had jurisdiction to settle the 'case' after an appeal from the order had been taken to this court, even though a supersedeas bond had been given on the appeal." [55] But, where the moving party is guilty of laches, leave to serve a "case" is properly denied. Thus, where a party neglected for six months after the filing of findings to examine them, and learn whether or not proposed amendments thereto, opposed by him, had been allowed, and in the meantime judgment had been entered, and an appeal therefrom taken by him, without making any effort to settle a "case" or bill of exceptions, the court properly refused to allow him then to propose or settle a "case," or to

[55] See Pratt v. Pioneer Press Co., 32 Minn. 217.

set aside or vacate the judgment on his motion.[56]

103. Irregularities — Discretion of Judge in Settling "Case."

The wide range of discretion allowed the judge in the matter of the settlement of a "case" is illustrated by a recent case, in which the court said: "Respondent claims that the proposed 'case' was not properly settled and allowed, and moves to strike it out. When the decision was filed, the court ordered a stay of 30 days, and allowed plaintiff 'that time in which to serve a "case" or bill of exceptions.' The proposed 'case' was served within the thirty days by delivering to respondent the original proposed 'case,' not a copy of the same. This was returned. Appellant made a copy, and served it 5 days after said 30-day stay had expired. This was also returned. In the meantime, on the last day of this stay, appellant procured ex parte a further stay of 20 days, and so notified respondent at the time of re-serving the proposed 'case.' Appellant moved the court to settle the 'case,' and, after hearing the parties, the court ordered the service of the proposed 'case' to stand as proper service, and ordered appellant to furnish respondent a copy of the

[56] Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 72.

proposed 'case,' and that respondent have 10 days thereafter in which to propose amendments thereto. The copy was furnished, but respondent proposed no amendments thereto, and after the 10 days the 'case' was settled. Respondent does not complain because he was not given 15 days, instead of 10, in which to propose amendments, and, under all the circumstances, we cannot say that the court abused its discretion in disposing of the irregularities in practice and laches of appellant, and the technical and exacting positions of respondent." [57]

104. Settling "Case" after Judgment.

After judgment, a case may be settled and included in the return, although notice of appeal has already been served.[58]

105. Statements Contained in Findings.

Errors occurring at a hearing cannot be alleged upon, nor irregularities or misconduct of the trial court shown on appeal by, a statement contained in the findings of fact or decision of the court. "As preliminary to the findings of fact, the judge stated that the counsel offered to support the petition with proof, and objected to a trial of the matters involved

[57] Nickerson v. Wells-Stone Mercantile Co., 71 Minn. 230.

[58] Bahnsen v. Gilbert, 55 Minn. 334.

upon affidavits; but this is insufficient to bring the matter before us. This was a fact occurring at the trial, not a matter of record, and, although stated in the findings or decision, is not reviewable on appeal. What took place at the trial cannot be made to appear by the findings of fact or by the decision." [59]

106. Appeal from Interlocutory Order—Certificate.

Upon an appeal from an order disposing of an interlocutory motion, it must be made to appear affirmatively either by the certificate of the judge making the order that the return contains all the files and papers used at the hearing of the motion, or by the certificate of the clerk of the proper court that his return contains copies of all the records and files in the case, in order that the appellate court may have before it everything which was presented and considered by the court below.[60]

"There is no bill of exceptions or certificate of the trial judge showing that the record contains all that was presented or considered

[59] Prouty v. Hallowell, 53 Minn. 488; D. M. Osborne & Co. v. Williams, 39 Minn. 353, and cases cited; Hendrickson v. Back, 74 Minn. 90.

[60] Du Toit v. Fergestad, 55 Minn. 462. See, also, Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256; Prouty v. Hallowell, 53 Minn. 488. This rule applied in Aure v. Board of Com'rs of Becker Co., 68 Minn. 85.

on the motion. Neither does the clerk certify that the return contains all the records and files in the case; hence we have no record before us which enables us to review the order of court which the plaintiff here challenges." [61]

107. Rule of Construction.

The appellate court will give to a bill of exceptions or a settled case, including the judge's certificate thereto, a reasonably liberal construction, but they will not, by construction, supply material defects therein.[62]

108. By Whom "Case" Settled.

Ordinarily a "case" must be certified and allowed by the judge or referee before whom the action was tried. But a judge may settle a "case" in an action tried by his predecessor,[63] and the statute provides that, "whenever the judge who tried the cause shall die, or become incapable of acting from sickness or other cause, before a bill of exceptions is allowed or case made, or shall depart from and remain without the state at the time limited for the same allowance or settlement, the said bill may be allowed, or case settled, by or before

[61] Parker v. Bradford, 68 Minn. 437.

[62] Board of Trustees of Ripon College v. Brown, 66 Minn. 179.

[63] Bahnsen v. Gilbert, 55 Minn. 334.

the judge of an adjoining judicial district in which the action is pending; or in case a referee shall so die, or become incapacitated, or remain absent, as herein set forth, such bill may be allowed or case settled by the judge of the district court in which such action is pending; and in either case such allowance or settlement shall be made upon the files in the cause, the minutes of the judge or referee, if attainable, and upon such proof of what transpired at the trial as may be presented by affidavit on behalf of the parties to the action." [64]

109. Conclusiveness of the "Case."

Subject to what appears on the face of the record, the "case" as settled is conclusive as to what occurred at the trial.[65] It is, however, subject to amendment.[66] It cannot be amended ex parte by the trial judge, as the parties must be given an opportunity to be

[64] Gen. St. 1894, § 5400.

[65] Hill v. Gill, 40 Minn. 441; Steinkraus v. Minneapolis, L. & M. Ry. Co., 39 Minn. 135; Reiff v. Bakken, 36 Minn. 333; Acker Post No. 21, G. A. R., v. Carver, 23 Minn. 567. The settled case cannot be contradicted and controlled by statements made in the order denying the motion for a new trial. Hemstad v. Hall, 64 Minn. 136.

[66] State v. Laliyer, 4 Minn. 379 (Gil. 286); Taylor v. Parker, 18 Minn. 79 (Gil. 63).

heard;[67] and the only person authorized to make the correction is the person authorized to make the certificate of settlement. Thus, if the case were tried before a referee, the settled case must be sent back to the referee for correction. The district court cannot, during the life of the referee, proceed to make the correction on motion, even though all parties appear before it.[68] Where the trial was by a referee, the "case" should be sent back to him if a correction is necessary.[69] The certificate of the trial judge that the "case" contains all the evidence is not controlling when the "case" itself shows the contrary.[70]

110. The Judge's Certificate.

It is not enough that the settled case shows documents to have been received, or offered and rejected, and that the clerk sends to the supreme court, as part of his return, copies which he certified to be copies of those so received, or offered and rejected. "That is not the way to bring before this court documents used or offered on a trial. It is for the judge who tries a cause, and not for the clerk, to settle and certify what takes place on the

[67] State v. Laliyer, 4 Minn. 379 (Gil. 286).

[68] Taylor v. Parker, 18 Minn. 79 (Gil. 63), citing Bazille v. Ullman, 2 Minn. 134 (Gil. 110).

[69] Id. Wescott v. Thompson, 16 N. Y. 613.

[70] Sage v. Rudnick, 67 Minn. 362, and cases cited.

trial, and what evidence, documentary or otherwise, is received or offered. To bring here the contents of documents so received or offered, they must be made a part of the settled case, which can be done only by their being inserted in or attached (with proper references to them in the body of the 'case') to the 'case' by the judge, or by his direction, so that his certificate shall include them." [71] The certificate of the judge cannot be dispensed with. The certificate of the clerk will not do;[72] nor will the stipulation of the parties take its place.[73] But if the "case" is properly presented for settlement, and the matter proceeded in and heard by the trial judge upon the "case," and decided as if the "case" had been settled, the lack of the mere formal signature to the order of settlement will not be fatal on appeal, if no objection was taken below.[74] Properly the order of settlement itself should show that the "case" "is

[71] Blake v. Lee, 38 Minn. 478; Pottner v. City of Minneapolis, 41 Minn. 73; Larson v. Northern Pac. R. Co., 33 Minn. 20; Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256, 260; Dow v. Northern Land & Loan Co., 51 Minn. 326.

[72] Blake v. Lee, 38 Minn. 478.

[73] Abrahams v. Sheehan, 27 Minn. 401.

[74] Sherman v. St. Paul, M. & M. Ry. Co., 30 Minn. 227; State v. Cox, 26 Minn. 214. It is an adoption and approval of the case by the court.

settled as a full 'case,' containing all the evidence and proceedings had upon the trial of the action," but it will suffice if the "case" as settled contains a statement that it contains everything.[75]

If the trial court fail to append a certificate of settlement, it may amend the record nunc pro tunc.[76] If the trial court append an erroneous or improper certificate of settlement, it may subsequently amend the order of settlement prior to return to supreme court,[77] and the return may even be sent back from the supreme court to the trial court to have such an amendment made, but not after the argument in that court has occurred.[78]

111. Strictness of the Rule.

The rule that the record must affirmatively show that it contains all the evidence in order to raise the question of the sufficiency of the evidence is strictly enforced. In a recent case

[75] Vassau v. Campbell (Minn.) 81 N. W. 829; Coleman v. Reierson, 36 Minn. 222; Brackett v. Cunningham, 44 Minn. 498.

[76] Sherman v. St. Paul, M. & M. Ry. Co., 30 Minn. 227.

[77] Chesley v. Mississippi & Rum River Boom Co., 39 Minn. 83.

[78] Chesley v. Mississippi & Rum River Boom Co., 39 Minn. 83; Anderson v. St. Croix Lumber Co., 47 Minn. 24; Phoenix v. Gardner, 13 Minn. 294 (Gil. 272).

the supreme court said:[79] "Where it is necessary to have the entire evidence in the record, it must clearly and affirmatively appear from the face of the bill of exceptions or settled case, or the trial judge's certificate, that such is the fact. This rule is not simply a technical one, which may be relaxed at the pleasure of the court, for its object is to secure certainty and to prevent disputes and a waste of the time of the court. It is no hardship to require parties to comply with this rule, and to have their records in form and substance correct and properly certified. The rule that, where a determination of the appeal depends on an issue of fact, the bill of exceptions or settled case must show affirmatively that the evidence relating to the issue as incorporated therein has been uniformly and with some strictness enforced by this court. If the bill or "case" contains no statement to the effect that all the evidence is incorporated therein, and the trial judge does not certify, the record is not sufficient to permit a review of any order or instruction made or given in view of and based upon the entire evidence given in the action, or on some one issue therein."

[79] Board of Trustees of Ripon College v. Brown, 66 Minn. 179; Brackett v. Cunningham, 44 Minn. 498. See the form of certificate in Baxter v. Coughlan, cited note a, p. 447, infra.

112. Compulsory Settlement of Proper "Case."

An order settling or refusing to settle a "case" is not an appealable order.[80] The party should in the first instance make a regular application to the court or judge for a resettlement. If this is denied mandamus will lie to compel a correct settlement.*

113. Refusal to Settle any "Case."

The cases which arise are of two classes. First, where the judge, after reaching the conclusion that the "case" is correct, wrongly refuses to make any order of settlement. Such a case arose some years since in this state, where the judge was erroneously of opinion that the time for settlement of the "case" had expired.[81] In such a case the writ of mandamus lies from the supreme court to the district court to compel an order of settlement of the "case" so found correct.[82] A second subdivision of this class of cases is where the judge simply refuses to settle a "case" or bill of exceptions. Mandamus will then lie to compel the court to proceed to settlement. If the

[80] Gen. St. 1878, c. 86, § 8, subds. 2–6; Richardson v. Rogers, 37 Minn. 461.

* State v. Macdonald, 30 Minn. 98.

[81] State v. Cox, 26 Minn. 214.

[82] State v. Cox, 26 Minn. 214; Richardson v. Rogers, 37 Minn. 461; State v. Macdonald, 30 Minn. 98; People v. Baker, 35 Barb. 105.

"case" proposed is admittedly correct, the writ may command the judge to settle the particular "case" as proposed.[83]

114. Settling an Incorrect Statement.

In the second class of cases, the correctness of the settlement made is the matter in dispute. It would seem that the settlement of the "case" is an act involving judicial discretion, but it has been long settled that it is not, but is merely a ministerial act. The higher court may, by writ of mandamus, compel the inferior court to settle the "case" correctly, and will determine the question of correctness on an issue made.[84] Of course in any such proceeding the recollection of the trial judge as to what occurred before him and the testimony of the stenographer's minutes will be given great weight.

Consideration of the procedure in these mandamus cases belongs to the subject of mandamus. We may, however, properly call attention to the necessity of a refusal on

[83] State v. Hawes, 43 Ohio St. 16; People v. Baker, 35 Barb. 105, cited in State v. Macdonald, 30 Minn. 98, 100.

[84] State v. Macdonald, 30 Minn. 98; Schumann v. Mark, 35 Minn. 379; Delavan v. Boardman, 5 Wend. 132; People v. Baker, 35 Barb. 105; State v. Whittet, 61 Wis. 351.

the part of the inferior court to take the proper steps.[85]

The trial court may refuse to settle and allow a proposed "case" where counsel refuses to attach certain exhibits which were in evidence.[86]

115. Certified Reports of Evidence in Special Proceedings.

In concluding this discussion of the settlement of the "case," we may call attention to the necessity of a settled case, or something analogous thereto in some special cases.

In tax proceedings, where a "case" is certified up to the supreme court by the district court,[87] the judge must state in his certificate what point or points he certifies for the opinion of the supreme court, and also the facts established bearing upon the point so certified, and his decision or conclusion based on these facts. Unless these matters are so certified, the case is not properly presented to the supreme court for decision, and it may decline to entertain it. The supreme court will consider no points or questions but those so certified, even though others seem to be

[85] State v. Macdonald, 30 Minn. 98. See State v. Boardman, 5 Wend. 132.

[86] State v. Otis, 71 Minn. 511.

[87] Under Gen. St. 1894, § 1589.

presented by the facts reported.[88] Where the recital in the certificate is that a certain point was raised in the district court, and "the statement winds up by certifying three separately numbered questions to this court, and that question is not one of them," it will not be considered.[89] But this certified statement is rather in the nature of findings and decision than in that of a bill of exceptions or settled case.[90] Except as to the points thus certified the decision of the district court is final.

On appeals from orders based on affidavits or other papers, there must be a certificate by the court identifying all papers and matters on which the consideration of the motion was based.[91]

[88] County of Morrison v. St. Paul & N. P. Ry. Co., 42 Minn. 451; State v. St. Croix Boom Corp., 49 Minn. 450; State v. Robert P. Lewis Co., 70 Minn. 202. The supreme court has no jurisdiction to consider points not properly certified up; State v. St. Croix Boom Corp., supra.

[89] Ramsey County v. Robert P. Lewis Co. (Minn.) 79 N. W. 1003.

[90] County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537.

[91] Dow v. Northern Land & Loan Co., 51 Minn. 326; Hospes v. Northwestern Manuf'g & Car Co., 41 Minn. 256. See supra, § 110. On the hearing of a motion and the making of an appealable order, the party is entitled to have the proceedings had on the hearing properly certified, and so returned that

Similarly, in such a special proceeding as a petition in insolvency proceedings, under our statute, for a distribution of assets without releases, where a large amount of evidence was taken, a "case" was regularly settled by the court.[92] In such a case the "case" will ordinarily be settled after the appeal is taken, and before the return is made, and the times prescribed in Gen. St. 1894, § 5400, will apply only by analogy.

In case of trials before referees to hear and determine, a settled case should be prepared as in case of ordinary trials before a court,[93] and settled by the referee.[94]

116. Filing the Settled Case.

By a rule of the district courts, "the party procuring a 'case' or bill of exceptions shall cause the same to be filed within 10 days after the 'case' shall be settled, or the same or the amendments thereto shall have been adopted; otherwise it shall be deemed abandoned." [95]

they can be reviewed. But the hearing of a motion is not a trial which requires a bill of exceptions or settled case. State v. Eagan, 62 Minn. 280.

[92] In re Shotwell, 43 Minn. 389. As to proceedings to remove an assignee, see Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183.

[93] Lundell v. Cheney, 50 Minn 470.

[94] Taylor v. Parker, 18 Minn. 79 (Gil. 63).

[95] Dist. Ct. Rule No. XLVII.

This would seem to establish the practice as correct in this state, of having the judge deliver the settled case to the attorney of the party applying therefor, instead of filing the same himself with the clerk.[96]

117. Motion on Minutes of Court.

The statute in certain designated cases[97] authorizes the judge to hear a motion for a new trial on the minutes of the court, or upon the minutes of the reporter, but provides that such motion can only be heard at the same term of court at which the trial is heard. The statute is said to be "imperative," and hence the court has no right, as against the objection of counsel, to hear the motion at a subsequent term.[98] But, if no objection is made, the motion may be heard after the term is adjourned. Thus, where the opposing attorney made no objection until it had been argued by the opposing attorney, the court said: "There was no question of jurisdiction involved in the case, but simply one going to the regularity of the proceedings. The defendant's counsel had proceeded irregularly, and, this being the situation, it was incumbent upon the plaintiff's attorney to point out the

[96] Cf. People v. Baker, 35 Barb. 105, 112.

[97] Gen. St. 1894, § 5399.

[98] Le Tourneau v. Board of Com'rs of Aitkin Co. (Minn.) 80 N. W. 840.

error to the court at the earliest opportunity. This he failed to do, but waited until his adversary had argued the motion upon the merits. He must be held to have waived the irregularity as he had a right to do." [99]

[99] Larson v. Ross, 56 Minn. 74. As to settlement of a "case" after this motion is determined, see Gen. St. 1894, § 5399. The case must be proposed and settled within the time and in the manner prescribed by § 5400. Van Brunt & Wilkins Manuf'g Co. v. Kinney, 51 Minn. 337; Hendrickson v. Back, 74 Minn. 90.

CHAPTER VI.

THE MOTION FOR A NEW TRIAL AND OTHER MOTIONS BEFORE JUDGMENT.

118. When Motion for a New Trial may be Made.
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132. Motion to Amend Conclusions of Law.
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135. Dismissal after Verdict.
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118. When Motion for a New Trial may be Made.

When the settled case is filed, the party may

make his motion for a new trial. The statute does not provide any limit of time within which the motion for a new trial must be made. The motion may be made either before judgment is entered or after. In the United States practice, the motion is always made after judgment, and granting a new trial vacates the judgment.[1] And a new trial may be granted for newly-discovered evidence, even after affirmance of the judgment by the supreme court.[2] Where a new trial is granted after judgment, the court will also set aside the judgment to give effectiveness to its decision.[3]

The rules regulating the making of such a motion are very fully laid down by our supreme court as follows: "The cases referred to[4] may be said to establish these proposi-

[1] Rev. St. U. S. 1878, § 987; Eaton v. Caldwell, 3 Minn. 134 (Gil. 80); Schuek v. Hagar, 24 Minn. 339; Cochrane v. Halsey, 25 Minn. 52; in jury case, Kimball v. Palmerlee, 29 Minn. 302; in court case, Conklin v. Hinds, 16 Minn. 457 (Gil. 411).

[2] Sheffield v. Mullin, 28 Minn. 251. The proper proceeding is by motion in the original suit, and not by the old chancery methods.

[3] Minnesota Val. R. Co. v. Doran, 15 Minn. 240 (Gil. 186); Cochrane v. Halsey, 25 Minn. 52.

[4] Groh v. Bassett, 7 Minn. 325 (Gil. 254); Conklin v. Hinds, 16 Minn. 457 (Gil. 411); Schuek v. Hagar, 24 Minn. 339; Cochrane v. Halsey, 25 Minn. 52.

tions: First, that the motion ought to, and, if the party has a reasonable opportunity, must, be made and brought to a decision before judgment; second, but as the statute gives the absolute right to make the motion, the party may make it after judgment, and within the time for bringing an appeal from the judgment, if, without fault or laches on his part, he has no reasonable opportunity to make it and bring it to a determination before judgment; third, if he have no reasonable opportunity to move before judgment, he must, on whatever ground he makes the motion, use reasonable diligence in doing so afterwards, and he will lose his right by neglect of such reasonable diligence; the determination of the question of reasonable diligence will necessarily be in the sound discretion of the trial court; fourth, that the rule is the same, whether the cause was tried by a judge, referee, or jury."[5]

In one of the earliest cases in our reports on the subject, it was held that the pendency of a motion for a new trial did not stay the entry of judgment without an order staying proceedings, but, if judgment was entered pending the motion, the court would never-

[5] Kimball v. Palmerlee, 29 Minn. 302; Collins v. Bowen, 45 Minn. 186.

theless proceed to hear the motion.[6] It is also well settled that, when the time for appeal from the final judgment is gone, the time for moving for a new trial is also gone, presumptively,[7] and this is not affected by the prevailing party consenting to the settlement of a case or bill of exceptions.[8]

119. Place of Making Motion — Before what Judge.

There is no specific provision of statute or rule of court requiring the motion for a new trial to be made before any particular judge. Common practice, however, as well as judicial courtesy, has made it a rule that the motion is properly to be heard by the judge before whom the case was tried. Of course where the case was tried before a referee, he becomes functus officio upon the filing of his report, except for the purpose of making an additional or amended report, or settling a case or bill of exceptions. In such a case, the motion for a new trial is addressed, not to the referee who tried the cause, but to the court, and is heard by one of the judges.[9] Similarly, in

[6] Eaton v. Caldwell, 3 Minn. 134 (Gil. 80).

[7] Deering v. Johnson, 33 Minn. 97; Richardson v. Rogers, 37 Minn. 461; Bonesteel v. Bonesteel, 30 Wis. 151.

[8] Deering v. Johnson, 33 Minn. 97.

[9] Thayer v. Barney, 12 Minn. 502 (Gil. 406).

case of the death of a judge, the motion may be addressed to the court, and heard by any one or more of the judges.[10]

The motion for a new trial under our statute is substantially a mere reproduction of the English common-law motion for a new trial, which was addressed to the court in banc. Accordingly it would not seem an improper practice for the judge who tried the case, if he should deem it advantageous, to ask other members of the same court to sit with him upon the hearing of the motion, in which case the opinion of a majority of those sitting would seem to prevail, whether that majority included the original trial judge or not.[11]

A motion for a new trial on the ground that the decision is not justified by the evidence is always addressed to the sound discretion of the judge who tried the case. In a late case the court said:[12] "He has seen the witnesses, observed their conduct, demeanor, and appearance while testifying, and the manner of giving their testimony, and has had an opportunity of judging of their credibility, which cannot be acquired merely by reading a

[10] Reynolds v. Reynolds, 44 Minn. 132.

[11] Demueles v. St. Paul & N. P. Ry. Co., 44 Minn. 436.

[12] McCord v. Knowlton (Minn.) 79 N. W. 397.

settled case.[13] * * * It often happens that a verdict or decision which by the settled case appears to be contrary to the great weight of the evidence is very satisfactory to every disinterested person who was present at the trial, saw the witnesses, and heard them testify. In such a case it might be much to the advantage of the defeated party to move for a new trial on the settled case before some other judge than the one who tried the case, but the defeated party should not be allowed to do so unless there is some good reason for it. Where the trial judge is dead, or has resigned, or his term of office has expired, we hold that some other judge must exercise the best discretion he can from the cold lines of the written evidence.[14] But several other courts have gone so far as to hold that in such a case, when the evidence is conflicting or not conclusive, the verdict should be set aside, and a new trial granted, as a matter of course.[15]

While we believe that the right of the parties to have the trial judge pass on the motion for a new trial should be guarded with great care, we are not willing to go to that extent. 'The general rule is that the motion for a new

[13] Quotes from Bass v. Swingley, 42 Kan. 729, and cites Ohms v. State, 49 Wis. 415.

[14] Hughley v. City of Wabasha, 69 Minn 245.

[15] See Ohms v. State, 49 Wis. 415, and cases cited; 14 Enc. Pl. & Prac. 856, and note 3.

trial must be decided, if possible, by the judge who tried the case, because he has heard the evidence, and is better qualified to pass upon the questions of fact.' " [16]

120. Motion before Judge Who did not Decide the Case.

Where a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is made before a judge other than the one who tried the case, it is his right and duty to exercise the same discretion as if the cause had been tried by him, with the qualification that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else of what occurred at the trial. "And, if he grants a new trial, this court, on appeal, in determining whether he did or did not abuse his discretion, will apply the rule of Hicks v. Stone, having in mind, however, that his discretion must have been exercised upon what the record discloses.[17]

[16] 14 Enc. Pl. & Prac. 856, and cases cited.

[17] Hughley v. City of Wabasha, 69 Minn. 245. The successor of the trial judge is not authorized or warranted in deciding or making findings of fact in a case not tried by him. If material issues are not passed upon and disposed of, a new trial is necessary. Bahnsen v. Gilbert, 55 Minn. 334.

121. Change in Judicial District.

After a case was tried, but before it was finally submitted and decided, the county was, by an act of the legislature, detached and annexed to another judicial district. Thereafter the judge filed his decision and settled a case. It was held that he thereafter had authority to hear and determine a motion for a new trial, involving the question of the weight and sufficiency of the evidence, and that a judge of another district, who was appointed by the governor to hear and determine such motion, should not do so, although he may have had the power to do so. As there was no reason why the judge who tried the case should not hear the motion for a new trial, it would have been an abuse of discretion for the specially appointed judge to have heard it.[18]

122. Form of Motion.

As we have seen, the motion must be "for a new trial." It cannot be a motion for a reargument,[19] though, in the case where the action is tried without a jury, there is a motion to correct the conclusions of law,[20] but this motion, although by a relaxation of practice

[18] McCord v. Knowlton (Minn.) 79 N. W. 397.
[19] Volmer v. Stagerman, 25 Minn. 234.
[20] Jones v. Wilder, 28 Minn. 238; Farnham v. Thompson, 34 Minn. 330.

the same relief may be granted on motion for a new trial, is not properly in the nature of an application for a new trial, but more like a motion for judgment notwithstanding the verdict, or in arrest of judgment. Where a new trial is sought, the motion should be "to vacate the verdict, report, or decision, and for a new trial."

123. The Order and Its Effect.

An appeal lies directly to the supreme court from the order, whether it grants or refuses a new trial.[21] The methods of procedure on such an appeal are substantially the same as upon appeal from a judgment, and we may therefore properly postpone consideration of these methods until we take up the subject of appeals and supreme court procedure. But the effects resulting from a determination of the supreme court on an appeal from a motion for a new trial are quite important, and are very proper to be considered in connection with the effects of action by the district court on such motion.

We have four classes of cases, as follows: (1) Refusal of a new trial by the district court, no appeal being taken from the order. (2) Grant of a new trial by the district court, no

[21] Gen. St. 1878, c. 86, § 8, subd. 4; Gen. St. 1894, § 6140.

appeal being taken from the order. (3) Refusal of a new trial by the supreme court's decision, no matter whether by reversing an order granting a new trial or affirming an order refusing a new trial. (4) Grant of a new trial by the supreme court's decision, no matter whether by reversing an order refusing a new trial or by affirming an order granting a new trial.

124. Unappealed Refusal of New Trial.

In this case proceedings continue as if no motion for a new trial had been made. No further trial is required, and the case proceeds to judgment in the ordinary manner. The sole exception to this equanimity of procedure is that, on an appeal from the judgment, the order refusing the new trial may be examined as an "intermediate order involving the merits or necessarily affecting the judgment." [22] There seems to be no uncertainty in this case.

125. Unappealed Grant of New Trial.

Direct authorities on this case seem to be wanting. Of course no judgment can be entered in this case until there has been a new trial; consequently the order setting aside the first trial and verdict did not necessarily affect the judgment, or involve, conclusively, the

[22] Gen. St. 1878, c. 86, § 8, subd. 1; Gen. St. 1894, § 6140; Mower v. Hanford, 6 Minn. 535 (Gil. 372).

merits, so, on appeal from the judgment entered after the second trial, it would not seem possible to raise the question of the propriety of the order setting aside the first one. Dicta are to be found that the granting of a new trial puts the case in exactly the same condition in all respects as if there had been no trial between the parties,[23] but this is subject to limitation in one respect, where the supreme court has passed on the question of granting a new trial.

The only question that can be here presented is this: Upon a determination by the supreme court of the question in favor of a new trial, all matters necessarily involved in that determination become res adjudicata between the parties and the law of the case. Is such the case when the action is simply that of the district court unappealed? It would seem that the unappealed decision of the district court ought to be as final on the questions involved in the decision of the motion as the decision of the supreme court in the particular case, but further examination shows one or two distinctions: (1) The action of the supreme court on appeal from an order terminates in a judgment in the supreme court; there is no judgment in the case of

[23] Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 490; Kellogg v. Hughes, 3 Dill. 357.

the mere order of the district court. (2) The parties in the supreme court are entitled to a judgment there, finally disposing of the merits of the matter presented so far as presented,[24] but, in the district court, the motion for a new trial is not an attempt at final disposition. This is perhaps much the same as the first reason assigned, but they seem to point almost conclusively to different consequences in the two cases. It would therefore seem that, in the case of an unappealed grant of a new trial, the determination of the court on motion for a new trial does not make any questions passed on in determining the motion res adjudicata, but the case stands exactly as if no trial had been had.[25]

126. Refusal of New Trial on Appeal.

In the case of the refusal of a new trial by a decision of the supreme court, either by reversing an order granting a new trial or affirming an order refusing a new trial, the result is the same as if no motion for a new trial had been made, except that all questions disposed of on the appeal from the order are res adjudicata, and cannot be reconsidered on ap-

[24] Schleuder v. Corey, 30 Minn. 501.

[25] Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 490; Winona v. Minnesota Ry. Const. Co., 27 Minn. 415; Edwards v. Edwards, 22 Ill. 121; Hidden v. Jordan, 28 Cal. 301; Hilliard, New Trials, 74.

peal from the judgment. The decision on the first appeal has become the law of the case, and this, even though the decision on the first appeal were an affirmance on default. In such case all questions that might have been presented on the record on the first appeal are settled by the first judgment of affirmance,[26] but a mere dismissal of an appeal has no such result.[27]

127. Grant of New Trial on Appeal.

The effect of a grant of a new trial by a decision of the supreme court reversing an order refusing a new trial, or affirming an order granting a new trial, is the same as if no trial had been had, with the exception that all matters necessarily involved in the determination of the appeal become res adjudicata in the suit, and cannot be further litigated.[28] But this does not extend to matters not necessarily involved in the decision made of the case, even though they were presented by the record on the first appeal.[29] These rules are instances of the doctrine of the law of the case, which we

[26] Schleuder v. Corey, 30 Minn. 501.
[27] Adamson v. Sundby, 51 Minn. 460.
[28] Tripp v. Northwestern Nat. Bank, 45 Minn. 383.
[29] Smith v. Pearson, 44 Minn. 397; Madden v. Oestrich, 46 Minn. 538.

have alluded to already, in connection with the subject of the necessity of exceptions. One case apparently somewhat in conflict with those just cited was decided partly on the ground of ambiguity in the instruction, so that the jury, misunderstanding the court's meaning, did not act according to the instruction given. The jury's understanding of the charge did not become the law of the case, to the exclusion of the real meaning of the court. Apparently the decision rested in part on the ground of sustaining the discretionary action of the trial court.[30]

A new trial being granted, the proceeding continues until a verdict or decision is had which is not set aside. We need therefore pay no further attention to cases where a new trial is granted, except to add that upon the grant of a new trial by the supreme court on appeal from a judgment, or where judgment has been entered after an appeal from the order, the judgment is vacated, and the case stands for trial exactly as on the granting of a new trial by the supreme court in ordinary cases.[31]

[30] Demueles v. St. Paul & N. P. Ry., 44 Minn. 436.

[31] Minnesota Val. R. Co. v. Doran, 15 Minn. 240 (Gil. 186); Mower v. Hanford, 6 Minn. 535 (Gil. 372).

Cf. Jordan v. Humphrey, 32 Minn. 522; National

128. Renewing the Motion.

One further step remains to be considered. After a motion for a new trial has been made and denied, the court in its discretion may allow a renewal of the motion, but this is purely discretionary.[32]

129. Other Motions after Verdict or Decision, and before Judgment.

The verdict or findings standing unimpeached, there still remain several motions which can be made by a party deeming himself prejudiced, whether in jury or in court cases. Primarily there are in jury cases the motions in arrest of judgment, and for judgment notwithstanding the verdict, and, in court cases, the corresponding motion to modify or correct the conclusions of law. This last relief, as we have seen,[33] may, in a court case, be granted on a motion for a new trial,[34] though the proper way is to make an explicit motion to correct the conclusions of law.[35]

Inv. Co. v. National Sav. Loan & Bldg. Ass'n, 51 Minn. 198. The question what amounts to a grant of a new trial by the supreme court is thoroughly cleared up by the decision in the cases last cited.

[32] Little v. Leighton, 46 Minn. 201.

[33] See § 158.

[34] Farnham v. Thompson, 34 Minn. 330.

[35] Jones v. Wilder, 28 Minn. 238.

130. Motion in Arrest of Judgment or for Judgment Notwithstanding the Verdict.

These are corresponding motions by plaintiff or defendant, and are substantially alike. They are simply the common-law motions. In fact, under the Code, in case of a counterclaim, the plaintiff may properly move in arrest, and the defendant for judgment non obstante veredicto. The two motions are so far the same that, even at common law, if one made the wrong motion he might nevertheless obtain the right relief on his improper motion.[36] We have but few cases on the subject of these motions in this state, but from them we may deduce a fair knowledge of the subject, as they point clearly to the adoption of principles well settled elsewhere. In the first place, these two motions for jury cases (really but one motion under different forms, owing to circumstances) can be made only before judgment. This is apparent from the nature of the motion which is directed, not to correcting an existing judgment, but to preventing an improper one. Of course relief may be obtained on the same grounds, after judgment by appeal from the judgment.[37]

[36] Schermerhorn v. Schermerhorn, 5 Wend. 514; Gaffney v. St. Paul, M. & M. Ry. Co., 38 Minn. 111.

[37] Nelson v. Central Land Co., 35 Minn. 408; McArdle v. McArdle, 12 Minn. 98, 105 (Gil. 53); Keegan v. Peterson, 24 Minn. 1.

The motion for judgment notwithstanding the verdict, as at common law, was successfully used in this state, where there was a verdict for the defendant, and the answer showed no defense.[38] It is of course familiar law, under common-law practice, that if the verdict be on immaterial issues, even if in favor of the plaintiff, plaintiff should have judgment entered notwithstanding the verdict, and not on the verdict. This rule of practice was erroneously applied in this state in one case where the issues were not immaterial, but only formally defective, and a judgment, having been entered notwithstanding the verdict, was set aside, and re-entered for a smaller amount on the verdict.[39] How the use of these motions in arrest and for judgment notwithstanding the verdict is affected by the nature of the verdict, as whether it is a general verdict, a general verdict with special findings, or a special verdict, we have considered elsewhere.

One slight difference in practice in England at common law and under the Code in this country may be noticed. At common law in England, a motion based on the existence of the verdict—e. g. in arrest, or for judgment non obstante veredicto—waived the right to

[38] Lough v. Bragg, 18 Minn. 121 (Gil. 106). Cf. Gaffney v. St. Paul, M. & M. Ry. Co., 38 Minn. 111.

[39] Lough v. Thornton, 17 Minn. 253 (Gil. 230).

move for a new trial.[41] The contrary rule obtains under the Code, and generally in America.[42]

131. Motion for Judgment Notwithstanding the Verdict under the Statute.

To entitle a party to judgment, under Laws 1895, c. 325, two things are necessary: (1) He must have made a motion to direct a verdict at the close of the testimony;[43] (2) after verdict the party must specifically move for judgment in his favor. The court cannot grant such relief on a mere motion for a new trial. A party must make his motion in the alternative, that is, for judgment notwithstanding the verdict, or, in case that is denied, for a new trial. But, on a motion for the latter alone, he cannot be granted the former.[44]

The rule that a party is not entitled to an order for judgment in his favor notwithstanding the verdict on a motion for a new trial, unless he has asked for that relief in his moving papers, applies in a case where the mo-

[41] Philpot v. Page, 4 Barn. & C. 160; Rex v. White, 1 Burr, 334; Tuberville v. Stamp, 2 Salk, 647.

[42] Stein v. Swensen, 44 Minn. 218, 223; Ry. Co. v. Dinick, 96 Ill. 42; Brannon v. May, 42 Ind. 92; 2 Thomp. Trials, § 2726.

[43] Hemstad v. Hall, 64 Minn. 136. See § 400.

[44] Netzer v. City of Crookston, 66 Minn. 355, citing Kernan v. St. Paul City Ry. Co., 64 Minn. 312; Crane v. Knauf, 65 Minn. 447. See 81 N. W. 533.

tion included as a ground therefor that the verdict was not justified by the evidence, and was contrary to law.[45]

132. Motion to Amend Conclusions of Law.

In court cases, the motion to amend the conclusions of law on the strength of the findings of fact lies at any time up to judgment.[46] Whether such a motion can be made after judgment is apparently an open question, but it has been held in this state that the court may correct its findings of fact after judgment entered, certainly if the defect be merely an omission, the supplying of which does not

[45] Crane v. Knauf, 65 Minn. 447.

One judge presided at the trial, and directed the jury to bring in a certain verdict, which they refused to do, but brought in a different one, which, however, did not reach the court until the jury had been discharged. The plaintiff could not have it recommitted, and moved for an order setting aside the verdict and a verdict non obstante veredicto. A settled case was made, and on it the same motion was made. The case was settled by Judge Webber, who presided at the trial; but the motion was heard before Judge Powers, who granted it, and made findings of fact. He had not heard the evidence or seen the witnesses. "Although the case was one for trial by a jury, and so tried, its functions were entirely disregarded, without the consent of the parties." This was error. Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58.

[46] Jones v. Wilder, 23 Minn. 238, 244.

call for a different conclusion of law than that previously reached,[47] and it is not an unnatural inference that the conclusions of law, and consequently the judgment, might be amended after judgment.[48]

133. The Record for These Motions.

These jury-case motions are properly based, as at common law, exclusively on the pleadings and verdict,[49] and similarly the court-case motion is based exclusively on the pleadings and findings.[50]

134. Outside Issues Tried by Consent.

To these rules, however, we may annex a qualification arising out of the peculiar practice of litigating, without objection, issues not made by the pleadings. Where issues not made by the pleadings are so litigated by consent, the finding or verdict on any such issue is

[47] Conklin v. Hinds, 16 Minn. 457, 462 (Gil. 411); Swanstrom v. Marvin, 38 Minn. 359. Cf. Williams v. Schembri, 44 Minn. 250. Clerical errors may be amended at any time. McClure v. Bruck, 43 Minn. 305.

[48] Cf., also, Gen. St. 1894, § 5266. See as to rights intervening of third persons in cases of confession of judgment, Auerbach v. Gieseke, 40 Minn. 258; Wells v. Gieseke, 27 Minn. 478.

[49] Lough v. Bragg, 18 Minn. 121 (Gil. 106); Lough v. Thornton, 17 Minn. 253 (Gil. 230).

[50] Morrison v. March, 4 Minn. 422 (Gil. 325); Miller v. Chatterton, 46 Minn. 338.

entitled to the same consideration as if the matter had been properly brought before the court by the pleadings.[51] The prevailing party is then entitled to the full measure of relief which is just and equitable under all the circumstances.[52] And where such a controversy is accepted as an issue in the case, it is the duty of the court to disregard the irregularity in pleading, and find upon the evidence.[53] Thus where an action to determine adverse claim was tried, without objection, as if it were a suit to redeem from an execution sale, the decision and adjudication was held conclusive.[54] And the doctrine goes so far that, where the decision on the matters litigated is in conflict with the allegations of the pleadings, it may be sus-

[51] Lyon v. Red Wing (Minn.) 78 N. W. 868; Bassett v. Haren, 61 Minn. 346; Erickson v. Fisher, 51 Minn. 300; Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438; Jones v. Wilder, 28 Minn. 238, 244, 245; Elston v. Fieldman, 57 Minn. 70; Olson v. St. Paul, M. & M. Ry. Co., 38 Minn. 479, 481; Abbott v. Morrissette, 46 Minn. 10; Butler v. Winona Mill Co., 28 Minn. 205, 207; D. M. Osborne & Co. v. Williams, 37 Minn. 507; Baker v. Byerly, 40 Minn. 489; Ambuehl v. Matthews, 41 Minn. 537.

[52] Bassett v. Haren, 61 Minn. 346.

[53] Warner v. Foote, 40 Minn. 176.

[54] Abraham v. Holloway, 41 Minn. 163 (second case); Bitzer v. Campbell, 47 Minn. 221.

tained.[55] Such consent may, and ordinarily will, consist simply in failure to object to admission of the evidence. This is sufficient consent.[56] But failure to object to evidence pertinent to issues not in the pleadings is not a consent to try such issues, if such evidence be pertinent to issues already made by the pleadings.[57] Such consent will be presumed, like everything else necessary to sustain the action of the trial court, in the absence of a settled case or bill of exceptions showing affirmatively that no such consent was given.[58]

Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined

[55] Abbott v. Morrissette, 46 Minn. 10.

[56] Olson v. St. Paul, M. & M. Ry. Co., 38 Minn. 479, 481.

[57] Bowen v. Thwing, 56 Minn. 177; Payette v. Day, 37 Minn. 366; Fergestad v. Gjertsen, 46 Minn. 369; Woolsey v. Bohn, 41 Minn. 235.

[58] Jones v. Wilder, 28 Minn. 238, 244; Deiber v. Loehr, 44 Minn. 451; Butler v. Winona Mill Co., 28 Minn. 205, 207; St. Paul & N. P. Ry. Co. v. Bradbury, 42 Minn. 222; Ahlberg v. Swedish-American Bank, 51 Minn. 162; Erickson v. Fisher, 51 Minn. 300.

upon that one issue, and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict,[59] but this doctrine is limited to the consent. A new trial cannot be ordered to enable the defeated party to litigate questions not in issue.[60] Nor can amendments be made of pleadings after verdict to conform to evidence on extraneous issues that was objected to.[61] Where the court ordered the trial of one issue, and reserved the hearing of other issues, and then filed findings on all issues, it was held that the findings on the reserved issues did not appear to be on issues tried by consent, and a new trial of these was awarded.[62]

The rule which will support a finding upon an issue tried by consent outside of the pleadings does not apply to a case where the plaintiff seeks to recover upon a special contract, and at the trial departs therefrom, and bases his right to recover upon the evidence of the defendant, showing a different contract.[63] Where it is not apparent that the parties consented to try an issue not made by the pleadings, evidence that might be proper upon such

[59] Engstad v. Syverson, 72 Minn. 188.

[60] Bullis v. Cheadle, 36 Minn. 164; Dean v. Hitchings, 40 Minn. 31.

[61] Guerin v. St. Paul F. & M. Ins. Co., 44 Minn. 20.

[62] Cobb v. Cole, 51 Minn. 48.

[63] Cremer v. Miller, 56 Minn. 52.

an issue is not to be considered in respect to it.[64]

135. Dismissal after Verdict.

The remaining motion preventing the entry of judgment is a motion to dismiss the action. Apparently the only case where this motion will lie is where the application is made by some of the defendants, on the ground that the plaintiff fails to prosecute the other defendants with diligence. All other modes and cases of dismissing after final submission of the case are abolished by the statute, and judgment must be on the merits.[65]

136. For Judgment on the Verdict.

This motion will ordinarily be used only in case of special verdicts, as, where there is a general verdict, judgment is entered by the clerk, in accordance with the general verdict on ex parte application to him, unless his action is stayed or prevented by the court.[66] The motion for judgment on the special verdict brings up the case for determination on the facts as shown by the pleadings and verdict, substantially as a demurrer brings the case up for determination on the facts shown

[64] White v. Western Assur. Co., 52 Minn. 352.

[65] Gen. St. 1878, c. 66, §§ 262, 263; Gen. St. 1894, §§ 5408–9.

[66] Gen. St. 1878, c. 66, § 268; Gen. St. 1894, § 5414.

by the pleadings. In case of conflict between the pleadings and the special verdict, the two will be construed together, in accordance with the rules governing the trial of issues outside the pleadings by consent.

CHAPTER VII.

NEW TRIALS.

THE CORRECTION OF ERRONEOUS VERDICTS AND FINDINGS.

137. General Provisions.
138. Motions for New Trial.
139. Errors on the Face of the Record.
140. Irregularity Preventing a Fair Trial.
141. Misconduct of Jury or Party.
142. Use of Affidavit to Show Misconduct.
143. Misconduct of Jury—Effect.
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145. Excessive or Inadequate Damages.
146. Verdict Contrary to Evidence or Law.
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149. Case of Actual Damages Distinguished from Case Where Damages are in Discretion of the Jury.
150. Newly-Discovered Evidence.
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152. Errors at the Trial.
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154. New Trial for Errors not Excepted to.
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156. Necessity for Ruling and Exception.
157. Limitations on Motion for New Trial.
158. This Motion at Times an Exclusive Remedy.
159. New Trial on Court's Own Motion.

160. New Trial Follows Granting of Motion.
161. Power to set Aside Order for New Trial.
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163. Review of Tax Judgments.
163a. Statutory New Trial as of Right.

137. General Provisions.

Upon receiving a verdict, "an entry shall be made in the minutes of the court, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration; or the judge trying the cause may, in his discretion, and upon such terms as shall be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion or for a new trial, in arrest of judgment, or for judgment notwithstanding the verdict, or to set aside the verdict, or dismiss the action." [1] And upon the filing of a decision upon a trial by the court of an issue of fact, judgment shall be entered in accordance with the decision.[2] Upon the decision of an issue of law, proceedings are had substantially as in case of a default.[3]

[1] Gen. St. 1878, c. 66, § 240; Gen. St. 1894, § 5384.
[2] Gen. St. 1878, c. 66, § 242, as amended by Gen. Laws 1889, c. 156, § 1; Gen. St. 1894, § 5386.
[3] Gen. St. 1878, c. 66, § 243; Gen. St. 1894, § 5387.

It will be noticed that a stay may be granted by the court after a verdict, and this is ordinarily done. In case of a decision upon an issue of fact, stays are commonly ordered for the same purpose. The statute providing for stays enumerated the following motions which may be made after verdict, and before judgment: Motions (1) for a new trial, (2) in arrest of judgment, (3) for judgment notwithstanding the verdict, (4) to set aside the verdict, and (5) to dismiss the action. Of these the second, third, and fifth do not attack the verdict itself, but only the conclusion of law to be drawn from the facts as retermined, and are based on the pleadings and verdict only. The remedy corresponding to these three motions, in case of trial by the court, is the motion to change or modify the conclusions of law, which is based on the pleadings and decision, and, as we have seen, may be made at any time before judgment.[4]

But the insufficiency of the facts found to sustain a conclusion of law in a case tried without a jury may be raised on motion for a new trial, and, if the facts are correctly decided, the remedy is to correct the conclusions of law.[5] We now take up the consideration of

[4] Jones v. Wilder, 28 Minn. 238.

[5] Farnham v. Thompson, 34 Minn. 330; Ames v. Richardson, 29 Minn. 330; Coolbaugh v. Roomer, 32 Minn. 445.

the first and fourth motions mentioned, viz. the motions for a new trial and to set aside the verdict, report or decision. These motions apply alike to cases tried by court, referee or jury.

138. Motions for New Trial.

"A verdict, report, or decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party: First, irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the moving party was prevented from having a fair trial; second, misconduct of the jury or prevailing party; third, accident or surprise which ordinary prudence could not have guarded against; fourth, excessive or inadequate and insufficient damages, appearing to have been given under the influence of passion or prejudice; fifth, that the verdict, report, or decision is not justified by the evidence, or is contrary to law; sixth, newly-discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial; seventh, error in law occur-

ring at the trial, and excepted to by the party making the application." [6]

139. Errors on the Face of the Record.

It will be observed that none of the defects so covered by the motion for a new trial are apparent on the face of the record, except some cases under the first class. For such few defects as can appear on the face of the record which vitiate the verdict, report, or decision, and which are not so provided for, there is a remedy, either by a motion for a new trial for insufficiency of the verdict, report, or decision, in the nature of a common-law motion for a venire facias de novo, or else the question can be raised by an appeal from any judgment entered on such defective verdict.[7]

In the first, second, and third classes of motions for a new trial, the facts relied on as grounds for the motion will ordinarily be presented by affidavit; in the fourth, fifth, and seventh classes they are necessarily presented by settled case, bill of exceptions, or the judge's minutes; while in the sixth class it is necessary to present the new evidence by

[6] Gen. St. 1878, c. 66, § 253, as amended by Gen. Laws 1891, c. 80, § 1; Gen. St. 1894, § 5398.

[7] Verdict uncertain, Cummings v. Taylor, 21 Minn. 366 (motion for new trial); verdict insufficient, Pint v. Bauer, 31 Minn. 4 (appeal from judgment).

affidavit, and the former evidence by settled case or bill of exceptions.[8]

140. Irregularity Preventing a Fair Trial.

"First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the moving party was prevented from having a fair trial." A dismissal at the opening of the trial on motion is within this provision.[9] In one case it was held that a refusal of a trial by jury and reference of the case could be considered under this clause.[10] In another case it seems to have been held that sending the case to trial without notice of trial could be reached on such a motion as this, or on appeal from the judgment.[11]

Motion for judgment on the pleadings at the trial may be considered on motion for new trial.[12] An agreement to average the amount of sums to be named and to adopt quotient as

[8] Gen. St. 1878, c. 66, § 254; Gen. St. 1894, § 5399; State v. Lautenschlager, 23 Minn. 290.

[9] Dunham v. Byrnes, 36 Minn. 106.

[10] St. Paul & S. C. Ry. Co. v. Gardner, 19 Minn. 132 (Gil. 99). See, also, Coolbaugh v. Roemer, 32 Minn. 445, and Schmidt v. Schmidt, 47 Minn. 451.

[11] Mead v. Billings, 43 Minn. 239.

[12] McAllister v. Welker, 39 Minn. 535; Dunham v. Byrnes, 36 Minn. 106.

verdict is misconduct.[13] It is held that the abuse of discretion here mentioned is an abuse of discretion happening at the trial, and that an order made previous to the commencement of the trial, and not as a part of it, granting an application for leave to amend the pleadings, cannot be considered on a motion for a new trial.[14]. Whether the misconduct of the court will be a ground for a new trial will depend upon the facts of the particular case and whether there appears to be reasonable ground to believe that the party was prejudiced thereby.[15]

It is possible that the court might hold that a motion to set aside a verdict for insufficiency on its face was allowed under the term "irregularity in the proceedings." [16]

141. Misconduct of Jury or Party.

"Second. Misconduct of the jury or prevailing party." As to what will or will not constitute misconduct of the jury we have a num-

[13] St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131).

[14] Winona v. Minnesota Ry. Const. Co., 27 Minn. 415.

[15] Helmbrecht v. Helmbrecht, 31 Minn. 504; of jury, Williams v. McGrade, 18 Minn. 82 (Gil. 65) (incompetent juror).

[16] Cummings v. Taylor, 21 Minn. 366; St. Paul & S. C. Ry. Co. v. Gardner, 19 Minn. 132 (Gil. 99); Mead v. Billings, 43 Minn. 239.

ber of cases.[17] It is to be noticed that neither the statements nor the affidavits of jurors can be used to show what occurred in the jury room to impeach the verdict.[18]

There may be an exception to this last rule if it is sought to show misconduct of the prevailing party by a juror's affidavit.[19] In general it may be said that granting a new trial on these grounds is largely in the discretion of the trial court;[20] and the misconduct of the jury must be clearly proven.[21] Misconduct of counsel in the course of the trial, in the presence of the court and of opposing counsel, as

[17] Eich v. Taylor, 20 Minn. 378 (Gil. 330); Chalmers v. Whittemore, 22 Minn. 305; Hayword v. Knapp, 22 Minn. 5; State v. Conway, 23 Minn. 291; Koehler v. Cleary, 23 Minn. 325; Hewitt v. Pioneer Press Co., 23 Minn. 178; St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131). As to disqualification of jurors, failure to elicit facts on examination, etc., see State v. Durnham, 73 Minn. 150; Keegan v. M. & St. L. R. Co. (Minn.) 78 N. W. 965.

[18] See § 142, infra. Webster v. Hedberg, 68 Minn. 434; St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131); State v. Lentz, 45 Minn. 177; Stevens v. Montgomery, 27 Minn. 108; Bradt v. Rommel, 26 Minn. 505; State v. Mims, 26 Minn. 183; State v. Stokely, 16 Minn. 282 (Gil. 249); Gardner v. Minea, 47 Minn. 295; State v. Durnham, 73 Minn. 150.

[19] Knowlton v. McMahon, 13 Minn. 336 (Gil. 358).

[20] Hewitt v. Pioneer Press Co., 23 Minn. 178; Knowles v. Van Gorder, 23 Minn. 197.

[21] State v. Dumphey, 4 Minn. 438 (Gil. 340).

in making improper references in the course of an address to the jury, cannot be shown by ex parte affidavits, but are proper to be included in a case or bill of exceptions to be settled under the statute. Such an act must also be objected to at the time, the objection overruled, and exception taken, or it will be deemed waived.[22] If the court itself rebuke the conduct of counsel for the prevailing party, and the conduct is persisted in, no further objection is neecessary.[23] Repeated offers of irrelevant testimony, coupled with comments to the jury on the irrelevant testimony and exclusion thereof, may amount to such misconduct on the part of the prevailing party. This

[22] Smith v. Wilson, 36 Minn. 334; St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131); State v. Adamson, 43 Minn. 196; State v. Frelinghuysen, 43 Minn. 265. As to misconduct of prosecuting attorney and jurors, see State v. Floyd, 61 Minn. 467. The court called the attention of the jurors to the fact that there were rumors of misconduct on the part of one of their number and that the rumors would be investigated. This was held proper. "If the rumors in question were of so serious a character as to require a dismissal of the jury in question and of the impaneling of another to try defendants, it was incumbent on their counsel to move in the matter upon being informed of the prevalence of such rumors. They could not speculate upon the result by sitting silently by with full knowledge of the situation."

[23] Knowles v. Van Gorder, 23 Minn. 197.

is a matter largely in the discretion of the trial court.[24]

142. Use of Affidavits to Show Misconduct.

The affidavit of a juror or of a third party of his statements as to what occurred in the jury room are not admissible to impeach a verdict; yet, when the affidavit of a juror is offered in support of a verdict, it is competent, for the purpose of impeaching him, to show that he made statements since the trial inconsistent with the statements in his affidavits.[25] "That the affidavit of a juror is not admissible for the purpose of impeaching the verdict on account of the alleged misconduct of the jury has been so often decided by this

[24] Riley v. Chicago, M. & St. P. R. Co., 71 Minn. 425; Loucks v. C., M. & St. P. Ry. Co., 31 Minn. 526; Knowles v. Van Gorder, 23 Minn. 197. Cf. as to remarks by counsel to the jury in summing up, see Mykleby v. Chicago, St. P., M. & O. Ry. Co., 49 Minn. 457; Watson v. St. Paul City Ry. Co., 42 Minn. 46; State v. Adamson, 43 Minn. 196; Olson v. Gjertsen, 42 Minn. 407; State v. Reid, 39 Minn. 277; Rheims v. Stillwater Street Ry. Co., 31 Minn. 193. A new trial was granted for the misconduct of the attorney of the prevailing party in offering prejudicial incompetent evidence, and in persisting in discussing the same in his argument to the jury, although his offer was ruled out. Belyea v. Minneapolis &c. Ry. Co., 61 Minn. 224.

[25] Aldrich v. Wetmore, 52 Minn. 164.

court as to forbid any discussion of the question. The defendants, however, claim that the affidavit falls within an exception to the rule recognized by some courts,[26] to the effect that if the affidavit does not relate to matters resting in the juror's personal consciousness, but to some overt act open to the knowledge of all the jurors, it is admissible to impeach the verdict. Conceding, without so deciding, the correctness of the alleged exception, the affidavit is insufficient." [27]

In another case, Chief Justice Start said: [28] "So much of the affidavit as related to the statements made by the jurors was, on motion of the defendant, stricken out by the trial court. This was a correct ruling, for the affidavit or statement of jurors cannot be used, on a motion to set aside a verdict, to show misconduct on the part of the jury. The rule does not apply to any one except jurors, and the affidavit of a third party which tends to show acts on the part of the jury from which misconduct may be inferred may be used on such motion.[29] There are cases which go further, and hold that the affidavit of a juror

[26] See Mattox v. U. S., 146 U. S. 140.

[27] Wester v. Hedberg, 68 Minn. 434; State v. Stokely, 16 Minn. 249, 282; Bradt v. Rommel, 26 Minn. 505; State v. Lentz, 45 Minn. 177.

[28] Svenson v. Chicago G. W. R. Co., 68 Minn. 14.

[29] Bradt v. Rommel, 26 Minn. 505.

which does not relate to matters resting in his personal consciousness, but to some overt act open to the knowledge of all of the jurors, may be received to show misconduct. * * *. While the party seeking to show misconduct on the part of the jury may not use the affidavits of jurors, yet it seems to be settled, upon principle and authority, that the affidavits and evidence of jurors may be received to sustain their verdict, when a charge of misconduct is made against them."

143. Misconduct of Jury—Effect.

Where there is misconduct of jurors that may have had an influence on the verdict unfavorable to the defeated party, the verdict must be set aside, unless it appears beyond doubt that in fact it had no such effect. Chief Justice Gilfillan said: "Misconduct of jurors as a reason for setting aside the verdict was fully considered in Koehler v. Cleary,[30] and the rule stated that, 'if it does not appear that the misconduct was occasioned by the prevailing party, or anyone in his behalf, and if it does not indicate any improper bias in the juror's mind, and the court cannot see that it either had or *might have had* an effect unfavorable to the party moving for a new trial, the

[30] 23 Minn. 325.

verdict ought not to be set aside,' and that all the moving party can be called on to show is 'that the misconduct may have had an effect unfavorable to him.' The party need not show that he was in fact prejudiced. That case concedes that, where the misconduct may have had an effect unfavorable to the defeated party. the other party may be permitted to show that in fact it did not have such effect; but that would have to appear very clearly,—so clearly as to leave no doubt as to the fact. When it may have had an unfavorable effect, it would be unsafe to allow any speculation as to whether in fact it did or not." [31]

In one case [32] it appeared that the jury, after they retired to consider the case, and before they returned a verdict, prepared a letter to the attorney of the defendant, which was signed by all the jurors, which was in these words: "Dear Sir: We, the jury in the case of Svenson vs. Chicago & Great Western Railway, in consideration of the circumstances and conditions, do earnestly request that the officers of your company give the plaintiff,

[31] Woodbury v. City of Anoka, 52 Minn. 329. Effect of unauthorized view of the locus in quo by the jury see Aldrich v. Minneapolis, 52 Minn. 164; supra, § 58; Svenson v. Chicago G. W. R. Co., 68 Minn. 14; Oswald v. Minneapolis, 29 Minn. 5.

[32] Svenson v. Chicago G. W. R. Co., 68 Minn. 14.

Mr. Svenson, a permanent position in your employ, on account of the serious accident that he received on your premises on November 11, 1895." This letter was delivered at the time the verdict for the defendant was returned. On a motion for a new trial, certain affidavits of jurors as to what occurred in the jury room were stricken out, but a new trial was granted. With some hesitation, the supreme court (Mitchell, J., dissenting) affirmed the order on the general ground that the trial court did not abuse his discretion, and was in a better position to know "whether substantial justice required the granting of a new trial."

Certain jurors, after they retired, went to an outhouse in the yard without the officer, but from the affidavits it appeared that all reasonable inference, suspicion, or presumption that either of them had been approached or tampered with while separated from their fellows for a few minutes had been rebutted and a new trial was therefore refused.[33]

[33] State v. Matakovich, 59 Minn. 514. The court said: "The defendant was not prejudiced, and was not, by reason of this slight irregularity, entitled to a new trial." Citing State v. Conway, 23 Minn. 291. Where the misconduct of two jurors, and of the party was discovered, and brought to the attention of the court during the trial, and by consent the two jurors were excused, and the trial proceeded

144. Accident or Surprise.

"Third. Accident or surprise which ordinary prudence could not have guarded against." [34] Where a witness who had promised to attend failed to do so because of physical inability, but the party went to trial without objection, and without a motion for continuance, and the trial was had without such witness, it was held that there was no ground for a new trial upon this ground.[35]

The allowance of an amendment on the trial by which the defendant could not have been surprised is not ground for setting aside the verdict.[36]

Where one has been honestly misled by statements of the opposing counsel into supposing that certain issues would not be raised on the trial, the raising of such issues may constitute such surprise.[37] Granting or denying a new trial on the ground of surprise rests in the sound discretion of the trial court.[38] The proper practice when one is so surprised

with ten jurors, such misconduct is not a ground for a new trial. Young v. Otto, 57 Minn. 307.

[34] See Huntress-Brown L. Co. v. Wyman, 55 Minn. 262; Nelson v. Carlson, 54 Minn. 90.

[35] Eich v. Taylor, 17 Minn. 172 (Gil. 145); see State v. Bagan, 41 Minn. 285.

[36] Parsons v. Sutton, 66 N. Y. 92.

[37] Continental Nat. Bank v. Adams, 67 Barb. 318.

[38] Wester v. Hedberg, 68 Minn. 434.

is to move the withdrawal of a juror, or for an adjournment on account of such surprise. But the court in its discretion may grant a new trial on this ground, even if such an application has not been made. The whole matter is largely discretionary.[39] This ground is frequently closely allied with the sixth ground, and due diligence must be shown in each case.[40]

145. Excessive or Inadequate Damages.

"Fourth. Excessive or inadequate and insufficient damages, appearing to have been given under the influence of passion or preju-

[39] Continental Bank v. Adams, 67 Barb. 313; Caughey v. N. P. Elevator Co., 51 Minn. 324.

As to what will constitute surprise, see Nudd v. Home Ins. Co., 25 Minn. 100; State v. Bagan, 41 Minn. 285; Shaw v. Henderson, 7 Minn. 480 (Gil. 386); Gardner v. Kellogg, 23 Minn. 463; Smith v. Chapel, 36 Minn. 180; Russell v. Reed, 32 Minn. 45; Farnham v. Jones, 32 Minn. 7; Adamant Mfg. Co. v. Pete, 61 Minn. 465; Huntress &c. Co. v. Wyman, 55 Minn. 262; Hull v. Minneapolis &c. R. Co., 64 Minn. 402.

For a peculiar case, witness stating testimony previous to trial one way, testifying at trial another way, and afterwards making affidavit the first way, see Webb v. Barnard, 36 Minn. 336.

The knowledge of an attorney is imputed to his client. Nelson v. Carlson, 54 Minn. 90.

[40] Shaw v. Henderson, 7 Minn. 480 (Gil. 386); Caughey v. Northern Pac. Ry. Co., 51 Minn. 324.

dice." The words "or inadequate and insufficient" were inserted by amendment in 1891.[41] Under this statute it must appear that the jury were swayed by passion or prejudice, or corruption, preference, or partiality.[42] The damages must be not merely more than the court would have awarded, but they must so grossly exceed what would be adequate that they cannot reasonably be accounted for except upon the theory of prejudice, i. e. partiality to the successful party, or unfair to the other; or passion, i. e. of excited feeling, rather than sober judgment.[43]

But the supreme court of Minnesota has apparently gone much further in practice than its statement of theory on this point.[44] There

[41] Gen. Laws 1891, c. 80, § 1. In Conrad v. Dobmeier, 57 Minn. 147, and Henderson v. St. Paul & D. Ry. Co., 52 Minn. 479, new trials were granted for insufficient and inadequate damages. In the latter case the verdict was set aside on the general ground that it was not supported or justified by the evidence. See elaborate note in 47 L. R. A. 33.

[42] St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131); Beaulieu v. Parsons, 2 Minn. 37 (Gil. 26); Meeks v. City of St. Paul, 64 Minn. 220, and many other cases.

[43] Libel ($5,000, $4,275 to $2,000), Pratt v. Pioneer Press Co., 32 Minn. 217; Id. 35 Minn. 251; libel ($5,200), Peterson v. W. U. Tel. Co., 65 Minn. 18.

[44] Trespass ($900), McCarthy v. Niskern, 22 Minn. 90.

are numerous cases in which verdicts have been set aside or reduced upon this ground.[45]

In an important recent case, where a verdict was given for terrible personal injuries of $40,143.33, the verdict was cut to $25,000, on the ground that there was a limit to the expression of suffering in money, though the court could not say the verdict was the result of passion or prejudice.[46] The court may grant a new trial on this ground, unless the successful party will remit part of the ver-

[45] Trespass ($800 to $400), Hardenbergh v. Railway Co., 41 Minn. 200; false imprisonment ($2,917), Woodward v. Glidden, 33 Minn. 108; trespass ($1,200 to $300), Craig v. Cook, 28 Minn. 232; contract ($1,737.96 to $1,505.80), Grant v. Wolf, 34 Minn. 32; libel ($5,000), Dennis v. Johnson, 42 Minn. 301.

Damages were not reduced in the following cases, despite application therefor hereunder: Personal injuries ($10,000), Tierney v. Minneapolis Ry. Co., 33 Minn. 311; personal injuries ($5,000), Greene v. Minneapolis Ry. Co., 31 Minn. 248; injuries to child (parent's action, $500), St. Paul v. Kuby, 3 Minn. 154 (Gil. 125); malpractice, Chamberlain v. Porter, 9 Minn. 260 (Gil. 244); false imprisonment ($800), Judson v. Reardon, 16 Minn. 431 (Gil. 387); slander ($212.50), St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131); slander ($4,000), Blakeman v. Blakeman, 31 Minn. 396; levy on exempt property ($439.50), Lynd v. Picket, 7 Minn. 184 (Gil. 128); alienation of husband's affection ($15,000), Lockwood v. Lockwood, 67 Minn. 476.

[46] Hall v. Chicago, B. & N. Ry., 46 Minn. 439, 451.

dict;[47] but if there is serious question of fact besides the issue of damages, the whole verdict should generally be set aside.[48]

In most states it is considered that a second verdict for an amount like the first should be set aside as excessive only on the fullest consideration, and it is believed that an instance where three verdicts have been set aside on this ground is not to be found. The nearest approach to such a case would seem to be the Pratt case,[49] where the reduction of the third verdict to the amount of the first was consented to, but the first verdict was set aside on other grounds than excessive damages.[50]

[47] Brown v. Doyle, 69 Minn. 543; Hutchins v. St. P., M. & M. Ry. Co., 44 Minn. 5; Craig v. Cook, 28 Minn. 232; Grant v. Wolf, 34 Minn. 32; Pratt v. Pioneer Press Co., 35 Minn. 251; Gardner v. Minea, 47 Minn. 295. "While the court has no right to substitute its own estimate of the damages for that of the jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict, and to order a new trial unless the plaintiff will consent to reduce the amount to such amount." Hutchins v. St. Paul &c. Ry. Co. supra; Frederickson v. Johnson, 60 Minn. 337; Becker v. Bohmert, 63 Minn. 403.

[48] Hall v. Chicago, B. & N. Ry. Co., 46 Minn. 439, 451; Craig v. Cook, 28 Minn. 232.

[49] 35 Minn. 251.

[50] Buenemann v. St. P., M. & M. Ry. Co., 32 Minn. 390. See § 148.

146. Verdict Contrary to Evidence or Law.

"Fifth. That the verdict, report, or decision is not justified by the evidence, or is contrary to law." The cases properly belonging under this subdivision are divisible into two classes, as follows: (1) Where there is no evidence to sustain the verdict; and (2) where the verdict, report, or finding is contrary to the manifest weight of evidence. In the first case there is, of course, no question. If there is no evidence on the issuable facts the verdict cannot be sustained;[51] but this does not mean that a mere variance will entitle the defeated party to a vacation of the verdict and a new trial.[52]

In the second case it is not sufficient that the court would have found otherwise on the evidence presented, if reasonable men might differ. In order to warrant a vacation of the verdict, the evidence must be manifestly insufficient to warrant it, and this reasoning ap-

[51] Cannon River Manufacturers' Ass'n v. Rogers, 51 Minn. 388.

In Wilkinson v. Crookston, 77 N. W. 797, a new trial was granted because the court submitted to the jury an issue of fact upon which the evidence was conclusive against the respondent, and took from the jury an issue upon which the evidence was not conclusive.

[52] Short v. McRea, 4 Minn. 119 (Gil. 78).

plies *a fortiori* to an appellate court.[53] These rules apply alike to all verdicts, reports, and decisions, including verdicts on framed issues in equitable cases, and findings of the court and reports of referees.[54]

After trial before a referee, the place to move for a new trial is the district court, and not before the referee.[55] And the old doctrine of the chancery courts, that the appellate court could judge of the facts as well as the trial court, does not obtain, even in equity cases tried before the court without a jury, or before a referee, even where the evidence is written, and not oral.[56]

[53] Morrison v. March, 4 Minn. 422 (Gil. 325); State v. Miller, 10 Minn. 313 (Gil. 256); Dixon v. Merritt, 6 Minn. 160 (Gil. 98); St. Paul v. Kuby, 8 Minn. 154 (Gil. 125); Humphrey v. Havens, 12 Minn. 298 (Gil. 196); Johnson v. W. & St. P. Ry. Co., 11 Minn. 296, 307 (Gil. 204); Hinkle v. L. S. & M. R. Co., 18 Minn. 297 (Gil. 270); St. Anthony &c. Co. v. Eastman, 20 Minn. 277 (Gil. 249); Tozer v. Hershey, 15 Minn. 257 (Gil. 197).

[54] Framed issues, Marvin v. Dutcher, 26 Minn. 391, 407, 411, and Davis v. Smith, 7 Minn. 414 (Gil. 328); referees, Kortan v. Knight, 44 Minn. 304, Dayton v. Buford, 16 Minn. 126 (Gil. 111), and Humphrey v. Havens, 12 Minn. 298 (Gil. 196).

[55] Thayer v. Barney, 12 Minn. 502 (Gil. 406).

[56] Humphrey v. Havens, 12 Minn. 298 (Gil. 196); McLachlin v. Branch, 39 Minn. 101; Dayton v. Buford, 18 Minn. 126 (Gil. 111); Marvin v. Dutcher,

Such a change in the law is a natural consequence of the changes in the mode of trial of equity cases, although, as we shall see later, there still exists the power of reversal on appeal from the judgment for failure of the evidence to support the findings in equity cases, without a motion for a new trial.[57] But in cases of a verdict, the question of the sufficiency of the verdict can be raised in but one way, and that is by a motion for a new trial on this ground, and, unless such motion is made, the question cannot be considered on appeal.[58] This applies to verdicts rendered on framed issues in equity cases.[59]

147. Rule in Hicks v. Stone.

According to the well-known rule in Hicks

26 Minn. 391, 409; Dixon v. Merritt, 6 Minn. 160 (Gil. 98); Kortan v. Knight, 44 Minn. 304; Segelbaum v. Segelbaum, 39 Minn. 258.

[57] Cooper v. Breckenridge, 11 Minn. 341 (Gil. 241) (case of a reference); St. Paul Fire & Mar. Ins. Co. v. Allis, 24 Minn. 75; Jordan v. Humphrey, 31 Minn. 495. The point that the decision of the trial court is not supported by its findings may be raised for the first time in the supreme court. Nelson v. Central Land Co., 35 Minn. 408.

[58] Kelly v. Rogers, 21 Minn. 146; Lund v. Anderson, 42 Minn. 201; Byrne v. M. & St. L. Ry. Co., 29 Minn. 200; Barker v. Todd, 37 Minn. 570; Barringer v. Stoltz, 39 Minn. 63.

[59] Jordan v. Humphrey, 31 Minn. 495.

v. Stone, where the trial court sets aside a verdict as against the evidence, its order will not be reversed on appeal unless the preponderance of evidence was manifestly and palpably in favor of the verdict,[60] and this rule applies also to the case of the granting of a motion to vacate a decision.[61] An order granting a new trial where there is conflicting

[60] Hicks v. Stone, 13 Minn. 434 (Gil. 398); Panton v. Duluth Gas & Water Co., 50 Minn. 175; Rheiner v. Street Ry. Co., 29 Minn. 147; Dupee v. N. P. Ry. Co., 50 Minn. 556; Clark v. Nelson Lumber Co., 34 Minn. 249; Breen v. Railway Transfer Co., 51 Minn. 4; Congdon v. Bailey, 39 Minn. 22; Shehan v. Dowling, 55 Minn. 289; Grommes v. Shute, 46 Minn. 182; Guthrie v. Great N. R. Co., 70 Minn. 237; Schwartz v. Church, 60 Minn. 183; Maxfield v. Auerbach, 62 Minn. 272; Hoffman v. Meyer, 57 Minn. 25; Hughley v. Wabasha, 69 Minn. 245 (referee).

Where the uncorroborated evidence of the plaintiff on the vital and essential point in the case is inherently unreasonable and improbable, a refusal to grant a new trial is an abuse of discretion. Messenger v. St. Paul City R. Co., 79 N. W. 583, cites In re Reuenburgh's Estate (Minn.) 77 N. W. 423.

[61] Knappen v. Swensen, 40 Minn. 171. A somewhat peculiar case illustrating the principle of this rule arose where a case was tried before Hon. Levi Vilas (judge in the Second district) shortly before his death, and the motion for a new trial was made before his successor in office, Judge Otis. Reynolds v. Reynolds, 44 Minn. 132.

evidence will not be disturbed.[62] Where the evidence is manifestly and palpably in favor of the verdict, an order granting a new trial will be reversed.[63]

And where the trial court vacates the report of a referee as against the evidence, and awards a new trial, the rule in Hicks v. Stone still applies to the action of the trial court on appeal to the supreme court.[64] It is important to notice that in all applications under this subsection it is of vital importance that the "case" or bill of exceptions purport to contain all the evidence. Where it does not, the appellate court will presume that there was other evidence to support the verdict or finding, and will sustain the order.[65] At one time it was held that this was the rule, even though the court below had granted a new trial on the ground that there was no evidence to support the verdict or finding, and, if the case did not purport to contain all the evidence, an order granting a new trial on this ground would be reversed.[66] But this

[62] Skone v. Barnard (Minn.) 80 N. W. 971.

[63] J. H. Bishop Co. v. Buckeye Pub. Co., 57 Minn. 219.

[64] Koktan v. Knight, 44 Minn. 304.

[65] Boright v. Springfield Ins. Co., 34 Minn. 352; Kohn v. Tedford, 46 Minn. 146; Craver v. Christian, 32 Minn. 525; Koethe v. O'Brien, 32 Minn. 78.

[66] Henry v. Hinman, 21 Minn. 378.

doctrine has since been overruled, and the better rule applied that the action of the trial court is presumed correct unless the contrary is shown.[67]

"It has almost universally been held that it is discretionary with the trial court to grant a new trial on the ground that on the evidence substantial justice has not been done, and an appellate court will interfere only in case of an abuse of discretion." [67a]

148. Effect of a Second Verdict.

Where a second verdict ratifies the finding of the first jury, the court will deem that fact of weight, although not controlling, in considering the question of vacating the verdict as against evidence, and granting a new trial.[68]

[67] Chesley v. Mississippi & Rum Riv. Boom Co., 39 Minn. 83; Mead v. Billings, 40 Minn. 505.

[67a] State v. Shevlin-Carpenter Co., 66 Minn. 217, citing 16 Am. & Eng. Enc. Law, 501, and 2 Enc. Pl. & Pr. 414.

[68] Buenemann v. St. P., M. & M. Ry. Co., 32 Minn. 390.

In Netzer v. Crookston, 66 Minn. 356, the court said: "Counsel insists that, inasmuch as there have been two trials, both resulting in verdicts for the plaintiff, therefore the familiar rule of Hicks v. Stone, 13 Minn. 434 (Gil. 308) is inapplicable in view of what was said in Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668. But this is the first time the verdict has been set aside on the ground of the insufficiency

"The trial court seems to have regarded the damages as so excessive as to justify a new trial except for the fact that this is the second verdict in the case, and that one reason for setting aside the former verdict was that the damages were excessive. As a rule the court will not set aside a second verdict on account of excessive damages, but where as in this case, the verdict is controlled by no reason, supported by no justice, and is manifestly the result of passion and prejudice, it is the duty of the court to set it aside, no matter how

of the evidence. On the former appeal, this case was reversed on account of error in the charge of the court." The court may be justified, in the exercise of its discretion, in granting a second trial on the ground that the verdict was against the evidence, when it would not be justified in granting a third or subsequent trial on the same grounds. "While, in our judgment, the evidence was ample to justify the verdict, yet, under the familiar rule of Hicks v. Stone, 13 Minn. 434 (Gil. 398), the preponderance was not so manifestly and palpably in favor of the verdict that we would be justified in holding that the court abused its discretion in granting a new trial, provided there had been but one trial of the case. But there is a limit to this rule, and there must be an end of litigation. A court may be justified in granting one new trial, when it would have no right to set aside several successive verdicts, especially if all were in favor of the same party." Van Doren v. Wright, 65 Minn. 80. See, also, Park v. Electric T. Co., 75 Minn. 349.

many similar verdicts have been previously returned in the case." [a]

149. Case of Actual Damages Distinguished from Cases Where Damages are in Discretion of the Jury.

In an action in which the plaintiff is entitled to actual damages only, as distinguished from an action in which the damages are in the discretion of the jury, and he obtains more or less than he ought, it was held that a motion for a new trial was properly made under the fifth subdivision of the section.[69]

In a recent case the court said:[70] "The views of the court upon this question have already been intimated in Nelson v. Village of West Duluth,[71] in which it was held that, in an action in tort, the objection that the damages recovered are excessive or inadequate and insufficient as a ground for a motion for a new trial comes under the fourth subdivision, not under the fifth. The fourth was evidently intended to apply to those cases in which the damages are within the discretion of the jury, and in which, because of passion and prejudice, juries may not act discreetly.

a Peterson v. W. U. Tel. Co., 65 Minn. 18.

[69] Gen. St. 1894, § 5398, subd. 5; Lane v. Dayton, 56 Minn. 90.

[70] Lane v. Dayton, 56 Minn. 90.

[71] Nelson v. West Duluth, 55 Minn. 497.

Where the plaintiff is entitled to actual damages only, and obtains more or less than he ought, the motion should be made under the fifth subdivision, and on the ground of the insufficiency of the evidence." [72]

In the Nelson case, it was held that as the motion came under subdivision 4, the doctrine of Hicks v. Stone did not apply. But in a later case the Nelson case was distinguished and criticised. The court said: "We can see no reason why the fourth subdivision should apply any more to an action on contract than to an action of tort, when the amount of damage must in each case be estimated by competent witnesses sworn and examined at the trial. In either case the question of excessive or inadequate damages on a motion for a new trial more properly comes under the fifth subdivision. * * * The Nelson case has never been followed and in our opinion should not be, even in cases where the fourth subdivision more properly applies, to-wit, cases where expert evidence as to value or amount of damages is incompetent." [72a]

150. Newly-Discovered Evidence.

"Sixth. Newly-discovered evidence, material for the party making the application, which

[72] Citing Haynes, New Trials, § 94.

[72a] State v. Shevlin-Carpenter Co., 66 Minn. 217.

he could not, with reasonable diligence, have discovered and produced at the trial." The newly-discovered evidence of course cannot be shown by a "case" or bill of exceptions, and must be made to appear by affidavit, which may be met by counter affidavits;[73] but it is further held that, in order to enable the court to determine on the materiality and importance of the new evidence, the evidence actually given on the trial must all be presented by a "case" or bill of exceptions, or the application cannot be granted.[74] In order to afford ground for a new trial, the newly-discovered evidence must be more than merely cumulative,[75] corroborative, or impeaching or contradicting.[76] There are, per-

[73] Finch v. Greene, 16 Minn. 355 (Gil. 315); Holmes v. Crummett, 30 Minn. 22.

[74] State v. Lautenschlager, 23 Minn. 290; Scofield v. Walrath, 35 Minn. 356.

[75] Layman v. M. & St. L. R. Co., 66 Minn. 452.

[76] Hoye v. Chicago, &c. Ry. Co., 46 Minn. 269; State v. Dumphey, 4 Minn. 438 (Gil. 340); Lampsen v. Brander, 28 Minn. 526; Mead v. Constans, 5 Minn. 171 (Gil. 134); Peck v. Small, 35 Minn. 465; Nininger v. Knox, 8 Minn. 140 (Gil. 110); State v. Barrett, 40 Minn. 65, 76, 77; State v. Wagner, 23 Minn. 544; State v. Cantieny, 34 Minn. 1; State v. Bagan, 41 Minn. 285; Gardner v. Kellogg, 23 Minn. 463; Jones v. Chicago &c. Ry. Co., 42 Minn. 183; Granning v. Swenson, 49 Minn. 381; Elmborg v. St. Paul City

haps, rare exceptions to this rule in extraordinary cases.[77]

The whole matter of granting a new trial on this ground is to a large extent in the discretion of the trial court, and its decision on the question will not be disturbed except for abuse of discretion, especially where there are conflicting affidavits.[78] All the cases concur in holding that it is not enough that the newly-discovered evidence be material, but that the court must take into account its importance, and the likelihood of its producing a different result.[79] In determining this question of the

Ry. Co., 51 Minn. 70; Galvin v. St. Paul, 62 Minn. 145.

[77] A judgment was entered against A. for the purchase price of land sold and conveyed to him by a quitclaim deed. Soon after its entry A. discovered that the grantor in the deed had no title and commenced an action to set aside the judgment. It was held that the action would not lie, as the proper remedy was a motion for a new trial on the ground of newly-discovered evidence. Hulett v. Hamilton, 60 Minn. 21, 61 N. W. 672.

[78] Farnsworth v. Robbins, 36 Minn. 369; Peck v. Small, 35 Minn. 465; Lampsen v. Brander, 28 Minn. 526; Hoye v. Ry. Co., 46 Minn, 269, 273; Hull v. Minneapolis &c. Co., 64 Minn. 402.

[79] Lampsen v. Brander, 28 Minn. 526; Cirkel v. Crosswell, 36 Minn. 323; Peterson v. Faust, 30 Minn. 22; Finch v. Green, 16 Minn. 355, 367 (Gil. 315); Eddy v. Caldwell, 7 Minn. 225 (Gil. 166); Mead

probability of a different result, the court may examine and weigh all the affidavits and counter affidavits brought forward by all the parties.[80] Evidence affecting only the question of punitive damages awarded does not furnish ground for a new trial hereunder.[81]

In general, applications for a new trial on this ground are regarded with jealousy because of the danger of protracting litigation, and the inducements thus offered to perjury. Such applications are always viewed with special disfavor when the new evidence is of alleged oral admissions of the other party, the evidence not being of the most reliable or permanent sort.[82]

The question of reasonable diligence before the trial is also an important one. Such diligence is necessary, and must be shown to have been exercised,[83] and the affidavits must show

v. Constans, 5 Minn. 171 (Gil. 134); Elmborg v. St. Paul City Ry. Co., 51 Minn. 70.

[80] Cirkel v. Crosswell, 36 Minn. 323; Lampsen v. Brander, 28 Minn. 526; Peterson v. Faust, 30 Minn. 22; Finch v. Green, 16 Minn. 355, 367; Schacherl v. Ry. Co., 42 Minn. 42; Eldredge v. Ry. Co., 32 Minn. 253; Brazil v. Peterson, 44 Minn. 212.

[81] Peck v. Small, 35 Minn. 465.

[82] Lampsen v. Brander, 28 Minn. 526, 529.

[83] Bradley v. Norris, 67 Minn. 48; Farnsworth v. Robbins, 36 Minn. 369; Wintermute v. Stinson, 19 Minn. 394 (Gil. 340); Lennon v. Brainerd, 36 Minn.

in what the diligence consists.[84] The motion must also be made with reasonable diligence. A delay of six months after discovering the new evidence is inexcusable laches.[85] And the fact that the party knew of the evidence, though his counsel did not, is fatal. It must affirmatively appear that the party neither knew nor failed to know for lack of reasonable diligence. It must not be doubtful even.[86]

Where a witness was examined, but the counsel feared to question him as to the matter because of statements made by the witness out of court, a motion for a new trial on the ground of newly-discovered evidence will not be granted.[87] Motions for new trials on this ground are carefully scrutinized by the courts, but proper cases for granting a new trial occur from time to time.[88]

330; Humphrey v. Havens, 9 Minn. 318 (Gil. 301); Taylor v. Mueller, 30 Minn. 343; Elmborg v. St. Paul City Ry. Co., 51 Minn. 70; Tuman v. Pillsbury, 64 Minn. 415; Meeks v. St. Paul, 64 Minn. 220; Hendrickson v. Tracy, 53 Minn. 404.

[84] Revor v. Bagley (Minn.) 79 N. W. 171.

[85] Lathrop v. Dearing, 59 Minn. 234.

[86] Broat v. Moor, 44 Minn. 468; Nininger v. Knox, 8 Minn. 140 (Gil. 110).

[87] Taylor v. Mueller, 30 Minn. 343.

[88] Hosford v. Rowe, 41 Minn. 245; Shaw v. Henderson, 7 Minn. 480 (Gil. 386); Sheffield v. Mullin, 28 Minn. 251; Humphrey v. Havens, 9 Minn. 318 (Gil. 301); Cairns v. Keith, 50 Minn. 32.

In conclusion we may say that what the new evidence is must be shown with definiteness and certainty and positively. The moving party must produce the affidavit of the witness himself to the facts which he proposes to prove by him, or account for its absence, and in general on this point must produce the best evidence of which the matter is susceptible.

But a new trial will not be granted if there is no reason to suppose that the verdict would be changed by such evidence.[89]

151. Errors in Law Occurring at the Trial.

"Seventh. Error in law occurring at the trial, and excepted to by the party making the application."[90] An exception is absolutely essential to a review of any alleged error under this subdivision.[91]

[89] Eddy v. Caldwell, 7 Minn. 225 (Gil. 166). A question for a new trial on the ground of newly discovered evidence may be made after the affirmance of the judgment on appeal, when the new evidence was discovered after such affirmance. Sheffield v. Mullen, 28 Minn. 251.

[90] Gen. St. 1878, c. 66, § 253, subd. 7; Gen. St. 1894, § 5398.

[91] Roehl v. Baasen, 8 Minn. 26 (Gil. 9); Kumler v. Ferguson, 22 Minn. 117; Barker v. Todd, 37 Minn. 370; Wilson v. Fire Ass'n, 36 Minn. 112; Smith v. Bean, 46 Minn. 138; Shatto v. Abernethy, 35 Minn. 538; Dakota County v. Parker, 7 Minn.

152. Errors "at the Trial."

"An exception is an objection, taken at the trial, to a decision upon a matter of law. The point of the exception shall be particularly stated, and either delivered in writing to the judge, or entered in his minutes, and immediately corrected or added to until made conformable to the truth, or it may afterward be settled in a statement of the case." "No particular form of exception is required. The objection shall be stated with so much of the evidence as is necessary to explain it, but no more, and the whole as briefly as possible." [92] It will be noticed that the words "at the trial" are given emphasis in each section of the statute. In the first place, the error must occur at the trial. Erroneous orders made previous or subsequent to the trial cannot be excepted to, and an attempted exception to such an order is nugatory.[93]

In the first of these cases the court held

267 (Gil. 207); Baldwin v. Blanchard, 15 Minn. 489 (Gil. 403); St. Paul v. Kuby, 8 Minn. 154 (Gil. 125); Teller v. Bishop, 8 Minn. 226 (Gil. 195).

[92] Gen. St. 1878, c. 66, §§ 251, 252; Gen. St. 1894, §§ 5396–7.

[93] St. Paul &c. Ry. Co. v. Gardner, 19 Minn. 132 (Gil. 99); Volmer v. Stagerman, 25 Minn. 234; Coolbaugh v. Roemer, 32 Minn. 445 (order at trial refusing jury).

that an order actually made beforehand denying a jury trial was not made at the trial, in contemplation of law, but before it. In the second, that an order of dismissal of the action made by the court after taking the matter under advisement was made after the trial. And in each case the court held the order reviewable on motion for a new trial under the first subdivision of the section. The court said: "To the point that the order of dismissal could not be re-examined because it had not been excepted to, it is an answer that this case was one in which no exception was requisite, because there was no opportunity to take one; for an exception is an objection taken at the trial, and the order of dismissal in this case was not granted at the trial but after it was concluded, and the court had taken the case under advisement." [94]

An exact statement, applicable to all cases, of what is to be included and what excluded in defining the "trial," would seem to be impossible, as the word varies considerably in meaning.[95] The following authorities would seem to give a good general idea of the meaning of the word as used in these sections:

A trial is an examination before a compe-

[94] Volmer v. Stagerman, 25 Minn. 234. See § 153.

[95] U. S. v. Curtis, 4 Mason, 232; Jenks v. State, 39 Ind. 1.

tent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.[96]

"The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submitting of the cause to the court or referee on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact. Such trial is not completed until finally submitted to the court, referee, or jury." [97]

The rules to determine when the trial begins or ends of necessity vary somewhat, as the case is tried with or without a jury. In a jury case, the trial would seem to begin with the calling of the jury, or possibly with the instruction of the court to the clerk to call the jury. Certainly, calling the jury is part of the trial.[98] And exception can be and must be taken to erroneous rulings on proceedings in impaneling of the jury.[99]

Calling the case for trial would seem not to be part of the trial.[100] In the case of trial before the court without a jury, or before a

[96] Anderson v. Pennie, 32 Cal. 265.

[97] Mygatt v. Wilcox, 35 How. Prac. 410.

[98] St. Anthony &c. Co. v. King Bridge Co., 23 Minn. 186–188.

[99] State v. Mims, 26 Minn. 183, 185.

[100] Scheffer v. National L. Ins. Co., 25 Minn. 534.

referee, the trial would seem to open with the address of counsel to the court, or any step after the call of the case for trial, not an application for postponement.[101] A trial before the court or referee without a jury would seem to end with the final submission of the case to the court, the decision of the court not being a part of the trial.[102]

On the other hand, in case of a jury trial, the trial for many purposes, and, among others, probably those of taking exceptions to proceedings as they occur, is held to continue up to the discharge of the jury, or at least the final rendition and entry of the verdict.[103] Of course this does not mean that exceptions can be taken after verdict to matters arising earlier in the trial. For instance, it is too late after verdict to except to the charge to the jury or to the admission of evidence.[104]

[101] Coolbaugh v. Roemer, 32 Minn. 445.

[102] Volmer v. Stagerman, 25 Minn. 234.

[103] Reilly v. Bader, 46 Minn. 212; Hudson v. M., L. & M. Ry. Co., 44 Minn. 52; Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Manny v. Griswold, 21 Minn. 506; Varco v. Ry. Co., 30 Minn. 18; Nichols & Co. v. Wadsworth, 40 Minn. 547. See People v. Kelly, 94 N. Y. 526, cited in 44 Minn. 55.

[104] Barker v. Todd, 37 Minn. 370; Roehl v. Baasen, 8 Minn, 26 (Gil. 9); Wilson v. Ins. Ass'n, 36 Minn. 112; Chamberlain v. Porter, 9 Minn. 260 (Gil. 244).

"The points on which either party desires the jury to be instructed must be furnished in writing to the court before the argument to the jury is begun, or the same may be disregarded. All exceptions to the charge and to refusals to charge shall be taken before the jury retire." [105]

153. Exceptions.

While no particular form of exception is required, it must be noticed that it is an objection to the ruling, and not an objection to the act of the other party which gives rise to a ruling. It is an objection made to the ruling after the ruling is made. A mere objection to the admission of evidence, followed by a ruling admitting the evidence, is not an exception.[106]

Where evidence is taken before a referee to take testimony, who has no power to hear and determine, and objection is made before the referee, the referee should overrule the objection, and note an exception. The objection must then be renewed before the trial

[105] Dist. Ct. Rule No. XLI. See, generally, § 63, supra.

[106] St. Paul v. Kuby, 8 Minn. 154 (Gil. 125); Roehl v. Baasen, 8 Minn. 26, 30 (Gil. 9); Smith v. Bean, 46 Minn. 138. As to exceptions to the charge of the court see § 65.

court, and, if overruled, exception must then be taken, or the objection will be deemed waived.[107]

An exception cannot be taken to the act of the other party, but only to the act of the court.[108] "To a decision upon a matter of law." No exception is ever taken to a finding of fact. "The point of the exception shall be particularly stated." This is an important clause, especially so with reference to exceptions to instructions to the jury. The question is constantly arising, what is a sufficiently particular statement of the point of an exception? The office of an exception is to point

[107] Gill v. Russell, 23 Minn. 362.

Where the court, on motion, struck out competent evidence, and no exception was taken, and subsequent to the trial the parties, by written stipulation, struck out all such evidence, and inserted certain matter instead, and the stipulation was that the record as so amended should be used in the supreme court, and no exception to the ruling was inserted in the stipulation, the court said: "While the parties had no strict legal right to amend the record, and we do not approve of such practice, yet we think that the appellant's attorney, by his conduct, waived his right to insist upon the original exception, and he must abide the consequences of the stipulation, and the omission therefrom of the exception." Selser Bros. Co. v. Minneapolis Cold Storage Co. (Minn.) 79 N. W. 680.

[108] State v. Frelinghuysen, 43 Minn. 265.

out, and call the attention of the court to, any proposition of law which is claimed to be erroneous, so that, if the court has inadvertently stated the rule of law erroneously, it may at once correct it. If a party, after a charge containing various propositions, states that he excepts to each and every part of it, this does not perform the office of an exception. No question can be raised upon such a general exception,[109] though it might suffice as an exception if "each and every" proposition in a charge were erroneous.[110]

Similarly, where a considerable number of instructions were requested, of which one related to and detailed the circumstances of the case at length, and the court embodied the substance of the requests in its general charge to the jury, but without specifying such circumstances, under a general "exception to the refusal of the court to charge the jury as requested," it cannot be urged that the court should have been more specific in alluding to the circumstances of the case.[111] And where numerous requests were submitted, some of

[109] Simmons v. Ry. Co., 18 Minn. 184 (Gil. 168); Ferson v. Wilcox, 19 Minn. 449 (Gil. 388); Carroll v. Williston, 44 Minn. 289; State v. Miller, 45 Minn. 521; Shull v. Raymond, 23 Minn. 66, 67; Judson v. Reardon, 16 Minn. 431 (Gil. 387).

[110] Shull v. Raymond, 23 Minn. 66, 69.

[111] State v. Adamson, 43 Minn. 196.

which were given, and others refused or qualified, a general exception to the refusal to give the requests asked has been held insufficient.[112] But these cases were overruled by the case of Van Doren v. Wright,* where it was held that where several separate and distinct requests, each containing but a single proposition of law, are given, an exception "to each and all of them" is sufficient.

On the other hand, where five distinct numbered requests to charge were submitted, and the court refused or modified them separately, and exception was taken "to said refusals and modifications, and to said instructions as given," the exception was formerly deemed sufficiently specific.[113] Where counsel requests the court to charge the jury on a number of points collectively, and the court refuses the request, there is no error if any one

[112] Carroll v. Williston, 44 Minn. 287; State v. Miller, 45 Minn. 522; Main v. Oien, 47 Minn. 89; Rosquist v. Furniture Co., 50 Minn. 192; Steffenson v. Chicago &c. R. Co., 51 Minn. 531.

*65 Minn. 80.

[113] Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250). But compare with this case the following cases: Bishop v. St. Paul City Ry. Co., 48 Minn. 26; Rosquist v. Furniture Co., 50 Minn. 192; Dallemand v. Janney, 51 Minn. 514; Steffenson v. C., M. & St. P. Ry. Co., 51 Minn. 531; Van Doren v. Wright, 65 Minn. 80.

of the propositions is not correct, and a general exception to the refusal is too indefinite.[114]

The following exception is too indefinite as to the first and third classes, and is sufficiently specific as to the second: "(1) To each and every part and portion of the instructions and charges as aforesaid, * * *, (2) and to all which, and so far as the same relates to the consideration for said chattel mortgage, and to the transfer and possession of the three promissory notes put in evidence in this cause to show a consideration for such mortgage, and (3) excepted to said charge, all and singular and severally." [115]

If counsel fear that an instruction not in itself erroneous may be misapplied by the jury, they should ask for more specific instructions. A mere general exception to the instruction given will not avail.[116] "Where, in an action for a libel, several other publications by defendant, some admissible to show actual malice, others not, were given in evidence without objection, the attention of the

[114] Castner v. Steamboat, 1 Minn. 73 (Gil. 51). Cf. Main v. Oien, 47 Minn. 89.

[115] Foster v. Berkey, 8 Minn. 351, 363 (Gil. 310). See, also, Carlson v. Dow, 47 Minn. 335.

[116] Bowen v. Ry. Co., 36 Minn. 522; Clapp v. Ry. Co., 36 Minn. 6; State v. Hair, 37 Minn. 351.

trial court not being called to the difference, and the court charged the jury in general terms that it might consider the publications in evidence on the question of malice, an exception which does not call attention to the difference is too general." [117]

If one fails to except to an instruction, he cannot have it reviewed as matter of right; and, if the verdict of the jury is in accord with the instruction, the instruction will, on appeal from an order denying a new trial, be taken as the law of the case, whether right or wrong, the appellant having no absolute right to a review of the error.[118] But if the jury disregard an erroneous instruction and find in accordance with the true rule, the verdict will be sustained in such case.[119] But if an erroneous instruction be given, and no exception is taken, the trial court perhaps may,

[117] Larrabee v. Minnesota Tribune Co., 36 Minn. 141. See, also, the following cases: Hooper v. Ry. Co., 37 Minn. 52; Lund v. Anderson, 42 Minn. 201; Rheiner v. Street Ry. Co., 31 Minn. 193; Ziebarth v. Nye, 42 Minn. 541; Elmborg v. St. Paul City Ry. Co., 51 Minn. 70.

[118] Smith v. Pearson, 44 Minn. 397; Madden v. Oestrich, 46 Minn. 538; Howe v. Minneapolis &c. R. Co., 62 Minn. 71.

[119] Dike v. Pool, 15 Minn. 315 (Gil. 245); Colter v. Mann. 18 Minn. 96 (Gil. 79); Caslin v. Bridgman, 26 Minn. 442; Hurt v. Ry. Co., 39 Minn. 485.

in its discretion, grant a new trial, if it deems injustice to have resulted from the error.[120]

Erroneous findings are not grounds for a new trial where correct findings would give the same result.[121] In each of the cases, the doctrine of error without prejudice is the principle involved. One cannot interpose an available exception to that which he has first consented to.[122]

Where there is an objection to the admissibility of evidence on a specific ground, the exception will be confined to error upon the specified ground.[123] The exception must be stated in a formal bill of exceptions or in a settled "case," or it will not be reviewed. A statement or recital of it in the decision (findings) is not a compliance with the statute, and will not suffice.[124]

[120] Demueles v. St. Paul & N. Ry. Co., 44 Minn. 436.

[121] Scheufler v. Grand Lodge, 45 Minn. 256.

[122] Lane v. Lanfest, 40 Minn. 375; Cummings v. Baars, 36 Minn. 350.

[123] Smith v. Bean, 46 Minn. 138; Triggs v. Jones, 46 Minn. 277; Union Cash Register Co. v. John, 49 Minn. 481. See Mareck v. Minneapolis Times Co., 77 N. W. 428.

[124] Stone v. Johnson, 30 Minn. 16; Coolbaugh v. Roemer, 32 Minn. 445; Osborne & Co. v. Williams, 39 Minn. 353; King v. Kindred, 38 Minn. 354; Bazille v. Ullman, 2 Minn. 134 (Gil. 110).

154. New Trial for Errors not Excepted to.

In civil actions, the power of the court to grant new trials is limited to the grounds specified and prescribed in Gen. St. 1894, § 5396. Hence a new trial cannot be granted for errors of law occurring at the trial, but not excepted to. It was contended that, where the trial judge was of the opinion that he had misstated the law in his charge, it was in his discretion to grant a new trial, though no exceptions were taken. But the court said: "The phrase 'contrary to law,' as used in the fifth subdivision, means 'contrary to the instructions.' To obtain a new trial upon that ground, it must be made to appear that there was an instruction which was disregarded. It is not enough that a principle of law not embodied in an instruction was disregarded by the jury. * * * It has been suggested that, when the court has misstated the law in its charge, or has stated propositions of law not applicable to the case, and is of the opinion that the jury was misled thereby, it has the discretion to grant a new trial, although no exception was taken. We admit that to have been the rule at common law. So the question is, has the rule been changed by statute? * * * It has also been suggested that the court below had authority to grant a new trial for errors of law occurring at the trial, and not excepted

to under the first subdivision of section 5396, supra, namely, 'irregularities in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee or abuse of discretion by which the moving party was prevented from having a fair trial.' Unfortunately for this contention, the parties making the application in the present case failed to specify the first subdivision as a ground for a new trial, but, as before stated, contented themselves with the grounds covered by subdivisions 5 and 7. Again, if there was anything in this position, we should have a motion for a new trial for errors of law occurring at the trial, but not excepted to, based wholly upon affidavits. * * * An 'irregularity' of the court is not an error of law, by any means. Errors in law occur only when there are rulings made on questions of law, and it is very evident that no error of law in giving or refusing instructions can be reviewed, as an irregularity of the court, under the first subdivision. The majority are of the opinion that, in civil actions, the power of the court to grant new trials is limited to the grounds prescribed in section 5396, and that new trials for errors of law can only be granted when an exception has been taken. The statutory grounds for new trials are exclusive." [125]

[125] Valerius v. Richard, 57 Minn. 443. See

155. Error without Prejudice.

Under this section 5396, subd. 7,[126] the party objecting to a new trial has no right to demand consideration of exceptions taken by him.[127]

In order to sustain an error, it must appear that the error was prejudicial.[128] Thus, if one is not allowed to put a question, it must appear that it was intended to elicit some material evidence.[129] Ordinarily, if evidence is improperly admitted over objection and exception, or if improper instructions are given and excepted to, it is error for which a new trial is the proper remedy;[130] but if the court

Haynes, New Trial, c. 1, § 7. But in Bank of Willmar v. Lawler, 80 N. W. 868, it was held that a court may, on its own motion, grant a new trial.

[126] Gen. St. 1894.

[127] Whitely v. Mississippi etc. Co., 38 Minn. 523.

[128] Comstock v. Comstock (Minn.) 79 N. W. 300; Gaines v. Trengrove (Minn.) 79 N. W. 1045; Stadin v. Helin (Minn.) 79 N. W. 537; Rosted v. Great N. R. Co. (Minn.) 78 N. W. 971; E. W. Backus L. Co. v. Scanlon-Gipson L. Co. (Minn.) 81 N. W. 216; Fenske v. Nelson (Minn.) 76 N. W. 785; and many other cases unnecessary to cite.

[129] State v. Staley, 14 Minn. 105 (Gil. 75); Norris v. Clark, 33 Minn. 476. If it is not apparent that a favorable answer to a question asked a witness will be material, it must, if objected to, be accompanied with an offer to make it material.

[130] Lowry v. Harris, 12 Minn. 255 (Gil. 166). The admission of improper evidence to prove a fact

is satisfied that no prejudice could have resulted, it may hold it harmless error, and deny a new trial.[131]

But unless it is clear that no prejudice resulted, a new trial should be granted.[132]

156. Necessity for Ruling and Exception.

Where evidence is taken subject to objection, on trial without a jury, a ruling must be obtained and excepted to, and placed in the settled case, or the matter cannot be reviewed.[133] Until a ruling, the evidence is not

which is already established by competent evidence, is not ground for a new trial.

[131] Clague v. Washburne, 42 Minn. 371; Pond Machine Tool Co. v. Robinson, 38 Minn. 272; Worden v. Hitter, 21 Minn. 12, 35 Minn. 244; Lowry v. Harris, 12 Minn. 255 (Gil. 166); Benton v. Nicoll, 24 Minn. 221; Smith v. Chapel, 36 Minn. 180. Instructions: Rollins v. St. Paul Lumber Co., 21 Minn. 5; Day v. Raguet, 14 Minn. 273 (Gil. 203); Gross v. Diller, 33 Minn. 424; Brown v. Nagel, 21 Minn. 415; Farnham v. Thompson, 32 Minn. 22; Colter v. Mann. 18 Minn. 96 (Gil. 79).

[132] Braley v. Byrnes, 21 Minn. 482. In Farmers &c. Co. v. Ins. Co., 40 Minn. 152, it was held that a statement of the trial court in a memorandum that the decision would have been the same had certain improper evidence which was received been ruled out, cannot be considered.

[133] Herrick v. Morrill, 37 Minn. 250, 255; Bitzer v. Bobo, 39 Minn. 18.

That error is not available unless the record shows

deemed admitted;[184] and where it is taken with an intimation that the ruling is not final, and the objecting party may subsequently move to strike out the evidence when a final ruling will be made, it is necessary to make the motion, and except to the final ruling on the question. A mere exception to receiving the evidence on such conditions will not suffice to raise the question of admissibility.[185]

157. Limitations on Motion for New Trial.

There are certain limitations on the motion for a new trial which are important. A new trial will not be granted for the purpose of trying an issue not made by the pleading.[186] A motion will not lie to vacate an order sustaining a demurrer, and to grant a new trial. The causes for a new trial specified in the sec-

a proper exception, see London &c. Co. v. McMillan Co. (Minn.) 80 N. W. 841; Gasper v. Heimbach, 53 Minn. 414. Must direct the attention of the court to the precise ground of objection urged on appeal. Johnson v. Okerstrom, 70 Minn. 303; Bedal v. Spurr, 33 Minn. 207; Towle v. Sherer, 70 Minn. 312. Objection to remarks of court. Smith v. Kingman, 70 Minn. 453. Exceptions to instructions, see §§ 65, 153.

[184] Perkins v. Morse, 30 Minn. 11.

[185] Such a practice by the court is not approved. Bitzer v. Bobo, 39 Minn. 18.

[186] Bullis v. Cheadle, 36 Minn. 164.

tion we have been considering, [137] as also the modes provided for presenting the application for a new trial, show that the term "new trial," used in this statute, means, as at the common law, a retrial of issues of fact, and this, despite section 5358.[138]

158. This Motion at Times an Exclusive Remedy.

The remedy of a motion for a new trial is exclusive in a great many cases. Thus it is the only method of reviewing the question whether or not the verdict of a jury is against the evidence.[139] For most of the matters reached by motion for a new trial, such a motion is the only remedy. But in cases of trials before referees, or before a judge without a jury, the question whether or not the findings are sustained by the evidence may be reviewed on appeal from the judgment without a motion for a new trial, if among the appeal papers is found a "case" or bill of exceptions containing all the evidence.[140] But

[137] Gen. St. 1894, § 5396.

[138] Dodge v. Bell, 37 Minn. 382.

[139] Barringer v. Stoltz, 39 Minn. 63; Barker v. Todd, 37 Minn. 370; Jordan v. Humphrey, 31 Minn. 495; Byrne v. Ry. Co., 29 Minn. 200.

[140] Bannon v. Bowler, 34 Minn. 416; Cooper v. Breckenridge, 11 Minn. 341 (Gil. 241); St. Paul F. & M. Ins. Co. v. Allis, 24 Minn. 75; Nelson v. Central Land Co., 35 Minn. 408; Jordan v. Humphrey, 31 Minn. 495.

no verdict can be so reviewed on the ground that it is against the evidence,[141] as a case or bill of exceptions containing all the evidence is necessary for this purpose.[142]

So, in an equitable action, where some issues are submitted to a jury, and others are tried by the court, the findings of the jury cannot be reviewed without a motion for a new trial, but those of the court may be.[143] On the other hand, it is settled in this state that on a motion for a new trial of a case tried without a jury the court may consider, under subdivision 5,[144] whether or not the facts found support the conclusions of law.[145]

In such case, if there is no trouble with the findings of fact, but only with the conclusions of law, the court should not grant a new trial, but should simply correct the conclusions of law, as if the motion had been for such relief,

[141] Kelly v. Rogers, 21 Minn. 146; Jordan v. Humphrey, 31 Minn. 495; Edgerton v. Jones, 10 Minn. 427 (Gil. 341); Byrne v. M. & St. L. Ry. Co., 29 Minn. 200.

[142] Bazille v. Ullman, 2 Minn. 134 (Gil. 110); Morrison v. March, 4 Minn. 422 (Gil. 325).

[143] Jordan v. Humphrey, 31 Minn. 495. Cf. appeal, Id., 32 Minn. 522.

[144] Gen. St. 1894, § 5396.

[145] Farnham v. Thompson, 34 Minn. 330; Ames v. Richardson, 29 Minn. 330; Coolbaugh v. Roemer, 32 Minn. 445.

instead of for a new trial.[146] The motion cannot be for a reargument, but must be for a new trial. There is no such motion known to the district court practice after a decision as a motion for a reargument.[147]

From the decision in this case we may readily draw the inference that other methods than those recognized at common law or under the old chancery practice do not exist except so far as specifically created by statute. It may even be doubted whether some of the older forms of remedies have not been superseded by the statutory motion for a new trial.[148]

159. New Trial on Court's Own Motion.

The trial court may, under proper circumstances, grant a new trial on its own motion. This was the rule at common law, and it has not been changed by our Code of Civil Procedure, although it may, to some extent, limit or modify the power. "The power to grant a new trial is not given to the district court by statute. The power of such a court to grant a new trial is not, like the right to appeal under our law, conferred by statute. It is inherent in courts of general jurisdiction,

[146] Farnham v. Thompson, 34 Minn. 330, 333.
[147] Volmer v. Stagerman, 25 Minn. 234, 244.
[148] Sheffield v. Mullin, 28 Minn. 251.

—not given, but regulated by statute.[149] The provisions of such a statute regulating motions for a new trial do not prevent the court, in a proper case, from granting a new trial on its own motion.[150] As a general rule, the trial court should not exercise this power except in aggravated cases." [151]

160. New Trial Follows Granting of Motion.

The supreme court may, upon a reversal, send the case back for a retrial, or, in a proper case under the statute,[152] order judgment entered in favor of the appellant. It may send the case back, and order a retrial of a single issue.[153] But where a new trial is granted on the ground that the findings of fact, be they one or more, are not justified by the evidence, a new trial must inevitably follow. This was held where there was but one fact found, and nothing remained upon which to base a judgment; but the court (Collins, J.) said: "Had

[149] McNamara v. Railway Co., 12 Minn. 388 (Gil. 269).

[150] Allen v. Wheeler, 54 Iowa, 628; 2 Thomp. Trials, § 2711.

[151] Bank of Wilmar v. Lawler (Minn.) 80 N. W. 868. As to the right to grant a new trial where no exceptions were taken, see § 154. Valerius v. Richards, 57 Minn. 443.

[153] Pond &c Co. v. Conners (Minn.) 73 N. W. 159, 248.

the court below fully found the facts as they were shown to exist in respect to the claims of each party, and added a finding of the import of the one heretofore declared not to have been justified by the proofs, a very different case would have been presented at this time, for upon the findings which were warranted, and therefore remained undisturbed by a simple reversal, defendants could have based a judgment in their favor. The finding or conclusion of fact as it really would be, last referred to, might be cut out and set aside as not justified, and there would still remain findings on which to rest a judgment exactly contrary to that appealed from. The only fact found being declared unsupported by the evidence, the effect was not to send the case back for the rendition of a proper judgment upon facts already found, but to remand it for other findings, to be made, of course, upon a new trial." [154] Where a new trial is granted by the supreme court without restrictions as to the retrial of any of the issues involved in the pleadings, either party is entitled to a retrial of all the issues.*

[154] Backus v. Burke, 52 Minn. 109.

* Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 58 Minn. 513.

161. Power to Set Aside Order for New Trial.

The district court has the power, at least before the time to appeal expires, to set aside an order granting a new trial, on the ground that such order was erroneously made.[155]

[155] Beckett v. Northwestern &c. Ass'n, 67 Minn. 298. The court said: "On the authority of Grant v. Schmidt, 22 Minn. 1; Semrow v. Semrow, 23 Minn. 214, and Weld v. Weld, 28 Minn. 33, 8 N. W. 900, appellant contends that the court below exhausted its jurisdiction when it granted the motion for a new trial, and had no power subsequently to set the order aside. In answer we will say that in 1876, after the first two of these cases arose, the statute (Gen. St. 1866, c. 66, § 105; see Gen. St. 1894, § 5267) was amended so as to add the following provision to the section: '* * * And the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered or proceedings had in or out of term, upon good cause shown, set aside or modify the judgments, orders, or proceedings, although the same were made or entered by the court or under or by virtue of its authority, order, or direction. * * *' This was clearly intended to do away with the rule of law laid down in the Grant Case. The case of Weld v. Weld arose after the amendment, but the court in a dictum approved the Grant Case, evidently without having its attention called to the amendment. In the case at bar, the order granting a new trial was set aside before the time to appeal from it expired, and we are clearly of the opinion that said amendment gave the court

162. Conditions—Cost.

As there is neither a statute nor a rule of court requiring the payment of costs as a condition of granting a new trial on the merits, it is not error for the trial court to refuse to impose such a condition.[156]

163. Review of Tax Judgment.

The only statutory mode of reviewing a tax judgment real or personal in the proceedings on which it is based is that prescribed by Gen. St. 1894, § 1589. The right of appeal is purely statutory, and is not given in the law regulating the enforcement and collection of taxes.[157] Under this statute, the judge should make a statement of the facts, and certify the point for consideration.[158] In view of the

below authority to set it aside if deemed erroneous. State &c. Co. v. Adams, 47 Minn. 399, 401."

[156] Park v. Electric Thermostat Co., 75 Minn. 58.

[157] State v. Faribault Water Works Co., 65 Minn. 345; Washington County v. German American Bank, 28 Minn. 360; State v. Jones, 24 Minn. 86.

In State v. Rand, 35 Minn. 502, an appeal from a personal tax judgment was disposed of on the merits; but no motion to dismiss was made, and the fact "that the judgment was nonappealable escaped the notice" of the court.

See, generally, State v. Northern Trust Co., 73 Minn. 70; State v. Empanger, 73 Minn. 337.

[158] County of Morrison v. St. Paul &c. R. Co., 42 Minn. 451; State v. St. Croix &c. Co., 49 Minn. 450.

language of the statute, it was generally understood that the questions certified under this statute might be of a general nature so that the answer would be of value in future cases; but in a recent case the court said: "Four different questions have been certified to this court for its opinion. They present theoretical and abstract problems, rather than the essential concrete questions involved in the transaction; but since the question of the validity of the tax is presented by the findings of fact and conclusions of law found by the court below, we will consider the questions submitted sufficient to command a review of the only practical question in the case." [159] Except as to the points certified the supreme court has no jurisdiction,[160] and the judgment of the district court is final.[161] If the court refuses to certify the case the remedy is certiorari, and not mandamus.[162]

[159] State v. Franklin Sugar-Refining Co. (Minn.) 81 N. W. 752. This is simply disregarding the questions certified, and considering the case on the finding and conclusions of law. See Ramsey County v. Chicago &c. R. Co., 33 Minn. 537.

[160] State v. St. Croix Boom Corp., 49 Minn. 451.

[161] County of Morrison v. St. Paul &c. R. Co., 42 Minn. 451.

[162] Brown County v. Land Co., 38 Minn. 397. "Certiorari to review a judgment against the defendant for personal taxes for the year 1894, the

163a. Statutory New Trial as of Right.

The statute, upon certain conditions, grants a new trial as of right to any person against whom a judgment is recovered in an action for the recovery of real property.[163] This statute applies only to cases in which either the plaintiff or defendant seeks the recovery of the possession of real property.[164] Where the action is for the recovery of possession the right to a second trial exists although other relief is incidentally asked for.[165] Where the first trial results in a judgment for the plaintiff and the second for the defendant, the plaintiff is not entitled to still another trial. There can be but two trials.[166] A party who has not an-

trial judge having declined to certify under the statute. County v. Winona, 38 Minn. 397. The case must therefore be reviewed on the return to the writ, notwithstanding that the court has added to the return what purports to be a statement of the facts and the points involved, pursuant to Gen. St. 1894, § 1589." State v. Red River V. E. L. Co., 69 Minn. 131.

[163] Gen. St. 1894, §§ 5845, 5846.

[164] Schons v. Village of Kellogg, 61 Minn. 128; Knight v. Valentine, 35 Minn. 367; Kremer v. Chicago &c. Ry. Co., 54 Minn. 157; Godfrey v. Valentine, 50 Minn. 284; McRoberts v. McArthur (Minn.) 72 N. W. 796.

[165] St. Paul v. Chicago &c. Ry. Co., 49 Minn. 88.

[166] Lewis v. Hogan, 51 Minn. 221.

swered but allowed judgment to go against him by default is not entitled to a second trial.[167]

[167] Hallam v. Doyle, 35 Minn. 337.

This right to a second trial does not apply to the action to recover land and damages on failure of a railroad company to pay for same. See Laws 1895, c. 52, amending Gen. St. 1894, § 2662.

CHAPTER VIII.

THE PRESENTATION OF THE FACTS ON MOTION FOR NEW TRIAL.

164. General Provisions.
165. Irregularities Which Prevent a Fair Trial.
166. Misconduct of Jury or Prevailing Party.
167. Accident or Surprise.
168. In Case of Excessive or Inadequate Damages.
169. Verdict Contrary to Evidence or Law.
170. Newly-Discovered Evidence.
171. Errors Occurring at the Trial.
172. Verdict Bad on Its Face.

164. General Provisions.

We may pass now to a fuller consideration of the methods of presentation of the facts on which the motion for a new trial is based. The general statutory provisions as to methods of presentment of the facts are as follows: "When the application is made for a cause mentioned in the fourth, fifth, and seventh subdivisions of the last [5398] section, it is made either upon a bill of exceptions or a statement of the case prepared as prescribed in the next section; for any other cause it is made upon affidavit: Provided, however, that the judge who tries the cause may, in his discretion, en-

tertain a motion to be made on his minutes or upon the minutes of the stenographic reporter, where there is such a reporter, to set aside a verdict, and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or court at which the trial is heard. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had." [1]

The method of using the judge's minutes is a mere substitute for preparation of a bill of exceptions or case. In some instances, one may thus avoid the preparation of a case, as where it is obvious that the jury have decided contrary to the evidence, or that there has been an important error of the court, so that an appeal will be useless if the court grants the motion, or, owing to similar causes, where granting the motion is obviously discretionary with the trial court, etc.,—cases, in short, where no appeal will be taken. Except in such cases, it is ordinarily of no particular advantage to make the motion for a new

[1] Gen. St. 1878, c. 66, § 254; Gen. St. 1894, § 5399.

trial on the minutes, even if the court will permit it. Occasionally, however, a matter can be brought on a little more speedily in this manner. No further attention is necessary to this substitute for a settled case or bill of exceptions, as when it is made, if appeal is taken, a case or bill of exceptions must be settled in the usual way.[2] Where the motion is made on the minutes, so that the settled case is prepared for the supreme court, and not for use in the trial court, the expense incurred in preparing the case is taxable as a disbursement in the supreme court.[3]

In dealing with the subject of grounds of motion for a new trial, we have, in passing, seen that the statement as to the method of presenting the facts contained in the first clause of section 5399 is not full enough to cover all the details of the matter; and we may make a somewhat fuller statement of the law on this point to advantage.

165. Irregularities which Prevent a Fair Trial.

In motions on the first class of grounds for new trial, viz. irregularity in the proceedings of court, jury, referee, or prevailing party, or order of the court or referee, or abuse of dis-

[2] Van Brunt v. Kinney, 51 Minn. 337. See § 117, supra.

[3] Linne v. Forrestal, 51 Minn. 249.

cretion by which the moving party was prevented from having a fair trial, the facts will generally be presented by affidavit or by the motion papers on file.[4] If the irregularity or order or abuse of discretion occur at the trial, and is not a matter of record per se, it must be incorporated in a bill of exceptions or settled case, to entitle it to be considered.[5]

As we have seen, however, affidavits of jurors are not admissible to show their own irregular conduct in the jury room,[6] though possibly allowed to show misconduct of the prevailing party.[7]

[4] St. Paul &c. Ry. Co. v. Gardner, 19 Minn. 132 (Gil. 99).

[5] Coolbaugh v. Roemer, 32 Minn. 445; Stone v. Johnson, 30 Minn. 16; Bazille v. Ullman, 2 Minn. 134 (Gil. 110); D. M. Osborne & Co. v. Williams, 39 Minn. 353; King v. Kindred, 38 Minn. 354. And will not be considered on affidavits only. Smith v. Wilson, 36 Minn. 334.

[6] St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131); State v. Lentz, 45 Minn. 177; State v. Stokely, 16 Minn. 282 (Gil. 249); Stevens v. Montgomery, 27 Minn. 108; Bradt v. Rommel, 26 Minn. 505; State v. Nims, 26 Minn. 183; Gardner v. Minea, 47 Minn. 295. Nor that of the officer having charge of them. Knowlton v. McMahon, 13 Minn. 386 (Gil. 358). See § 143, supra.

[7] Knowlton v. McMahon, 13 Minn. 386 (Gil. 358); Reynolds v. Champlain &c. Co., 9 How. Prac. 7.

166. Misconduct of Jury or Prevailing Party.

In the second class (misconduct of the jury or prevailing party), substantially the same principles will apply as in the preceding class.[8]

167. Accidents or Surprise.

In the third class (accident or surprise which ordinary prudence could not have guarded against), the materiality of the surprise or accident must appear;[9] and, as in case of newly-discovered evidence, a "case" or bill of exceptions is necessary to make this appear properly.[10]

168. In Case of Excessive or Inadequate Damages.

In the fourth case, the question is, of course, were the damages so extraordinary upon the evidence? This will have to appear by the evidence, and nothing can be added by affidavits. The review will therefore be on case or bill of exceptions.

169. Verdict Contrary to Evidence or Law.

In the fifth case, the review must necessarily be bad on the evidence and proceedings at the trial, shown by court's minutes, proposed case,

[8] See §§ 143, 165.

[9] Smith v. Chapel, 36 Minn. 180.

[10] State v. Lautenschlager, 23 Minn. 290; Scofield v. Walrath, 35 Minn. 356.

or bill of exceptions, and no outside matters can be adduced, except where the verdict is defective or insufficient on its face, in which case that will appear by the record itself.

170. Newly-Discovered Evidence.

In the sixth class of cases, the newly-discovered evidence must be shown by affidavit, and it must appear that diligence was exercised both before and after trial, etc.[11] But the materiality of the new evidence, and the fact that it is not merely corroborative or impeaching testimony, must be shown by a case or bill of exceptions.[12] So, in this class of cases, both a settled case (or bill of exceptions) and affidavits are always necessary.

171. Errors Occurring at the Trial.

In the seventh class, the errors complained of must always be shown by case or bill of exceptions, or by the court's minutes. Errors not at the trial cannot be considered hereunder.[13]

[11] Eddy v. Caldwell, 7 Minn. 225 (Gil. 166); Farnsworth v. Robbins, 36 Minn. 369; Lennon v. Brainerd, 36 Minn. 330; Revar v. Bagley (Minn.) 79 N. W. 171.

[12] State v. Lautenschlager, 23 Minn. 290; Scofield v. Walrath, 35 Minn. 356.

[13] D. M. Osborne & Co. v. Williams, 39 Minn. 353; King v. Kindred, 38 Minn. 354; Coolbaugh v.

172. Verdict Bad on its Face.

If there is such a thing as a motion for a venire facias de novo under our practice (and it would seem as though this ancient common-law motion might exist, although cases reached by it are mostly covered by the provisions of subdivisions 1 and 5 of section 5398)[14] the matter will always appear on the face of the record, and neither affidavit, case, nor bill of exceptions is necessary.

Roemer, 32 Minn. 445; Stone v. Johnson, 30 Minn. 16; Bazille v. Ullman, 2 Minn. 134 (Gil. 110).

[14] Gen. St. 1894, § 5398.

CHAPTER IX.

OF COSTS.

173. General Provisions.
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189g. Payment Required before Remittitur of Case.

173. General Provisions.

In proceeding to judgment upon a verdict or decision, the first step, following the ordinary and regular order, is the taxation of costs and disbursements, though this order may be departed from.[1]

The statutory provisions are very brief, and are as follows: "Costs and disbursements shall be taxed and allowed in the first instance by the clerk, upon two (2) days' notice by either party, and inserted in the entry of judgment. The disbursements shall be stated in detail, and verified by affidavit, which shall be filed. A copy of the items of the costs and disbursements, with the affidavit verifying the same, shall be served with the notice of taxa-

[1] Richardson v. Rogers, 37 Minn. 461; Jakobsen v. Wigen. 52 Minn. 6; Leyde v. Martin, 16 Minn. 38 (Gil. 24).

tion. The party objecting to any item shall specify in writing the grounds of objection, and the same, in case of appeal, shall be certified to the court by the clerk, and the appeal shall be heard and determined upon the objection so certified, and none other."[2]

There is neither a statute nor rule of court requiring the payment of costs as a condition of granting a new trial on the merits. The court may therefore refuse to impose such condition.[2a] A party convicted under the bastardy act cannot, upon reversal in the supreme court, tax costs against either the county or the complaining witness.[2b] The costs are an incident of the judgment, and hence, in the absence of special directions, go with an irregular judgment, as well as with a regular judgment.[2c]

174. Notice of Taxation.

According to common practice, when judgment is taken by default for want of an answer, the costs are taxed without notice, and such seems to be the practice intended by the provisions of the statute for judgment by de-

[2] Gen. St. 1878, c. 67, § 8, as amended by Laws 1885, c. 23, § 1; Gen. St. 1894, § 5505.

[2a] Park v. Electro Th. Co., 75 Minn. 349.

[2b] State v. Spencer, 73 Minn. 101.

[2c] McRoberts v. McArthur, 66 Minn. 74.

fault.[3] Whether or not a defendant, who appears, but does not answer, is entitled to notice of taxation of costs, does not seem to have been expressly decided in this state. But the matter has been considered in New York under a statute similar to ours, and it is there held that, while a defendant who has appeared but has not answered is not entitled to notice of assessment of damages, the complaint being verified, in an action on contract for money only,[4] or of entry of judgment in any case,[5] he nevertheless is entitled to notice of taxation of costs,[6] and to notice of assessment, where an assessment is necessary.[7]

Our court has held that a defendant so appearing, but failing to answer, is not entitled to notice of entry of judgment;[8] but this was in an action where no assessment of damages was necessary beyond the action of the clerk, as it was on a contract for payment of money only. The court adverts to this feature of the case,

[3] Richards v. Sweeter, 3 How. Prac. 413; Gen. St. 1878, c. 66, § 210; Gen. St. 1894, §§ 5212, 5354.

[4] Dix v. Palmer, 5 How. Prac. 233; Southworth v. Curtiss, 6 How. Prac. 271.

[5] Lynde v. Cowenhofer, 4 How. Prac. 327, and cases below.

[6] Dix v. Palmer, 5 How. Prac. 233; Elson v. Equitable Ins. Co., 2 Sandf. 654.

[7] Purdy v. Green, 3 How. Prac. 126.

[8] Heinrich v. Englund, 34 Minn. 395.

and cites, among other authorities, Dix v. Palmer,[9] and it leaves open to consideration the two questions: (1) Is such a defendant entitled to notice of taxation of costs; and (2) is such a defendant entitled to notice of application to the court for relief, whether assessment of damages or decree for equitable relief? Probably both of these should be answered in the affirmative, under Gen. St. 1894, § 5212.

With regard to the first question, the two New York decisions quoted are entitled to weight, especially as one of them has been cited with approval by our court.[10] The affirmative answer to the second question is also supported somewhat by the provisions of section 5221 of the same chapter, as well as indirectly by the language of the supreme court in one case.[11]

If the prevailing party does not give notice to an appearing defendant of application to the

[9] 5 How. Prac. 233.

[10] Heinrich v. Englund, 34 Minn. 397.

[11] Heinrich v. Englund, 34 Minn. 395. "In an action arising on contract for the payment of money only, where the defendant is entitled to judgment, as a matter of course, on default of an answer, the appearance of defendant does not entitle him to notice of the entry of judgment, any more than in case of entry of judgment upon a verdict, finding or report." Leyde v. Martin, 16 Minn. 24 (Gil. 38); Piper v. Johnston, 12 Minn. 27 (Gil. 60).

court for relief, whether assessment of damages or application for findings and order for judgment, the judgment would seem to be irregular, and may be vacated on application of the party prejudiced thereby within a reasonable time. Such a case can arise only in case of default of a defendant who has entered appearance, or on the decision of a demurrer. It cannot, of course, arise where there has been a trial of an issue of fact. But the question of notice of taxation of costs stands on a different footing. Whenever a party has appeared, he is entitled to notice of taxation; but failure to give the notice does not invalidate the judgment, as the costs may be retaxed on notice, and if, on the retaxation, a smaller sum than that first taxed is found correct, the judgment may be modified accordingly.[12]

Where, upon a stipulation for a dismissal without costs or notice, a judgment was entered with costs, an order vacating the allowance of costs, but refusing to set aside the judgment, will not be reversed because made with leave to defendant to proceed upon no-

[12] Richardson v. Rogers, 37 Minn. 461; Jakobsen v. Wigen, 52 Minn. 6; Felber v. Southern Minnesota Ry. Co., 28 Minn. 156; Herrick v. Butler, 30 Minn. 156; Herrick v. Marotte, 30 Minn. 159; Fall v. Moore, 45 Minn. 517; Jakobson v. Wigen, 52 Minn. 6; Lindholm v. Itasca Lumber Co., 64 Minn. 46.

tice to tax costs. The remedy is an appeal after the retaxation and allowance of costs in the judgment, and not from that part of the order refusing to set aside the judgment, and granting leave to readjust costs.[12a]

It frequently happens that it is important to get a judgment entered and docketed instantly, in order that the lien of the judgment may attach or execution be issued. Judgment, when one is immediately entitled to the judgment (i. e. when a verdict has been rendered no stay being granted, or when an order for judgment has been granted, or when no order is necessary, as on default in action on contract for money only), may always be entered without notice. The other party is not entitled to notice of the simple entry of judgment in any case.[13]

On the other hand, the statute and rule [14] call for two days' notice of taxation of costs; and that two days may frequently make a very great difference in the effectiveness and value of the judgment. In such cases, the proper practice is to enter the judgment forthwith, taxing the costs without notice, and then give

[12a] Herrick v. Butler, 30 Minn. 156. See Herrick v. Marotte, 30 Minn. 159.

[13] Heinrich v. Englund, 34 Minn. 395, 61 Minn. 534.

[14] Gen. St. 1878, c. 67, § 8, as amended in 1885, Gen. St. 1894, § 5505, and Dist. Ct. Rule No. XLIV.

notice of retaxation. Upon the retaxation, if the first taxation was erroneously large, the judgment may be modified accordingly; apparently without affecting the lien of the judgment, or the validity of any levy of execution made under the judgment.[15]

Where execution has been issued before the reduction is made, the amount of the reduction may be simply indorsed on the execution.[16] Naturally no increase of the costs will be permitted, as a party cannot be heard to say that he did not tax enough. But, properly and ordinarily, costs should be taxes on notice before entry of the judgment. The costs are taxed in the first instance by the clerk. From the clerk's adjustment, an appeal lies to the trial court. An order affirming the order of the clerk refusing to allow and insert certain costs in the judgment may be reviewed on appeal from the judgment, although it had been informally entered without costs prior to such order.[16a]

[15] Richardson v. Rogers, 37 Minn. 461; Dix v. Palmer, 5 How. Prac. 233; Potter v. Smith, 9 How. Prac. 262; Tracy v. Humphrey, 1 Code R. (N. S.) 197; Leyde v. Martin, 16 Minn. 38 (Gil. 24); Felber v. S. M. Ry. Co., 28 Minn. 156; Herrick v. Butler, 30 Minn. 156; Herrick v. Marotte, 30 Minn. 159; Fall v. Moore, 45 Minn. 517.

[16] Id.

[16a] Fall v. Moore, 45 Minn. 517.

175. Items of Costs.

Costs under our system of practice are of three principal kinds: (a) Costs proper, sometimes spoken of as statutory costs; (b) disbursements; (c) interlocutory costs awarded by the court.

176. Statutory Costs—In General.

"The right of a party to agree with an attorney or counsel for his compensation is unrestricted, and the measure and mode of such compensation is left to the agreement, express or implied, of the parties; but there may be allowed, to the prevailing party, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs." [17]

176a. Costs Allowed Prevailing Party.

"Costs are allowed to the prevailing party, in actions commenced in the district court, as follows: First, to the plaintiff, upon a judgment in his favor of one hundred dollars or more, in an action for the recovery of money only, when no issue of fact or law is joined, five dollars. When an issue is joined, ten dollars; second, in all other actions, except as hereinafter otherwise provided, ten dollars; third, to the defendant upon discontinuance or

[17] Gen. St. 1878, c. 67, § 1; Gen. St. 1894, § 5497.

dismissal, five dollars; fourth, when judgment is rendered in his favor on the merits, ten dollars."

"When several actions are brought on any instrument in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state; but the disbursements of the plaintiff may be allowed to him as provided in the preceding section." [18]

176b. Costs in Equitable Actions.

"In equitable actions, costs may be allowed or not; and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. When there are several defendants, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them." [19] This whole

[18] Gen. St. 1878, c. 67, § 4; Gen. St. 1894, §§ 5498, 5501.

[19] Gen. St. 1878, c. 67, § 5; Gen. St. 1894, § 5502.

section applies only to equitable actions. The first clause relates only to costs proper, and not to disbursements.[20]

176c. Costs in Action on Judgment.

"Costs cannot be allowed to the plaintiff in an action upon a judgment of a court of this state, between the same parties, unless such action was brought with previous leave of the court for cause shown; but this prohibition does not apply to an action upon the judgment of a justice, brought in another county, or brought in the same county, in case of the summons not having been served on all the defendants, or the death of a party, or the death, resignation, incapacity to act, or removal from the county of the justice, or the loss of his docket." [21]

[20] Van Meter v. Knight, 32 Minn. 205. "In every action commenced in the district court, the prevailing party is entitled to his disbursements as a matter of right. The term 'costs,' as used in section 5502, the allowance of which is in the discretion of the court in equitable actions, refers to what are called 'statutory costs,' as distinguished from 'disbursements.'" As to the right to allow out of trust estate costs incurred by bondholders, see Seibert v. Minneapolis & St. L. R. Co., 58 Minn. 58.

[21] Gen. St. 1878, c. 67, § 6; Gen. St. 1895, § 5503.

176d. Effect of Tender.

"When, in an action on contract, express or implied, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found true, the defendant is entitled to costs and disbursements." [22]

Where the defendant, after tendering judgment, with costs and disbursements, sets up new matter in his answer, which is denied by the reply, and the issue thus raised is voluntarily litigated by the plaintiff, he is not entitled to his costs, although judgment is entered against the defendant.[22a]

176e. Action in Name of State on Relation of Citizen.

"When an action or proceeding is instituted in the name of the state, on the relation of any citizen, such relator is entitled to, and liable for, costs and disbursements, in the same cases and to the same extent as if such action or proceeding had been instituted in his own name." [23]

[22] Gen. St. 1878, c. 67, § 11; Gen. St. 1894, § 5508.

[22a] Harbo v. Board of County Com'rs, 63 Minn. 238.

[23] Gen. St. 1878, c. 67, § 13; Gen. St. 1894, § 5510. See State v. Probate Court, 67 Minn. 51.

The relator in certiorari to the probate court is entitled to costs and disbursements against the opposite party in interest, although the writ was directed only to the court. Pursuant to the order directing the issuing of the writ, a citation was served on the attorney of the personal representatives of the estate to show cause why the order of the probate court should not be reviewed and reversed. They, and not the court, were the real parties in interest. The court, after quoting Gen. St. 1894, § 5510, said: "As costs cannot be taxed against a court, this must mean that they shall be taxed against the real party in interest." After referring to the practice in other states of taxing costs against the real parties in interest, although they were not cited in, the court said: "Leaving for future consideration the correctness of this practice, and also whether the better practice is to have the writ directed to both the court and the real parties in interest, or to the court alone, accompanied as in this case by a citation to such parties to appear and show cause, we are clearly of opinion that, when either is done, the relator, if successful, is entitled to costs and disbursements." [23a]

176f. On Appeal from Justice Court—Reduction of Judgment.

"In civil actions tried before a justice of the

[23a] State v. Probate Court, 67 Minn. 51.

peace, if the plaintiff appeals from a judgment in his favor, and does not recover in the district court a greater sum as damages than he recovered by the first judgment, the defendant is entitled to costs and disbursements. If the defendant appeals, and the amount of the plaintiff's recovery before the justice is reduced one-half or more in the district court, the defendant is entitled to costs and disbursements. In all other cases of appeal from the judgment of a justice of the peace in such actions, the successful party is entitled to costs and disbursements." [24]

"In comparing the sums recovered by the two judgments, for the purposes specified in the preceding section, the interest accrued on the plaintiff's demand after the first judgment shall not be considered." [25]

A defendant who appeals and succeeds upon the only matter litigated in the action and appeal is entitled to costs, although he does not reduce the recovery against him one-half.[25a]

These provisions concerning costs on appeals from justices have been approved by the supreme court apparently without any ques-

[24] Gen. St. 1878, c. 67, § 14; Gen. St. 1894, § 5511; Watson v. Ward, 27 Minn. 29; Flaherty v. Rafferty, 51 Minn. 341.

[25] Gen. St. 1878, c. 67, § 15; Gen. St. 1894, § 5512.

[25a] Foster v. Hausman, 55 Minn. 157.

tion being raised as to their constitutionality.[26] As we shall see later, there may possibly be some question on the subject of allowing the defeated party on the appeal costs against the successful party.

176g. Neglect by Railroad Company to Pay Damages.

"If any railroad company shall neglect or refuse to pay the actual damages occasioned by such killing of or injury to any domestic animal [i. e. by negligence or failure to maintain cattle guards and fences] for the space of 30 days after such damage occurs, and the same shall be recovered by action, then, in case such action shall be pending in the district court, double the costs allowed by law, together with disbursements, shall be recovered in such action against such company, and, in case such action be maintained before a justice of the peace, the sum of ten dollars costs shall be recovered against such company: Provided, that the said company, within the time above mentioned, or before the commencement of an action, may tender to the person or persons injured such amount as they are willing to pay; and if such amount is refused, and the person or persons so injured fail to recover a greater

[26] Watson v. Ward, 27 Minn. 29.

Costs of both courts taxed in district court. Laws 1895, c. 24.

amount than the sum so tendered, he or they cannot recover costs and disbursements." [27]

This statute has no reference to costs in the supreme court, but is limited to costs in the district and justices courts.[27a]

176h. Neglect to Pay for Labor or Services.

"If any person, partnership, or corporation, having employed any person to perform any labor or render any services, shall neglect or refuse to pay the agreed price for such services or labor, if the price therefor has been agreed upon, or the reasonable value thereof, if the price has not been agreed upon, for thirty (30) days after the same becomes due, and payment has been demanded, and the same shall be recovered by action there shall be allowed and taxed for the plaintiff, and included in the judgment, in addition to his costs and disbursements as now allowed by law, five (5) dollars costs if the judgment be recovered in a justice or municipal court, and double the costs heretofore provided by law if

[27] Gen. St. 1878, c. 34, § 56. This provision is constitutional. Johnson v. Chicago, etc. R. Co., 29 Minn. 425. Cf. Hooper v. Railway Co., 37 Minn. 52; Gen. St. 1894, § 2694.

[27a] Croft v. Chicago & W. R. Co., 72 Minn. 47.

the judgment be recovered in a district court or the supreme court of the state." [28]

The costs provided for by this statute may be recovered by an assignee of the person rendering the services.[28a]

The constitutionality of the first of these acts has been twice before our supreme court, and in each case affirmed,[29] and these decisions would seem to establish the constitutionality of the act of 1891, and of similar acts.

We do not here undertake to consider seriatim the special provisions of statute for some peculiar cases. Of these special provisions quite a number are to be found, but it may be noted that on appeals in suits for violations of the ordinances of the city of Minneapolis, although brought in the name of the state, and in some respects quasi criminal, yet, as the state is only a nominal party, costs are recoverable as in civil actions.[30]

On an appeal on behalf of a county from the decision of the county commissioners allowing a claim against the county, if the plaintiff recovers a part of his claim, costs cannot be

[28] Gen. Laws 1895, c. 109, § 1; Gen. St. 1894, § 5499.

[28a] Clifford v. N. P. R. Co., 55 Minn. 150.

[29] Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425; Schimmele v. Chicago, M. & St. P. Ry. Co., 34 Minn. 216.

[30] State v. Harris, 50 Minn. 128, 138.

awarded to the county. The statute makes no provision for costs in such a case.[30a]

177. Exclusive.

The provisions for costs in chapter 67 are exclusive of other costs, except where specially granted by statute. The old chancery power of awarding costs (other than statutory) out of the estate has been destroyed. The statute in respect to costs on appeal applies to actions for the construction of wills. "The authority of this court to award costs is regulated and limited by the statute, and it has no equitable or discretionary powers over the subject, other than the statute confers." [31]

178. Constitutional Questions.

There may be some doubt, on constitutional grounds, of the validity of the provisions with regard to appeals from justice courts, and with regard to the provisions for costs and disbursements to the defendant when plaintiff recovers judgment.[32] The first of these provisions [33] has been directly sustained by our

[30a] Kroshus v. Houston Co., 46 Minn. 162, construing Gen. St. 1894, § 645.

[31] Atwater v. Russell, 49 Minn. 57, 87; Kroshus v. Houston County, 46 Minn. 162.

[32] Gen. St. 1878, c. 67, § 3; Gen. St. 1894, § 5499.

[33] Gen. St. 1878, c. 67, §§ 14, 15; Gen. St. 1894, §§ 5511, 5512.

supreme court.[34] The second is supported by a direct intimation from the supreme court.[35] But in neither case was the question of constitutionality raised, as far as appears.

The ground of the constitutional objection in cases originally brought in the district court rests upon the fact that by the state constitution,[36] the district court has complete jurisdiction in all such cases.[37]

Of course the legislature cannot impose restrictions or conditions on the jurisdiction conferred by the constitution.[38] To say that a plaintiff may not proceed in the district court unless he is willing to pay the defendant's costs might be held to transgress this rule.[39] On the other hand, the legislature has not overstepped the bounds in refusing to allow the plaintiff either costs or disbursements.[40]

[34] Watson v. Ward, 27 Minn. 29. But see Flaherty v. Rafferty, 51 Minn. 341.

[35] Felber v. Southern Minnesota Ry. Co., 28 Minn. 156.

[36] Article VI., § 5.

[37] Agin v. Hayward, 6 Minn. 110 (Gil. 53); State v. Bach, 36 Minn. 234.

[38] Cf. Const. Minn. art. I., § 8.

[39] State v. Gorman, 40 Minn. 232; Const. Minn. art. I., § 8.

[40] Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425; Schimmele v. Chicago, M. & St. P. Ry. Co., 34 Minn. 216.

It is only when it imposes costs on the prevailing party to prevent his appeal to the jurisdiction conferred by the constitution that the act is subject to the constitutional objection.[41]

In the case of appeals from justice courts, the same objection arises in slightly different form. Here the jurisdiction of the district court is founded on the constitutional provision allowing an appeal to the supreme court in all cases,[42] and on the statutory provisions providing that this appeal must be carried up through the district court. From this point on, the argument is the same as before, and similarily limited in its application.

179. Lack of Jurisdiction.

Neither costs nor disbursements can be allowed where the case is dismissed for want of jurisdiction.[43]

180. Parties Acting Jointly.

Where there are several defendants who unite in a defense, they are jointly entitled to single costs only.[44]

[41] Const. Minn. art. I., § 8; State v. Gorman, 40 Minn. 232.

[42] Const. Minn. art. VI., § 2.

[43] McGinty v. Warner, 17 Minn. 41 (Gil. 23).

[44] Barry v. McGrade, 14 Minn. 286 (Gil. 214).

181. Parties Acting Severally.

But whether they defend separately or jointly, a prevailing defendant is entitled to full costs, though verdict goes against codefendants.[45]

182. Discretion in Court Cases.

The discretionary power of the court over costs proper in equitable suits extends to an absolute refusal of statutory costs to either party.[46] Costs will not be allowed in favor of the plaintiff in an action for specific performance unless there was a tender of performance before suit was commenced.[46a]

183. On Dismissal at Close of Plaintiff's Case.

Where the court, when plaintiff rests, dismisses the action upon motion of defendant, on the ground that no cause of action has been established, the judgment is one of dismissal, and not upon the merits, and the defendant is entitled only to five dollars costs.[47]

A somewhat peculiar case, where it was stipulated that the action be "dismissed on its

[45] Id. Slama v. Chicago, etc. R. Co., 57 Minn. 167.
[46] Wallrich v. Hall, 19 Minn. 383 (Gil. 329).
[46a] Minneapolis, etc. R. Co. v. Chisholm, 55 Minn. 374.
[47] Conrad v. Bauldwin, 44 Minn. 406.

merits," presented a close question as to whether the judgment was one of dismissal merely, or not, and was decided in the negative.[48]

184. Ordinary Disbursements.

By the statute: "In every action commenced in the district courts of this state * * * , the prevailing party shall be allowed his disbursements necessarily paid or incurred."[49] Then follows this proviso: "Provided, that in all actions for the recovery of money only of which a justice of the peace has jurisdiction, the plaintiff, if he recover no more than $50, shall recover no disbursements; and if he recovers less than $50, he shall pay the defendant's costs and disbursements, as allowed by law when judgment is rendered in favor of the defendant on the merits; which said costs and disbursements shall be taxed and allowed by the clerk upon notice, the same as in other cases, and shall be deducted by the clerk from the amount recovered by the plaintiff; and, in case the amount of such costs and disbursements exceed the amount recovered by the plaintiff, the clerk shall enter judgment against the

[48] Cameron v. Chicago, M. & St. P. Ry. Co., 51 Minn. 153.

[49] Gen. St. 1878, c. 67, § 3; Gen. St. 1894, § 5500.

plaintiff and in favor of the defendant for the amount of such excess, and the defendant may have execution thereon." [50]

Passing now to the general subject of disbursements, we see that the successful party in an equitable action is entitled to his disbursements as matter of right. It is only the costs proper which are in the discretion of the court.[51]

The fees of the defeated party's witnesses should not be taxed in against him with the other costs.[52] The fees paid to witnesses who attend and are sworn, though not subpoenaed, are taxable.[53] The expenses of obtaining papers needed in evidence are properly taxable,[54] but where the documents are obtained for use and used in different actions by the same person, he can tax the expense of obtaining them only in one case.[55] Neither a party nor the attorney of a party will ordinarily be allowed

[50] Id.

[51] Van Meter v. Knight, 32 Minn. 205. See note 20, supra.

[52] Payson v. Everett, 12 Minn. 216 (Gil. 137).

[53] Clague v. Hodgson, 16 Minn. 329 (Gil. 291). Where a party on appeal pays the justice fees in full as taxed, he cannot object to them on appeal. Such a payment is purely voluntary.

[54] Wentworth v. Griggs, 24 Minn. 450; Barry v. McGrade, 14 Minn. 286 (Gil. 214).

[55] Barry v. McGrade, 14 Minn. 286 (Gil. 214).

any witness' fees, but where one attends as a witness solely for the benefit of other parties to the cause, the fees paid him for his attendance are properly taxable.[56] The transcript of the reporter's minutes is ordinarily a proper item for taxation where a case is settled, and should be taxed in the district court, not in the supreme court, unless the case is used only in the supreme court, in which case it is taxable there.[57] The defendant may tax the fees of witnesses who attend, but are not sworn, because the case is dismissed by the plaintiff.[57a] Jury fees paid at successive trials, all resulting in verdicts for the plaintiff, are properly taxed against the defendant.[57b]

Where a new trial is awarded for error committed by the judge, the costs, i. e. disbursements, of the irregular trial abide the event of the suit, and are recoverable by the party who ultimately succeeds;[58] but in case of a motion for a new trial, the district court may grant costs, in its discretion, to the prevailing par-

[56] Barry v. McGrade, 14 Minn. 286 (Gil. 214); Gen. St. 1878, c. 70, § 40.

[57] Pinney's Will, 27 Minn. 280; Hefferen v. Northern Pac. Ry. Co., 45 Minn. 471; Linne v. Forrestal, 51 Minn. 249.

[57a] Slama v. Chicago, etc. R. Co., 57 Minn. 167.

[57b] Schultz v. Bowers, 66 Minn. 281.

[58] Walker v. Barron, 6 Minn. 508, 513 (Gil. 353).

ty.[59] Sheriff's charge of one dollar for return of subpoenas "not found" is properly taxable where witness was needed.[60]

184a. Actions Which might have been Brought in Justice Court.

The statute above quoted contains a proviso to the effect that, in actions brought in the district court for the recovery of money only, of which a justice of the peace has jurisdiction, the plaintiff shall recover no disbursements if he recovers no more than $50, and shall pay the defendant's costs and disbursements if he recovers less than $50. In Greenman v. Smith[60a] it was held that, as the amount of damages claimed was the sum of $1,000, the action was not within the jurisdiction of a justice, and the plaintiff was therefore entitled to tax $10 costs, although he recovered judgment for only $50. This decision has been recently adhered to by a divided court, although its correctness was doubted.[60b]

184b. Prospective Costs—Sheriff's Fees.

"In entering any judgment or decree, no

[59] Siebert v. Mainzer, 26 Minn. 104. See Park v. Electric Th. Co., 75 Minn. 349.

[60] Barman v. Miller, 23 Minn. 458.

[60a] 20 Minn. 418 (Gil. 370), approved in Potter v. Mellen, 36 Minn. 122.

[60b] L. Kimball &c. Co. v. Southern L. Imp. Co., 57 Minn. 37.

prospective costs shall be taxed or included therein, except for docketing the same, unless the party demanding such judgment or decree shall require the costs of an execution or transcript of the judgment to be taxed and included therein, in which case the same shall be so taxed and included." [61]

In one case it appeared that the plaintiff obtained judgment by default, and caused execution to be issued and levied upon certain personal property. The judgment was set aside, and the defendant allowed to answer on condition that the judgment, execution and levy should stand as security for the plaintiff's claim, to abide the result of the action. Thereafter, by stipulation, the answer was withdrawn, and judgment entered, and a new execution issued. On the taxation of costs, the plaintiff was allowed certain sums incurred by the sheriff, under the first execution, in keeping and caring for the property levied on to the time of the entry of the second judgment. It was contended that the items were in the nature of prospective costs, occurring after judgment, and that the clerk had no jurisdiction to allow these sums in the absence of a prior allowance by the court, and that they were unreasonable in amount. But it was

[61] Gen. St. 1878, c. 70, § 38; Gen. St. 1894, § 5588.

held that under the circumstances the first execution performed the office of a writ of attachment, and that the sums were properly taxable as fees and disbursements incurred under such a process. The action of the clerk was irregular, as the amounts should first have been determined by the court, but as the court subsequently approved them, no prejudice resulted.[61a]

"No fees shall be taxed for services, as having been rendered by any clerk, sheriff, or other officer in the progress of a cause, unless such service was actually rendered, except when otherwise expressly provided." [62]

When an offer of judgment is made under Gen. St. 1894, § 5405, and no larger amount is recovered than the offer, no disbursements can be recovered by plaintiff, but he must pay defendant's disbursements. The word "costs," as here used, includes disbursements.[63] An offer for judgment in favor of the plaintiff for a specified sum and "accrued costs" is a substantial compliance with the statute, and, upon the acceptance of the offer, the plaintiff has the right to enter judgment, and include the costs lawfully taxable to carry the offer into effect.[63a]

[61a] Barman v. Miller, 23 Minn. 458.
[62] Gen. St. 1878, c. 70, § 37; Gen. St. 1894, § 5587.
[63] Woolsey v. O'Brien, 23 Minn. 71.
[63a] Petroski v. Flanagan, 38 Minn. 26.

185. Collateral and Special Disbursements.

Proceedings by attachment, or by appointment of a receiver, or by temporary injunction, and various other interlocutory remedies, frequently involve considerable disbursements. These are scarcely disbursements of the action, and would not seem to be properly taxable as such by the clerk, and yet the prevailing party should recover them.

The costs of execution may be taken out of the proceeds by the sheriff, but this he may not do on an attachment, but he is entitled to such sum as the court deems proper to be allowed for his services.[64] In such cases, the proper practice is to get an order from the court, on notice, specifying the amounts to be taxed, and that they be allowed and taxed.[65] But if such an order is obtained without notice, or the clerk taxes such costs without an order therefor, the affirmance or modification of the amount taxed on appeal from the clerk to the trial court will take the place of any previous order, since an allowance by the court—the main object of the statute—is accomplished and no prejudice results from the irregularity.[66]

[64] Gen. St. 1878, c. 70, § 11; Gen. St. 1894, § 5550.
[65] Barman v. Miller, 23 Minn. 458.
[66] Id.

Under this head, attention may also be properly called to the provisions of Gen. St. 1894, § 5692, as the allowances made thereunder are to be classed as collateral, rather than as ordinary disbursements, as they require the same special allowance by the court as those above mentioned.

186. Interlocutory Costs—In General.

By statute, the court, on sustaining or overruling a demurrer, or granting or refusing a motion, may, in its discretion, award costs not exceeding $10, which may be absolute or directed to abide the event of the action.[66a] Sometimes it is provided that these be paid before the defeated party proceed further in the action, as a condition of allowing him to proceed. In such cases, they, of course, will be paid forthwith. If not paid, the prevailing party will be entitled ordinarily to proceed to judgment as upon default, and may therein tax such costs in a manner analogous to that adopted in taxing collateral disbursements.[67] Or the prevailing party may have an order

[66a] Gen. St. 1894, § 5506. On motion for new trial, the allowance of costs rests in the discretion of the court. Siebert v. Mainzer, 26 Minn. 104. On motion to set aside a judgment, the award of costs is discretionary. Olmstead v. Firth, 64 Minn. 243.

[67] Wentworth v. Griggs, 24 Minn. 450.

entered for the immediate payment of the costs.[68]

But more commonly such interlocutory costs are awarded to one party or other, "to abide the event" of the action.

Attention is called to the following distinction, which is observed by the New York courts, and which is doubtless the rule in this state, viz.: Where a given sum is awarded generally "to abide the event," whether it be as costs or disbursements, whichever party prevails is entitled to tax the costs and disbursements so allowed.[70] But where costs or disbursements are specifically awarded to one party to abide the event, there such party, if successful, will recover such costs or disbursements; but, if the other party be successful, such costs or disbursements will not be taxed.[71]

187. Proof of Items.

As we have seen, "the disbursements shall be stated in detail, and verified by affidavit, which shall be filed. A copy of the items of the costs and disbursements, with the affidavit verifying the same, shall be served with the no-

[68] Fay v. Davidson, 13 Minn. 298 (Gil. 275).

[70] 3 Wait, Prac. 506. Cf. Walker v. Barron, 6 Minn. 508, 513 (Gil. 353).

[71] 3 Wait, Prac. 506.

tice of taxation."[72] It is not enough to state in this affidavit that "the foregoing items of costs and disbursements have been paid and incurred in this action by" the prevailing party. The very least that can be required is that the affidavit should state that they were necessarily incurred; and it must further appear that witnesses were necessarily present the number of days for which fees were paid them for the purpose of the action, and necessarily traveled the number of miles specified; and the various items must be stated separately, so that the court can strike out any erroneous items.[73]

It devolves upon the party claiming disbursements to show, by his statement and affidavit, at least prima facie, that they are such as he is entitled to have taxed. Hence, if a party claims traveling fees for witnesses, his affidavit should state the place of residence of each witness, and the number of miles they respectively traveled as such witnesses for the purpose of going from such place of residence to the place of trial, and returning therefrom. "No other rule will fairly meet the re-

[72] Gen. St. 1878, c. 67, § 8, as amended by Gen. Laws 1885, c. 23, § 1; Gen. St. 1894, § 5506.

[73] Andrews v. Cressy, 2 Minn. 67 (Gil. 55). As to such an affidavit, see Ehle v. Bingham, 4 Hill, 595, cited in Andrews v. Cressy, supra

quirements of the statute, or effectually guard against overcharges." [74]

Where, in a bill of costs offered for adjustment, there are items for witnesses, who for any cause were not sworn, if the items are objected to, an affidavit showing the attendance and travel of the witnesses, and stating that they were necessary and material, is not sufficient. There must be an affidavit stating facts which show the necessity of having them in attendance, which affidavit the party may furnish when the items are objected to.[75] Upon objection, opposing affidavits may be presented by the objector; and, if he present none, the proponent's affidavits will be deemed true.[76]

188. Objections to Items.

Any objections one has to make must be made specifically in writing before the clerk at the time specified in the notice of taxation. If not made then, they are wholly waived, and cannot be raised otherwise.[77] But this is sub-

[74] Merriman v. Bowen, 35 Minn. 297. Cf. opinion and affidavit in same.

[75] Osborne v. Gray, 32 Minn. 53.

[76] Hefferen v. Northern Pac. R. Co., 45 Minn. 471. Subject to the just-mentioned rule requiring further and more specific affidavits, Osborne v. Gray, 32 Minn. 53.

[77] Gen. St. 1878, c. 67, § 8; Dist. Ct. Rule No. XLIV.; Barry v. McGrade, 14 Minn. 286 (Gil. 214);

ject to one limitation, viz.: Where the taxation of a particular item is ordered in the judgment itself, and it is contended that the whole item was improper, it would seem that that objection may be taken without contesting the matter before the clerk, as that is not the action of the clerk. The appeal in such a case should be from the judgment, and not from the order affirming the action of the clerk.[78] The objection must be made in writing, and the writing must specify the grounds of the objection.[79]

As we have already seen, the objection may be supported by affidavits meeting or avoiding the affidavits of the proponent of the taxation. The manner of statement of the objection is a matter of practice, to be determined by the trial court.[80] The objections are, however, generally construed liberally.

189. Appeals from the Clerk.

From the decision of the clerk, an appeal lies to the trial court. Unless such an appeal is taken, the parties are concluded by the ac-

Myers v. Irvine, 4 Minn. 553 (Gil. 435); Gen. St. 1894, § 5505.

[78] Minnesota Val. R. Co. v. Flynn, 14 Minn. 552 (Gil. 421).

[79] Gen. St. 1878, c. 67, § 8; Gen. St. 1894, § 5505.

[80] Davidson v. Lamprey, 17 Minn. 32 (Gil. 16).

tion of the clerk, and his action cannot be reviewed by the supreme court on appeal from the judgment.[81]

Until 1893, the method of taking an appeal to the court from the clerk's decision does not seem to have been very accurately prescribed, and almost any method would suffice which secured a hearing of the question on notice to all parties before the court; and this, whether it preceded or followed the clerk's decision. The principal object was to have the ruling made by the trial court itself, and, if that was secured, it sufficed.[82]

In 1893, this matter was provided for by an adequate rule, as follows: "An appeal therefrom (the clerk's taxation) may be taken to the court within ten days after such taxation by the clerk, but not afterwards. Such appeal shall be taken by notice in writing, signed by the appellant, directed to and served upon the adverse party and the clerk, and shall specify the items from which the appeal is taken.

[81] Hurd v. Simonton, 10 Minn. 423 (Gil. 340); Barry v. McGrade, 14 Minn. 286 (Gil. 214); Fay v. Davidson, 13 Minn. 298 (Gil. 275); Kent v. Bown, 3 Minn. 347 (Gil. 246); Jensen v. Crevier, 33 Minn. 372; Coles v. Berryhill, 37 Minn. 56; Stevens v. McMillin, 37 Minn. 509.

[82] Barman v. Miller, 23 Minn. 458; Andrews v. Cressy, 2 Minn. 67 (Gil. 55); Kent v. Bown, 3 Minn. 347 (Gil. 246).

When such appeal is taken, either party may bring the same on for determination before the court on notice, or by any order to show cause. On such appeal, the court will only review the items objected to, and upon the grounds specified before the clerk." [83] Upon such appeal, the court may modify the judgment as to the costs therein taxed; and this may be done, as we have seen, without disturbing the lien of the judgment, or a levy of execution thereunder.[84]

The judgment is not, in contemplation of law, complete till the determination of the question of costs by the court, and although the actual entry of judgment may, and ordinarily will, precede this determination, yet, in contemplation of law, the judgment is not perfected till the determination of the appeal.

The order determining the appeal is then an intermediate order affecting the judgment; and it would seem that, even where the clerk's taxation is affirmed, the time to appeal from the judgment would begin to run only from the day of the taxation of the costs and insertion of the same in the judgment.[85] And it is only as an intermediate order affecting the judg-

[83] Dist. Ct. Rule No. XLIV.
[84] Richardson v. Rogers, 37 Minn. 461.
[85] Id.

ment that the decision of the trial court can be reviewed by the appellate court.[86]

189a. Security for Costs.

When an action is commenced in the district court in the name of any plaintiff who is committed, and in execution for a crime, or wherein the plaintiff is a nonresident of the state, or all of several plaintiffs are nonresidents of the state, or in the name and behalf of any foreign corporation, or when any such action is brought into any district court on appeal by the defendant, such plaintiff shall file with the clerk of the court wherein such action is brought, before the service of the summons therein, and in the appellate court in case of an appeal by the defendant within five days after the perfecting of the appeal, a bond in the penal sum of $75, executed by one or more sureties, payable to the clerk of such court. The bond is for the benefit of any one who may become entitled to costs and disbursements in the action. An addition bond may be required if, after the commencement of the action, or the taking of the appeal, all the plaintiffs become nonresidents, or the sureties on the bond become insolvent or nonresidents.

The provisions of this act do not apply to an

[86] Closen v. Allen, 29 Minn. 86; Richardson v. Rogers, 37 Minn. 461.

action brought for the recovery of wages, or claims for personal services.[87] Upon failure to give the bond for costs, the court may, on motion of defendant, order a stay of proceedings or dismissal of the action at the cost of the attorney who commenced the same.[88] The objection that security for costs has not been given must be made by motion, and not by answer.[89]

[87] Gen. St. 1894, § 5518, as amended by Laws 1899, c. 186. Suit on the bond may be commenced if the costs remain unpaid for 10 days after the entry of judgment. Gen. St. 1894, § 5520. The action to recover on such a bond, or on any security for costs given in a justice court, shall be brought and tried in the county in which such bond for costs or security for costs is filed, unless the court, for cause other than the place of residence of the defendants, change the place of trial as now provided by law. Laws 1899, c. 335.

[88] Gen. St. 1894, § 5519.

[89] Henry v. Bruns, 43 Minn. 295; Butts v. Moorhead Manuf'g Co., 43 Minn. 296.

As to security for costs which may be required in a justice court, see Gen. St. 1894, § 4965. The obligation thus incurred extends to and includes costs in the district court on appeal. Starlocki v. Williams, 34 Minn. 543. The proceedings in a second action may be stayed until the costs in a previous action are paid. Gerrish v. Pratt, 6 Minn. 53 (Gil. 14). See 5 Enc. Pl. & Prac. p. 261.

In Page v. Bacon, decided June 13, 1900, it was held that the judgment for costs entered on reversal in the supreme court, of a judgment in favor of the

189b. Costs on Appeal to Supreme Court.

Costs in the supreme court may be allowed in the discretion of the court, as follows: First, to the prevailing party, upon a judgment in his favor on the merits, not exceeding $25; second, upon dismissal, not exceeding $10.[90] In all cases, the prevailing party shall be allowed his disbursements necessarily paid or incurred.[91] If the action is for the recovery of money only, the court may, if it appears that the appeal was taken for delay only, allow the plaintiff, in addition to his costs and disbursements, a sum not exceeding three per cent. on the judgment in the district court.[92] The authority of the supreme court to award costs is regulated and limited by this statute, and it has no equitable or discretionary power over the subject, other than as conferred by the statute.[93]

189c. The Prevailing Party.

Costs are allowed to the "prevailing party." Where the supreme court modifies the order

respondent as assignee should be subordinated to the assignee's claim for services in the matter of the assignment.

[90] Gen. St. 1894, § 5515. See Supreme Court Rules XXI., XXII., XXIII., XXIX.

[91] Gen. St. 1894, § 5516.

[92] Gen. St. 1894, § 5517.

[93] Atwater v. Russell, 49 Minn. 57.

for judgment of the court below, the appellant is the prevailing party, and entitled to costs.[94] As said by Justice Flandrau: "A party is aggrieved when an improper judgment is taken against him, and if he has to seek relief in this court, and obtains a correction of the error complained of, he is entitled to his costs, unless, perhaps, in a case where it appears that the appeal was prosecuted for vexatious purposes, and not in good faith."[95] Where there is an appeal by several plaintiffs or defendants, and the judgment is modified as to some, and affirmed as to the others, the respondent is entitled to costs against those as to whom there is an affirmance, and those as to whom it is modified are entitled to costs against the respondent.[96] The statute merely allows the costs and disbursements, but makes no provision for their recovery. It was intended that the court should provide means for enforcing the recovery of such allowances, and this was done by the adoption of rule 30, under which costs may be taxed and inserted in the judg-

[94] Henry v. Meighen, 46 Minn. 549; Sanborn v. Webster, 2 Minn. 323 (Gil. 277).

[95] Allen v. Jones, 8 Minn. 202 (Gil. 172).

[96] Nelson v. Munch, 30 Minn. 132. As to right to tax costs against the county on an appeal from the decision of the county commissioners disallowing a claim against the county, see Kroshus v. County Commissioners, 46 Minn. 162.

ment, which may be enforced by execution. Hence, if a party neglects to have the costs taxed and inserted in the judgment, the adverse party may have the judgment entered without a provision for costs, and the right to recover the same is forfeited.[97]

189d. Particular Disbursements.

The expense incurred in preparing a "case" or bill of exceptions, to be used on a motion for a new trial in the district court, is not taxable as a disbursement in the supreme court. But if prepared after the motion is determined by the district court for use in the supreme court, the cost is properly taxable there.[98] Where such an item was disallowed, the court said: "The clerk's disallowance of the item for copy of the reporter's minutes in appellants' bill of costs and disbursements is affirmed, not on the ground that the appellants are not entitled to the item, but that it is not a disbursement incurred in this court, nor in perfecting or preparing the appeal. If necessarily incurred, it should be allowed to appellants as the prevailing party in the motion for a new trial, upon the final taxation of costs in the court below." [99]

[97] D. M. Osborne & Co. v. Paulson, 37 Minn. 46.
[98] Linne v. Forrestal, 51 Minn. 249.
[99] In re Perry's Will, 27 Minn. 280.

A party cannot recover his disbursement for printing in the record matter which is irrelevant to any issue involved in the appeal.[100]

Supreme Court Rule IX. forbids the printing of irrelevant and unnecessary matter in the record. Where a settled case was unnecessarily made, the court said: "Upon a claim that the conclusions of law were not justified by the findings of fact, appellant caused a case to be settled in the court below, containing all the evidence. This evidence is in the return on appeal, and occupies 27 pages of the paper book, in disregard of the plain provisions of subdivision 5 of Rule IX. of this court. Appellant is not entitled to, and will not be allowed, any disbursements by the clerk for preparing, certifying, or printng the evidence." [101]

Where four cases, involving precisely the same question, are briefed and argued together as one, and by the same counsel, on records differing only in names, dates, and amounts, counsel for appellant is bound to ask the court to dispense with a paper book in all but one

[100] Henry v. Meigher, 46 Minn. 548. See Sup. Ct. Rule IX. As to what is meant by "printing papers on appeal," see Hart v. Marshall, 4 Minn. 552 (Gil. 434); Cooper v. Stinson, 5 Minn. 522 (Gil. 419).

[101] Winston v. Hart, 65 Minn. 439.

case, and costs will hence be allowed for printing but one paper book.[102]

189e. Brief Containing Scandalous Matter—No Disbursements Allowed—Violation of Rules.

When a brief is stricken from the files because it contains scandalous matter, the party will not be allowed his disbursements for printing it. In a recent case the court said: "Counsel has, in his zeal for his cause, so far forgotten his duty to the court as to make in his brief an improper attack on the motives and conduct of the trial judge, which is entirely unjustified by anything we can discover in the record. As courteous and respectful treatment of the courts by the bar is essential to the due administration of justice, we do not feel that we ought to permit this matter to pass without notice. It is therefore ordered that the brief of plaintiff's counsel be stricken from the files of this court, and that no disbursements for printing the same be allowed in the taxation of costs." [103]

So no costs will be allowed where the party willfully violates one of the rules of court, as by

[102] Fitzgerald v. Hennepin, etc., Ass'n, 56 Minn. 424.

[103] Wood v. Chicago, etc., R. Co., 66 Minn. 49. This rule was applied to appellant's brief in Baxter v. Coughlin (Minn.) 82 N. W.

setting a case down for oral argument, in violation of rule XV.[104]

189f. Double Costs and Damages.

The provision allowing double costs in certain cases has already been discussed.[105] If the supreme court is of the opinion that the appeal was taken merely for delay, it may allow additional costs, amounting to three per cent. of the judgment, to be taxed and entered as a part of the judgment.[106]

189g. Payment Required before Remittitur of Case.

In all cases, unless otherwise ordered by the court, the costs and disbursements taxed in the supreme court, including the fees and charges of the clerk, shall be paid before any remittitur

[104] Olson v. Hanson, 74 Minn. 337; Larson v. Dukleth, 74 Minn. 402. In Ramgren v. McDermott, 73 Minn. 368, the court also refers to the fact that the defendant "took a somewhat technical advantage," etc.

[105] Section 176g, supra.

[106] Gen. St. 1894, § 5517; Bardwell-Robinson Co. v. Brown, 57 Minn. 140; Burr v. Crichton, 51 Minn. 343; West v. Eureka Imp. Co., 40 Minn. 394. The old statute, authorizing the court, in its discretion, to award double costs "to the party prevailing on a writ of error," did not apply to an appeal. St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131).

of the case shall be made. This is a condition precedent to any further proceedings by the adverse or losing party in the lower court. This is, however, subject to the proviso that, whenever it appears to the satisfaction of the court that the party is unable to pay such costs in full, it shall be the duty of the court to remit the case upon the payment of the clerk's fees only.[107]

In a recent case the court said: "Our construction of this case is that, whether the costs in any given case shall be paid as a condition precedent to remitting the case, and its further prosecution in the court below, is a question exclusively for this court. If the case is remitted without the costs being paid, no matter whether it is on the application of the respondent or appellant, it goes down for further proceedings, in accordance with the opinion of this court, without reference to whether the costs have been paid or not." [108]

[107] Gen. St. 1894, § 5517.
[108] Fonda v. St. Paul City Ry. Co., 72 Minn. 1.

CHAPTER X.

THE JUDGMENT.

190. Entry of Judgment.
191. Entry by Clerk.
192. The Judgment Book.
193. Signing the Judgment.
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207. Irregular Judgments—Continued.

190. Entry of Judgment.

Upon a failure to answer in an action on contract for the recovery of money only, the clerk shall enter judgment. In other actions

for the recovery of money on failure to answer, the court ascertains by a reference, or in any other manner, the amount recoverable, and the clerk enters judgment. In other actions, on failure to answer, application is made to the court for relief, and the court gives an order for judgment, and the clerk enters judgment.[1]

"On a judgment (i. e. decision) for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the statute, upon the failure of the defendant to answer, where the summons was personally served. If judgment (i. e. decision) is for the defendant upon an issue of law, and the taking of an account, or the proof of any fact is necessary to enable the court to complete the judgment a reference may be ordered, as by statute provided." [2]

Upon the trial of an issue of fact by the court, the findings shall be filed, and "judgment upon the decision shall be entered accordingly." [3] Upon confession of judgment, special provisions of statute apply, which authorize the clerk to proceed without application to a judge.[4]

[1] Gen. St. 1878, c. 66, § 210; Gen. St. 1894, § 5354.
[2] Gen. St. 1878, c. 66, § 243; Gen. St. 1894, § 5387.
[3] Gen. St. 1878, c. 66, § 242; Gen. St. 1894, § 5386.

"When a trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict, unless the court orders the case to be reserved for argument or further consideration, or grants a stay of proceedings." [5] In a case where the court reserves the case for argument or further consideration, the matter will ultimately be resolved by an order of the court ordering judgment either according to the verdict or otherwise, and the order will govern the action of the clerk, who will proceed according thereto. Where a stay is granted, it will terminate, and the clerk will ultimately proceed.

In case of dismissal by a party by entry on the clerk's register and notice to the adverse party, either with or without the consent of the party, judgment will be entered by the clerk on the dismissal, as also when the court dismisses the action.[6]

Where a motion for judgment on the pleadings is granted, the matter is proceeded with as in case of determination of an issue of law. If the defendant answers, but fails to appear at the trial, he waives any right he has to

[4] Gen. St. 1878, c. 82, §§ 1–6; Gen. St. 1894, §§ 6077–6082.

[5] Gen. St. 1878, c. 66, § 242; Gen. St. 1894, § 5386.

[6] Gen. St. 1878, c. 66, § 262; Gen. St. 1894, § 5408.

a jury,[7] and plaintiff may and must proceed to prove up his case, and take findings and an order for judgment, as in ordinary cases of trials of issues of fact before the court. If plaintiff fails to present his proofs, and judgment is entered without proof being made, defendant is entitled, as a matter of right, to have the judgment vacated.[8]

191. Entry by Clerk.

The clerk may perhaps enter judgment without an order of court, in pursuance of a stipulation of the parties, but this is questionable and the proper practice is to procure an order of court based on the stipulation.[9]

All the cases resolve themselves into two classes:

(1) Cases where the clerk is called upon to enter judgment in accordance with the terms of an order of the court for judgment, or of a verdict or report of a referee;

(2) Certain enumerated cases where, by statute, the clerk is authorized to enter judgment, without any special direction from the court, on the strength of the existence of certain specified facts.

[7] Gen. St. 1878, c. 66, § 241; Gen. St. 1894, § 5385.
[8] Strong v. Comer, 48 Minn. 66. See 83 N. W. 41.
[9] Oldenberg v. Devine, 40 Minn. 409.

As to the first class, it will be noticed that in reference cases the order of the referee, contained in his decision, is sufficient authority, without an additional order from the judge.[10] Where a cause is heard by a court or referee, the judgment entered by the clerk of the court must be in accordance with the conclusions of law and the order for judgment. He has no authority to include anything in the judgment which is not authorized by such conclusions and order, even though the findings of fact would have justified or required different conclusions of law. "The decision should contain a sufficient statement of facts to form a basis for the conclusions of law, and these conclusions, and the order for judgment based thereon, are the mandatory guide for the clerk in the performance of his ministerial duty in entering the judgment." [11]

The cases of the second class are not very numerous. The important ones are cases of failure to answer in actions on contract for money only,* dismissal by the plaintiff before

[10] Lundell v. Cheney, 50 Minn. 470.

[11] Ramaley v. Ramaley, 69 Minn. 491.

* Gen. St. 1894, § 5354. See as to default judgments, Skillman v. Greenwood, 15 Minn. 102 (Gil. 77); Bradley v. Sandilands, 66 Minn. 40; Stickney v. Jordain, 50 Minn. 258; Northern T. Co. v. Albert Lea College, 71 N. W. 9.

trial, confessed judgments, either in actions or confession proceedings, and the doubtful case of stipulated judgments. In either class, the judgment itself may always be entered where the requisite authority appears, upon the ex parte application of the prevailing party. Notice to the defeated party is not required.[12]

While the clerk may so enter the judgment without the action of the judge, he naturally does not so proceed of his own motion, but only upon the request of the prevailing party. This application is made, as we have seen, ex parte. If, however, the prevailing party neglects to have the judgment entered up for the space of 10 days after verdict or notice of the filing of the report, decision, or finding, or in case the same has been stayed, for the space of 10 days after the expiration of such stay, the opposite party may cause the same to be entered by the clerk upon 5 days' notice to the adverse party of the application therefor.[13] It will be observed that the mere proceeding to have the judgment properly entered after the decision is made is not such a consent to the judgment as will bar the party entering it from appealing from it.[14]

[12] Heinrich v. Englund, 34 Minn. 395; Leyde v. Martin, 16 Minn. 38 (Gil. 24); Piper v. Johnston, 12 Minn. 60 (Gil. 27).

[13] Dist. Ct. Rule No. XLVI.

The findings of fact, with an order for judgment, do not constitute a judgment, and are not admissible in evidence in another action.[14a]

192. The Judgment Book.

The clerk keeps a judgment book, in which it is his duty to enter the judgment. The Minnesota practice differs from that in most states. This entry in the judgment book is here the original judgment,[15] and, until this actual entry in the judgment book, it was formerly held that there was no judgment that could be docketed, enforced, or appealed from.[16] The paper in the judgment roll was regarded merely as a copy of the entry in the book.

[14] Warner v. Lockerly, 28 Minn. 28. In an action of replevin, where the property has been delivered to the plaintiff before trial, and on the trial the jury find for the defendant, and fix the value of the property, the defendant is not entitled to elect to take judgment for the value only, and not in the alternative. French v. Ginburg, 57 Minn. 264. See Sherman v. Clark, 24 Minn. 37.

[14a] Child v. Morgan, 51 Minn. 116.

[15] Gen. St. 1878, c. 66, § 273; Gen. St. 1894, § 5421; Thompson v. Bickford, 19 Minn. 17 (Gil. 1); Williams v. McGrade, 13 Minn. 46 (Gil. 39); Rockwood v. Davenport, 37 Minn. 533. Cf. Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346).

[16] Exley v. Berryhill, 36 Minn. 117; Gen. St. 1878, c. 66, §§ 273, 275; Rockwood v. Davenport,

But the rule now is that, although it is irregular to enter the judgment in the judgment roll, instead of in the judgment book, the order of entry is not material.[16a] Where judgment is entered by confession, both the entry in the judgment book and the entry in the judgment roll are originals.[17]

193. Signing the Judgment.

The judgment entered in the book, and the copy or duplicate for the judgment roll, are signed by the clerk,[18] and compliance with this provision is sufficient.[19] Prior to the adoption of the present rule in 1893, it was held that signature by the judge instead of the clerk would suffice; [20] and, if the judgment were not signed at all, it would seem to have been sufficient prior to the 1893 rule, as the statute

37 Minn. 533; Brown v. Hathaway, 10 Minn. 303 (Gil. 238); Williams v. McGrade, 13 Minn. 46 (Gil. 39); Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346); Hodgins v. Heaney, 15 Minn. 185 (Gil. 142); Thompson v. Bickford, 19 Minn. 17 (Gil. 1); Hunter v. Cleveland, 31 Minn. 505. See next note, and note 31.

[16a] Clark v. Butts, 73 Minn. 361.

[17] Gen. St. 1878, c. 82, § 3; Wells v. Gieseke, 27 Minn. 478; Gen. St. 1894, § 6079.

[18] Dist. Ct. Rule No. XLV.

[19] Cathcart v. Peck, 11 Minn. 45 (Gil. 24).

[20] Hawke v. Banning, 3 Minn. 67, 71 (Gil. 30).

required only entry in the judgment book, and clear specification of the relief granted or other determination of the action.[21]

194. The Judgment Roll.

When the judgment is entered in the judgment book, there still remains an important step to take to complete what is commonly known as the entry of judgment, although not strictly part of the entry of judgment, to wit, the making and filing of the judgment roll. The provisions of statute are simple, and tolerably complete.[22] This making and filing the judgment roll is, in Minnesota, a mere clerical duty, imposed on the clerk of the court to be performed immediately after entering the judgment, for which neither the party nor his attorney are responsible; and this is so far true that omission of this duty

[21] Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346); Hotchkiss v. Cutting, 14 Minn. 537, 542 (Gil. 408). A somewhat loose form of judgment was sustained in Norton v. Beckman, 53 Minn. 456. An erroneous form of judgment is not infrequently used by the clerks in some of our courts of record, e. g.: "It is adjudged that plaintiff have judgment that he have and recover of the defendant," etc. The proper form being: "It is adjudged that plaintiff have and recover," etc.

[22] Gen. St. 1878, c. 66, §§ 275, 276; Gen. St. 1894, § 5423.

will apparently not invalidate subsequent proceedings, which properly should follow such filing.[23]

195. Docketing the Judgment.

After the filing of the judgment roll, where the judgment requires payment of money, the judgment is docketed, i. e. a brief entry is made in a book kept by the clerk, called the "judgment docket," showing the parties, the date of entry of the judgment, the day and hour of docketing, the amount due, and sometimes other details of the judgment.[24] The docket entries are made in alphabetical order, according to the names of the judgment debtors, so that it may readily be learned if any person has a judgment against him. The object of docketing a judgment is first to render the judgment a lien on all the real property of the debtor in the county where the judgment is docketed, owned by him at the time of docketing, or afterward acquired, during the 10-year life of the judgment.[25]

The second object is to enable one to have execution issued, as this writ, on such judgments as can be docketed, can issue to sheriffs

[23] Williams v. McGrade, 13 Minn. 46 (Gil. 39).
[24] Gen. St. 1878, c. 66, § 277; Gen. St. 1894, § 5425.
[25] Gen. St. 1878, c. 66, § 277; Gen. St. 1894, § 5425.

of those counties only where the judgment is docketed.[26] A docket entry is thus effectual only in the county where it is made. The original docket entry is in the county where the judgment is entered. If it is desirable to have the judgment a lien in other counties, or execution issued to other counties, transcripts of the docket entry may be filed with the clerks in such other counties, and thereupon the judgment will be docketed in such counties.[27]

While, as we have seen, the omission to file the judgment roll will not, in ordinary cases, vitiate the docketing of the judgment,[28] the omission to enter the judgment in the judgment book was held fatal to the validity of a docket entry, and it is beyond the power of the clerk, without an order of the court, to enter judgment nunc pro tunc. The most he can do is to enter the judgment, and then redocket it.[29] But the judgment can be validly docketed, so as to give a lien before the costs are taxed.[30] Where a judgment roll in the municipal court was made up and tran-

[26] Gen. St. 1878, c. 66, §§ 295, 299; Gen. St. 1894, § 5448.

[27] Gen. St. 1878, c. 66, § 277; Gen. St. 1894, § 5425.

[28] Williams v. McGrade, 13 Minn. 46 (Gil. 39).

[29] Rockwood v. Davenport, 37 Minn. 533.

[30] Richardson v. Rogers, 37 Minn. 461.

script of the judgment entered in the roll filed in the district court before any judgment was entered in the municipal court, the judgment in the judgment roll became that of the municipal court, and the transcript thereof filed in the district court was held valid.[81]

[81] Clark v. Butts, 73 Minn. 361, overruling Rockwood v. Davenport, 37 Minn. 533, and Maurin v. Carnes, 71 Minn. 308.

In Clark v. Butts, 73 Minn. 361, 367, in discussing the effect of irregularities in the docketing of judgments, Mr. Justice Collins said: "But it must be remembered that a judgment of a court of record is not a mere creature of statute. If the court has jurisdiction, a departure from the statute in the manner of entering the judgment is a mere irregularity and does not render void the judgment, or the proceedings under it. The validity of the judgment cannot depend on whether it is written in one part of the clerk's records or another,—whether it is written in the judgment book, or in the judgment roll. If, before entering a judgment in the judgment book, the judgment roll is made up with a judgment entered therein, such that it would be a proper judgment if entered in the judgment book, and the judgment is docketed, or an execution issued, or a transcript of the judgment is taken out, before entering judgment in the judgment book, this amounts to treating the judgment entered in the judgment roll as the judgment in fact. And although it is irregular to enter the judgment in the judgment roll, instead of entering it in the judgment book, yet the judgment entered in the roll will support the docketing, execution, etc., and will not be viti-

196. The Docket—Misnomer.

Care should be exercised to have the docket entry correctly made, as the validity of the lien may be affected thereby. Where, however, the name of the judgment debtor was misspelled, and he sought to take advantage of this by transferring his property to a confederate, the complicity of the grantee enabled the judgment creditor to preserve his lien.[32] And, in the absence of a special showing of fraud, or that the purchaser had been misled, it was held, where the initials only of the debtor appeared, in place of his Christian name, that the entry was sufficient to put purchasers of land upon inquiry, and presumably they had notice.[33]

Nevertheless, the practice of entitling a case or docketing a judgment by the initials of the Christian name of the defendant or judgment debtor is heartily disapproved of, and, where one is innocently misled, may defeat the lien of the judgment.[34] Similarly, a misnomer in the docketing is necessarily fatal, but the dock-

ated or destroyed by subsequently entering a copy or duplicate of it in the judgment book."

[32] Fuller v. Nelson, 35 Minn. 213.

[33] Pinney v. Russell, 52 Minn. 443, 447.

[34] Knox v. Starks, 4 Minn. 20 (Gil. 7); Gardner v. McClure, 6 Minn. 250 (Gil. 167); Kenyon v. Simon, 43 Minn. 180; Jones' Estate, 27 Pa. St. 336.

eting of a judgment in favor of Sumner W. Farnham is proved by a transcript of the docket, in which the name is given as Samuel W. Farnham, the description corresponding in other respects with the judgment rendered.[35]

197. Entry of Judgment for Deficiency in Foreclosure Action.

In connection with the provisions for docketing judgments, considerable question has arisen in the different district courts concerning the proper construction of sections 6057 to 6073, Gen. St. 1894, relating to mortgage foreclosures by action. On the one hand it is contended that the judgment provided for by section 6059 is a regular judgment, requiring the payment of money, that it should be entered and docketed, and a transcript issued to the sheriff, and when the amount realized on the foreclosure sale is credited, an execution may then issue on this judgment for any balance remaining due, as in other cases. This construction seems to be that adopted in most of the districts, and indeed it is difficult to see how any other construction is compatible with the provisions of sections 6057 and 6063. But in the county of Hennepin, by a divided court, three judges to

[35] Thompson v. Bickford, 19 Minn. 17 (Gil. 1).

two, it was held that the judgment "adjudging the amount due" was not a "have and recover" judgment, requiring the payment of money, as provided in the section providing for docketing judgments, but simply an ascertainment of the sum which was a lien on the property, an interlocutory judgment like the old equity decree for sale, and that, on the confirmation of the sale, a new judgment for any deficiency would then be rendered, "requiring the payment" of such sum, that this deficiency judgment would be docketed.[36]

198. Of Clerical Errors in Judgment.

Where a judgment is entered by the clerk in any of the cases not enumerated, or on a verdict or stipulation, or on an order of court, to which it is claimed that the judgment does not conform, it is necessary that application be made to the court below to vacate or modify the judgment, or the matter cannot be considered on appeal.[37]

[36] But in Thompson v. Dale, 58 Minn. 365, it was held that in foreclosure of mortgages and mechanic liens the judgment cannot be docketed before a sale so as to be a lien on other property. Thompson v. Dale, 58 Minn. 365.

[37] Parker v. Bradford, 68 Minn. 437; Nell v. Dayton, 47 Minn. 257; Oldenburg v. Devine, 40 Minn. 409; Hall v. Merrill, 47 Minn. 260; Lundberg v.

The rule adopted in the enumerated cases where the clerk may enter judgment was formerly much the same. It was held that impropriety in the judgment entered by the clerk would not be reviewed on appeal unless application were first made to the court below to correct it.[38] But the early cases were considered and overruled so far as concerns default cases.[39] "By repeated decisions of this

Single Men's Endowment Ass'n, 41 Minn. 508; Coles v. Berryhill, 37 Minn. 56; Scott v. M., St. P. & S. S. M. Ry. Co., 42 Minn. 179; Hennepin County v. Jones, 18 Minn. 199 (Gil. 182); Oldenberg v. Devine, 40 Minn. 409; Piper v. Johnston, 12 Minn. 60, 65 (Gil. 27); Babcock v. Sanborn, 3 Minn. 141 (Gil. 86). See note 39.

Where a judgment is entered in strict accordance with the order of the court, but departs from or exceeds the relief demanded in the complaint, the proper remedy is by appeal from the judgment, and not by a motion to wholly vacate and set it aside. Palmer v. Bank of Zumbrota, 65 Minn. 90. The findings of fact and conclusions of law and order for judgment are merged in the judgment, and are immaterial so far as they awarded the prevailing party any greater relief than the judgment awards him. Johnson v. Deforge, 61 Minn. 72.

[38] Babcock v. Sanborn, 3 Minn. 141 (Gil. 86); Hawke v. Banning, 3 Minn. 67 (Gil. 30); Milwain v. Sanford, 3 Minn. 147 (Gil. 92).

[39] Reynolds v. La Crosse &c. Co., 10 Minn. 178 (Gil. 144); Dillon v. Porter, 36 Minn. 341; Hersey v. Walsh, 38 Minn. 521; Skillman v. Greenwood, 15 Minn. 102 (Gil. 77).

court," said Mr. Justice Berry, "the action of the clerk in entering judgment in cases of this kind is to be taken as the action of the court; and the fact that a particular entry is improper, unauthorized, and erroneous does not render the judgment entered void, any more than if it was entered under the immediate eye and direction of the court itself." [39a] In such cases, the party may apply for an order modifying the judgment, and this order would seem to be appealable.[40]

It has been the general practice in this state to compel application to the lower court to correct a judgment entered by the clerk upon a verdict, report, or order, and not in consonance therewith, and, unless the authority of the lower court has been thus invoked, no such question as that of conformity of the judgment to the verdict will be considered on appeal from the judgment.[41]

[39a] Dillon v. Porter, 36 Minn. 341.

[40] Hersey v. Walsh, 38 Minn. 521. Cf. Piper v. Johnston, 12 Minn. 60 (Gil. 27).

[41] Scott v. Ry. Co., 42 Minn. 179. Such seems to have been the ruling in most of the cases. Eaton v. Caldwell, 3 Minn. 134 (Gil. 80); stipulation, Oldenberg v. Devine, 40 Minn. 409; order, Lundberg v. Ass'n, 41 Minn. 508; Nell v. Dayton, 47 Minn. 257, and Hall v. Merrill, 47 Minn. 260; referee's report, Piper v. Johnston, 12 Minn. 60, 65 (Gil. 27); assessment, Hennepin County v. Jones, 18 Minn. 199 (Gil.

In a late case the court said: "Notwithstanding the numerous decisions of this court to this effect, cases are frequently brought here involving the same question, imposing unnecessary expense upon the parties, and unnecessarily taking up the time of the court. Such practice should be avoided. The rule is fully stated by Justice Mitchell in Bank of Commerce v. Smith, 57 Minn. 374, 376, 59 N. W. 312, as follows: 'Whatever vacillation or uncertainty on the subject there may have been in the earlier decisions of this court, its uniform and inflexible rule for many years has been that, where the error or mistake is not that of the court itself, but of the jury or the clerk, application must be made, in the first instance, to the trial court to correct it. This has been held in cases where the verdict was claimed not to be justified by the evidence; also where the judgment entered by the clerk was not in accordance with the verdict or findings. The propriety of this rule is very apparent, because, presumably, if the trial court's attention was called to the matter, it would correct the error; and to allow a party to raise these questions on appeal to this

182); taxation, Coles v. Berryhill, 37 Minn. 56; although where the verdict was contrary to admissions in the pleadings in one case, a different practice was adopted. Brown v. Lawler, 21 Minn. 327, 329.

court, without first applying to the trial court, would be to allow him to omit to resort to a very speedy and inexpensive remedy, which is very much in the nature of an intermediate appeal.' " [42]

199. Correction of Entry of Judgment—Continued.

The power to correct clerical errors in judgments resides in the district court, not only in cases where such is the only method of review, as we have seen, but apparently also in those cases where the clerk's entry of judgment can be appealed from,—defaults and demurrers,[43] —and in such cases an appeal can be taken,

[42] State v. Currie, 72 Minn. 403. To the same effect, see Bishop Iron Co. v. Hyde, 72 Minn. 16; Scott v. Ry. Co., 42 Minn. 179; Levine v. Lancashire Ins. Co., 66 Minn. 138.

A party cannot complain that the judgment entered by the clerk is more favorable to him than that ordered by the court. Even if he could, he would have to apply to the court to make the judgment conform to the order. McLaughlin v. Nicholson, 70 Minn. 71; Harper v. Carroll, 66 Minn. 487; Bank v. Smith, 57 Minn. 374.

[43] Reynolds v. La Crosse &c. Co., 10 Minn. 178 (Gil. 144); Dunwell v. Warden, 6 Minn. 287 (Gil. 194); Gerish v. Johnson, 5 Minn. 23 (Gil. 10); Barker v. Keith, 11 Minn. 69 (Gil. 37).

apparently, from the order, in case of modification or refusal to modify.[44]

But there seems to be a distinction made in some of the cases.[b] In some the action of the lower court being discretionary and reviewable only for abuse of discretion, while in others the matters are reviewable as matter of strict law.[45] Apparently any application to relieve a party from a judgment on any such ground must, in any event, be made within one year after entry of judgment, and, moreover, must also be made without laches within the year,[46] but applications to correct the proceedings are not so limited in point of time. Such applications must be made upon notice to the opposite party.[48] But in serving such notice on the defeated party, i. e. the one against whom the judgment runs, it must be served on the party,

[44] Barker v. Keith, 11 Minn. 69 (Gil. 37); Hersey v. Walsh, 38 Minn. 521; Dunwell v. Warden, 6 Minn. 287 (Gil. 194); Nell v. Dayton, 47 Minn. 257.

[45] Chisago County v. St. Paul & D. R. Co., 27 Minn. 109.

[46] Gen. St. 1878, c. 66, § 125; Gen. St. 1894, § 5267; Gerish v. Johnson, 5 Minn. 23 (Gil. 10); Groh v. Bassett, 7 Minn. 325 (Gil. 254); Altmann v. Gabriel, 28 Minn. 132; Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346).

[48] Berthold v. Fox, 21 Minn. 51, 55; Hill v. Hoover, 5 Wis. 386; Weed v. Weed, 25 Conn. 337.

and not on the former attorney for that party. He is no longer attorney, as his authority ceases with the entry of judgment; though, if he assume to act, his authority will be presumed as in other cases.[49] But the attorney for the judgment creditor while his authority to enforce the judgment continues is the proper person on whom to serve notice of a motion to vacate or modify the judgment.

"The authority of an attorney by reason of his general retainer to prosecute or defend, determines upon the entry of judgment against his client. But, upon judgment in favor of his client, the statute continues his authority for a time, for the purpose of enforcing or collecting the judgment. While this authority continues it implies and includes authority to act for his client in protecting and retaining the judgment against any proceeding in that action to avoid it. He is, therefore, the proper person upon whom to serve notice of such proceeding." [50]

But motions of this character are strictly limited in their scope. It is only within the lines of making the judgment conform to the order or direction for judgment, or the statutory provisions for judgment, or for other cases specifically provided for by statute, that

[49] Berthold v. Fox, 21 Minn. 51.
[50] Sheldon v. Risedorph, 23 Minn. 518.

such a motion for irregularity can be made use of. In cases of erroneous decision by the trial court, the remedies of the defeated party are simply motion for a new trial and appeal, and such motions as we are now considering will not lie for those purposes.[51]

200. Power of the Court to Correct Its Own Errors.

The court may, on its own motion, at any time after final judgment, at least where no rights of third parties are affected, correct its own clerical errors, so as to make the judgment conform to what it intended it to be.[52]

201. Vacating and Modifying Judgments on Motion.

Judgments are occasionally open to attack by motion on other grounds than that we have just examined, viz. clerical. Thus occurrences after judgment, if undisputed, may be ground for relief on motion, in analogy to the old equity bill to supersede a decree.[53]

[51] Weld v. Weld, 28 Minn. 33, 35; Grant v. Schmidt, 22 Minn. 1, 4; Semrow v. Semrow, 23 Minn. 214.

[52] Chose v. Whitten, 62 Minn. 498; McClure v. Bruck, 43 Minn. 305.

[53] Weaver v. Mississippi & Rum River Boom Co., 30 Minn. 477, 479; Wetmore v. Law, 34 Barb, 515; Gilchrist v. Comfort, 26 How. Prac. 394; Cotton v. Mississippi & Rum River Boom Co., 22 Minn. 372.

202. Void Judgments.

A doctrine of more frequent application is that entirely void judgments may be attacked and set aside or vacated on motion.[54] But motion is not the sole remedy in such case. Action will also lie to vacate such void judgments,[55] or they may even be attacked collaterally.[56] In attacking judgments of this character, the moving party is not called on to show merits.[57] He has an absolute right to have the judgment vacated, which is not dependent either on merits or promptings.[58]

The above are cases where the judgments were void for want of jurisdiction. In such

[54] Feikert v. Wilson, 38 Minn. 341; Mueller v. Reimer, 46 Minn. 314; Godfrey v. Valentine, 39 Minn. 336; Covert v. Clark, 23 Minn. 539; Heffner v. Gunz, 29 Minn. 108; Lee v. O'Shaughnessey, 20 Minn. 173 (Gil. 157); Magin v. Lamb, 43 Minn. 80; Stocking v. Hanson, 35 Minn. 207.

[55] Knutson v. Davies, 51 Minn. 363; Magin v. Lamb, 43 Minn. 80.

[56] Mueller v. Reiner, 46 Minn. 314; State v. Armingtorf, 25 Minn. 29.

[57] Heffner v. Gunz, 29 Minn. 108; Savings Bank v. Authier, 52 Minn. 98.

[58] Magin v. Lamb, 43 Minn. 80; Heffner v. Gunz, 29 Minn. 108; Mueller v. Reimer, 46 Minn. 314; Feikert v. Wilson, 38 Minn. 341; Lee v. O'Shaughnessey, 20 Minn. 173 (Gil. 157); Stocking v. Hanson, 35 Minn. 207; People v. Greene, 74 Cal. 400; Pennoyer v. Neff, 95 U. S. 714, 728.

cases, not only the persons named in the record, may apply for relief, but strangers to the record may make the motion, by showing an interest to have the record purged of the entry. But one not a party to the action is not entitled to such relief as a matter of right. It rests in the sound discretion of the court.[59]

It was at one time held that, where the defendant, in attacking a judgment by motion as void for want of jurisdiction of his person, asked leave to appear and answer the complaint, he thereby made a general appearance, which related back, and validated the judgment originally void,[60] but this very unjust ruling was subsequently reversed.[61] A void judgment cannot be validated by citing the party against whom it is entered to show cause why it should not be declared valid.[61a] On a motion to vacate a judgment for lack of juris-

[59] Mueller v. Reimer, 46 Minn. 314; Hervey v. Edmunds, 68 N. C. 243, 245; Blodget v. Blodget, 42 How. Prac. 19–21; Bridenbacker v. Maron, 16 How. Prac. 203, 205; Mills v. Dixon, 6 Rich. Law, 487; Milnor v. Milnor, 4 Halst. 93; Lanning v. Carpenter, 20 N. Y. 427.

[60] Curtis v. Jackson, 23 Minn. 268.

[61] Godfrey v. Valentine, 39 Minn. 336; Kanne v. Milwaukee & St. L. R. Co., 33 Minn. 419, 421; Roberts v. Chicago, St. P., M. & O. R. Co., 48 Minn. 521.

[61a] Jewett v. Iowa Land Co., 64 Minn. 532.

diction of the person, the sheriff's return of service may be impeached,[62] although it is entitled to much weight.[63] If it appears that it is only the proof of service that is defective, and not the actual service of process, the court may, instead of vacating its judgment, allow proper proof to be filed nunc pro tunc.[64]

203. Confessed Judgments.

A closely allied class of cases, possibly properly to be treated as little more than a subdivision of these cases, of void judgments, is that of judgments entered on confession, where the statement of confession is inadequate. It seems to be the universal rule in these cases that any persons adversely interested as another lien creditor of the confessor of judgment, or an assignee in insolvency, may move to vacate the confessed judgment as void,[65] and such stranger stands in a far stronger position than the confessor of judgment himself.[66] In these cases, the interven-

[62] Crosby v. Farmer, 39 Minn. 305; Burton v. Schenck, 40 Minn. 52; Gray v. Hays, 41 Minn. 12; Knutson v. Davies, 51 Minn. 363.

[63] Jensen v. Crevier, 33 Minn. 372.

[64] Burr v. Seymour, 43 Minn. 401.

[65] Cleveland v. Douglas, 27 Minn. 177; Auerbach v. Gieseke, 40 Minn. 258.

[66] Coolbaugh v. Roemer, 30 Minn. 424, 427.

ing rights of innocent third persons cannot be affected by nunc pro tunc amendments.[67]

204. Fraudulent Judgments.

Another class of cases consists of those where the judgment has been obtained by the fraud of the judgment debtor, to the prejudice of his other creditors, or other interested persons. Such a judgment may be attacked by motion of the interested creditor.[68] The principle of a recent decision of our own supreme court seems to be opposed to these doctrines, and is possibly open to some criticism.[69] And the right to have a judgment set aside for fraud extends, of course, to the parties to the suit who are prejudiced thereby,[70] and in di-

[67] Wells v. Gieseke, 27 Minn. 478; Auerbach v. Gieseke, 40 Minn. 258.

[68] Chappell v. Chappell, 12 N. Y. 215; Atwater v. Manchester Sav. Bank, 45 Minn. 341; Dunham v. Waterman, 17 N. Y. 9; Bernard v. Douglas, 10 Iowa, 370; Reed v. Bainbridge, 4 N. J. Law, 403, 404; Harrod v. Benton, 2 Man. & R. 130.

[69] Bovey &c. Co. v. Tucker, 48 Minn. 223. Cf. Mueller v. Reimer, 46 Minn. 314; Hunter v. Cleveland Stove Co., 31 Minn. 505, 510; Atwater v. Savings Bank, 45 Minn. 341.

[70] Motion, Olmstead v. Olmstead, 41 Minn. 297; action under Gen. St. 1878, c. 66, § 285, Bomsta v. Johnson, 38 Minn. 230; Spooner v. Spooner, 26 Minn. 137; Sturm v. District No. 70, 45 Minn. 88;

vorce cases, even when they have been parties to the fraud.[71]

A further remedy in some of these cases of fraud is by action under our statute to vacate the fraudulent judgment; but this statutory action is open only to the parties to the first record.[72] It provides (section 5434) that "in all cases where judgment heretofore has been or hereafter may be obtained in any court of record by perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment, at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or repre-

Edson v. Edson, 23 Mass. 590; Johnson v. Coleman, 23 Wis. 452; Chauncey v. Wass. 35 Minn. 1, 38.

[71] True v. True, 6 Minn. 458, 465, 468 (Gil. 315); Bomsta v. Johnson, 38 Minn. 230.

[72] Henry v. Meighen, 46 Minn. 548; Gen. St. 1878, c. 66, § 285; Gen. St. 1894, § 5434; Bomsta v. Johnson, 38 Minn. 230; Wieland v. Shillock, 24 Minn. 345; Stewart v. Duncan, 40 Minn. 410; Spooner v. Spooner, 26 Minn. 137; Johnston v. Paul, 23 Minn. 46; Hass v. Billings, 42 Minn. 63. This statute is unconstitutional as applied to judgments absolute at the time of its passage. Wieland v. Shillock, 24 Minn. 345. See, also, as to its construction, Spooner v. Spooner, 26 Minn. 137.

sentation." The action to set aside the judgment on the ground that it was obtained by perjury cannot be maintained upon the bare allegation that on an issue of fact squarely made, so that each party knew what the other would attempt to prove and where neither has a right nor is under any necessity, to depend on the other, to prove the fact as he claims it to be, there was false or perjured testimony by the successful party or his witnesses.[72a] A judgment cannot be set aside under this statute for the purpose of allowing a defense where there is no excuse for not interposing it in the original action.[72b] Except as authorized by the statute, the remedy by motion would seem the only one open to a party to the action.[73]

"Upon no principle of equity jurisprudence can a separate action be maintained to set aside a judgment of a court of competent jurisdiction because it has been procured by false testimony in a case where the court rendering it has full power to afford adequate relief upon an application in the same suit or proceeding,

[72a] Hass v. Billings, 42 Minn. 63; Wilkins v. Sherwood, 55 Minn. 154; Colby v. Colby, 59 Minn. 432; Watkins v. Landon, 67 Minn. 136.

[72b] Clark v. Lee, 58 Minn. 410.

[73] Johnston v. Paul, 23 Minn. 46; Spooner v. Spooner, 26 Minn. 137; State v. Bachelder, 5 Minn. 223, 242, 245 (Gil. 178).

and we know no authority giving authority to any such doctrine." [73a]

The judgment cannot be attacked collaterally for the fraud.[74] In considering who is a party to the record, it is to be noticed that, where a party is deceased, his heirs or personal representatives may be substituted, and have the rights of the party,[75] and, in some similar cases, other persons may properly be substituted as parties.[76] But this privilege of attack by third parties does not extend to any cases except those (1) where there is a lack of jurisdiction, or (2) where there is fraud, or (3) where there is a defective confession of judgment.

205. Irregular and Informal Judgments.

The last class is judgments defective by reason of some irregularity or informality only. In these cases, the motion of attack can be made only by a party or his substituted representative.[77] The court may correct the

[73a] Johnston v. Paul, supra.

[74] Johnston v. Paul, 23 Minn. 46.

[75] Stocking v. Hanson, 22 Minn. 542; Waite v. Coaracy, 45 Minn. 159.

[76] Boeing v. McKinley, 44 Minn. 392.

[77] Hunter v. Cleveland Stove Co., 31 Minn. 505; Mann v. Flower, 26 Minn. 479. Cf. Mueller v. Reimer, 46 Minn. 314.

irregularity or defect.[78] Thus, where proof of service is insufficient, it may allow sufficient proof to be filed nunc pro tunc, if the service was valid in fact.[79] Similarly, where the defendant put in no answer, but the affidavit of no answer was defective, the court allowed a proper affidavit to be filed nunc pro tunc.[80] Or it may amend a defect in a description in the findings.[81] The limitation of one year after notice of entry does not apply to corrections of clerical errors.[82]

Where the judgment has not been entered, but a docket entry has been made, and judgment roll made up, it may order the judgment to be entered nunc pro tunc, although this is perhaps not necessary as the order of procedure is now immaterial.[83] The clerk has no authority to enter a judgment nunc pro tunc without an order of court. Where no findings were filed before judgment, the court

[78] Gen. St. 1878, c. 66, §§ 124, 125; Gen. St. 1894, §§ 5266, 5267.

[79] Burr v. Seymour, 43 Minn. 401.

[80] Dunwell v. Warden, 6 Minn. 287 (Gil. 194).

[81] McClure v. Bruck, 43 Minn. 305; Nell v. Dayton, 47 Minn. 257.

[82] McClure v. Bruck, 43 Minn. 305; Nell v. Dayton, 47 Minn. 257.

[83] Clark v. Butts, 73 Minn. 361, overruling Rockwood v. Davenport, 37 Minn. 533.

Satisfaction of judgment, after discharge in bankruptcy, Laws 1899, c. 262.

may file them nunc pro tunc.[84] Or the court may disregard the defect, if action is not taken promptly to attack the judgment,[85] and, in these cases of irregularity, merits must be shown.[86]

Where two judgments were entered in the same action in favor of different defendants, correct practice would have been to amend the first judgment, but, as plaintiff was not in any way prejudiced by the two judgments, his appeal from the second was not sustained, despite the irregularity.[87] Cases of the default of the party taking the judgment are readily distinguishable from those where the fault is that of an officer of the court.[88]

206. Irregular Judgments—Continued.

By far the greatest number of motions of this character arises under §§ 5206, 5267 and 5842, Gen. St. 1894.[89] Under the first and last

[84] Swanstrom v. Marvin, 38 Minn. 359.

[85] Groh v. Bassett, 7 Minn. 325 (Gil. 254); Cutler v. Button, 51 Minn. 550; Jorgensen v. Griffin, 14 Minn. 464 (Gil. 346).

[86] Weymouth v. Gregg, 40 Minn. 45.

[87] Adamson v. Sundby, 51 Minn. 460.

[88] Wells v. Gieseke, 27 Minn. 478; Auerbach v. Gieseke, 40 Minn. 258; Burr v. Seymour, 43 Minn. 401.

[89] Gen. St. 1878, c. 66, §§ 66, 125; c. 75, § 8.

of these sections, the vacation of the judgment seems to be a matter of right, and not merely of discretion.[90]

Applications made under section 5267 are discretionary, even when made within a year from the entry of judgment.[91] Personal serv-

[90] Lord v. Hawkins, 39 Minn. 73; Nye v. Swan, 42 Minn. 243; Boeing v. McKinley, 44 Minn. 392. In Lord v. Hawkins, supra, the court said: "In the cases of Washburn v. Sharpe, 15 Minn. 43 (Gil. 63), Frankoviz v. Smith, 35 Minn. 278, it was assumed, though in neither case was it necessary to decide, that in both sections 66 (5206) and 125 (5267) the application is addressed to the discretion of the court. Upon a more careful examination and comparison of the two sections we are satisfied that herein lies the chief difference between them. * * * The construction we place on section 66 is that it provides to the defendant who comes within its terms, and who shows that he has a good defense, and who has not lost his right by laches, an opportunity to defend as a matter of right, and not of discretion. But the year from the rendition of the judgment is the limit of the opportunity. If he applies after that time, his case comes under section 125." But see the language used in Mueller v. McCulloch, 59 Minn. 409, where the court evidently overlooked Lord v. Hawkins and followed the earlier cases. This statute (section 5206) "simply regulates the exercise of the equity powers of the court over its own judgments and proceedings in execution thereof." Russell v. Blakeman, 40 Minn. 463.

[91] Reagan v. Madden, 17 Minn. 402 (Gil. 378); Drew v. St. Paul, 44 Minn. 501.

ice of the summons is not necessarily personal notice of the judgment.[92] These applications are open only to the parties or others substituted as parties.[93]

It will be observed that in those two clauses of the statutes the year is to run from the rendition of judgment, without any regard to notice; but in section 5267 the provision is for one year after notice. But, on the other hand, the granting of an application is discretionary, under this section.[94] Under section 5206 it suffices if application is made within the year, though the court does not act till the year has expired.[95] "Although an application of this character, made under the provisions of Gen. St. 1894, § 5206, is largely addressed to the discretion of the court, it ought not to be favorably considered when the presumption that the party in default has been diligent after receiving notice of the pendency of the action is expressly and conclusively rebutted."[96] These remedies by motion are

[92] Wieland v. Shillock, 23 Minn. 227.

[93] Kern v. Chalfant, 7 Minn. 487 (Gil. 393); Stocking v. Hanson, 22 Minn. 542.

[94] Waite v. Coaracy, 45 Minn. 159, and cases cited supra.

[95] Washburne v. Sharpe, 15 Minn. 63 (Gil. 43).

[96] Mueller v. McCulloch, 59 Minn. 409.

perhaps somewhat affected by Gen. St. 1894, § 5435.[97]

A number of cases have arisen in this state on the subject of these applications. Misconduct of one's own attorney, coupled with the facts that the judgment was a surprise, that meritorious defenses exist, and the insolvency of said attorney is sufficient ground when the application is promptly made.[98]

In a mortgage foreclosure suit, after entry of decree of expiration of time to redeem, it is too late, unless a sufficient excuse is shown for failure to oppose the application to confirm the sale, to move to vacate the sale, the order of confirmation, and the final decree for mere irregularity in the sale.[99] Judgment irregularly entered against three of four joint parties, instead of against all four, cannot be vacated after one year after notice.[100] And where, on default, judgment for unliquidated damages was entered up by the clerk without the

[97] Bomsta v. Johnson, 38 Minn. 230. Cf. Mueller v. Reimer, 46 Minn. 314.

[98] Hildebrandt v. Robbecke, 20 Minn. 100 (Gil. 83). Cf. Bray v. St. Brandon, 39 Minn. 390.

[99] Coles v. Yorks, 36 Minn. 388.

[100] Dillon v. Porter, 36 Minn. 341. See this case and Gen. St. 1894, § 5207, as to proceeding where some of the defendants jointly liable are not served.

court's assessment, delay is fatal to an application of this nature.[101]

Where one application to vacate a judgment has been denied, another application, on grounds existing at the time of the first application, but not therein advanced, cannot be made without sufficient excuse for the non-presentment of the question on the first application,[102] and in this case, as we have already seen, the court ordered findings filed nunc pro tunc.

A motion to modify a judgment against stockholders, obtained under section 5903, so as to change the amounts distributed to each creditor is authorized solely by the provisions of Gen. St. 1894, § 5267. Except in cases of mistake, surprise, etc., the right to vacate or set such a judgment aside is limited in time to six months from the time it is entered. It cannot be made after the time to appeal from the judgment has expired.[102a]

207. Irregular Judgments—Continued.

The provisions of section 5267 apply also to persons included in section 5206, and one

[101] Hersey v. Walsh, 38 Minn. 521.

[102] Swanstrom v. Marvin, 38 Minn. 359.

[102a] Gallagher v. Irish-Am. Bank. (Minn.) 81 N. W. 1057.

served by publication may have relief under either section. But while relief under section 5206 will be a matter of right, relief under section 5267 will still be merely discretionary; and the fact that there is a bona fide purchaser relying on the judgment, as long as it is not a judicial sale under a judgment, will not affect the right to have the judgment vacated, except in so far as the rule has been modified by Gen. Laws 1887, c. 61.[103] Where a proposed answer shows a good and sufficient defense to the action, this must be treated as "sufficient cause shown," under section 5206.[104]

[103] Windom v. Schuppel, 39 Minn. 35; Lord v. Hawkins, 39 Minn. 73; Welch v. Marks, 39 Minn. 481. As to the effect of Gen. Laws 1887, c. 61 (the proviso to section 5267), see Drew v. City of St. Paul, 44 Minn. 501, and Gowen v. Conlow, 51 Minn. 213.

[104] Bausman v. Tilley, 46 Minn. 66.

On a motion to set aside a default and for leave to answer, unless the proposed answer shows merits, and is verified on personal knowledge, there must be an affidavit of merits by the party, or some one having personal knowledge of the facts. People's Ice Co. v. Schlenker, 50 Minn. 1. Where the defendant is a corporation, the affidavit must be made on its behalf by some officer or agent, and the head of the legal department is presumptively a proper person. An order opening a default and granting leave to answer will not be reversed solely because of the insufficiency of the affidavit of merits, or of

A defendant served by publication in a foreclosure proceeding obtained an opening of the judgment two months after the expiration of the time for redemption from the sale and final decree adjudging the period for redemption expired. The motion was made under section 5267. No separate affidavit of merits was used, but the affidavits stated facts which showed a good defense on the merits.[105]

A judgment taken against an infant defendant without the appointment of a guardian ad litem is voidable for the irregularity. It is erroneous, however, and not void, and the defendant must move to vacate within a reasonable time after coming of age; and he will be held to some promptitude in the matter.[106] Where the allegations of the complaint are denied by the answer, and, on defendant's failure to appear at the trial, plaintiff takes judgment without offering evidence to prove his cause of action, the defendant has an absolute right to have the judgment vacated. It is not a mere irregularity in proceeding, but the de-

the answer, unless the answer is so bad that it would be struck out on motion. Foren v. Duluth, 66 Minn. 54, following Sheldon v. Risedorph, 23 Minn. 518. See Jones v. Swain, 57 Minn. 251.

[105] Russell v. Blakeman, 40 Minn. 463.

[106] Eisenmenger v. Murphy, 42 Minn. 84.

As to rights of purchaser before judgment is modified, see Aldrich v. Chase, 70 Minn. 243.

nial of a substantial right, amounting to error.[107]

In applications under section 5267, judgments affecting titles to realty "abandonment" of the property, and failure for a long time to pay taxes, are properly to be considered as affecting the discretionary action of the court.[108] Stipulations for judgment have been relieved against by vacating the judgment.[109] In the municipal court of St. Paul, the municipal court still retains control over its judgments, so that it may vacate or modify them after transcript filed in the district court.[110] In the municipal court of Minneapolis, the rule is probably different.[111]

[107] Strong v. Comer, 48 Minn. 66. Two peculiar cases of actions against deceased persons to determine adverse claims are Waite v. Coaracy, 45 Minn. 159; Boeing v. McKinley, 44 Minn. 392.

[108] Nauer v. Benham, 45 Minn. 252.

[109] Dupries v. Ry. Co., 20 Minn. 156 (Gil. 139); Barker v. Kieth, 11 Minn. 65 (Gil. 37). But the court cannot reform a stipulation for judgment. It can only set it wholly aside upon a proper showing. Gerdtzen v. Cockrell, 50 Minn. 546.

[110] Crosby v. Farmer, 39 Minn. 305; Buffham v. Perkins, 43 Minn. 158; Granse v. Frings, 46 Minn. 352. As to executions, see Laws 1897, c. 57.

[111] After a transcript from the municipal court of Minneapolis is filed in the district court the judgment "passes under the exclusive control of the district court and is carried into execution by its process." Hanson v. Bean, 51 Minn. 546.

CHAPTER XI.

THE CORRECTION OF ERRORS ON APPEAL.

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208. General Provisions.

By the Minnesota constitution, the supreme court has appellate jurisdiction in all cases, both at law and in equity;[1] but it does not follow that this jurisdiction must go unregulated, or be exercised without restriction. This jurisdiction must be exercised in the manner provided by law, and cannot be exercised in any other way. Jurisdiction cannot be conferred on the supreme court by stipulation.[2] Hence parties cannot by stipulation, nor can the

[1] Article VI., § 2.

[2] Rathbun v. Moody, 4 Minn. 364 (Gil. 273); Ins. Co. v. Schroeder, 21 Minn. 331.

court by order, extend the time within which an appeal can be taken to the supreme court.[3]

209. Abolition of the Writ of Error in Civil Cases.

At common law, the only methods of removing cases to higher courts were by writs of error and of certiorari. The writ of certiorari was used to remove cases from courts which did not proceed or from proceedings which were not according to the common law, while the writ of error ran to common-law proceedings of the courts of common-law jurisdiction. The writ of error ran only for error affecting a judgment, and it was only when judgment had been entered that the writ lay. In the early practice in this state, the writ of error was much used in both civil and criminal cases, and it still runs in criminal cases.[4] But, as far as civil cases are concerned, the use of writ of error in one Minnesota state practice seems to have been abrogated by our present statute regarding appeals;[5] and apparently the

[3] First Nat. Bank of Fargo v. Briggs, 34 Minn. 266; Burns v. Phinney, 53 Minn. 431.

[4] Kennedy v. Williams, 11 Minn. 314 (Gil. 219); Kern v. Chalfant, 7 Minn. 487 (Gil. 393); State v. Sawyer, 43 Minn. 202.

[5] Barbeau v. Potvin (case No. 2,779, decided on motion to quash the writ on this ground, at April term, 1880. Writ quashed. No opinion filed).

only method of review in civil cases is by the statutory remedy of appeal. But this must not be supposed to extend to the cases where writs of certiorari formerly ran, for that writ still obtains as of old, the remedy by appeal not extending to such cases.[6] It is to be noticed that orders made in the district court in proceedings by writ of certiorari issuing out of the district court may be appealed to the supreme court.[7]

210. Of Appeals.

The disappearance of the remedy by writ of error cannot be looked at as a hardship, for our statute of appeals in civil actions has provided a proceeding at once more simple, equally or more efficacious in all cases reached

[6] State v. Leftwich, 41 Minn. 42. Contempt proceeding may be reviewed on appeal where the penalty imposed is for the benefit of the party, and by certiorari when in punishment for an offense. At common law the authority of the court to punish for contempts committed in its presence was uncontrollable.

[7] Moede v. County of Stearns, 43 Minn. 312. The action of the county commissioners in forming school district cannot be reviewed in the district court on certiorari.

As to whether a writ of coram nobis will lie in this state, suggested in State v. Madigan, 66 Minn. 10.

by writ of error, and more far reaching in its application. "A judgment or order in a civil action in any of the district courts may be removed to the supreme court, by appeal, as provided in this chapter, and not otherwise." [8] Nothing is appealable except judgments and orders, and these only when made or entered in a civil action, or something tantamount thereto.[9] An appeal can be taken only by one who is interested in the subject of the controversy.[10] "The party appealing is known as the 'appellant,' and the adverse party as the 'respondent'; but the title of the action is not to be changed in consequence of the appeal.[11]

211. Powers of the Supreme Court.

"Upon an appeal from a judgment or order, the appellate court may (1) reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and (2) may, if necessary or proper, order a new trial. When the judgment is reversed or

[8] Gen. St. 1894, § 6132; Gen. St. 1878, c. 86, § 1.

[9] Von Glahn v. Sommer, 11 Minn. 203 (Gil. 132); Thompson v. Howe, 21 Minn. 1; Conter v. Ry. Co., 24 Minn. 313; but see Witt v. St. Paul & N. P. R. Co., 35 Minn. 404.

[10] Burns v. Phinney, 53 Minn. 431.

[11] Gen. St. 1894, § 6133; Gen. St. 1878, c. 86, § 2.

modified, the appellate court may make complete restitution of all the property and rights lost by the erroneous judgment." [12] The statute also provides that "any judge of the supreme court shall, during vacation, have the same power as the court at term to dismiss any appeal, and remand the cause to the court below, upon the stipulation of the parties to such appeal, consenting to such dismissal, to be filed with the clerk of said court." [13]

212. Power of Supreme Court—Control of Property after Supersedeas Bond Given.

After a receiver pendente lite was appointed, a supersedeas bond was duly given, which had the effect of removing the matter to the supreme court. An application was then made to the district court for an order requiring the receiver to turn the property back to the defendant, which was denied. He then procured an order from the supreme court, requiring the receiver to show cause why he should not turn over the property. It was there urged that the only proper procedure

[12] Gen. St. 1894, § 6136; Gen. St. 1878, c. 86, § 5. Upon a joint appeal, the supreme court may affirm, reverse, or modify the judgment or order appealed from as to any or all of the parties. Nelson v. Munch, 28 Minn. 314.

[13] Gen. St. 1894, § 6137.

was by an appeal from the order of the district court. "We need not decide whether it was proper for appellant to first proceed in the court below to obtain possession of his property, or whether an appeal will lie to review the order denying the motion. The matter is now here on the original appeal, and this court has thereby acquired full jurisdiction over it. This court has an inherent power to make such an order as will effectuate the spirit and intent of the statute under which the bond was given, and the cause removed for our consideration. This power may rightfully be exercised to prevent the receiver from pursuing a course which takes away from the supersedeas all of its qualities, renders it a mere idle ceremony, and of no more value than an ordinary appeal bond." [14] The supreme court has no jurisdiction to modify an order of the district court except for error appearing upon the record.[15]

213. Loss of Jurisdiction—Filing of Remittitur.

After the remittitur was issued, an order to show cause was issued why the remittitur should not be recalled, and a reargument

[14] Farmers' Nat. Bank v. Backus, 63 Minn. 115. See § 230, infra.

[15] State v. Flint, 63 Minn. 187.

granted on the ground that the court had fallen into a material error as to the facts. The court said: "We are of opinion that, after an appellate court has pronounced its judgment or decree in a cause, and has remitted it to the court below for enforcement, and such remittitur has been filed in the lower court, the jurisdiction of the appellate court is completely divested, and that it has no authority to recall the remittitur unless there has been some irregularity or error in issuing it; as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the court." [16]

214. Power to Dismiss Frivolous Appeals.

The appellate court has inherent power to dismiss appeals which are without merit. In a recent case [17] it was said: "Notwithstand-

[16] Rud v. Board of County Com'rs of Pope County, 66 Minn. 358. See note to Legg v. Overbach, 21 Am. Dec. 115.

[17] Johnson v. St. Paul City R. Co., 68 Minn. 408. The court treats frivolous appeals with scant ceremony. In Ramsland v. Rock, 66 Minn. 129, the court said: "Putting aside all considerations of the insignificant amount involved, the appeal is frivolous and without merit. This is so plain that we do not propose to dignify the case, or waste any

ing decisions to the contrary, we are of the opinion that an appellate court has the inherent power to dismiss an appeal which is manifestly and palpably frivolous and without merit. This power is necessary in order to prevent the court itself from being imposed upon, and the administration of justice being trifled with and perverted for mere purposes of delay. This court has heretofore exercised this power, although very cautiously and sparingly. We will not permit such motions to be used as a short cut to a hearing on the merits. They will only be granted where it is perfectly apparent, without argument,, that the appeal is frivolous."

215. Time of Appeal.

"The appeal from a judgment hereafter rendered may be taken within six months after the entry thereof, and from an order within thirty days after written notice of the same." [18]

time in discussing the points made by defendant's counsel in his behalf." In Kosko v. Hay, 66 Minn. 133, the court said: "We decline to waste time in a discussion of the questions raised by this appeal. It is without merit."

[18] Gen. St. 1894, § 6138; Gen. St. 1878, c. 86, § 6. This statute did not repeal Laws 1868, c. 83, as to judgments entered prior to its passage. Kerlinger v. Barnes, 14 Minn. 526 (Gil. 398).

It will be noted that the six months begin to run from the time of the entry of the judgment appealed from.[19] It is not a perfected judgment for this purpose until the costs have been duly taxed and inserted therein.[20] Neither the supreme nor district court can give a party a right to appeal after the time for appeal prescribed by the statute has passed.[21]

216. Notice of Appeal.

The statute provides that "an appeal shall be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof." The correction of errors is provided for in the following language:

"When a party gives, in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay pro-

[19] Hostetter v. Alexander, 22 Minn. 559; Humphrey v. Havens, 9 Minn. 318 (Gil. 301).

[20] Richardson v. Rogers, 37 Minn. 461.

[21] Burns v. Phinney, 53 Minn. 431. No discontinuance or dismissal of an appeal shall preclude the party from taking another appeal in the same case within the time limited by law. Gen. St. 1894, § 6152.

ceedings, the court may permit an amendment on such terms as may be just." [22]

217. Service of Notice—The Adverse Party.

If the notice of appeal is filed with the clerk, its validity is not affected by the fact that it is addressed to the attorney for the opposite party, instead of to the clerk.[23] The adverse party, on whom a notice of appeal is to be served, is the party, whether plaintiff or defendant, whose interests in the question sought to be raised on the appeal are adverse to the appellants. "The statute requires the notice of appeal to be served on the adverse party. This does not mean the party adverse in position in the title to the action or proceeding. Thus, if the appellant is a defendant, the plaintiff is not necessarily the adverse party in the question sought to be raised by the appeal. A defendant may be the adverse party, as to that question, and for the purpose of presenting that question he is the proper party respondent." [24] Where there are several parties to the action or proceedings, some

[22] Gen. St. 1894, § 6134.

[23] State v. Klitzke, 46 Minn. 343; Baberick v. Magner, 9 Minn. 232 (Gil. 217).

[24] Frost v. St. Paul Banking & Investment Co., 57 Minn. 325.

of whom are not served with the notice of appeal, the court will consider only those questions between the appellant and the parties served in which the interests of those not served are not adverse to the claims of the appellant.[25]

218. Service of Notice—Continued.

Notice of appeal must be served on each adverse party as to whom it is sought to review in the supreme court any order of judgment, although he did not appear in the action in the district court. "The mode of taking an appeal prescribed by statute is mandatory and must be strictly complied with, and notice served as the statute requires, or no appeal is perfected. The statute (Gen. St. 1894, § 6134) expressly requires that the notice must be served on the adverse party. The fact that such creditors did not appear in the district court does not constitute an exception to the mandate of the statute as to the service of the notice of appeal. It is true that Gen. St. 1894, § 5212, provides that, when a defendant has not appeared, service of notices or papers in the ordinary proceedings in an action need not be made on him. But the removal of the action by appeal to this court is not an ordinary pro-

[25] Id.

ceeding in the action. While an appeal is the continuation of the original action in another jurisdiction, yet it is analogous in many respects to a writ of error, which is regarded as the beginning of a new action, and in each case the service of notice of the proceeding on the adverse party is necessary unless the statute dispenses with it. Where there are several parties to an action or proceeding, some of whom have not been served with the notice of appeal, this court will consider only the questions between the appellant and the parties upon whom the notice of appeal has been served." [26]

An assignee in insolvency filed his final account, and applied, on proper notice, to have his account allowed. Forty-one creditors had filed claims, but of these only three appeared at the hearing, and opposed the claim. The claim was disallowed, and the assignee appealed, and served notice of appeal on the three creditors only. It was held, on a motion to dismiss the appeal on the ground that there

[26] Lambert v. Scandinavian-American Bank, 66 Minn. 185, citing Frost v. St. Paul Banking & Investment Co., 57 Minn. 325; Oswald v. St. Paul Globe Pub. Co., 60 Minn. 82.

was no service on the other creditors, that the service was sufficient.[27]

219. Service of Notice—Purchaser at Assignee's Sale.

The adverse party, within the intent of the statute [28] relating to appeals, means the party whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of the order for judgment appealed from. A purchaser at a sale made by an assignee in insolvency, subject to the approval of the court, is a party to the proceedings resulting in an order confirming the sale, and a necessary and adverse party to an appeal by a creditor from such order, upon whom notice of appeal must be served. "The notice of appeal must be served upon each adverse party as to whom it is sought to review in this court any order or judgment although he did not appear in the proceedings or action in the district court. * * * The parties to the record are not always necessary parties to the appeal, nor are those who were not parties

[27] In re Skoll, 80 N. W. 953. "The result arrived at is not in conflict with Lambert v. Bank, 66 Minn. 185."

[28] Gen. St. 1894, § 6134.

to the record, as originally made, to be overlooked in prosecuting an appeal." [29]

220. Bond on Appeal.

The statutes provide for two kinds of bonds on appeal: (1) Cost bonds, and (2) supersedeas bonds. There are also special provisions for supersedeas bonds on appeals: (1) From a money judgment; [30] (2) from a judgment for the delivery of documents or personal property; [31] (3) from a judgment directing the execution of a conveyance or other instrument; [32] and (4) directing the sale or delivery of possession of real property.[33]

221. The Bond for Costs.

Before an appeal is effectual for any purpose, the appellant must execute a bond, with at least two sureties, conditioned that the appellant will pay all costs and charges which may be awarded against him on the appeal, not exceeding the penalty of the bond. This

[29] Kells v. Nelson Tenney Lumber Co., 74 Minn. 8, citing Frost v. Investment Co., 57 Minn. 325, Oswald v. Publishing Co., 60 Minn. 82, and Lambert v. Bank, 66 Minn. 185.

[30] Gen. St. 1894, § 6143.

[31] Gen. St. 1894, § 6144.

[32] Gen. St. 1894, § 6145.

[33] Gen. St. 1894, § 6146.

bond must be in the sum of not less than $250. In place of the bond, the appellant may deposit the sum of $250 in cash with the clerk of court, to abide the judgment of the court of appeals. The bond or deposit may be waived by a written consent of the respondent.[34]

In all cases of appeals from a judgment, except in case of a judgment (1) directing the payment of money, (2) the assignment or delivery of documents or other personal property, (3) the execution of a conveyance or other instrument, or (4) the sale or delivery of possession of real property, the bond given as provided by this section of the statute stays all proceedings in the court below, upon the judgment appealed from, except that, where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.[35]

222. Stay—The Supersedeas Bond on Appeal from an Order.

An appeal from an order "shall stay all proceedings thereon, and save all rights affected thereby, if the appellant or someone in his be-

[34] Gen. St. 1894, § 6141.
[35] Gen. St. 1894, § 6151.

half, as principal, executes a bond, in such sum, and with such sureties, as the judge making the order, or, in case he cannot act, the court commissioner or clerk of the court where the order is filed, directs and approves, conditioned to pay the costs of said appeal, and the damages sustained by the respondent in consequence thereof, if said order, or any part thereof, is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, which bond shall be filed in the office of said clerk." [36]

The condition of this bond does not require the appellant to pay the judgment that may afterwards be entered on the verdict or decision, unless the benefit of the judgment is lost in consequence of the appeal and stay.*

223. Supersedeas Bond upon Appeal from Money Judgment.

To stay execution, the bond must be executed by (1) the appellant, (2) with at least two sureties, and (3) conditioned "that, if the judgment appealed from, or any part thereof, is affirmed, the appellant will pay the amount directed to be paid by the judgment, or the

[36] Gen. St. 1894, § 6142.

* Reitan v. Goebel, 35 Minn. 584; Friesenham v. Merrill, 52 Minn. 55.

part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the appellant upon the appeal." [87] A levy made before an appeal is taken from the judgment is not discharged by the giving of this bond for a stay.[88]

224. Bond to Vacate a Stay on Money Judgment on Contract.

Notwithstanding an appeal and the giving of the security for a stay of proceedings, the court may, upon the giving of adequate security, vacate the stay when it appears that the appeal is taken for delay only. The respondent may proceed to enforce the judgment if he gives adequate security to make restitution in case the judgment is reversed or modified. Such security "shall be a bond executed by the respondent, or some one in his behalf, to the appellant, with at least two sufficient sureties, to the effect that, if the judgment is reversed or modified, the respondent will make such restitution as the appellate court directs." Leave of court must be obtained which "shall only be granted upon motion and notice to the adverse party, and in

[87] Gen. St. 1894, § 6143.

[88] First Nat. Bank v. Rogers, 13 Minn. 407 (Gil. 376).

case when it satisfactorily appears to the court that the appeal has been taken for delay." [39]

225. Stay Bond on Appeal from Judgment for Delivery of Personal Property.

If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by an appeal unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court may appoint, or unless a bond is executed by the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, conditioned "that the appellant will obey the order of the appellate court upon the appeal." [40]

226. Bond on Appeal from a Judgment Directing Sale of Real Estate.

If the judgment directs the sale or delivery of possession of real property, the execution of the same is not stayed unless a bond is executed on the part of the appellant, with two sureties, conditioned that "during the possession of such property by the appellant he will not commit, or suffer to be committed, any

[39] Gen. St. 1894, § 6148.
[40] Gen. St. 1894, § 6144.

waste thereon; and that, if the judgment is affirmed, he will pay the value of the use and possession of the property from the time of the appeal until the delivery of the possession, pursuant to the judgment." [41]

227. Appeal in Bastardy Case—Bond.

The statutes relating to supersedeas bonds in civil actions do not apply to bastardy proceedings. The court, on such appeal, must adopt as far as possible the analogies of the law in other cases. The supersedeas bond should be conditioned on the payment of all costs and charges awarded against defendant on appeal, and in case of dismissal of the appeal, or affirmance of the judgment, or defendant's abiding by and performing the judgment, or surrendering himself as a prisoner, in execution thereof.[42]

228. Appeal upon a Judgment Directing Execution of an Instrument.

No bond is provided for in this case. If

[41] Gen. St. 1894, § 6146.

[42] State v. Allrick, 63 Minn. 328. The court said: "In State v. Klitzke, 46 Minn. 343, it was held that the procedure in appeals in bastardy proceedings is that regulating appeals in civil actions; but this must be understood as being subject to the implied qualification 'so far as applicable.'"

the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument is executed, and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.[43]

229. Extent of Stay—Discretion of Court—Appeals by Executors, Administrators, Trustees, etc.

When an appeal is perfected from a judgment (1) directing the payment of money, (2) the assignment or delivery of documents or personal property, or (3) the sale or delivery of possession of real property, it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. The court may, in its discretion, dispense with or limit the security required in such cases, where the appellant is an executor, administrator, trustee, or other person acting in another's right.[44] The district court should

[43] Gen. St. 1894, § 6145.

[44] Gen. St. 1894, § 6147. An ex parte order granting an injunction is not appealable; but if the defendant moves to dissolve, and the order is denied,

not hear a motion for a new trial while an appeal from the judgment is pending in the supreme court.[45] An appeal with a stay does not oust the jurisdiction of the district court.[46] The appeal stays, but does not supersede prior proceedings.[47] An appeal from an order refusing a new trial, the supersedeas stay bond prescribed by section 6142 being filed, is effectual as a stay, and suspends the right to enter judgments in the court below.[48]

230. Effect of Supersedeas Bond—Appeal from an Order Appointing a Receiver.

When an appeal is taken from an order appointing a receiver pendente lite, and a supersedeas bond is duly executed and filed, in accordance with the provisions of Gen. St. 1894, § 6142, the power of the receiver is suspended in reference to the order appealed from, and the order remains inoperative during the ap-

the plaintiff, by appealing, can keep the order in force. State v. District Court, 52 Minn. 283. See State v. Duluth St. R. Co., 47 Minn. 369; State v. District Court (Minn.) 81 N. W. 324.

[45] McArdle v. McArdle, 12 Minn. 122 (Gil. 70.

[46] State v. Young, 44 Minn. 76; Briggs v. Shea, 48 Minn. 218.

[47] Robertson v. Davidson, 14 Minn. 554 (Gil. 422).

[48] St. Paul &c. Co. v. Village of Hinckley, 53 Minn. 102. See comment upon Exley v. Berryhill, 37 Minn. 182.

peal. It is the duty of the receiver, when the bond is duly executed and filed, and he is duly notified thereof, to restore to the appellant possession of such property as he may have taken from him by virtue of the order. "The general rule is that if an appeal with a supersedeas be taken from an interlocutory order, that part of the case which is appealed is completely removed from the jurisdiction of the lower court, and wholly transferred to that of the higher or appellate tribunal. * * * The legal effect of the appeal and supersedeas was to withdraw from the receiver the right to possession of the property, and vest that right in the party from whom it had been taken." [49]

231. Form of Bond—Sureties—Justification.

The various appeal and stay bonds which the statute authorizes an appellant to give,[50] except on appeal from an order,[51] may, at the option of the appellant, be in one instrument or several.[52] The bond is of no effect unless it is accompanied by the affidavit of the sureties that they are each worth double the amount

[49] Farmers' Nat. Bank v. Backus, 63 Minn. 115.
[50] Under Gen. St. 1894, §§ 6141, 6143, 6144, 6146.
[51] Gen. St. 1894, § 6142.
[52] Gen. St. 1894, § 6149.

specified therein. The adverse party may except to the sufficiency of the sureties within 10 days after notice of the appeal, and unless they or other sureties justify before a judge of the court below, as prescribed by law in other cases, within 10 days thereafter, the appeal shall be regarded as if no such bond had been given. The justification shall be upon a notice of not less than 5 days.[53]

232. Bond by Surety Company—Justification.

The statute[54] making it lawful for an "annuity safe deposit and trust company" to become sole surety on 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.[55]

233. Service of Bond.

A copy of the appeal or supersedeas bond, including the names and residences of the sureties, must be served on the adverse party

[53] Gen. St. 1894, § 6150.

[54] Laws 1885, c. 3, § 7; Gen. St. 1894, § 2849, subdiv. 9.

[55] State v. District Court, 58 Minn. 351, citing Fox v. Hale &c. Co., 97 Cal. 353.

with the notice of appeal. If a deposit of cash is made as security for costs on appeal, notice of the fact must be given the adverse party.[56]

234. The Return to the Supreme Court.

The statute provides that, "upon an appeal being perfected, the clerk shall transmit to the supreme court a certified copy of the judgment roll or order appealed from, and the papers upon which the order was granted, at the expense of the appellant. When a case is made, or bill of exceptions allowed, it may, for the purpose of the appeal, stand in place of or be attached to the judgment roll, and certified to the appellate court as such." [57] Until the return is filed, the supreme court has only jurisdiction to dismiss the appeal or compel a return.[58] The place of a return cannot be supplied by a stipulation.[59] Matter improperly included in the return will, upon proof of the fact by affidavits, be stricken out.[60] If

[56] Gen. St. 1894, § 6149. The notice should be in writing.

[57] Gen. St. 1894, § 6135.

[58] Briggs v. Shea, 48 Minn. 218. See Page v. Mille Lacs L. Co., 53 Minn. 492.

[59] American Ins. Co. v. Shroeder, 21 Minn. 331.

[60] Daniels v. Winslow, 2 Minn. 113 (Gil. 93); Robinson v. Bartlett, 11 Minn. 410 (Gil. 302).

only a part of the proceedings are returned, the order appealed from will be affirmed.[61] Thus an appeal from an order denying a motion for a new trial was dismissed because the record failed to show the order.[62] In a recent case the court said:[63] "The return is clearly defective, under the rule laid down in Hospes v. Northwestern M. & C. Co.,[64] and frequently applied in later cases. It has not been made to appear affirmatively, either by the certificate of the judge making the order, or by the certificate of the clerk of the court below, that there are before this court all the files, records, and proceedings in the action on which the order was predicated, according to the recital therein found."

[61] Mickelson v. Duluth B. & L. Ass'n, 68 Minn. 535.
[62] Granite Sav. Bank v. Weinberg, 62 Minn. 202.
[63] Murphy v. Halterhoff, 72 Minn. 98.
[64] 41 Minn. 256.

In Spencer v. Stanley (Minn.) 76 N. W. 953, the court said: "This is an appeal from an order denying a new trial. The paper book contains a notice of motion for a new trial, but does not state any grounds for the motion. This is fatal. See Clark v. Lumber Co., 34 Minn. 289. But we will go further. The return does not show any notice of motion at all, and this is equally fatal. The order appealed from should therefore be affirmed."

When the return on appeal from a judgment of dismissal fails to show what became of the motion made by the defendant to strike out a reply as sham, there is no presumption that the motion was granted. If the reply was stricken out, it was the duty of the defendant to make the fact appear by having an amended return.[65] In order to review a ruling made on the trial, the return must contain the verdict, if there was one, or the decision of the court, if made, or, if a judgment has been entered, what the judgment is.[66] Where it appears that the hearing of an appeal was on what purported to be a return from the district court, but that in fact no return had been made, the order entered on such hearing will be set aside, as the court has no jurisdiction.[67]

The rule which provides that, if the appellant shall fail to cause the proper return to be made and filed with the clerk within 60 days after the appeal is perfected, the respond-

[65] Floberg v. Joslin, 77 N. W. 557.

[66] Chase v. Carter, 79 N. W. 307; Anderson v. Kittell, 37 Minn. 125.

[67] Page v. Mille Lacs Lumber Co., 53 Minn. 492. An amendment of the judgment, so as to make it one of dismissal only, made by the court after an appeal had been made, and a return filed in the supreme court, does not affect the plaintiff's rights in appeal. Floberg v. Joslin, 77 N. W. 557.

ent may, "by notice in writing," require such return to be made within 20 days, does not affect the right of such respondent to move for a dismissal of the appeal for noncompliance with rule II.[68]

Compliance with the amendment made to rule IX. of the supreme court requiring the paper book and briefs to be filed three days before the day or argument cannot be dispensed with by the stipulation of the parties; and the prevailing party failing to comply with the same cannot recover statutory costs.[68*]

235. Printing the Return.

Rule IX. of the supreme court requires that so much of the return as will clearly and fully present the question arising on review must be printed in the paper book. Where it appeared that no attempt had been made to comply with this rule, the court said: "It was wholly disregarded, and the alleged error is, as a consequence, not properly before us for review. Of course this rule may be modified upon application, and in proper cases, so as to render the printing of portions of the record

[68] In re Bank of Minneapolis (Minn.) 77 N. W. 239.

[68*] Lehigh &c. Co. v. Scallen, 61 Minn. 63.

unnecessary, but no modification was asked for in this instance." [69]

236. Papers to be Furnished Supreme Court.

The party appealing is charged with the duty of furnishing the appellate court with copies of the notice of appeal, and of the order or judgment roll, and, if he fails to do so, the appeal may be dismissed.[70]

237. Presumption—Error not Presumed.

The proceedings at a trial are presumed to be regular until the contrary appears.[71] In the absence of a return from which the contrary appears, it will be presumed, on appeal

[69] Gardner v. Leck, 52 Minn. 522.

[70] Gen. St. 1894, § 6139. See American Ins. Co. v. Schroeder, 21 Minn. 331; Briggs v. Shea, 48 Minn. 218.

[71] It appeared that there were certain discrepancies between the complaint and the findings of fact and counsel for the appellant contended that the differences were fatal to the judgment. "But, whatever the rule may be in other jurisdictions, it has been iterated and reiterated in the opinions of this court that error in the proceedings must be made to appear; that the proceedings on a trial are presumed to have been regular. The presumption obtains that by consent the parties litigated all the facts found by the court whether within or in consonance with the pleadings or not." Coons v. Lemieu, 58 Minn. 99.

from a judgment, that it was duly authorized and regularly entered. That the judgment was irregularly entered, or was unauthorized or unwarranted, cannot be made to appear by a return which does not purport to contain a copy of the judgment roll, and of all the papers and files which should be made a part of such roll.[72]

238. Details of Procedure Regulated by Rules of Court.

The details of procedure in the supreme court are regulated by a body of somewhat elaborate rules of court. A few of the most important of these rules have been referred to but they must be carefully examined for the details of practice.

239. The Assignment of Error.

Rule IX. of the supreme court provides that: "Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly, and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the

[72] Pabst Brew. Co. v. Butchart, 68 Minn. 303; Granite Sav. Bank v. Weinberg, 62 Minn. 202.

evidence, it shall specify particularly the error complained of. No error not affecting the jurisdiction over the subject matter will be considered unless stated in the assignment of errors."

An assignment of error not included in the points relied on will be deemed abandoned.[1] "The first assignment of error is not mentioned in defendant's brief or in the argument, and must be deemed abandoned."[2] Under the rule if the appellant fails to make any assignment of error the order appealed from will be affirmed.[3] An assignment which is too general is of no avail.[4] The reports are full of decisions determining whether particular assignments are sufficiently specific but attention can be called to but a few of them. An assignment may specify several rulings involving the same error, but when assignments are upon different subjects and present different points,

[1] Johnson v. Johnson, 57 Minn. 100; Mpls &c. R. Co., v. Fireman's Ins. Co., 62 Minn. 315.

[2] Bates v. Richards Lumber Co., 56 Minn. 14.

[3] Day v. Ebert, 68 Minn. 499.

[4] Albrecht v. St. Paul, 56 Minn. 99; Yellow Medicine Co. Bank v. Wiger, 59 Minn. 384. See, also, Cook v. Kittson, 68 Minn. 474; Lytle v. Prescott, 57 Minn. 129; Adolph v. Minneapolis &c. R. Co., 58 Minn. 178.

they must be assigned separately.[5] "That the court erred in granting the defendant's motion to dismiss the action" is a good assignment, as from the very nature of the error it is not practicable to be more specific.[6] An assignment that the court erred in granting a new trial where the motion was made on two or more grounds is too general to be available.[7] A ruling of the trial court whereby evidence is admitted or rejected cannot be reviewed under an assignment in substance that the conclusions of law are not justified by the findings of fact.[8] Assignments that the "court erred in its instructions to the jury, to which the defendant excepted" and "that the court erred in refusing the instructions requested by the defendant" where there were several exceptions and requests are each too general to be available.[9] Whether damages were excessive cannot be raised by an assignment that the court erred in denying a motion for a new trial, although one of the grounds of the mo-

[5] Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224.

[6] Ermentrout v. American F. Ins. Co., 60 Minn. 418.

[7] Ingalls v. Oberg, 70 Minn. 102.

[8] Hewetson v. Dossett, 71 Minn. 358.

[9] Carpenter v. Eastern Ry. Co., 67 Minn. 188.

tion was excessive damages.[10] "An assignment so general and indefinite as not to indicate the specific error asserted would be a mere evasion of the rule; while on the other hand the practice of multiplying assignments by repetition and unnecessary subdivisions is a perversion of the rule, which defeats the very purpose for which it was adopted."[11] An assignment that the court erroneously refused to a party a jury trial, is bad unless the record affirmatively shows that he has complied with all statutory conditions, such as the payment or tender of the jury fee.[a] An assignment that "the court erred in denying a motion for a new trial" when the motion was made on two or more distinct grounds is insufficient.[12] An assignment that the court erred in finding that all the material facts alleged in the answer were true is not a compliance with the rule requiring that the assignment of error shall specify the particular finding complained of.[13] "That the trial court erred in

[10] Carpenter v. Eastern Ry. Co., 67 Minn. 188; Sharp v. Larson, 67 Minn. 428.

[11] Duncan v. Kohler, 37 Minn. 379.

[a] McGeagh v. Nordberg, 53 Minn. 235.

[12] Stevens v. City of Minneapolis, 44 Minn. 141; Moody v. Tschabold, 52 Minn. 51.

[13] Moody v. Tschabold, 52 Minn. 51; Smith v. Kipp, 49 Minn. 119.

granting the order vacating judgment and allowing defendant to answer" is bad.[14] The trial court cannot excuse a party from the necessity of making his assignments definite and specific. Where the defendant began to state his exceptions to the charge, the judge said, "The exceptions will be made so broad that they will cover all requests of either plaintiff or defendant, either as refused or modified by the court." This was held not to dispense with the necessity of taking exceptions so as to comply with the rule. The court said: "At most it could be taken only as leave for the parties to state their exceptions specifically when they should come to make up their case or bill of exceptions; and even as such it is not commendable practice, for the purpose of an exception to the charge is to call the attention of the trial court before the jury retires to specific instructions given or refused, so that the court may make any proper corrections before too late." [15]

240. What Orders and Judgments are Appealable—Generally.

The statute prescribes in detail what judgments and orders are appealable. "An appeal

[14] Fitzpatrick v. Campbell, 58 Minn. 20.

[15] Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224.

may be taken to the supreme court by the aggrieved party in the following cases: First. From a judgment in an action commenced in the district court, or brought there from another court from any judgment rendered in such court, and, upon the appeal from such judgment, the court may review any intermediate order involving the merits, or necessarily affecting the judgment. Second. From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve, an injunction, or an order vacating or sustaining an attachment. Third. From an order involving the merits of the action, or some part thereof. Fourth. From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer. Fifth. From an order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken. Sixth. From a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment." [73]

241. Who May Appeal.

Beginning with the general clause of the

[73] Gen. St. 1894, § 6140; Gen. St. 1878, c. 86, § 8.

section, the first question is who can appeal? The statute says, "the aggrieved party."

In the first place, he must be a "party" to the proceeding. A stranger to the action cannot take an appeal.[74] Of course the rules permitting substitution of parties apply here, as in other cases.[75] One defendant may appeal against a codefendant where their rights are conflicting.[76]

In the second place, what parties are aggrieved parties? One who is successful on a demurrer is not an aggrieved party because one ground of objection raised by him is overruled.[77] One who consents to or adopts the benefits of an order or judgment, or who has joined in a settlement thereof, has ceased to be an aggrieved party, and has lost his right to appeal.[78] He must also be aggrieved by the

[74] Estate of John Columbus v. Monti, 6 Minn. 568 (Gil. 403); In re Allen's Will, 25 Minn. 39. Cf. proceeding in rem, In re Estate of Hardy, 35 Minn. 193.

[75] Stocking v. Hanson, 22 Minn. 542.

[76] Atwater v. Russell, 49 Minn. 57, 87.

[77] Insurance Co. v. Pierro, 6 Minn. 569 (Gil. 404).

[78] Babcock v. Banning, 3 Minn. 191 (Gil. 123); State v. Sawyer, 43 Minn. 202; Johnson v. Howard, 25 Minn. 558; Lamprey v. Henk, 16 Minn. 405 (Gil. 362); Dols v. Baumhoefer, 28 Minn. 387, affirmed Thompson v. Haselton, 34 Minn. 12; Daniels v. Willis, 7 Minn. 374 (Gil. 295); Colvill v. Langdon,

action of the court. Hence, a plaintiff cannot complain of error in the proceedings in going to trial without the appointment of a guardian ad litem for minor defendants, as the responsibility for the irregularity is on the plaintiff's counsel. It is not the error of the court.[79]

And further, one who stipulates merely for entry of judgment in accordance with the verdict, or who has the judgment entered thereon, has not thereby lost his grievance or waived his right to appeal, as regards errors on which the verdict rests.[80] Moreover, the aggrieved party does not lose his right to appeal because he attends to entering the order or judgment, which the prevailing party ought to have had entered.[81] In effect, the words are treated as though they read, "The party deeming himself aggrieved." The appealability of the order does not depend on whether the party

22 Minn. 565. As to right of appeal from a pro-forma order see Johnson v. Howard, 25 Minn. 558; Colvill v. Langdon, 22 Minn. 565.

[79] Poehler v. Reese (Minn.) 80 N. W. 847.

[80] Hall v. McCormick, 31 Minn. 280; Everett v. Boyington, 29 Minn. 264; Warner v. Lockerby, 28 Minn. 28.

[81] Warner v. Lockerby, 28 Minn. 28. One may be aggrieved by a judgment in one's own favor in this, that it may be less favorable than it ought to be to him.

actually is aggrieved. An assignee, under the Insolvent Law of 1881, has no interest in the trust which will give him a right of appeal from an order of court removing him pursuant to Gen. St. 1894, § 4248.[82]

242. Appeal by Attorneys in Insolvency Proceedings.

An erroneous practice has grown up in some of the districts under which the attorneys for assignees and receivers attempt to deal directly with the court, and thus disregard the fact that the attorney is the employe of the assignee or receiver. The correct practice is for the assignee to apply to the court for the allowance of certain fees for his counsel, and for the court to make the allowance in that form. In a recent case, the attorneys for an assignee appealed from that part of the order denying their claim for compensation. Certain creditors moved to dismiss the appeal, on the ground that the attorneys were not parties to the proceedings in the district court, and hence not entitled to prosecute the appeal. The court said:[83] "In our opinion, the point is well taken. The attorneys were merely the servants of the assignee, not parties to the as-

[82] Gunn v. Smith, 71 Minn. 281.

[83] In re Skoll (Minn.) 80 N. W. 953.

signment proceedings, and whatever compensation is awarded to them should be allowed to the assignee for them.[84] Of course, if the client is insolvent, or acts fraudulently, or in bad faith, or, without sufficient reason, refuses to apply for compensation for his attorney, the latter may apply to the court to be allowed to proceed in his own right, and in his own name, or the name of his client, for compensation out of the fund in court; and in that case the attorney can appeal if unsuccessful."

243. From what Court Appeal May be Taken.

We have already noticed the provision of the statute that a judgment or order in a civil action in any of the district courts may be removed to the supreme court by appeal. By special statutes, proceedings in many of the municipal courts are removable directly to the supreme court, in the same way as proceedings in the district courts. Among the municipal courts so provided for is that of Minneapolis,[84] and that of St. Paul,[85]

[84] Stuart v. Boulware, 133 U. S. 78; appeal of Pereya, 126 Pa. St. 220.

[84] Boston Block Co. v. Buffington, 39 Minn. 385; Kohn v. Tedford, 46 Minn. 146; Stevens v. Ludlum, 46 Minn. 160.

[85] Bennett v. Morton, 46 Minn. 113.

and that of Duluth.[86] By general act such courts are now established in most of the cities of the state. Orders of court commissioners ordinarily cannot be appealed to the supreme court. They are reviewable by the district court.[87]

244. Appeals from Judgments.

The first subdivision of section 6140, Gen. St. 1894, provides: "First. From a judgment in an action commenced in the district court, or brought there from another court, from any judgment rendered in such court, and, upon the appeal from such judgment, the court may review any intermediate order involving the merits, or necessarily affecting the judgment." Upon an appeal from the judgment, the appellate court may review an order refusing a new trial, or an order made before judgment

[86] Guiterman v. Sharvey, 46 Minn. 183. See Laws 1895, c. 229, as amended by Laws 1899, c. 102, establishing municipal court in cities having a population of less than 5,000. See, also, Laws 1899, cs. 127, 271. In villages of less than 2,000, Laws 1899, c. 289. As to methods of pleading and practice see Gen. St. 1894, §§ 1376, 1377, and Laws 1894, c. 143.

[87] Gere v. Weed, 3 Minn. 352 (Gil. 249); Pulver v. Grooves, 3 Minn. 359 (Gil. 252). But see State v. Lembke, 38 Minn. 278, where it was held that the decision of a court commission could only be reversed by the district court for error.

directing the delivery to the sheriff, and the sale of the property which is the subject matter of the action.[88] Irregularities in the settling of a case cannot be reviewed on an appeal from the judgment.[89]

An order refusing to postpone a trial seems to have been reviewed on appeal from the judgment on the question of abuse of discretion.[90] It would seem that this question should have been raised on an application for a new trial, under subdivision 1, as it certainly neither involved the merits nor necessarily affected the judgment. Where there has been an appeal from an order refusing a new trial, and the order affirmed, the questions involved in such appeal are res judicata on an appeal from the judgment. The fact that the appeal from the order was affirmed by default is not material;[91] so upon the affirmance of

[88] Mower v. Hanford, 6 Minn. 535 (Gil. 372).
[89] Bahnsen v. Gilbert, 55 Minn. 334.
[90] Lowenstein v. Creve, 50 Minn. 383.
[91] Schleuder v. Corey, 30 Minn. 501; Adamson v. Sundby, 51 Minn. 460. "It is well settled that where, upon an appeal from an order denying a motion for a new trial, the order is affirmed, all questions that might have been raised on that appeal are res adjudicata, and will not be considered on an appeal from the judgment entered upon the verdict or findings." Tillery v. Wolverton, 54 Minn. 75; Schleuder v. Corey, 30 Minn. 501; Adamson v. Sundby, 51 Minn. 460.

an order for failure to serve paper book and brief, the matter involved in the order is res adjudicata, and cannot be presented again on an appeal from the judgment,[92] but a mere dismissal of the appeal from the order denying the new trial does not have any such result.[93]

"The judgment is the conclusion of the law upon the facts found, and upon an appeal from it, where there is no settled case or bill of exceptions, only the conclusions of law necessarily embraced in the judgment can be reviewed on the ground that they are not supported by the facts found by the court." [94]

245. Appeals from Default Judgments.

An appeal may be taken from a judgment entered on default of appearance and answer. A defendant makes no admissions by suffering a default against insufficient allegations in the complaint.[95] If the default judgment is not justified by the complaint and its prayer for relief, the error may be reviewed and corrected on appeal; but where the objection is

[92] Maxwell v. Schwarz, 55 Minn. 414, following Schleuder v. Corey, 30 Minn. 501.

[93] Adamson v. Sundby, 51 Minn. 460.

[94] Wheadon v. Mead, 71 Minn. 322; McLaughlin v. Nicholson, 70 Minn. 71.

[95] Doud v. Duluth Milling Co., 55 Minn. 53.

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 fairly inferable by any reasonable intendment from what is alleged, the judgment should be sustained. "It has repeatedly been held that a judgment by default could not stand where the declaration or complaint stated no cause of action (1 Black, Judgm. 84, and cases cited), and would be reversed on appeal, especially in states where an objection to a defective complaint is not waived by a failure to demur, as is the case in this jurisdiction. Gen. St. 1894, § 5235. This proposition has not been fully indorsed by this court, for in Smith v. Gennett, 15 Minn. 59 (Gil. 81), it was said that on appeal from a judgment entered in district court on defendant's default, an objection interposed in this court for the first time that the judgment is erroneous because the complaint failed to state a cause of action should not be favored."[96] Where, on motion for judgment in the court below, the order is made on default, on appeal from the judgment will not avail until an application for relief has first been made to the lower court.[97]

[96] Northern Trust Co. v. Markell, 61 Minn. 271.
[97] Gederholm v. Davies, 59 Minn. 1.

246. In What Proceedings Appeals may be Taken.

We have a few cases in which the court has determined what is meant by a civil action as used in this section. Section 6140 is merely a specification in detail limiting the more general language of section 6132, and itself limited by the scope of the first.[98] A judgment in a special proceeding is clearly not included in the judgments made appealable by this chapter, unless under subdivision 6. The only special proceeding matters that can be appealed are those specifically described in subdivision 6, § 6140;[99] but a final order in a special proceeding is appealable.[100]

Where appeal in judicial proceedings will not lie full relief can always be had by the writ of certiorari, which exists in its fullest form in

[98] McNamara v. Railway Co., 12 Minn. 388 (Gil. 269); In re Wilson, 32 Minn. 145; Christlieb v. Hennepin County, 41 Minn. 142; Moede v. County Attorney Stearns County, 43 Minn. 312; State v. St. Paul, 34 Minn. 250.

[99] McNamara v. Railway Co., 12 Minn. 388 (Gil. 269); Conter v. Railroad Co., 24 Minn. 313; Minnesota Cent. R. Co. v. McNamara, 13 Minn. 508 (Gil. 468); Gurney v. City of St. Paul, 36 Minn. 163.

[100] Minnesota Val. R. Co. v. Doran, 15 Minn. 230 (Gil. 179); Warren v. Railway Co., 18 Minn. 384 (Gil. 345); Moede v. County Attorney Stearns Co., 43 Minn. 312.

this state.[101] But proceedings must, for this purpose, be judicial or quasi judicial in their nature.[102] A tax proceeding under Gen. St. 1894, § 1579,[103] comes with the provisions of this section.[104] An action for divorce is a civil action, within this section.[104] A judgment rendered by a district court having no jurisdiction may nevertheless be appealable and reversible on that very ground.[105] It was at one time held that no appeal would lie from a judgment of the district court to review errors occurring during the trial of an appeal to that court from an award of damages made by commissioners to take property in condemnation proceedings.* But the doctrines advanced in the cases of McNamara v. Railway Co. and Conter v. Railway Co., have been somewhat modified and such proceedings are now, for purposes of appeal, treated as actions commenced in the district court.[106]

[101] Minnesota Cent. R. Co. v. McNamara, 13 Minn. 508 (Gil. 468); In re Wilson, 32 Minn. 145.

[102] Lamont v. Dodge County, 39 Minn. 385; In re Wilson, supra.

[103] Chisago County v. Railroad Co., 27 Minn. 109.

[104] Wagner v. Wagner, 34 Minn. 441.

[105] Railway Transfer Co. v. Railway Commissioner, 39 Minn. 231.

* Conter v. Railway Co., 24 Minn. 313.

[106] Witt v. St. Paul & N. P. Ry. Co., 35 Minn. 404.

The line between proceedings for contempt, which can be revised on certiorari, and those reviewable on appeal, has been pointed out clearly by our supreme court.[107] Apparently the present status of the matter in our courts is that of a tendency to allow an appeal (1) in all civil actions, and (2) in all matters authorized by statute to be proceeded in in the same manner as civil actions.

Judgments in tax proceedings cannot be taken to the supreme court by appeal.[108] The only statutory mode of reviewing a tax judgment, real or personal, in the proceedings on which it is based, is that prescribed by Gen. St. 1894, § 1589.[109] The proceedings are removable by certiorari (the statute having provided for removal by certificate) if the certificate is refused.[110] And in qui tam actions, though the penalty is recoverable by civil action, and is all to go to complainant, no appeal

[107] State v. Leftwich, 41 Minn. 42. Cf. Bapke v. Bapke, 30 Minn. 260.

[108] State v. Jones, 24 Minn. 86; Washington County v. German-American Bank, 28 Minn. 360.

[109] State v. Faribault Water Works Co., 65 Minn. 345. No motion to dismiss was made in State v. Rand, 39 Minn. 502, and the court overlooked the fact that the judgment was not appealable.

[110] Brown County v. Railway Co., 38 Minn. 397. Mandamus will not lie to compel the judge to certify the case.

lies by complaint under the constitutional provision.[111]

247. Of Appealable Judgments.

What is a judgment? And what is merely an order? In ordinary cases, it is not very difficult to determine what is a judgment; but in special proceedings of one kind and another, and special actions, many difficult questions arise. Thus, in cases of mortgage foreclosure, we have the judgment of sale, which, according to the opinion of Hicks, Young, and Smith, J.J., in Hennepin county, does not ripen into a judgment till the sale and decree of confirmation (but contra, Lochren and Hooker, J.J.), the decree of confirmation, judgment for deficiency, and the final decree at the expiration of the period for redemption. Which of these is appealable?

The judgment of sale determines all the issues in the case; and it would seem the better opinion that it is appealable as soon as entered, and does not await the order of confirmation for its perfection.[111*] In the United

[111] Article 1, § 7; Kennedy v. Raught, 6 Minn. 235 (Gil. 155).

[111*] Dodge v. Allis, 27 Minn. 376, 381. But see Thompson v. Dale, 58 Minn. 365, where it is held that judgment cannot be docketed until after sale.

States equity practice it is deemed a final judgment, so as to be appealable.[112]

And apparently such a judgment is appealable under our statute, and it is only by appeal therefrom that a review of this judgment can be had. Appeal may be taken from the final judgment, determining that the period of redemption has expired without redemption, but the only questions determinable on such an appeal are those involved in the inquiry, has the allotted period for redemption expired?[113] This final decree is a judgment, and not an order, and is appealable within six months after entry as such.[114] Under our former statute, regulating the foreclosure of mortgages, the same doctrines obtained as to appeals from the different decrees.[115]

On the other hand, in partition proceedings, where there is first a judgment that partition be had, then a partition thereunder by referees, and then a second and final judgment, establishing and making effectual the partition by the referees, the final judgment of confirmation is the proper one to appeal from, and

[112] Forgay v. Conrad, 6 How. 203; Whiting v. Bank of U. S., 13 Pet. 15; Bronson v. Railroad Co., 2 Black, 524.

[113] Dodge v. Allis, 27 Minn. 376.

[114] Dodge v. Allis, 27 Minn. 378, 381.

[115] Thompson v. Bickford, 19 Minn. 17 (Gil. 1).

an appeal therefrom brings up all intermediate questions.[116]

The principle of the distinction is this: In each case, the judgment to be appealed from, to bring up the merits of the controversy, is the one which awards the relief sought. In the proceedings for partition, the partition, which is the relief sought, is made only by the final judgment; while in the foreclosure case, the foreclosure, which is the relief sought, is made by the judgment of sale, and the decree of no redemption is substantially an application by a stranger to the record, the purchaser at the foreclosure sale, merely for the purpose of his benefit, and, after all the relief asked by the plaintiff has been fully obtained.[117]

In an early case, a judgment was entered adjudging simply that the defendant's demurrer to the complaint be overruled, with costs to be taxed. No reference was made to the relief sought. This was held not to be a judgment from which an appeal would lie, being neither interlocutory nor final.[118]

The order of a probate court admitting a will to probate is a judgment, within this section, and an appeal lies to the supreme court

[116] Dobberstein v. Murphy, 44 Minn. 526.
[117] Dobberstein v. Murphy, 44 Minn. 526, 529.
[118] Hawke v. Deuel, 2 Minn. 58 (Gil. 46).

from a judgment of the district court affirming such order.[119]

In suits for an accounting, the judgment for an accounting is an appealable judgment, apparently. without proceeding to take the accounting. Under the special provisions of the charter of Minneapolis, allowing an appeal to the district court of Hennepin county from an assessment of damages for the taking of land for street purposes, no appeal or other removal to the supreme court is allowed.[120]

If the district court has acquired no jurisdiction of the person, and the objection is properly made there by special appearance and motion to vacate the service, defendant may have this question reviewed by appeal from the judgment, and by appealing he does not waive the error.[121]

248. Of Appealable Orders.

Before considering the various subdivisions of orders which are appealable under this sec-

[119] In re Penniman, 20 Minn. 245 (Gil. 220).

[120] Jones v. City of Minneapolis, 20 Minn. 491 (Gil. 444). Cf. County of Brown v. Winona & St. P. Land Co., 38 Minn. 397.

[121] State v. District Court, 26 Minn. 233. There being an adequate remedy by appeal, prohibition is not the proper remedy.

tion, we may consider some general doctrines applicable to all orders.

249. General Limitations.

1. Consent orders and pro forma orders, and those that have been acceded to like similar judgments, will not be reviewed on appeal. There must be a real decision on a real controversy.[122] And, in general, the supreme court is averse to passing on points not raised below, especially if they might have been cured there by amendment or otherwise.[123] An order, as well as a judgment, may have severable parts.[124] Following out the above doctrine, that the order appealed from must have been considered by the district court, we find that ex parte orders are not appealable.[125] These cases do not proceed on this ground alone,

[122] Babcock v. Banning, 3 Minn. 191 (Gil. 123); State v. Sawyer, 43 Minn. 202; Colvill v. Langdon, 22 Minn. 565; Johnson v. Howard, 25 Minn. 558; Lamprey v. Howard, 25 Minn. 558; Dols v. Baunhoefer, 28 Minn. 387; Thompson v. Haselton, 34 Minn. 12; Daniels v. Willis, 7 Minn. 374 (Gil. 295).

[123] White v. Western Assur. Co., 52 Minn. 352; Keyes v. Clare, 40 Minn. 84; Bond v. Corbett, 2 Minn. 248 (Gil. 209); Johnson v. Sherwood, 45 Minn. 9; Cochrane v. Quackenbush, 29 Minn. 376.

[124] Hall v. McCormick, 31 Minn. 280.

[125] Hoffman v. Mann, 11 Minn. 364 (Gil. 262); Schurmeier v. Ry. Co., 12 Minn. 351 (Gil. 228).

but also on an old provision of statute no longer in force, allowing no appeal from an order made by a judge at chambers. But ex parte orders seem still to be unappealable.[126]

2. Orders made without jurisdiction in the district court to make them may nevertheless be appealable and reversible on that ground.[127]

3. An order which refuses to vacate, or vacates, another order, if the original order is not appealable, does not, by reason of that fact, become an appealable order.[128] An ex parte order granting an injunction is not appealable, as an application must first be made to the court which granted the order. But an order vacating or refusing to vacate the ex parte order would seem to be appealable, under subdivision 2 of the appeal section.[129]

[126] State v. District Court, 52 Minn. 283.

[127] Ry. &c. Co. v. Commissioner, 39 Minn. 231; M. & St. L. Ry. Co. v. Commissioner, 44 Minn. 336.

[128] Lockwood v. Rock, 46 Minn. 73; Brown v. Minnesota Thr. Manuf'g Co., 44 Minn. 322; Shepard v. Pettit, 30 Minn. 119.

[129] State v. District Court, 52 Minn. 283. The opinion reviews the cases. Mitchell, J., concurred in the result, but said that, while his own view was that an ex parte order granting an injunction was not appealable, "yet I think the logic of the opinion by the court in State v. Duluth Street

4. No appeal lies from a mere refusal to entertain a motion,[130] unless the refusal is, in effect, an adverse decision on the motion, made upon legal grounds of objection to the motion.[131]

5. An order made by a court commissioner, which he has no power to make, is a nullity, and cannot be appealed from.[132]

6. No orders are appealable except those specified in this statute, or in other special statutes.[133] As we have seen, subdivisions 2 to 5, inclusive, relate to orders in civil actions only.[134]

R. Co., 47 Minn. 369, would lead to the conclusion that it is appealable, and that such appeal, with a stay, will suspend the operation of the order."

[130] Mayall v. Burke, 10 Minn. 285 (Gil. 224).

[131] Ashton v. Thompson, 28 Minn. 330.

[132] Pulver v. Grooves, 3 Minn. 359 (Gil. 252); Gere v. Weed, 3 Minn. 352 (Gil. 249); Prignitz v. Fischer, 4 Minn. 366 (Gil. 275). But see State v. Bechdel, 38 Minn. 278. An appeal will not lie from an order dissolving an attachment, after the attachment has been released by executing and filing the statutory bond for that purpose. Thomas v. Craig, 60 Minn. 501.

[133] St. Anthony &c. Co. v. King &c. Co., 23 Minn. 186.

[134] But see Chisago County v. R. R. Co., 27 Minn. 109; Aitkin County v. Morrison, 25 Minn. 295.

250. Orders under Laws 1895, c. 320.

Where, under Laws 1895, c. 320, either party has moved for a directed verdict in his favor, which was denied, and thereafter moves for a judgment 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 that part which denies his motion for judgment.[135] Where the motion is for judgment notwithstanding the verdict, and not in the alternative, and it is de-

[135] Kalz v. Winona & St. P. R. Co. (Minn.; May, 1899) 79 N. W. 310.

In Oelschlegel v. Railway Co. (Minn.) 73 N. W. 631, the motion was upon a settled case, to set aside the verdict, and for judgment notwithstanding the verdict, and it was held that no appeal would lie from an order denying the motion.

Where a party appeals from an order for judgment notwithstanding the verdict, made upon a simple notice of motion for a new trial, on the ground that the verdict is not justified by the evidence, and is contrary to law, the order will first be modified, and the appeal will then be considered as from an order granting a new trial on the ground that the evidence did not justify the verdict. Crane v. Knauff, 65 Minn. 447; Kernan v. St. Paul &c. R. Co., 64 Minn. 312.

nied, the moving party is not, as of right, entitled to a new trial.[186]

In St. Anthony Falls Bank v. Graham [187] the court said: "An order granting or denying a motion for judgment notwithstanding the verdict, made pursuant to Laws 1895, c. 320, is simply an order for judgment, or one refusing a judgment, and it is therefore, standing alone, not appealable.[188] Such an order can only be reviewed by appeal from a judgment or from an order granting or denying a motion for a new trial, except that, when the motion for judgment is blended with a motion for a new trial, pursuant to Laws 1895,, c. 320, on an appeal from the order disposing of such

[186] Cruikshank v. St. Paul F. & M. Ins Co. (Minn.) 77 N. W. 958.

[187] 67 Minn. 318; Oelschlegel v. Railway Co. (Minn.) 73 N. W. 631. See Eckman v. Lauer, 67 Minn. 221, and Crane v. Knauff, 65 Minn. 447. In Savings Bank v. St. Paul Plow Co. (Minn.) 78 N. W. 873, it was held that an order denying a motion to change the conclusions of law, and for judgment notwithstanding such conclusions, is not appealable. Citing Shepard v. Pratt, 30 Minn. 119. The rule is not changed by Laws 1895, c. 320, which evidently does not apply to court cases.

[188] Ames v. Mississippi B. Co., 8 Minn. 467 (Gil. 417); McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Rogers v. Holyoke, 14 Minn. 514 (Gil. 387; Croft v. Miller, 26 Minn. 317; State v. Bechdel, 38 Minn. 278.

motion, the action of the trial court in directing or refusing judgment, regardless of the verdict may be reviewed." [139] But where the trial court grants the alternative request for a new trial, and denies the balance of the motion, the party cannot, after securing a new trial, appeal from that part of the order denying his motion for judgment, leaving the order for a new trial in full force. The effect of the unconditional order in this case for a new trial is to entirely set aside the trial with all its evidence and proceedings, and the case then stands for trial precisely as if no trial had ever been had.[140]

251. Construction of this Statute.

In a recent case, at the close of the evidence, the defendant moved the court to direct a verdict in his favor, which was denied, and the case submitted to the jury, and a verdict returned in favor of the plaintiff. Thereupon the defendant made a motion, not in the alter-

[139] Kernan v. St. Paul City R. Co., 64 Minn. 312.
[140] Hempstad v. Hall, 64 Minn. 136.
Laws 1895, c. 320, provides that, on appeal from an order granting or denying a motion for a new trial, or by either party to direct a verdict, the supreme court may order judgment in favor of the party who moved for such verdict, if it appear from the testimony that he was entitled thereto.

native for judgment notwithstanding the verstanding the verdict, nor was he entitled to a new trial, but merely for judgment notwithstanding the verdict. The motion was denied, and the defendant appealed from the judgment entered upon the verdict. It was held that, as he was not entitled to judgment notwithstanding the verdict, he was not entitled to a new trial on the ground of the insufficiency of the evidence. Mr. Justice Mitchell said: "Originally, at common law, judgment notwithstanding the verdict could only be granted in favor of the plaintiff, the remedy in favor of the defendant being to have the judgment arrested; but, either by statute, or by judicial relaxation of this rule, judgment notwithstanding the verdict became quite generally allowed in favor of either party. But in either case, the motion was based upon the record alone, and granting or denying it depended upon the pleadings. The rendition of judgment notwithstanding the verdict was discretionary with the court. It would only be granted when it was clear that the cause of action or the defense put upon the record did not, in point of substance, constitute a legal cause of action or defense. It was never granted on account of any technical defect in the pleadings, but, in such case, the court would order a repleader. By enacting Gen. Laws 1895, c.

320, the legislature was not creating a new remedy, but merely extended, as has been done in many other states, the common-law remedy to cases where, upon the evidence, either party was clearly entitled to judgment. In thus extending the remedy, it must be presumed that the legislature intended it to be governed by the same rule which applies when it is granted upon the record alone; that is, that it should not be granted unless it clearly appeared from the whole 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. This court has acted on this construction of the statute, and refused to order judgment, even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial. This is such a case." [141]

252. Illustrations of Nonappealable Orders.

Without attempting to state the reasons given for the decisions, attention is called to the following orders, which have been held not

[141] Cruikshank v. St. Paul Fire & Marine Ins. Co., (Minn.) 77 N. W. 958.

appealable under either subdivision of section 6140:

An order denying a motion for additional findings;[142] granting an application of a receiver for leave to commence suit to enforce stockholders' liability, under Laws 1895, c. 145;[143] appointing a committee in proceedings to condemn lands for the purpose of enlarging a cemetery, under Gen. St. 1894, § 3096;[144] requiring that a bill of particulars be made more specific;[145] denying a motion to dismiss an action;[146] denying a motion for a new trial, made by the district court upon an appeal from the judgment of a justice's court, upon questions of law alone;[147] a decision or

[142] Rogers v. Hedemark, 70 Minn. 441.

[143] Bank of Minnesota v. Anderson, 70 Minn. 414.

[144] Forest Cemetery Ass'n v. Constans, 70 Minn. 436.

[145] Van Zandt v. S. H. Wood Produce Co., 54 Minn. 202. "Perhaps the decision in Pugh v. Winona & St. P. R. Co., 29 Minn. 390, may lend some support to the contrary conclusion, but we do not think that the rule of appealability, as applied to that case, should be further extended."

[146] Pillsbury v. Foley, 61 Minn. 434.

[147] St. Cloud Common Council v. Karels, 55 Minn. 155; an order denying a motion to vacate an order sustaining a demurrer, and for a "new trial" on the demurrer is not an order refusing a new trial; Dodge v. Bell, 37 Minn. 382.

ruling of the court that a party may be allowed to amend his pleadings, no order having been made or entered.[148]

The court said: "When an amendment is allowed and made in the trial, the allowance and amendment are a part of the trial, and, being made to appear by the settled case or bill of exceptions, may be reviewed on an appeal from the judgment, or from an order refusing or granting a new trial, and they can be reviewed in no other way, any more than can any other ruling or decision made in the course of a trial. In no other case can we review a ruling or decision of a court not entered in an order. There can be no appeal until then."

An order of the district court denying a motion to dismiss an appeal from the probate court is not appealable. "It does not involve the merits of the action, or any part thereof. It is not an order which in effect determines the case, and prevents a judgment from which an appeal may be taken, or a final order affecting a substantial right in a special proceeding" [149]

[148] Macauley v. Ryan, 55 Minn. 507.

[149] Kelley v. Hopkins, 72 Minn. 258; McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Gurney v. St. Paul, 36 Minn. 163; Exley v. Berryhill, 36 Minn.

An order denying the plaintiff's motion in the district court for judgment upon the summons, pleadings, findings of fact, decision of the supreme court upon appeal from a judgment in defendant's favor, reversing the same, upon the ground that, on such findings, plaintiff was entitled to judgment and remittitur, is not appealable under any of the subdivisions of Gen. St. 1894, § 6140.[150]

An order directing a compulsory reference of an action is not appealable.[151] The court said: "Such an order is analogous to an order of the court refusing a trial by jury because it is of the opinion that the case is one for trial by the court. In neither case can the trial before the court or referee be suspended,

117; Minneapolis Trust Co. v. Menage, 66 Minn. 447.

[150] Fulton v. Town of Andrea, 72 Minn. 99. The court said: "We can concede that, upon the findings of fact, the plaintiffs were entitled to have judgment rendered in their favor, and could have compelled the entry of judgment, unless the court below, upon proper application, had seen fit to grant a new trial; but this does not render the order appealable. Its appealability is not determined by the statute. This question was not raised in Babcock v. Murray, 61 Minn. 408, as it might have been."

[151] Bond v. Welcome, 61 Minn. 43, distinguishing the case of St. Paul &c. v. Gardner, 19 Minn. 132 (Gil. 99).

and an appeal taken. Such orders are not appealable, but are reviewable (a distinction sometimes overlooked) on appeal from an order denying a motion for a new trial, or from the judgment. What was said to the contrary in the case referred to (St. Paul &c. R. Co. v. Gardner, 19 Minn. 99 [Gil 105]), is obiter dictum. For the appeal in that case was from an order denying a new trial; and the question was not whether an order of compulsory reference was appealable, but whether it was reviewable on the appeal from the order denying a motion for a new trial, and it was held that it could be so reviewed. The appeal in this case is not authorized by Gen. St. 1894, § 6140, subsec. 3. We are not unmindful of the fact that in practice, with the seeming approval of this court, the provision of this statute has been made a veritable stalking horse, behind which appeals from all kinds of intermediate orders have crept into this court, resulting in vexatious delays in the trial of the actions on the merits, and in adding to the burdens of the court. But by no fair construction of this statute can it be made to authorize this appeal, for the order relates, not to the merits of the action, but to the procedure upon its trial; that is, whether it shall be tried by a jury or the court by its referee." An order denying a motion to amend the trial

court's conclusions of law is not appealable.[152]

An order denying a motion to set aside the report of commissioners in condemnation proceedings is not appealable. Whether an order appointing them is appealable, quaere.[153] An order was made vacating a judgment. Subsequently, the plaintiff obtained an order to show cause, and the previous order was set aside, and an order made to the effect that defendant's motion to vacate the judgment stand "open and for trial, to be heard before this court upon due notice by either party." The latter order was held not appealable.[154]

No appeal lies from an order refusing to change the place of trial of an action.[155]

253. Illustrations of Appealable Orders.

The following have been held to be appealable orders: Dismissing a motion for a new trial at the time it came on for hearing, being,

[152] Wheadon v. Mead, 71 Minn. 322.

[153] Fletcher v. Chicago, St. P., M. & O. R. Co., 67 Minn. 339.

[154] State v. Crosley Park Land Co., 63 Minn. 205. In Pugh v. Winona, 29 Minn. 390, an order denying a motion to make a complaint more definite and certain was held appealable, but the case was reversed by American Book Co. v. Kingdom Pub. Co., 71 Minn. 363.

[155] Allis v. White, 59 Minn. 97, following Carpenter v. Comfort, 22 Minn. 539.

for the purposes of appeal, an order denying a new trial;[156] allowing creditors of insolvent to share without filing releases.[157] An order vacating a previous order setting aside a judgment is equivalent to an order refusing to vacate a judgment, and is appealable.[158] An order denying the petition of a creditor in insolvency proceedings to be permitted to file his claim for allowance with the assignee, after the expiration of the time limited, is appealable, but an order granting such petition is not appealable, as it can be reviewed on appeal from the judgment establishing the creditor's claim.[159]

254. Appealable Order—Meaning of "New Trial."

Where a cause has been called for trial on issues of fact, any order or ruling thereafter made, such as ordering judgment on the pleadings, which it is claimed prevented the party from having a fair trial on such issues, constitutes a ground for a new trial, and an order granting or refusing such motion is ap-

[156] McCord v. Knowlton (Minn.; May, 1899) 79 N. W. 397.

[157] Ekberg v. Schloss, 62 Minn. 427, citing In re Harrison, 46 Minn. 331.

[158] Piper v. Johnson, 12 Minn. 60 (Gil. 27).

[159] Richter v. Merchants' Nat. Bank of St. Paul, 65 Minn. 237.

pealable. Where, at the trial, the court, on motion of the plaintiff, ordered judgment in his favor on the pleadings, on the ground that the complaint did not state a cause of action, and afterwards denied a motion for a new trial, the court said: "The defendant upon the authority of Dodge v. Bell, 37 Minn. 382, moves that the appeal be dismissed on the ground that the order is not appealable. The order appealed from in Dodge v. Bell was an order denying a motion to vacate an order sustaining a demurrer, and it was there held that a 'new trial,' where used in the statute, means, as at common law, a retrial of issues of fact. But it has always been held by this court that, when a cause is called for the trial of issues of fact, any order or ruling thereafter made by the court, which it is claimed prevented a party from having a fair trial of those issues, such as dismissing the action, or ordering judgment on the pleadings, constitutes a good ground for a motion for a new trial. Whether this rule is strictly logical or not, it is at least a very convenient one, and has been too long recognized by the court as good practice to be now changed."[160]

[160] Thorp v. Lorenz, 34 Minn. 350; Dunham v. Byrnes, 36 Minn. 106.

255. Order Dismising Appeal from Justice Courts.

It was formerly held that an order dismissing an appeal from a justice court for want of jurisdiction apparent on the face of the return was within the terms of Gen. St. 1894, § 6140, subd. 5, and appealable.[161] But Laws 1895, c. 24, changed the rule, and now the appeal can only be taken from the judgment entered in the district court.[162]

256. Orders under Subdivision 2, Section 6140.

The second subdivision of the statute provides that an appeal may be taken: "Second. From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve, an injunction, or an order vacating or sustaining an attachment."

In passing we may again call attention to the fact that appeals from the orders specified in subdivisions 2, 3, 4, and 5 of this section are allowable only when the order is made in a civil action, and not when it is made in a special proceeding.[163] Of course, owing to the

[161] Ross v. Evans, 30 Minn. 206.

[162] Graham v. Conrad, 66 Minn. 470

[163] McNamara v. Ry. Co., 12 Minn. 388 (Gil. 269); Minnesota Val. R. Co. v. Doran, 15 Minn. 230 (Gil. 179); Warren v. Ry. Co., 18 Minn. 384 (Gil. 345); Conter v. R. R. Co., 24 Minn. 313.

nature of an exception, as defined by statute, it is not necessary to take an exception to an appealable order to enable one to review it on appeal from the order. The point has, however, been raised and adjudicated.[164]

An order refusing to appoint a receiver is appealable, as an order refusing a provisional remedy, under this subdivision.[165] An order appointing a receiver in foreclosure suit is appealable, as it is an order granting a provisional remedy, within Gen. St. 1894, § 6140, subd. 2.[166] An order dissolving or modifying an injunction, and in part suspending its operation, is in effect one dissolving the injunction pro tanto, and is appealable under this subdivision.[167] An order discharging an attachment upon defendant's giving bond, under Gen. St. 1894, § 5299, is appealable under this subdivision.[168]

257. Orders under Subdivision 3, Section 6140.

By the third subdivision of the statute an

[164] Ely v. Titus, 14 Minn. 125 (Gil. 93); Harlan v. Ry. Co., 31 Minn. 427.

[165] Grant v. Webb, 21 Minn. 39. Cf. Folsom v. Evans, 5 Minn. 418 (Gil. 338).

[166] State v. Egan, 62 Minn. 280.

[167] Weaver v. Mississippi & Rum River Boom Co., 30 Minn. 477.

[168] Gale v. Seifert, 39 Minn. 171.

appeal may be taken: "Third. From an order involving the merits of the action, or some part thereof."

Few clauses of the statute have been before the court as frequently as this one. The attempt has apparently been to construe the language in such a way as to prevent burdensome appeals from mere interlocutory steps in the proceeding, and at the same time to allow full consideration of any order in an action involving the ultimate rights of the parties, not otherwise readily reviewable. A fundamental distinction was promptly drawn by the courts by the determination that the term "merits of the action," as here used means "the strict legal rights of the parties," as contradistinguished from "those mere questions of the practice which every court regulated for itself, and from all matters which depend upon the discretion or favor of the court." [169] "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 in-

[169] Holmes v. Campbell, 13 Minn. 66, 68 (Gil. 58); Piper v. Johnston, 12 Minn. 60 (Gil. 27).

An order refusing to strike out a settled case is appealable. Baxter v. Coughlan (Minn.) June 26, 1900. See note a, p. 447.

volve the merits or effect a substantial right." [170]

Under this principle, it is held that an order striking out a portion or the whole of a pleading is appealable, while an order refusing to strike out is not, whether as sham, frivolous, double, or redundant.[171]

Formerly it was held that an order vacating a judgment on the ground of erroneous practice, which alone permitted the judgment, did not involve the merits, and was not appealable, as it merely determined a question of practice.[172] But more recently these cases have

[170] McMahon v. Davidson, 12 Minn. 357 (Gil. 232); National Bank v. Cargill, 39 Minn. 477.

[171] Vermilye v. Vermilye, 32 Minn. 499; Starbuck v. Dunklee, 10 Minn. 168 (Gil. 136); Wolf v. Banning, 3 Minn. 202 (Gil. 133); Kingsley v. Gilman, 12 Minn. 515 (Gil. 425); Brisbin v. American Exp. Co., 15 Minn. 43 (Gil. 25); Madden v. M. & St. L. Ry. Co., 30 Minn. 453; Harlem v. Ry. Co., 31 Minn. 427. Orders refusing to strike out a pleading not appealable: National Bank v. Cargill, 39 Minn. 477; Rice v. First Div. &c. Ry. Co., 24 Minn. 447; Exley v. Berryhill, 36 Minn. 117.

Van Loon v. Griffin, 34 Minn. 444, seems to have been an oversight on the part of the court, and is not to be considered as authority for the proposition that such an order is appealable.

[172] Westervelt v. King, 4 Minn. 320 (Gil. 236); Myrick v. Pierce, 5 Minn. 65 (Gil. 49). Cf., too, Prince v. Heenan, 5 Minn. 347 (Gil. 279).

been overruled, and it is now held that a final judgment determines the rights of the parties to the action, and any order which vacates or modifies it necessarily affects the legal rights of the party in whose favor it is, and hence involves the merits of the action.[173] Some of the early decisions do not properly distinguish between appealability and reversibleness of an order. An order may be appealable, though reversible only where there has been an abuse of discretion. In a number of cases this distinction was overlooked.[174]

An order requiring or refusing to require a pleading to be made more definite and certain is accordingly appealable, as it involves the merits, but the order is reversible only for abuse of discretion.[175] And an order permit-

[173] People's Ice Co. v. Schlenker, 50 Minn. 1; County of Chisago v. R. R. Co., 27 Minn. 109.

[174] Brisbin v. American Exp. Co., 15 Minn. 43 (Gil. 25). Here the appeal was dismissed, and the proper remedy was, according to the later cases, affirmance of the order. Barker v. Keith, 11 Minn. 65, dicta on page 69 (Gil. 37); Jorgensen v. Boehmer, 9 Minn. 181 (Gil. 166). In some later cases, these are referred to as authorities for reversing, and not on appealable orders. Reagan v. Madden, 17 Minn. 402 (Gil. 378).

[175] Pugh v. R. R. Co., 29 Minn. 390; Madden v. Ry. Co., 30 Minn. 453; Lehnertz v. Ry. Co., 31 Minn. 219; Lee v. Ry. Co., 34 Minn. 225; Todd v.

ting a party to amend, or refusing leave to amend, his pleading, is not appealable. They are intermediate orders.[176] An order made after judgment in a divorce case, allowing money for counsel fees, is appealable, as determining the absolute legal rights of the parties.[177]

An order vacating a judgment on default and granting the defendant leave to answer, is appealable as "an order involving the merits of the action." [178]

Under this principle, that the order must put an end to the matter, it has become thoroughly established that an order denying a motion for judgment on the pleadings is not appealable. Nor are other like orders. They reserve the matter for further determination.[179]

Ry. Co., 37 Minn. 358; Orth v. Ry. Co., 43 Minn. 208; Fraker v. Ry. Co., 30 Minn. 103.

[176] Winona v. Minn. &c., 25 Minn. 328. S. C. 27 Minn. 423, and 29 Minn. 68, 76; Fowler v. Atkinson, 5 Minn. 505 (Gil. 399). An order made before the trial, allowing an amendment to a pleading cannot be reviewed on an appeal from an order refusing a new trial. It is an intermediate order reviewable on appeal from the judgment. Ib.

[177] Wagner v. Wagner, 34 Minn. 441.

[178] Peoples Ice Co. v. Schlenker, 50 Minn. 1.

[179] McMahon v. Davidson, 12 Minn. 357 (Gil. 232); National Bank v. Cargill, 39 Minn. 477, 478; Minnesota Cent. R. Co. v. Peterson, 31 Minn. 42;

258. Orders under Subdivision 3, Section 6140—Continued.

An order granting a motion for judgment or dismissal of the action on the pleadings is not appealable. It is not the final step. The judgment must be entered, and the appeal taken from the judgment. The appellate court may dismiss the appeal of its own motion.[180] No mere order for judgment is appealable.[181] No appeal lies from an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee. It does not involve the "merits of the action," as the effect was to leave the question involved still pending before the court, and undetermined. "The order made in this cause left the question of the sufficiency of the objections, as one of law or fact, or

Rebette v. Nathan, 22 Minn. 266; Gurney v. St. Paul, 36 Minn. 163.

[180] U. S. &c. Co. v. Ahrens, 50 Minn. 332; Lamb v. McCanna, 14 Minn. 513 (Gil. 385); Lockwood v. Bock, 46 Minn. 73; Croft v. Miller, 26 Minn. 317; Rogers v. Holyoke, 14 Minn. 514 (Gil. 387); Thorp v. Lorenz, 34 Minn. 350; Searles v. Thompson, 18 Minn. 316 (Gil. 285); Hodgins v. Heaney, 15 Minn. 185 (Gil. 142).

[181] State v. Bechdel, 38 Minn. 278; Johnson v. Ry. Co., 39 Minn. 30; Shepard v. Pettit, 30 Minn. 119: Von Glahn v. Sommer, 11 Minn. 203 (Gil. 132); Ryan v. Kranz, 25 Minn. 362; Croft v. Miller, 26 Minn. 317.

both, still pending beore the court. It was therefore not appealable." [182]

But an order discharging a garnishee is final. No judgment of discharge is entered thereon. The order of discharge is therefore appealable.[183] The only exception seems to be orders sustaining or overruling demurrers which are specially provided for by the next subdivision.[184] For a similar reason, orders made at the trial of a case, admitting or excluding evidence, are not appealable, although incidentally they may go far toward determining the controversy. Such orders, if excepted to, are reviewable on motion for new trial, or on appeal from the judgment.[185] Similarly, too, no merely provisional order is appealable under this subdivision.[186] Upon the

[182] Minneapolis Trust Co. v. Menage, 66 Minn. 447.

[183] McConnell v. Rakness, 41 Minn. 3. In Croft v. Miller, 26 Minn. 317, there was an order for judgment.

[184] Sons of Temperance v. Brown, 9 Minn. 151 (Gil. 141).

[185] Hulett v. Matteson, 12 Minn. 349 (Gil. 227); Lamb v. McCanna, 14 Minn. 513 (Gil. 385). In Minnesota Cent. R. Co. v. Peterson, 31 Minn. 42, it was held that an order denying a motion to dismiss an appeal from the award of commissioners in railway condemnation proceeding is not appealable. It is an intermediate order. See § 246.

[186] Sibley County v. Young, 21 Minn. 335.

principle that mere questions of practice do not involve the merits, it is held that an order refusing to set aside the complaint, where summons indicated another kind of action, is not appealable under this subdivision, or otherwise.[187] Similarly, orders changing or refusing to change the place of trial are not appealable hereunder, or otherwise.[188] For the same reasons, orders extending the time to do any act are not appealable.[189] And the order settling or refusing to settle a "case" or bill of exceptions is not an appealable order. The remedy is by mandamus.[190]

In a comparatively early case it was held in this state that an order refusing permission to intervene was not appealable where the would-be intervenor showed no interest in the subject matter of the controversy.[191] The reasoning of the court indicates that in this case the court fell into the old error of failing to distinguish between an appealable order, which obviously ought to be affirmed, and one which is not

[187] Board of Com'rs v. Young, 21 Minn. 335.

[188] Carpenter v. Comfort, 22 Minn. 539.

[189] Irvine v. Meyers, 6 Minn. 558 (Gil. 394).

[190] Richardson v. Rogers, 37 Minn. 461; State v. Cox, 26 Minn. 214; State v. MacDonald, 30 Minn. 98.

[191] Bennett v. Whitcomb, 25 Minn. 148.

appealable. This is also indicated by later cases, where such orders have been appealed from and considered, and sustained on appeal. It would seem that an order refusing permission to intervene is appealable, though this is open to question.[192]

This brings us to the question of motions to vacate or set aside judgments. We have already noticed two rulings, viz. that, where a judgment is vacated solely on a question of erroneous practice, the order is not appealable,[193] and that, where it is vacated as void, in a tax proceeding, it is appealable.[194] These orders are not appealable, if made in actions, under the sixth subdivision, for that was early held to relate only to orders in an action which are predicated upon the judgment, and not to orders relating to attacks on the judgment.[195] But it was subsequently held that an order refusing to set aside a tax judgment under Gen. St. 1894, § 1579, was made in an "action" and

[192] These cases come up in other forms: Lewis v. Harwood, 28 Minn. 428; Wohlwend v. J. I. Case & Co., 42 Minn. 500; Becker v. Northway, 44 Minn. 61.

[193] Westervelt v. King, 4 Minn. 320 (Gil. 236).

[194] Chisago County v. R. R. Co., 27 Minn. 109; Aitkin County v. Morrison, 25 Minn. 295.

[195] Westervelt v. King, 4 Minn. 320 (Gil. 236).

was therefore appealable under subdivision 6.* But these orders vacating or refusing to vacate a judgment in an action, properly come up under this subdivision. With the exception of some early cases, where the court fell into confusion over reversible and appealable cases, the holding seems to have been uniform that orders vacating or refusing to vacate a judgment are appealable.[196] In a large number of recent cases, appeals of this character have been considered without objection.[197] An order setting aside a stipula-

* Aitkin Co. v. Morrison, 25 Minn. 295; Chicago Co. v. St. Paul &c. R. Co., 27 Minn. 109; Washington Co. v. German-Am. Bank, 28 Minn. 360.

[196] Frankoviz v. Smith, 35 Minn. 278; Reagan v. Madden, 17 Minn. 402 (Gil. 378); Holmes v. Campbell, 13 Minn. 66 (Gil. 58); Aitkin County v. Morrison, 25 Minn. 295. The early cases referred to are Jorgensen v. Boehmer, 9 Minn. 181 (Gil. 166); Myrick v. Pierce, 5 Minn. 65 (Gil. 47); Groh v. Bassett, 7 Minn. 325 (Gil. 254); Merritt v. Putnam, 7 Minn. 493 (Gil. 399). See Barker v. Keith, 11 Minn. 65 (Gil. 37); Brisbin v. American Exp. Co., 15 Minn. 43 (Gil. 25).

[197] Swanstrom v. Marvin, 38 Minn. 359; Crosby v. Farmer, 39 Minn. 305; Godfrey v. Valentine, 39 Minn. 336; Bray v. St. Brandon, 39 Minn. 390; Welch v. Marks, 39 Minn. 481; Weymouth v. Gregg, 40 Minn. 45; Gray v. Hayes, 41 Minn. 12; Eisenmenger v. Murphy, 42 Minn. 84; Nye v. Swan, 42 Minn. 243; Feikert v. Wilson, 38 Minn. 341; Sturm v. School District, 45 Minn. 88.

tion for dismissal of the action is appealable under this subdivision, as an order involving the merits of the action.[198]

An order referring a case, where a jury is a matter of right, is an appealable order.[199]

259. Orders under Subdivision 4, Section 6140.

We come now to the fourth subdivision of this section: "Fourth. From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer."

By far the greatest number of appeals taken from orders come up under this subdivision. In almost all cases it is very easy to recognize what orders are included herein. However, a few special questions have been raised and determined. The motion for a new trial only lies after the trial of an issue of fact. There is no such thing contemplated by the statute as an order granting a new trial of an issue of law. Consequently, an order denying a motion to vacate an order sustaining a demurrer, and for a new trial of the demurrer, is not an order denying a new trial, and, as

[198] Rogers v. Greenwood, 14 Minn. 333 (Gil. 256); Bray v. Doheny, 39 Minn. 355; Bingham v. Winona County, 6 Minn. 136 (Gil. 82).

[199] Gardner v. Ry. Co., 19 Minn. 132 (Gil. 99).

we have already seen, it is not appealable as an order sustaining a demurrer.[200]

Appeals lie from orders granting or refusing new trials of issues of fact, whether the case was tried before judge and jury, or judge alone, or before a referee.[201] And this, although, in case of trials before the court, the findings of fact can be reconsidered on appeal from the judgment, without making a motion for a new trial.[202] Orders granting new trials in special proceedings are said to be not appealable under this subdivision.[203]

It has been held directly that an order refusing a new trial in a special proceeding is appealable, under the sixth subdivision, as an order which affects a substantial right, made in a special proceeding.[204] After an order had been made granting a new trial, a subsequent order was made modifying the order for a new trial, providing that certain depositions used on the first trial might be used on the second trial. This order was held not appealable, on

[200] Dodge v. Bell, 37 Minn. 382.

[201] Chittenden v. Bank, 27 Minn. 143.

[202] Ins. Co. v. Allis, 24 Minn. 75.

[203] McNamara v. Ry. Co., 12 Minn. 388 (Gil. 269). But see Ramsey County v. Stees, 27 Minn. 14; Witt v. St. Paul & N. P. R. Co., 35 Minn. 404.

[204] Minn. Valley R. Co. v. Doran, 15 Minn. 230 (Gil. 179).

the grounds (1) that it did not involve the merits; (2) that it was inoperative, as the depositions could have been used without the order.[205]

With regard to orders overruling or sustaining demurrers, there are a few decisions. The failure of a party demurring to appear at the hearing upon it in the court below does not prevent his being heard on the appeal from the order overruling the demurrer.[206] In New York it is held that the decision on a demurrer is a judgment, and must be entered as such before an appeal;[207] and, in a case in this state prior to the present appeal statute, the same doctrine was held.[208] But it is held that our present statute (the clause under consideration) alters this, and makes the order appealable, without any such entry of judgment.[209] In this case the court went so far as to say: "It is our opinion that this act allows an appeal from any order made upon a demurrer."[210]

[205] Chouteau v. Parker, 2 Minn. 118 (Gil. 95).

[206] Hall v. Williams, 13 Minn. 260 (Gil. 242).

[207] Lewis v. Acked, 8 How. Prac. 414; Bauman v. R. R. Co., 10 How. Prac. 218; Cook v. Pomeroy, 10 How. Prac. 221.

[208] Cummings v. Heard, 2 Minn. 34 (Gil. 25).

[209] Sons of Temperance v. Brown, 9 Minn. 151 (Gil. 141).

[210] Id.

In a recent case, the district court struck out a demurrer as frivolous, and judgment was ordered and entered as for want of an answer. Defendant appealed separately from the order striking out the demurrer, and from the judgment. The supreme court holding that two appeals were wholly uncalled for, and that such practice should not be encouraged, dismissed the appeal from the order while reversing the judgment.[211]

This would seem to indicate that an order striking out a demurrer as frivolous is appealable, under this subdivision. An order overruling a demurrer in a criminal case was once considered by the supreme court on appeal therefrom hereunder.[212] This seems to have been done inadvertently. No appeal lies under this statute in criminal cases. An order overruling a demurrer in a criminal case is not appealable.[213]

260. Orders under Subdivision 5, Section 6140.

"Fifth. From an order, which in effect determines the action, and prevents a judgment from which an appeal might be taken."

An order dismissing an action is not ap-

[211] Hatch v. Schusler, 46 Minn. 207.
[212] State v. Abrisch, 41 Minn. 41.
[213] State v. Abrisch, 42 Minn. 202.

pealable hereunder. It does not prevent a judgment. It is an order for a judgment of dismissal.[214] It was formerly held that an order dismissing an appeal to the district court from the judgment of a justice, for want of jurisdiction under the appeal papers, prevented a judgment, and was appealable under this subdivision.[215] But an order refusing to dismiss such an appeal is not appealable, either under this provision or the preceding one. It does not prevent a judgment.[216] And an order discharging a garnishee is, as we have seen, appealable. It prevents a judgment.[217]

In an early case an order was made vacating a judgment and after the expiration of the time to appeal from the judgment, a second order was made vacating the former order, and reinstating the judgment. The judgment could not be appealed, as the time therefor

[214] Jones v. Rahilly, 16 Minn. 177 (Gil. 155).

[215] Ross v. Evans, 30 Minn. 206. But see contra under Laws 1895, c. 24, § 255, supra. As to highway proceedings, Haven v. Orton, 37 Minn. 445; Anderson v. Meeker, 46 Minn. 237.

[216] Minn. &c. Co. v. Peterson, 31 Minn. 42; Prince v. Heenan, 22 Minn. 347; Hulett v. Matteson, 12 Minn. 349 (Gil. 227); Gurney v. City of St. Paul, 36 Minn. 163; Water Power Co. v. Bridge Co., 23 Minn. 186; Searles v. Thompson, 18 Minn. 316 (Gil. 285).

[217] McConnell v. Rakness, 41 Minn. 3.

had elapsed. It was held that this was an appealable order, under the language of this subdivision.[218] An order made in insolvency proceedings, setting apart as exempt insurance money, is appealable, under either subdivision 5 or 6.[219]

261. Orders under Subdivision 6, Section 6140.

The last subdivision of the section provides for an appeal, "Sixth. From a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment."

We may take up the consideration of the two parts of this subdivision separately; discussing (1) final orders affecting substantial rights, made in a special proceeding, and (2) final orders affecting substantial rights, made upon a summary application after judgment.

1. Final orders in special proceedings, affecting substantial rights. What is a *special proceeding*? In general, of course, it includes any proceeding in a district court which is not an action, or a step in an action. Thus, mandamus is a special proceeding, and an appeal lies from an order granting a peremptory writ.[220]

[218] Marty v. Ahl, 5 Minn. 27 (Gil. 14).
[219] In re How, 59 Minn. 415.
[220] State v. Webber, 31 Minn. 211.

An order to show cause was issued to a sheriff, and on the hearing an absolute order was made, requiring him to turn over certain warrants which he held, or had taken from the city comptroller under a writ of replevin. It was his duty to hold the warrants for the plaintiff in the original action, who was not a party to the special proceeding in which the order was made. "But the plaintiff was not bound by the order made in the special proceedings on the sheriff, and the latter could not plead it in justification when called upon by the former for the property. The order in question being a final one, affecting a substantial right, made in a special proceeding, is appealable." [221]

Proceedings under the insolvency act are special proceedings, and appeal lies from any final order made in such proceedings that affects a substantial right.[222]

Appeals from commissioners in railway condemnation proceedings, where the proceedings are by statute to be as in other appeal cases, at one time were held special proceed-

[221] Elwell v. Goodnow, 71 Minn. 390.

[222] State v. Severance, 29 Minn. 269; Brown v. Minn. &c. Co., 44 Minn. 322; In re Harrison, 46 Minn. 331; In re Shotwell, 43 Minn. 389; In re Jones, 33 Minn. 405.

ings.[223] But it has since been held that appeals from commissioners' awards are to be treated as actions.[224] Highway condemnation applications to the district court for the appointment of commissioners seem to be special proceedings.[225] And such applications in railway condemnation proceedings are held to be special proceedings.[226]

And in a comparatively recent case, the court has held that an appeal from an award of the commissioners appointed in condemnation proceedings, under Sp. Laws 1881, c. 188, is a special proceeding.[227] And it seems to be the rule that, where proceedings are to be the same as in actions there, the right of appeal exists as in actions.[228] Contempt proceedings, when punitive merely, seem to be special proceedings, within this subdivision.[229] But where used as a means of enforcing rights of parties, they are treated as appealable proceedings, under one or the other of the subdivisions of this section.[230] But these gener-

[223] See note 163, supra.

[224] Witt v. St. P. & N. P. Ry. Co., 35 Minn. 404. Cf. Gurney v. St. Paul, 36 Minn. 163.

[225] State v. MacDonald, 26 Minn. 445.

[226] In re St. Paul & N. P. Ry. Co., 34 Minn. 227.

[227] Gurney v. St. Paul, 36 Minn. 163.

[228] County of Ramsey v. Stees, 27 Minn. 14.

[229] State v. Leftwich, 41 Minn. 42.

[230] State v. Leftwich, 41 Minn. 42.

ally come under the other half of this subdivision, or under subdivision 3. Habeas corpus proceedings are special proceedings. The proceedings on appeal in habeas corpus proceedings are regulated by chapter 327, Laws of 1895.[231]

Intervention we have already considered under subdivision 3. An application by a stranger to vacate and strike from the records a judgment void for want of jurisdiction is a special proceeding.[232]

What is a final order affecting a substantial right in these special proceedings? In mandamus, an order granting or refusing a peremptory writ is a final order.[233] In condemnation proceedings, the question is full of confusion, but an order dismissing an appeal is a final order,[234] as is also an order determining that commissioners be appointed.[235] But an order refusing to dismiss is not final.[236] In insolvency proceedings, an order appointing a receiver is final, as it finally disposes of some questions of

[231] State v. Hill, 10 Minn. 63 (Gil. 45).
[232] Mueller v. Reimer, 46 Minn. 314.
[233] State v. Webber, 31 Minn. 211.
[234] Warren v. Ry. Co., 18 Minn. 384 (Gil. 345).
[235] In re St. Paul & N. P. Ry. Co., 34 Minn. 227.
[236] Gurney v. St. Paul, 36 Minn. 163.

right.[237] An order (judgment) allowing or disallowing a claim seems to be final.[238] And an order granting or refusing, on the merits, a motion that creditors participate without filing releases, is final and appealable.[239] The order of distribution in such proceedings is appealable.[240] And an order refusing a new trial in condemnation proceedings has been held final.[241] An order refusing to dismiss a special proceeding, and retaining it for consideration, is not final.[242] And a mere interlocutory order that finally determines no question is not appealable, under this provision.[243]

[237] In re Evan Jones, 30 Minn. 358; In re Jones, 33 Minn. 405.

[238] Clark v. Lindeke, 43 Minn. 463; 44 Minn. 112, 179.

[239] In re Shotwell, 43 Minn. 389; In re Harrison, 46 Minn. 331; In re Gazett, 35 Minn. 532; In re Miller, 42 Minn. 96; In re Welch, 43 Minn. 7; In re Rees, 39 Minn. 401.

[240] State v. Severance, 29 Minn. 269.

[241] Minnesota Val. R. Co. v. Doran, 15 Minn. 230 (Gil. 179).

[242] Turner v. Holleran, 11 Minn. 253 (Gil. 168).

[243] Brown v. Minn. &c. Co., 44 Minn. 322. Where the court made additional findings and order, in pursuance of an agreement of the parties, the last order was held the final one in force, and that an appeal might be taken therefrom within 30 days after written notice of its filing. Billson v. Lardner, 67 Minn. 35.

2. Taking up now the other half of this subdivision, what is a *summary application after judgment*? In a very early case the court said it meant a proceeding predicated upon the judgment, and did not include a motion to vacate the judgment.[244] But this idea seems to have been abandoned, and an order on a motion to vacate a judgment is appealable under this head, apparently.[245] Certainly such orders are appealable, either hereunder or under subdivision 3.[246]

Applications in supplementary proceedings come under this head, though we must there distinguish carefully between interlocutory and final orders.[247] An order under our former statute, allowing execution to issue after five years, is one made on a summary application after judgment.[248] Applications to have judgments satisfied of record[249] are summary applications, within this subdivision.[250] So is

[244] Westervelt v. King, 4 Minn. 320 (Gil. 236).

[245] Stocking v. Hanson, 22 Minn. 542.

[246] See notes 195 and * supra.

[247] Knight v. Nash, 22 Minn. 452; Roeller v. Ames, 33 Minn. 132; Menage v. Lustfield, 30 Minn. 487; Christensen v. Tostevin, 51 Minn. 230.

[248] Entrop v. Williams, 11 Minn. 381 (Gil. 276).

[249] Gen. St. 1878, c. 66, § 286; Gen. St. 1894, § 5435.

[250] Woodford v. Reynolds, 36 Minn. 155; Ives v. Phelps, 16 Minn. 451 (Gil. 407).

an order canceling a sheriff's return of satisfaction of execution.[251] An order to a sheriff to pay over moneys collected on execution is such an order and appealable.[252]

In general, the same doctrines obtain here as under the third subdivision, and the first part of this subdivision, as to what constitutes finality. We may call attention to a few cases on orders in supplementary proceedings. The following are deemed final and hence appealable: An order imposing definitely and finally a punishment for contempt in disobeying an order in supplementary proceedings;[253] an order appointing a receiver in supplementary proceedings to take the debtor's assets;[254] an order refusing to appoint a receiver in such case.[255]

The following are not final or appealable: The order that the judgment debtor appear and be examined;[256] an order that imposes a penalty in case the person does not do something is not final or appealable, and before any

[251] Pettingill v. Moss, 3 Minn. 222 (Gil. 151); Hutchins v. Carver County, 16 Minn, 13 (Gil. 1) Tillman v. Jackson, 1 Minn. 183 (Gil. 157).

[252] Gen. St. 1878, c. 8, § 198; Coykendall v. Way, 29 Minn. 162.

[253] Menage v. Lustfield, 30 Minn. 487.

[254] Knight v. Nash, 22 Minn. 452.

[255] Roeller v. Ames, 33 Minn. 132.

[256] Rondeau v. Beaumette, 4 Minn. 224 (Gil. 163).

punishment can be inflicted a further order is necessary;[257] an order adjudging one is guilty of contempt, but leaving the penalty for later consideration, is not final or appealable.[258]

262. Questions which will be Considered on Appeal.

The supreme court will consider only such questions as are properly raised upon the record. The return must be in proper shape,[259] the assignments of error must be clear and definite, and the point must be stated and argued in the brief of the appellant.[260] An is-

[257] Semrow v. Semrow, 26 Minn. 9.

[258] Menage v. Lustfield, 30 Minn. 487.

[259] State v. Anderson, 59 Minn. 484; Mickelson v. Duluth B. & L. Ass'n, 68 Minn. 535.

[260] Cutting v. Weber (Minn.) 79 N. W. 595. In Boe v. Irish, 69 Minn. 493, the court applies a rule often stated, but sometimes not enforced. The appellant failed to notice or argue a point on which the case turned. The court below held a judgment so defective that, until amended in direct proceedings, no execution could issue on it, and that an execution sale was void. The respondent took the same position in his brief in the supreme court, but the appellant ignored the question. The court said: "We cannot reverse in this case without considering this question, and deciding it contrary to the holding of the court below. But, as counsel has not discussed the question, we are not called upon to consider it or look for reasons why Casper v. Klippen, 61 Minn. 353, does not cover the point."

sue will not be considered for the first time in the appellate court.

Recently the court said: "It is a rule that generally this court will not decide a cause upon an issue of fact or law not presented to and passed upon by the trial court; and that, where it is unquestionable that the party tried his cause upon one theory either of the fact or the law in the court below, he will not be permitted to shift his ground, so as to present an entirely different theory here." [261] This is illustrated by a demurrer to a complaint on two grounds: (1) That several causes of action are improperly united, and (2) that it does not state a cause of action. The demurrer was erroneously sustained on the first ground, but no mention was made of the second. The court said that, even though the demurrer should have been sustained on the second ground, the supreme court could not, for the purpose of affirmance, shift the ground on which the demurrer is sustained. "The court below failed to dispose of one of the issues of

[261] White v. Western Ass'n Co., 52 Minn. 352, quoted in Woodbridge v. Sellwood, 65 Minn. 135; Anchor Ins. Co. v. Kirkpatrick, 59 Minn. 378; Keyes v. Clare, 40 Minn. 84; Johnson v. Sherwood, 45 Minn. 9; Keyes v. Clare, 40 Minn. 84; Hand v. National &c. Co., 57 Minn. 519.

law raised by the demurrer and this court cannot pass on that issue." [262]

When a demurrer is overruled, and the dedendant answers, goes to trial on the merits, and, after trial, settles a case, and from an order denying a new trial appeals, he abandons his demurrer, and, on the appeal, cannot have the order overruling the demurrer reviewed.[263] A defendant who demurs to the complaint and fails to appear at the hearing, cannot on appeal from an order overruling the demurrer, raise the objection that the court did not fix

[262] Northwestern Railroader v. Prior, 68 Minn. 95.

Whether damages were excessive cannot be considered on appeal, where the appellant failed to raise the question in district court. Severns v. Brainard, 61 Minn. 265. The court said: "The record does not show that the appellant ever applied to the court below for a reduction of the amount of the damages, or that he made a motion for a new trial because the damages assessed by the jury were excessive. In order to have presented that question properly on this appeal, the court below should have exercised its discretion and judgment on the matter, and then his judgment or order would have been reviewable here."

Where a criminal case is certified, the supreme court will consider only such questions as appear from the certificate to have been raised and passed upon by the lower court. State v. Northern Pacific Exp. Co., 58 Minn. 403, following State v. Byrud, 23 Minn. 29.

[263] Thompson v. Ellenz, 58 Minn. 301.

the time and place of hearing as required by G. S. 1894, § 5227. He waived the question by failing to object to the hearing. "He cannot suffer a default in the court below, and raise the question for the first time in this court." *[263] Whether the court erred in allowing an amended complaint, and in denying a motion to set aside the order allowing the same, cannot be considered on an appeal from an order overruling a demurrer interposed to such amended complaint.[264]

The question of a variance between the judgment entered and that ordered cannot be raised for the first time on appeal,[265] nor that evidence was inadmissible under the pleadings.[266] The objection that the conclusions of law are not justified by the findings of fact may be raised on a motion for a new trial. "Whatever may be the rule in other jurisdictions, it has long been the common practice, sanctioned by this court, to consider and pass upon this point, on a motion for a new trial, and, if the conclusions of law are wrong, to

*[263] Fallgatter v. Lammers, 71 Minn. 239, and cases there cited.

[264] Potter v. Holmes, 72 Minn. 153.

[265] Harper v. Carroll, 66 Minn. 487; or a departure in pleading, Whitney v. National Mas. &c. Ass'n, 57 Minn. 472.

[266] Poehler v. Reese (Minn.) 80 N. W. 847.

modify them. The practice, although admitted not to be strictly logical, has been sanctioned as convenient, and as long settled." [267]

263. Error of Clerk or Jury.

Where the error complained of is not that of the court itself, but of the jury or clerk, it cannot be raised on appeal to the supreme court without first applying to the trial court to have the error corrected. This rule was applied where the amount of the verdict was slightly in excess of the amount claimed in the complaint. The trial court could have corrected the error by requiring the plaintiff to remit the excess.[268]

264. Theory of Case—Changing on Appeal.

Where parties consent to try their case below on a particular theory of what the law of the case is, though it be erroneous, they cannot complain if the result be correct, according to that theory. "So we need not inquire whether the theory was right or wrong, but only whether there was any error, assuming

[267] Tilleny v. Wolverton, 54 Minn. 75; Ames v. Richardson, 29 Minn. 330; Coolbaugh v. Roemer, 32 Minn. 445; Farnham v. Thompson, 34 Minn. 330. See, also, Wilson v. Richards, 28 Minn. 337.

[268] Bank of Commerce v. Smith, 57 Minn. 374. See cases cited at § 262.

it to have been right."[269] If a cause was rightly decided according to the positions taken by a party on the trial, he cannot complain. He cannot shift his position on appeal, and urge that some other position was the correct one, and that, for that reason, the case should have been decided differently.[270] Thus, where a plaintiff has secured a verdict in the court below upon the theory that certain evidence introduced by him was necessary in order to recover, and the verdict has been set aside because of erroneous rulings when admitting such evidence, or because it was insufficient to support the verdict, he cannot shift position on appeal, and contend that such evidence was wholly unnecessary, and that hence the errors of the court in receiving it cannot be considered.[271]

"The appellant is therefore bound by the record which it made as to the nature of the action. It cannot be allowed to try the case

[269] Shea v. Chicago, R. I. & P. R. Co., 66 Minn. 102; Engler v. Schneider, 66 Minn. 388; Davis v. Jacoby, 54 Minn. 144; White v. Western Ass'n Co., 52 Minn. 352; Keyes v. Clare, 40 Minn. 84; Johnson v. Sherwood, 45 Minn. 9; Anchor Inv. Co. v. Kirkpatrick, 59 Minn. 378; Hane v. Bank, 75 Minn. 286.

[270] Moquist v. Chapel, 62 Minn. 258.

[271] Earl Fruit Co. v. Thurston Cold-Storage & W. Co., 60 Minn. 351.

as arising solely out of the defendant's tort, inducing the trial court to accept its views, thus compelling its adversary to meet its theory, and then, in the exigencies of an appeal, shift position, that the rulings may be tested as if the action was on contract only." [272]

265. Grounds Stated in the Notice of Motion.

The notice of motion is required to state the grounds upon which the motion for a new trial is based. If a general order granting a new trial is justified and proper on any of the grounds set forth in the notice of motion, it will be sustained on appeal, although not justified on any of the other grounds stated. "It is the duty of the appellant in appeals of this kind to show that the order appealed from is erroneous, and not proper on any of the grounds set forth in the notice of motion for a new trial." [273] But the appellant is confined to the grounds stated in his notice of motion.[274]

[272] Peteler Portable Ry. M. Co. v. N. W. Adamant M. Co., 60 Minn. 127. A party cannot object on appeal to the correctness of instructions to the giving of which he consented. See Howe v. Minneapolis &c. R. Co., 62 Minn. 71.

[273] Longan v. Iverson (Minn.) 80 N. W. 1051.

[274] State v. District Court, 56 Minn. 56.

266. Effect of Decision of Appellate Court—Right to Renew Motion Below.

A decision of the supreme court, reversing an order of the district court on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief. The decision was not necessarily final in respect to other relief. It may expressly provide for a renewal of the motion, or the authority to do so may be implied from the nature of the case, and the grounds of the decision, where the appeal does not finally dispose of the whole matter on the merits; and in such cases the fact that, pending the proceedings on appeal, more than one year had elapsed, will not bar the second motion. The original motion, the appeal, and renewal should, as respects the application of the statute,[275] be regarded as one proceeding.[276]

Whether a reversal shall result in a new trial will depend on the nature of the case and the character of the decision. In one case where the supreme court gave no directions, Mr. Justice Mitchell said: "The district court was therefore left free to proceed in any manner it saw fit, not inconsistent with the opinion

[275] Gen. St. 1878, c. 66, § 125; Gen. St. 1894, § 5267.
[276] Gerdtzen v. Cockrell, 52 Minn. 501.

of the court." [276*] The lower court, of course, has no discretion, but must enter the particular judgment ordered by the court of appeals.[276**] A judgment simply of reversal will have the least effect which is consistent with the opinion and the grounds on which the reversal is put, and does not of itself grant a new trial in the sense of awarding a trial de novo, unless it is the necessary effect of such a reversal and the ground on which it is put. Where the conclusions of law order for judgment, and judgment of the court below were based on two independent findings of fact, as to one of which no issue was ever made by the pleadings or litigated on the trial, and the other was wholly insufficient to sustain the judgment and the court on appeal so held, and no other error was found in the record, and the other findings of fact were responsive to all the material issues actually litigated, it was held that a judgment simply reversing the judgment of the trial court did not in effect grant a new trial.[276***]

267. Second Appeal—Res Judicata.

The decision on a former appeal is the law of the case on a second appeal, and will not be

[276*] Kurtz v. St. Paul &c. R. Co., 65 Minn. 60.
[276**] Piper v. Sawyer (Minn.) 80 N. W. 970.
[276***] Babcock v. Murray, 61 Minn. 408.
See Carleton v. Carey, 61 Minn. 318.

considered on a second appeal.[277] All questions determined on the former appeal are res judicata.[278] The result of a former appeal from the original judgment was to remand the case to the district court, with directions to modify the judgment in certain particulars. It was held that there might be an appeal from the judgment as modified, although the time for appealing from the original judgment had expired when the appeal was taken; but no matter can be reviewed on the last appeal, which was, or might have been, reviewed on the appeal from the original judgment. "The decision on the former appeal herein is, however, conclusive on the appellants on this appeal, as to all matters which were or might have been reviewed on the appeal from the original judgment." [279] Where, on an appeal

[277] Phelps v. Sargent (Minn.) 76 N. W. 25.

[278] Piper v. Sawyer (Minn.) 80 N. W. 970; Johnson v. Telephone Co., 54 Minn. 37. "This conclusion does not rest upon the doctrine of stare decisis, but on the same principle as the doctrine of res adjudicata. This court has the right to overrule the decision made in the former appeal in some other case, but in this case it must be followed." Bradley v. Norris, 67 Minn. 48, citing Schleuder v. Corey, 30 Minn. 501; Maxwell v. Schwartz, 55 Minn. 414; Johnson v. N. W. T. E. Co., 54 Minn. 37; Tilleny v. Wolverton, 54 Minn. 73.

[279] Malmgren v. Finney, 65 Minn. 25.

from an order denying a motion for a new trial, the order is affirmed, all questions that might have been raised on that appeal are res judicata, and will not be considered on an appeal from the judgment entered upon the verdict or findings.[280]

268. Reasons of Trial Court—Memoranda.

The appellate court cares but little for the reasons which controlled the action of the trial judge in granting a new trial. If, under a proper exercise of judicial discretion, the party was entitled to the new trial, the order will not be reversed because the court may have acted upon an erroneous view of the law or of the force of the evidence.[281]

A general order overruling a demurrer will be deemed to have been intended to cover all defects in the complaint, notwithstanding a statement in the memorandum of the trial court that a certain question was not argued or

[280] Tilleny v. Wolverton, 54 Minn. 75; Schleuder v. Corey, 30 Minn. 501; Adamson v. Sundby, 51 Minn. 460.

[281] In re Rivenburgh's Estate (Minn.) 77 N. W. 422. An order granting a new trial will not be reversed because the court assigns an insufficient reason therefor, if it appears from the record that prejudicial errors of law occurred on the trial which were excepted to. Morrow v. St. Paul City Ry. Co., 65 Minn. 382.

decided. "The order overruling the demurrer must be taken with all the force and effect which its language implies, uncontrolled by the language of the trial court." [282] A memorandum is no part of the decision.[283]

269. De Minimis Non Curat Lex.

This salutary maxim is often applied to avoid granting a new trial.[284] Thus, a new trial will not be granted for a failure to assess merely nominal damages, where no question of permanent right is involved.[285]

[282] Myers v. C., St. P., M. & O. R. Co., 69 Minn. 476.

[283] Kertson v. Great Northern Exp. Co., 72 Minn. 378.

[284] Palmer v. Degan, 58 Minn. 505; Singer Manuf'g Co. v. Potts, 59 Minn. 240; Hilliard, New Trials, 572. Staggy v. Crescent C. Co., 72 Minn. 316.

[285] Knowles v. Steele, 59 Minn. 452, citing Harris v. Kerr, 37 Minn. 537; U. S. Express Co. v. Koerner, 65 Minn. 540.

Litigants contemplating appeals because of "principle" are referred to the following language used by Mr. Justice Mitchell in Marty v. Weber, 66 Minn. 354: "This case is a sample of the trifling character of many appeals which occupy our time, and illustrate the expensive folly into which suitors are frequently led by their own litigious dispositions, or by injudicious advice, or by both. * * * It is unfortunate for the cause of the administration of

justice, as well as the interests of these parties, that in so small a case, involving so simple an issue, the trial court could not have made a finding of fact to which he could adhere."

a In the case of Baxter v. Coughlan, filed June 26, 1900, it was held that "An order denying a motion to strike out a bill of exceptions involves the 'merits of the action, or some part thereof' and is appealable. 3 Am. & Eng. Enc. Pl. & Pr. 498, 499; Holmes v. Campbell, 13 Minn. 66. Or perhaps it might be reviewed on appeal from the judgment." It is not reviewable on appeal from an order granting a new trial. See § 257.

CHAPTER XII.

THE WRIT OF CERTIORARI.

270. Statutory Provisions.
271. When the Writ Will Issue.
272. The Object of the Writ.
273. Appeal to Inferior Tribunal.
274. What the Writ Brings Up.
275. When the Writ Will Lie—Illustrations.

270. Statutory Provisions.

The supreme court has authority to issue the writ of certiorari "when necessary for the furtherance of justice and the enforcement of the laws," [1] and the district courts, "when necessary to the perfect exercise of the powers with which they are vested, and the due administration of justice." [2] The statute was amended by Laws 1895, c. 25, by omitting the word "certiorari" from section 4837, but it was replaced by Laws 1897, c. 7, and it was held that between the dates of these amend-

[1] Gen. St. 1894, § 4823. For a full treatment of the writ see vol. 2 Spell. Ext. Leg. Rem., 4 Enc. Pl. & Pr., article "Certiorari," p. 1.

[2] Gen. St. 1894, § 4837; State v. Willrich, 72 Minn. 165.

ments the district courts had no authority to issue the writ.[3]

271. When the Writ Will Issue.

The law seems to be well settled that ordinarily a writ of certiorari will not be issued where the party may have adequate relief against the grievance of which he complains, and it should not be allowed or issued when there is a remedy by appeal, or some other mode of review is given by law.[4] The fact that the petitioner has no other mode of review must appear upon the face of the petition.[5]

"The appellate jurisdiction of this court will not be exercised through the writ of certiorari in any case in which it can be adequately invoked by appeal."[6] Only judicial or quasi judicial acts can be reviewed on certiorari. "The authorities are almost uniform in hold-

[3] In re Wilbur's Estate (Minn.) 73 N. W. 521. As to the form of the writ, see State v. Winona, etc., Land Co., 38 Minn. 397.

[4] State v. Olsen, 56 Minn. 210; State v. Hanft, 32 Minn. 403; Fall v. Moody, 45 Minn. 517.

[5] State v. Olsen, 56 Minn. 210.

[6] State v. Probate Court of Hennepin Co., 28 Minn. 381; State v. Hanft, 32 Minn. 403. Compare this case in 28 Minn. with Massachusetts Mut. Life Ins. Co. v. Elliot's Estate, 24 Minn. 134. See State v. Probate Court, 72 Minn. 434.

ing that mere legislative or ministerial acts, as such, of municipal officers, cannot be reviewed on certiorari; that only those which are judicial or quasi judicial can be thus reviewed."[7] The writ will lie to review a proceeding unknown to the common law, where no appeal is provided by statute. Thus, it was held that certiorari will lie upon a summary conviction, where there is no legislative restriction.[8]

The allowance of the writ by the supreme court is a matter of discretion.[9]

272. The Object of the Writ.

In this state, a certiorari is employed strictly as in the nature of a writ of error. The legitimate office of this writ is to review and correct decisions and final determinations of inferior tribunals; not to divest them of the right of terminating the proceedings, nor to

[7] In re Wilson, 32 Minn. 145; State v. Clough, 64 Minn. 378; Lemont v. Dodge Co., 39 Minn. 385; Christlieb v. Hennepin Co., 41 Minn. 142; Moede v. Stearns Co., 43 Minn. 312.

[8] Tierney v. Dodge, 9 Minn. 166 (Gil. 153); Faribault v. Hulett, 10 Minn. 30 (Gil. 15). When a court acts in a summary manner, or in a new course, different from the common law, in the absence of other legislative restriction, certiorari lies. Tierney v. Dodge, 9 Minn. 166 (Gil. 153).

[9] Libby v. West St. Paul, 14 Minn. 248 (Gil. 181).

withdraw from them the question to be tried. The district court has no power to issue a writ of certiorari to remove into that court proceedings pending and undetermined before an inferior court or tribunal. The office of the writ is simply to review and correct decisions and determinations already made. Upon return of the writ, the inquiry is whether or not there has been error, and, upon answer to this question, the court above determines whether to affirm or reverse, just as is done in cases of writs of error or of appeals.[10]

273. Appeal to Inferior Tribunal.

In all cases where the statute provides for an appeal from an inferior tribunal to the district court, the review must first be heard in that court. "Proper times are limited within which all this character of errors must be corrected, and although cases might arise in which this court would review the decisions of other courts by means of the common-law writ of certiorari after the expiration of the time prescribed by statute for appealing from them, such cases would be exceptional, and some good reason would have to be shown why the ordinary manner was not resorted

[10] Grinager v. Norway, 33 Minn. 127.

to." In exceptional cases only will certiorari issue where the time to appeal has expired.[11]

274. What the Writ Brings Up.

In an early case the court said: "It has been said that the writ of certiorari brings up nothing but the record, or the proceedings in the nature of a record, and that therefore the court to which the return is made can only review errors apparent upon such record or proceedings, and cannot examine the rulings of the inferior tribunal upon the admission or exclusion of evidence, or the giving or refusal of instruction to a jury. * * * If there should be any doubt whether, at common law, the writ of certiorari would bring up anything except the record, we are of opinion that the statute gives us, as 'the supreme judicial tribunal' of the state, the power to issue it with an enlarged office. * * * It is only necessary to say, in this case, that the record, the proceedings in the nature of a record, the rulings of the inferior tribunal upon the admission or rejection of testimony, the instructions given and refused to the jury, with the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions, and the prejudice to

[11] Wood v. Myrick, 9 Minn. 149 (Gil. 139); State v. Milner, 16 Minn. 55 (Gil. 43).

the petitioner, may be brought before this court in the return to a certiorari for examination and revision." [12]

275. When the Writ Will Lie—Illustrations.

There are a number of decisions which apply the general rule stated in the preceding section. The proceedings of the governor, secretary of state, and state auditor, under Laws 1895, c. 228, providing for the enlargement of counties, are neither judicial nor quasi judicial, and cannot be reviewed on certiorari.[13] In condemnation proceedings, certiorari will not lie to the district court until there has been a final decision of the matter by the court. Hence, a writ issued where the court had made an order setting aside a verdict, and granting a new trial, was quashed.[14]

[12] Minn. Cent. Ry. Co. v. McNamara, 13 Minn. 508 (Gil. 468); City of St. Paul v. Marvin, 16 Minn. 102 (Gil. 91). Above doctrine limited, of course, to cases where there is no remedy by appeal. State v. Noonan, 24 Minn. 124; People v. Betts, 55 N. Y. 600; Hauser v. State, 33 Wis. 680.

[13] State v. Clough, 64 Minn. 378. So, the action of the board of county commissioners in dividing a town, and organizing a new town out of a part of the territory, is not judicial. Christlieb v. County Com'rs, 41 Minn. 142; Lemont v. County Com'rs, 39 Minn. 385.

[14] State v. District Court, 58 Minn. 534.

The probate court made an ex parte order making an allowance to the widow out of the estate, and the executor moved to vacate this order, which was denied. On appeal to the district court, this order was affirmed. The probate court then made an order requiring the executor to pay the amount in accordance with the terms of the original order. A writ of certiorari to review this order was denied. The court said: "We are of opinion that the writ will not lie. The executor's remedy is by appeal from the order of the district court affirming the action of the probate court in refusing to vacate or modify the order making the allowance." [15]

The attempted revocation by the mayor of a license is not judicial, and cannot be reviewed on certiorari.[16]

The duty of a city council to canvass votes is ministerial, and cannot be reviewed on certiorari.[17] The act of a village council in granting a license to sell intoxicating liquor is not of a judicial character, and therefore not reviewable under this writ. "There is a further reason why the writ should be quashed, in that the relator has no peculiar interest in

[15] State v. Steele, 62 Minn. 28; State v. Probate Court, 51 Minn. 241.

[16] State v. Mayor of St. Paul, 34 Minn. 250.

[17] State v. Common Council, 25 Minn. 216.

the matter in question. It is not enough that he is a resident and taxpayer in this village. In general, the courts will not review and correct the official action of public officers at the suit of private individuals who have no peculiar interest therein, nor will they be allowed to sue out such writs as this for that purpose." [18]

[18] State v. Village of Lamberton, 37 Minn. 362.

Proceedings in district court under mill-dam law are removable by certiorari to supreme court. Faribault v. Hulett, 10 Minn. 30 (Gil. 15). Same rule was held to apply in railway condemnation proceedings. Minnesota Cent. Ry. Co. v. McNamara, 13 Minn. 508 (Gil. 468), but see section 246. The writ lies directly to the probate court on order refusing to extend time to present claims. Massachusetts Mut. Life Ins. Co. v. Elliot's Estate, 24 Minn. 134. Aliter when time allowed as that can be brought up on appeal from order allowing claim, or order directing payment of same. State v. Hennepin Co. Probate Court, 28 Minn. 381.

Habeas corpus order can be brought up by appeal, therefore not by certiorari. State v. Buckham, 29 Minn. 462. See Laws 1895, c. 327. The same is true of a final order of distribution in insolvency proceeding. State v. Severance, 29 Minn. 269. But certiorari allowed as auxiliary proceeding to habeas corpus in supreme court to bring up record on previous appeal from habeas corpus in district court. In re Snell, 31 Minn. 110.

Where in contempt proceedings, the penalty imposed is for the benefit of a party the order is ap-

pealable, and certiorari will not lie to review it. But where the punishment is for a criminal contempt, that is where the penalty is imposed solely to vindicate the authority of the court, the order is not appealable, and it can be reviewed by certiorari. State v. Willis, 61 Minn. 120, 63 N. W. 169, following State v. Leftwitch, 41 Minn. 42, 42 N. W. 598.

CHAPTER XIII.

THE RULES OF THE SUPREME COURT.

RULE I.

Clerk—Duties of—Calendar.

1. The clerk shall keep a general docket or register, in which he shall enter the titles of all actions and proceedings, including the names of the parties, and the attorneys or solicitors by whom they prosecute or defend, and he shall enter thereunder, from time to time, of the proper dates, brief notes of all papers filed and all proceedings had therein; the issuing of writs and other process, and the return thereof; the court or officer to whom directed; the return of any court, officer or other person thereto; the filing of any bond or other security, and the issuing of a certificate of supersedeas, and of all orders and judgments in any action or proceeding, whether of course or on motion; also, proper references to the number and terms of all papers and proceedings.

2. He shall also keep a judgment book, in

which he shall enter all judgments; the names of the parties thereto, plaintiff and defendant; the date of the judgment, its number and term, the amount thereof, if the recovery of money or damages is included therein, and the amount of costs, which record shall be properly indexed.

3. He shall keep a court journal, in which he shall enter, from day to day, brief minutes of all proceedings in court.

4. He shall file all papers presented to him; indorse thereon the style of the action, its number and term, the character of the paper and date of filing; and after filing, no paper shall be taken from the office, unless by order of the court or a judge thereof.

At the commencement of each term he shall furnish the court and bar with separate lists of all causes pending therein which have been noticed for argument, and of which a note of issue has been filed six days before the commencement of the term. Causes shall be placed upon the list according to the date of the notice of appeal or writ of error.[1]

RULE II.

Motions—Bringing on for Hearing—Motion Papers.

Motions, except for orders of course, shall

[1] Unless otherwise noted the rules were adopted July 24, 1867.

be brought on upon notice, and when not made upon the records or files of the court, shall be accompanied with the papers on which the same are founded.

RULE III.

Clerk of District Court—Certifying Additional Papers.

Upon an appeal from a judgment or order, the clerk of the district court, in addition to the copies of the notice of appeal and judgment roll or order, shall, upon the request of either party to such appeal, and at the expense of the party applying, certify and transmit to this court copies of any papers, affidavits, or documents on file, in the district court, in the action in which the appeal is taken, which such party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the appeal.

RULE IV.

Return on Appeal—Notice to File—Dismissal for Failure.

The appellant or plaintiff in error shall cause the proper return to be made and filed with the clerk of this court within sixty days after the appeal is perfected or the writ of error served. If he fails to do so, the respondent or defendant in error may, by notice in writing,

require such return to be filed within twenty days after the service of such notice, and, if the return is not filed in pursuance of such notice, the appellant or plaintiff in error shall be deemed to have abandoned the appeal or writ of error, and on an affidavit proving when the appeal was perfected or writ of error served, and the service of such notice, and a certificate of the clerk of this court that no return has been filed, the respondent or defendant in error may enter an order with the clerk dismissing the appeal or writ of error for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal or writ of error.[2]

RULE V.

Defective Return — Procuring Additional Return.

If the return made by the clerk of the court below is defective, or full copies of all the orders, papers, or records necessary to the understanding or decision of the case in this court are not certified or transmitted, either party may, on an affidavit specifying the defect or omission, apply to one of the judges of this court for an order that such clerk make a further return and supply the omission or defect without delay.

[2] See §§ 234, 371, supra.

RULE VI.

Original Papers—Procuring Order for Transmission to Appellate Court.

Whenever it is necessary or proper, in the opinion of any judge of this court, that original papers of any kind should be inspected in this court on appeal, such judge may make such order for the transmission, safe keeping, and return of such original papers as to him may seem proper, and the court may receive and consider such original papers in connection with the transcript of the proceedings.

RULE VII.

Attorneys—Guardians ad litem—Continue Such on Appeal.

The attorneys and guardians ad litem of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others are retained or appointed, and notice thereof served on the adverse party.

RULE VIII.

Notice of Argument—Filing Note of Issue.

Causes shall be noticed for the first day of the term, and may be noticed for argument by either party. Criminal cases shall have a preference, and may be moved on behalf of the state out of their order on the calendar. Cases shall be noticed for argument at least ten days before the first day of the term; and

at least six days before the commencement of the term, the party giving the notice of argument shall furnish the clerk with a note of the issue, containing the title of the action, specifying which party is appellant and which respondent or plaintiff in error and defendant in error, as the case may be; the names of the attorneys of the parties respectively, and the date of the notice of appeal or writ of error.[3]

RULE IX.

Paper Books and Briefs—Furnishing Copies to Court and Reporter.

The appellant, or party removing a cause to this court, shall at least three days (excluding Sunday) previous to the argument thereof, file eight copies—one for each of the judges, and one for the reporter, clerk and librarian respectively—of the paper book, his assignment of errors, points and authorities, and within the same time the respondent shall file eight copies of his points and authorities; any party failing to do so shall not be entitled to statutory costs, in case he prevails.*

2. The paper book and briefs must be print-

[3] As amended February 10, 1868. In computing ten-day period, the day of service and first day of the term must be excluded. See Greve v. St. P. S. & T. F. R. Co., 25 Minn. 327.

* Compliance with this rule cannot be dispensed with by stipulation. Lehigh &c. Co. v. Scallen, 61 Minn. 63.

ed, and the folios of the paper book distinctly numbered in the margin.

The paper book shall consist of so much of the return as will clearly and fully present the questions arising on the review, with the reasons of the court below for its decision, if any were filed, also the notice of appeal, verdict or finding and judgment, if there be one.

3. Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject matter will be considered unless stated in the assignment of errors.

4. The points and authorities of appellant shall contain a concise statement of the case so far as necessary to present the questions involved and shall state separately the several points relied on for a reversal of the order or judgment of the court below, with a list of authorities to be cited in support of the same.

5. Whenever either the settled case or the paper book contains any unnecessary, irrele-

vant or immaterial matter, and the appellant prevails, he shall not be allowed any disbursements for preparing, certifying or printing such unnecessary matter.

If the settled case contains all the evidence, but the appellant does not prevail on any error which required the bringing up all of the evidence, but does prevail on an error which could have been raised, without the evidence, or by a bill of exceptions, he shall not be entitled to tax disbursements for preparing, certifying or printing any matter not reasonably necessary to present the points on which he prevailed.

The respondent's objection to the taxation of disbursements in such cases shall point out —specifying the folios—the particular portions of the record or paper book, for which he claims that the appellant is not entitled to tax disbursements.[4]

RULE X.

Call of Calendar—Setting Causes for Argument —Motions.

On the first day of the term the court will proceed to call the calendar in order to set causes for oral argument or for submission on briefs, and will continue the call until there shall be as many causes so set as the court

[4] As amended February 1, 1895. See § 235, supra.

shall believe can be disposed of during the term. On such day motions in causes on the calendar, to strike from the calendar, or to dismiss, affirm, or reverse, may be orally noticed in open court and will be heard during the first week of the term.

On the call of the calendar, if neither party to a cause called shall have it set for oral argument or submission on briefs, or if neither party shall move a cause or submit it when it is called on the day on which it is set for oral argument, or, if it be set for submission on briefs, if neither party shall have filed his brief by the day appointed for the briefs to be filed, or, if no day be appointed, neither party shall file his brief during the term, the cause shall be continued to the next term.[5]

RULE XI.

Paper Books and Briefs—Furnishing Copy to Adverse Party.

At least twenty days before the term of this court at which a cause is noticed for trial by the appellant or plaintiff in error, and in all cases at least twenty days before the first term of this court commencing more than sixty days after the appeal is perfected or writ of error served, the appellant or plaintiff in error shall deliver to the adverse party a copy of the

[5] As amended January 24, 1890.

paper book, and of the assignment of errors, and of his points and authorities; and on or before the first day of the term at which the cause is noticed for trial the respondent or defendant in error shall furnish the adverse party a copy of his points and authorities.[6]

RULE XII.

Noticing Cause for a Term Commencing within Sixty Days—Continuance.

When the respondent, or defendant in error, notices a cause for trial at a term commencing within the time allowed to the appellant, or plaintiff in error, to serve his points and authorities, the appellant or plaintiff in error, shall be entitled to a continuance on a suggestion that he cannot conveniently proceed with the trial at such term.

RULE XIII.

Examination of Evidence—Stating Points on Facts Claimed to be Established—Argument of Question of Fact.

In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall add to the copies of his points furnished the court the leading facts which he deems established, with reference to the portions of the evidence where he

[6] As amended December 24, 1885.

deems the proof of such facts may be found. And the court will not hear an extended discussion upon a mere question of fact.

RULE XIV.

Failure to Serve Points and Paper Book or to Argue Cause.

Either party may apply to the court for judgment of affirmance or reversal, or for a dismissal, as the cause may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases and points as required by these rules.

RULE XV.

Oral Argument—When Allowed.

Either party may submit a cause on his part on a printed brief or argument.

In actions for the recovery of money only, or of specific personal property, where the amount, or the value of the property, involved in the appeal, shall not exceed one hundred dollars, and in appeals from orders involving only questions of practice, or forms or rules of pleading, and in appeals from the clerk's taxation of costs, the parties may submit on briefs but no oral argument will be allowed.

On oral arguments the appellant or plaintiff in error, or on a motion the moving party, or party procuring the order to show cause,

shall open and be entitled to reply. Each party shall be entitled to one hour in all, except that in actions for the recovery of money only, or of specific personal property, where the amount, or the value of the property, involved in the appeal, shall not exceed five hundred dollars, they shall be entitled to only thirty minutes each, and on motions and orders to show cause to only fifteen minutes each.

Leave to argue a cause orally, when not entitled to such oral argument under this rule, may be given on application therefor, at the time of calling the calendar. And the time allowed for oral argument as prescribed by this rule may be extended, on application thereof at the commencement of the argument, notice of intention to apply therefor being given at the time of calling the cause on the call of the calendar, and on motions and orders to show cause on application when brought to a hearing.[7]

RULE XVI.

Dismissal—Certifying to Court Below.

In all cases of the dismissal of any appeal or writ of error in this court, it shall be the duty of the clerk to issue a certified copy of the order or dismissal to the court below, so

[7] As amended January 24, 1890.

that further proceedings may be had in such court as if no writ of error or appeal had been brought.

RULE XVII.

Remittitur—Mailing Notice of Decision—Clerk's Fee—Entry of Judgment—Transmitting Remittitur.

Remittitur shall contain a certified copy of the judgment of this court, sealed with the seal thereof, and signed by the clerk.

When a decision is filed or an order entered determining the cause, the clerk shall mail notice thereof to the attorneys of the parties, and no judgment shall be entered until the expiration of ten days thereafter.

The clerk shall receive a fee of twenty-five cents for each notice aforesaid.

The remittitur shall be transmitted to the clerk of the court below as soon as may be, after judgment is entered.[8]

RULE XVIII.

Remittitur as Matter of Course.

Upon the reversal, affirmance, or modification of any order or judgment of the district court by this court, there will be a remittitur to the district court unless otherwise ordered.

[8] As amended by Rule 33, October 31, 1872.

RULE XIX.

Reversal—Final Judgment without Remittitur.

On reversal of a judgment of the district court, rendered on a judgment removed into it from an inferior court, when there is no remittitur, this court will render such judgment as ought to have been given in the court below including the costs of that court, and also for the costs of this court; and the plaintiff in error or appellant may have execution thereupon.

RULE XX.

Judgment for Money Only—Affirmance—Final Judgment in this Court.

In all cases where a judgment of the district court, for the recovery of money only, is affirmed, and there is no remittitur, judgment may be entered in this court for the amount thereof, with interest and costs and damages, if any are awarded, to be added thereto by the clerk; and the party in whose favor the same was rendered may have execution thereupon from this court.

RULE XXI.

Reversal—No Remittitur—Costs of Prevailing Party.

In case of a reversal of a judgment, order or decree of a district court, rendered or made

in a cause commenced therein, if there is no remittitur, the prevailing party shall have judgment in this court for the costs of reversal, and the costs of the court below, and execution therefor.

RULE XXII.

Remittitur—Costs Notwithstanding Remittitur.

In all cases in which a remittitur is ordered, the party prevailing shall have judgment in this court for his costs, and execution thereon, notwithstanding the remittitur.

RULE XXIII.

Costs—Taxation of.

Costs in all cases shall be taxed in the first instance by the clerk upon two days' notice, and inserted in the judgment, subject to the review of the court, and the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment.[9]

RULE XXIV.

Judgment Roll—Papers Constituting.

In all cases, the clerk shall attach together the writ of error, if any, the transcript and papers certified and returned by the clerk of the

[9] As amended June 10, 1875. See § 189b, supra.

court below, a copy of the minutes of argument and order for judgment, and annex thereto a copy of the judgment of this court signed by him; and the papers thus annexed shall constitute the judgment roll.

RULE XXV.

Executions—Issuance and Satisfaction.

Executions to enforce any judgment of this court may issue to the sheriff of any county in which a transcript of the judgment is filed and docketed. Such executions shall be returnable in sixty days from the receipt thereof by the officer. On the return of an execution satisfied, or acknowledgment of satisfaction, in due form of law, by the party who recovered the same or his representatives or assigns, the clerk shall make an entry thereof upon the record.

RULE XXVI.

Process and Writs Other than Executions.

All other writs and process issuing from or out of the court shall be signed by the clerk, sealed with the seal of the court, tested of the day when the same issued, and made returnable on any day in the next term, or in the same term when issued in term time, and a judge may, by an indorsement thereon, order process to be made returnable on any day in

vacation when, in his opinion, the exigency of the case requires it.

RULE XXVII.

Writ of Error—Giving Notice of.

On the issuance from this court of a writ of error, the plaintiff in error in such writ shall give notice in writing to the attorney general and county attorney of the county in which the action is triable, within ten days after the issuing of such writ, that such writ has been sued out.

RULE XXVIII.

Paper Books—Printing.

Paper books, the assignment of errors, and briefs shall be neatly and legibly printed with black ink on white writing paper, properly paged at the top, with a margin on the outer edge of one inch and a half. The printed page shall be seven inches long, and three and a half inches wide, and the paper page shall not be more than nine inches long or seven inches wide. Each brief shall be signed by counsel preparing it, and each paper book and brief shall be stitched together, with its proper designation and the title of the cause printed on the outside.[10]

[10] As amended December 24, 1885.

RULE XXIX.

Costs—Amount Allowed—Prevailing Party.

Unless otherwise ordered, the prevailing party shall recover costs as follows: 1. Upon a judgment in his favor on the merits, twenty-five dollars; 2. Upon dismissal, ten dollars.[11]

RULE XXX.

Judgment—Entry by Losing Party.

In case the prevailing party shall neglect to have judgment entered up within twenty days after notice of the filing of the opinion or order of court, the adverse party may, without notice, cause the same to be entered by the clerk without inserting therein any allowance for costs or disbursements, except the clerk's fees in this court.[12]

RULE XXXII.

Rules—When to Take Effect.

These rules shall take effect at the expiration of thirty days after the publication thereof. All former rules of this court are abrogated, except so far as it may be necessary to

[11] Who is prevailing party. See Sanborn v. Webster, 2 Minn. 323 (Gil. 277); Allen v. Jones, 8 Minn. 202 (Gil. 172). See § 189c.

[12] Rule 31 is obsolete. It related to admissions to the bar. The matter is now regulated by Gen. St. 1894, §§ 6172 et seq.

follow them upon appeals and writs of error which shall be pending when these rules take effect.[13]

RULE XXXIV.

Entering Cause on Calendar during Term—Duty of Clerk.

When the clerk shall be directed to enter a cause upon the calendar during term, he shall transcribe the same into the copies of the calendar furnished to the judges, for which service he shall be entitled to a fee of one dollar, to be paid by the party upon whose motion such entry is ordered.[14]

RULE XXXV.

Calling Calendar—Motions—Setting Cases for Hearing.

On the first day of the term the calendar will be called for the purpose of entering motions, and of ascertaining what cases are for oral argument, and of setting down the same.

Motions, and such cases as counsel may desire to argue, may be heard during the first week of the term.

Such cases as, upon the call of the calendar, are found to be for oral argument and as shall not be set down for the first week of the term, shall be heard in their order upon the

[13] Rule 33 is an amendment of Rule 17. See supra.
[14] Adopted October 31, 1872.

calendar, at the rate of two per day, commencing upon the first Monday of the term, unless otherwise directed by the court for special reasons, or unless substitutions shall be made by agreement of counsel and with the consent of court.[15]

RULE XXXVI.

Failure to Furnish Papers—Continuance.

In case of the failure of the appellant or plaintiff in error to furnish papers as required by Rule 9, the action will be continued by the court upon its own motion, unless an affirmance or dismissal is ordered on application of the other party under Rule 14.[16]

RULE XXXVII.

Rehearing—Filing Application.

Applications for rehearing shall be made ex parte, on petition setting forth the grounds on which they are made, and filed within ten days after notice of the decision.[17]

RULE XXXVIII.

Modification and Suspension of Rules.

Any of these rules may be relaxed or suspended by the court in term or judge thereof in vacation, in particular cases, as justice may require.

[15] Adopted October 31, 1872.
[16] Adopted June 10, 1875.
[17] As amended January 24, 1890.

CHAPTER XIV.

THE RULES OF THE DISTRICT COURTS OF MINNESOTA.[1]

Part I, General Rules of Practice.
Part II, Rules in Insolvency Proceedings.

I. GENERAL RULES OF PRACTICE.

RULE I.

Bonds—Who may be Surety.

All bonds shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

No practicing attorney or counselor at law shall be received as a surety on any bond or undertaking required in an action, whether he be the attorney of record in the action or not, except where such bond or undertaking shall be executed on behalf of a non-resident party.

RULE II.

Qualification of Sureties.

The qualifications of sureties must be as follows:

[1] Adopted by the district judges of the state August 24, 1893, pursuant to Laws 1875, c. 44.

Each must be a resident and freeholder of this state, and worth the amount specified in the bond or undertaking above his debts and liabilities, and exclusive of his property exempt from execution, except where the statute otherwise provides. Whenever a judge or other officer approves the security to be given in any case, or reports upon its sufficiency, he must require the sureties to justify by affidavit.

RULE III.

Discharge of Garnishee.

Garnishments shall not be discharged under section 198, chapter 66, General Statutes 1878 nor attachments under section 157 of the same chapter, without notice of the application therefor to the adverse party.

RULE IV.

Endorsement on Papers.

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of residence and the particular location of his place of business by street, number, or otherwise; and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information that can

conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

RULE V.

Papers must be Legible.

All copies of papers served shall be legible, and if not legible may be returned within twenty-four hours after service thereof, and the service of an illegible paper so returned shall be deemed of no force or effect.

RULE VI.

Causes of Action Separately Numbered.

In all cases of more than one distinct cause of action, defense, counter claim, or reply, the same shall not only be separately stated, but plainly numbered; and all pleadings not in conformity with this rule may be stricken out on motion.

RULE VII.

Folios must be Numbered.

The attorney or other officer of court who draws any pleading, affidavit, case, bill of exceptions or report, decree or judgment, ex-

ceeding two folios in length, shall distinctly number and mark each folio of one hundred words in the margin thereof, or shall number the pages and the lines upon each page, and all copies, either for the parties or court, shall be numbered and marked, so as to conform to the originals. And if not so marked and numbered, any pleading, affidavit, bill of exceptions, or case, may be returned by the party on whom the same is served.

RULE VIII.

Notice of Motion—Copies of Papers—What Notice must Contain.

Notices of motion shall be accompanied with copies of the affidavits and other papers on which the motions are made, provided that papers in the action of which copies shall have theretofore been served and papers other than such affidavits which have theretofore been filed, may be referred to in such notice and read upon the hearing without attaching copies thereof. When the notice is for irregularity, the notice shall set forth particularly the irregularity complained of; in other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally the grounds of the motion.

RULE IX.

Motion—Dismissal on Nonappearance.

Whenever notice of a motion shall be given, or an order to show cause served, and no one shall appear to oppose the motion or application the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear or shall decline to proceed, the opposite party, upon filing like proof of service, shall be entitled to an order of dismissal.

RULE X.

Motion—Order of Argument.

Upon motion or order to show cause, the moving party shall have the opening and the closing of the argument. Before the argument shall commence, the moving party shall introduce his evidence to support the application; the adverse party shall then introduce his evidence in opposition; and the moving party may then introduce evidence in rebuttal or avoidance of the new matter offered by the adverse party. On hearing such motion or order to show cause, no oral testimony shall be received.

RULE XI.

Order to Show Cause.

Orders to show cause will only be granted when a restraining order is necessary, or some exigency is shown which would cause injury or render the relief sought ineffectual if the moving party were required to give the statutory notice of motion. If on the hearing it appear that there was no such ground for the order, it may be discharged or the hearing continued in the discretion of the court. Such order must be accompanied by a notice setting forth the grounds on which the relief asked is sought as in other notices of motion.

RULE XII.

Correction of Pleading.

Motions to strike out or correct any pleading under section 107 of chapter 66, General Statutes 1878, must be heard before demurring to or answering such pleading, and before the time for demurring to or answering such pleading expires, unless the court, for good cause shown, shall extend the time for demurring to or answering such pleading to permit such motion to strike out or correct such pleading to be heard.

RULE XIII.

Special Term Calendar.

The clerk in each county shall keep a special term calendar, on which he shall enter all actions or proceedings noticed for special term according to the date of issue or service of notice of motion. Notes of issue of all matters for special term shall be filed with the clerk one day before the term. And no case shall be entered upon the calendar unless such note of issue shall have been filed.

RULE XIV.

Filing Papers for Special Term.

So all affidavits, notices, and other papers, designed to be used in any cause at special term, shall be filed with the clerk at or before the hearing of the cause unless otherwise directed by the court.

RULE XV.

Filing of Orders.

All orders, together with the affidavits and other papers upon which the same are based, which orders are not required to be served, shall within one day after the making thereof be filed in the office of the clerk, by the party applying for such orders. Orders required

to be served shall be so filed within five days after the service thereof.

RULE XVI.

Filing of Pleadings.

Whenever any party to an action fails to file any pleading therein as required by section 80 of chapter 66, General Statutes 1878, the action shall, upon the application of the adverse party, be continued to the next general term of said court, and if both parties fail to so file their pleadings, the action shall be stricken from the calendar.

RULE XVII.

Application for Order without Notice.

Any party applying to any judge or court commissioner for any order to be granted without notice, except an order to show cause, shall state in his affidavit whether he has made any previous application for such order, and if such previous application has been made upon the same state of facts, every subsequent application shall be refused. When an application made to any judge for the approval of any bond or undertaking, or for an order to show cause, or any ex parte order, is refused, the application shall not be renewed before another judge without leave.

RULE XVIII.

Order Extending Time to Answer.

No order extending the time to answer or reply shall be granted, unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits, or an affidavit of his attorney or counsel that from the statement of the case made to him by such party he verily believes that he has a good and substantial defense, upon the merits to the pleading or some part thereof.

RULE XIX.

Affidavit of Merits.

In an affidavit of merits, the affiant shall state that he has fully and fairly stated the case and facts in the case to his counsel, and that he has a good and substantial defense or cause of action on the merits, as he is advised by his counsel after such statement, and verily believes true, and shall also give the name and place of residence of such counsel.

RULE XX.

Amendment of Pleading.

In all places where an application is made for leave to amend a pleading or for leave to answer or reply after the time limited by stat-

ute or to open a judgment and for leave to answer and defend, such application shall be accompanied with a copy of the proposed amendment, answer or reply as the case may be, and an affidavit of merits and be served upon the opposite party.

RULE XXI.

Services of Orders and Notices.

In cases where service of any order or notice is required to be made, if the party directed to make the service and the person upon whom the service is to be made, reside in the same city, village or town, the service shall be personal. In all other cases such service shall be by mail, or in such other manner as the court may direct.

RULE XXII.

Proof of Service.

Proof of personal service shall be made by the affidavit of the person making the service. The affidavit shall fully set forth the time, place and manner of service, and that the person upon whom the service was made was to the affiant well known to be the person, co-partnership, or corporation, agent or attorney

upon whom such service was directed to be made.[2]

If such service be made by mail, the proof thereof shall be (substantially) in the following form, to-wit:

State of Minnesota, } ss.
County of }

I, , of (street and No., if any) in the ..... of ..... in said county, of lawful age, being first duly sworn, on my said oath say, that at said ..... on the ..... day of ..... 18.., I did then and there deposit in the post office within and for said ..... a true copy (or in case more than one service was made, true copies) of the ..... hereto attached, which copy was (or, which copies were) properly enveloped, sealed, postage paid thereon and directed to the following named persons, co-partnerships or corporations respectively in said order named, at the places respectively as follows, to-wit:
One to ..... at No. .... Street, in the ..... of ..... in the state of .....
One to ..... at No. .... Street, in the ..... of ..... in the state of .....

Proof of service shall in all cases be filed in the office of the clerk within five days after the making thereof,

Provided that the written admission of service by the attorney of record in any action or proceeding shall be sufficient proof of service.

[2] See Cunningham v. Water Power Co., 73 Minn. 283.

RULE XXIII.

Divorce Cases—Publication of Summons.

Orders for publication of summons in actions for divorce will only be granted upon an affidavit of the plaintiff stating facts showing that personal service cannot well be made.

RULE XXIV.

Divorce Cases—Trial at General Term.

All divorce cases shall be tried at general term in all counties wherein three or more general terms of court are appointed to be held during any one year.

RULE XXV.

Sale of Real Estate—Injunction—Notice.

In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party either by motion or order to show cause.

The application shall be made immediately on receiving notice of the publication of the notice of sale. And no injunction in such case shall be allowed ex parte, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory excuse is furnished, showing why the application was

not made in time to allow the same to be heard and determined upon notice before the day of sale.

And in all other cases, if the court or judge deem it proper that the defendant or any of several defendants be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place why the injunction should not be granted.

RULE XXVI.

Injunction—Ne Exeat—Bond.

In every case where no special provision is made by law as to security, the court or officer allowing a writ of injunction or ne exeat, shall require an undertaking or bond on behalf of the party applying for such writ, in not less than two hundred and fifty dollars, executed by him or some person on his behalf, as principal, together with one or more sufficient sureties, to be approved by the court or officer allowing the writ, and to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he may sustain by reason of the writ, if the court shall eventually decide that the party was not entitled to the same.

RULE XXVII.

Demurrer—Time to Answer.

When a demurrer is overruled with leave to answer or reply, the party demurring shall have twenty days after notice of the order, if no time is specified therein, to file and serve an answer or reply as the case may be.

RULE XXVIII.

Change of Venue.

A change of venue or place of trial will not be granted unless the party applying therefor use due diligence to procure the same within a reasonable time after issue joined in the action and the ground for the change shall have come to the knowledge of the applicant. Nor will a change be granted where the other party will lose the benefit of a term, unless the party asking for such change shall move therefor at the earliest reasonable opportunity after issue joined, and he shall have information of the ground of such change. In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or defense or both of them arose; and these facts will be taken into consideration by the court in fixing the place of trial.

RULE XXIX.

Framing Issues for Jury.

In cases where the trial of issues of facts is not provided for by section 216, of chapter 66, of General Statutes of Minnesota, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a motion to be made upon the pleadings, that the whole issue or any specific question of fact involved therein, be tried by a jury. With the notice of motion shall be served a distinct and brief statement of the questions of fact proposed to be submitted to the jury for trial, in proper form, to be incorporated in the order, and the court or judge may settle the issues, or may refer it to a referee to settle the same. The court or judge may, in his discretion, thereupon make an order for trial by jury, setting forth the questions of fact as settled, and such questions only shall be tried by the jury, subject however to the right of the court to allow an amendment of such issues upon the trial in like manner as pleadings may be amended upon trial.

RULE XXX.

Commission to Take Testimony Out of State.

Commissions to take testimony without this state may be issued on notice, and applica-

tion to the court, or judge thereof, either in term time or in vacation. Within five days after the entry of the order for a commission, the party applying therefor shall serve a copy of the interrogatories proposed by him, on the opposite party. Within five days thereafter the opposite party may serve cross interrogatories. After the expiration of the time for serving cross interrogatories, either party may within five days give five days' notice of settlement of the interrogatories before the court, or judge thereof. If no such notice be given within five days, the interrogatories and cross interrogatories, if any served, shall be considered adopted. Whenever a commission is applied for, and the other party wishes to join therein, interrogatories and cross interrogatories to be administered to his witnesses may be served and settled or adopted within the same times and in the same manner as those to the witnesses of the party applying. After the interrogatories are settled, they must be engrossed by the party proposing the interrogatories in chief, and the engrossed copy or copies be signed by the officer settling the same, and must be annexed to the commission and forwarded to the commissioners. If the interrogatories and cross interrogatories are adopted without settlement, engrossed copies need not be made, but the originals or copies

served may be annexed and forwarded with the commission.

RULE XXXI.

Same.

Should any or either of the commissioners fail to attend at the time and place for taking testimony, after being notified thereof, any one or more of the commissioners named in the commission may proceed to execute the same.

RULE XXXII.

Same.

In taking the deposition of a witness when the deposition is completed, the witness shall sign his name or make his mark at the end thereof as well as upon each piece of paper on which any portion of his deposition is written and the commissioner or commissioners shall annex to the commission a certificate, showing the time or times and place of executing it, which certificate may be substantially in the following form:

I, ... commissioner named in the within and above written commission, do certify that the said commission was executed, and the testimony of ..... was taken before me at ..... in ..... on the ..... day of..... 18.., at .. o'clock in the .....noon and was reduced to writing by myself, (or by deponent, or by .....

a disinterested person in my presence and under my direction).

That the said testimony was taken by, and pursuant to the authority and requirements of the said commission, upon the interrogatories ..... annexed and herewith returned. The said witness, before examination was sworn to testify the whole truth, and nothing but the truth, relative to the cause specified in said commission, and that the testimony of said witness was carefully read to (or by) said witness (by me) and then by him subscribed in my presence.

A. B. Commissioner.

And shall also state whether any commissioner not attending was notified of the time and place of the taking of the deposition. The commissioner or commissioners shall annex the deposition, with such certificate, to the commission, seal them up in an envelope, and direct to the clerk of the court of the county in which the action is pending. They may be transmitted by mail or private conveyance. The clerk, on receipt of the same, shall open the envelope, and file it with the commission or deposition, marking thereon the time. They cannot be taken from his custody except upon the order of the court, or of a referee appointed to take proofs or try any issues in the cause. The clerk shall produce them in court to be used upon the trial of the cause, upon the request of either party.

RULE XXXIII.

Objections to Depositions.

All objections to the manner of taking, or certifying, or returning depositions shall be deemed to have been forever waived unless the party objecting thereto shall make it appear, to the satisfaction of the court, that the officer taking such depositions was not authorized to administer an oath then and there, or that such party was, by such informality, error or defect, precluded from appearing and cross examining the witness; and every objection to the sufficiency of a notice, or to the manner of taking, or certifying, or returning such deposition, shall be deemed to have been forever waived, unless such objections are taken by motion to suppress such deposition, which motion shall be made within ten days after service of such notice, in writing, of the return thereof.

RULE XXXIV.

Papers on File with the Clerk—Receipt for.

No papers on file in a cause shall be taken from the custody of the clerk, except by the judge for his own use, or a referee appointed to try the action. Before a referee shall take any files in said action, the clerk shall require a receipt therefor, signed by the referee, specifying each paper so taken.

RULE XXXV.

Dismissal before Referees.

On a hearing before referees, the plaintiff may dismiss his action, or his action may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision, in which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

RULE XXXVI.

Referees' Report—When Filed.

Upon a trial of issues by a referee, such referee shall file his report in the clerk's office, upon his fees being paid or tendered by either party.

RULE XXXVII.

Call of Calendar.

There shall be two calls of the calendar. The first shall be preliminary, the second peremptory. All preliminary motions, except motions for continuance, shall be made on the first call. The cases shall be finally disposed of in their order upon the calendar on the second call. Where, upon the preliminary call, or at any time afterwards, no response is made by either party to a case, the case shall

be stricken from the calendar unless otherwise directed by the court.

RULE XXXVIII.

Motions for Continuance.

All motions for continuance shall be made on the first day of the term, unless the cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day. And in all affidavits for continuance on account of the absence of a material witness, the deponent shall set forth particularly what he expects and believes the witness would testify to were he present and orally examined in court.

RULE XXXIX.

Order of Challenges.

In jury trials of civil actions where a full panel is called in the first instance, challenges shall be made alternately, first by the defendant and then by the plaintiff.

RULE XL.

Order of Trial.

On the trial of actions before the court but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the case to the jury,

unless the judge who holds the court shall otherwise order.

Upon interlocutory questions, the party moving the court, or objecting to the testimony, shall be heard first; the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated and a pertinent answer to the respondent's argument.

Discussion on the question shall then be closed, unless the court requests further argument.

At the hearing of causes before the court, no more than one counsel shall be heard on each side, unless by permission of the court.

The defendant, in opening his case to the jury, shall confine himself to stating the facts which he proposes to prove.

In cases where the affirmative of the issue to be tried is upon the defendant, the defendant's counsel shall open the case to the jury and have the closing argument, as though his client were the plaintiff.

RULE XLI.

Requests and Exceptions to Charge.

The points on which either party desires the jury to be instructed must be furnished in writing to the court before the argument to the jury is begun or the same may be disre-

garded. All exceptions to the charge and refusals to charge, shall be taken before the jury retires.

RULE XLII.

Presence of Counsel When Verdict Returned.

It shall not be necessary to call either party, or that either party be present or represented when the jury returns to the bar to deliver their verdict.

RULE XLIII.

Stay of Proceedings—Notice.

Upon the rendering of a verdict of a jury or the filing of a decision by the court in any case, no stay of proceedings, after the first, will be granted without notice to the counsel or consent of counsel for the opposite party.

RULE XLIV.

Taxation of Costs.

Costs and charges to be inserted in a judgment, shall be taxed in the first instance by the clerk upon two days' notice. And an appeal therefrom may be taken to the court within ten days after such taxation by the clerk, but not afterwards. Such appeal shall be taken by notice in writing, signed by the appellant, directed to and served upon the adverse party and the clerk, and shall specify the

items from which the appeal is taken. When such appeal is taken, either party may bring the same on for determination before the court on notice, or by any order to show cause. On such appeal the court will only review the items objected to, and upon the grounds specified before the clerk.

RULE XLV.

Judgment Signed by Clerk.

Judgments, and copies to annex to the judgment roll, shall in all cases be signed by the clerk, and no other signature thereto shall be required.

RULE XLVI.

Entry of Judgment.

Where a party is entitled to have judgment entered in his favor by the clerk, upon the verdict of a jury, report of referee, or decision or finding of the court, and neglects to enter the same for the space of ten days after the rendition of the verdict, or notice of the filing of the report, decision or finding, (or in case the same has been stayed, for the space of ten days after the expiration of such stay,) the opposite party may cause the same to be entered by the clerk upon five days notice to the adverse party of the application therefor.

RULE XLVII.

Bill of Exception or Case—Service of—Filing.

In case of trials by the court or by referees, the time for serving a case or bill of exceptions shall be computed from the date of service of notice of filing the report, decision or finding. The party procuring a case or bill of exceptions, shall cause the same to be filed within ten days after the case shall be settled, or the same, or the amendments thereto shall have been adopted, otherwise it shall be deemed abandoned.

RULE XLVIII.

Form of Statement in Case.

Transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the original minutes. The proposed case shall not be made in narrative form, but shall be in the form of question and answer as at the trial. The party procuring the transcript shall, at or before the time of serving the proposed case or bill of exceptions, file the same with the clerk for the use of parties and the court, and the failure so to file said transcript shall be deemed good and sufficient reason for extending the time within which proposed amendments may be served by the opposite party. After the settled case or bill of exceptions has been filed in the clerk's

office, the stenographer's transcript may be withdrawn.[3]

RULE XLIX.

Failure of Juror to Appear.

If during the progress of the term a juror does not appear and answer when called by the court the clerk shall make an entry of the default of such juror, and deduct from his time of service the day upon which such default shall have occurred, unless the court for good cause shall excuse such absence.

RULE L.

Where There are no Rules—Customary Practice.

In cases where no provision is made by statute or by these rules, the proceeding shall be according to the customary practice, as it has heretofore existed in the several district courts of the state.

II. IN INSOLVENCY PROCEEDINGS.

RULE I.

Authority to Appear—Notice.

Any creditor proving his claim against the insolvent may file, in the office of the clerk of

[3] The part of this rule providing that the narrative form shall not be used is held invalid. See § 97, supra.

the court, a written notice stating that the person, or co-partnership, or corporation therein named is by such creditor authorized to appear and act for him, in any and all proceedings in the matter of the assignment or receivership in such notice specified, a copy of which notice shall, by the person so filing the same, be served upon the assignee or receiver. All orders or notices made after the serving of such notice, which are directed to be served upon such creditor shall be served upon the person, co-partnership, or corporation in such notice named, and no further service thereof shall be necessary.

RULE II.

Sale of Property in Gross.

No sale in gross of the assigned property shall be made, except upon petition to the court setting forth fully the facts relied upon to authorize such sale, of which alleged facts proof shall be made in such manner as the court may direct, and obtaining from the court an order authorizing such sale. No such sale, except of perishable property, shall be made, save upon notice, given in such manner as the court may direct, to such creditors of the insolvent as have then proved their claims, and also to such persons as in the schedule of the insolvent are named as his creditors.

No such sale shall be consummated until after report to, and confirmation by, the court.

RULE III.

Confirmation Before Sale.

No assignee or receiver shall make conveyance of any real estate covered by the assignment and sold by him until after confirmation of such sale by the court.

RULE IV.

Statements of Assets and Liabilities.

The assignee or receiver making application to the court for any order declaring a dividend, or for the allowance of the account of such assignee or receiver, or for limiting the time for the filing of releases, shall file a summary statement, showing the amount of moneys then received by such assignee or receiver, the amount of the expenses of the trust then incurred and a general description of the assigned property then remaining in his hands, with the estimated value thereof.

RULE V.

Time for Filing Releases.

Orders limiting the time for filing releases shall not be made until after the time for filing claims has expired, nor until the assets have been reduced to money, or such progress has

been made towards the same that it appears approximately how much will be realized therefrom, and the assignee or receiver shall serve with such order a copy of the summary statement provided for by Rule IV.

RULE VI.

List of Claims.

Each assignee or receiver shall keep a list of all claims presented to him against the insolvent, which list shall contain the name and residence (with street number if known or appearing) of the creditor presenting the claim, the amount of such claim, the date of the presentation thereof, the amount thereof allowed, the amount thereof disallowed, the name and residence of the agent or attorney (if any) of the creditor presenting such claim, and such remarks, memoranda or explanation as he may deem necessary in connection therewith. All preferred claims shall be designated by the word "preferred." A copy of such list shall be filed in the office of the clerk of the court within five days after the expiration of the time for filing claims.

Such list shall be substantially in the following form:

District Court,.....County, Minnesota,.....Judicial District.

In the matter of the insolvency (or receivership) of.....

List of claims against said insolvent filed with..... Assignee / Receiver

No. of Claim	Name of Creditor	Residence	If Known No.	If Known Street	Amount of Claim	When Presented M.	When Presented D.	When Presented Y.	Amount of Claim Allowed	Amount of Claim Disallowed	Agent or Att'y present'g claim and residence	Remarks

RULE VII.

Appeals to Court.

An appeal to the court may be taken by the insolvent from the action of the assignee or receiver allowing any claim against such insolvent. An appeal may also be taken by any creditor whose claim has been allowed by the assignee or receiver, from the action of such officer allowing the claim of any other creditor of the insolvent.

RULE VIII.

Same.

All such appeals shall be taken within twenty days after filing the list of claims provided for in Rule 6, and shall be so taken by serving written notice thereof upon the assigneee or receiver, and upon the creditor from the allowance of whose claim the appeal is taken. Such notice, with proof of the service thereof, shall within five days after such service, be filed in the office of the clerk of the court, and if not so filed, the appeal shall be deemed and held to be abandoned. Such appeals shall be tried as civil actions.

If such appeal be not noticed for trial and placed upon the calendar by the appellant at the first general term of the court appointed to be held within the county, not less than twenty days after the taking of the appeal, the ad-

verse party may have the same entered upon the calendar during that, or some succeeding term, and have such appeal dismissed, or the action of the assignee affirmed.

RULE IX.

Same.

Upon an appeal, the pleadings shall be the same as in civil actions. The first pleading shall be the complaint of the claimant, which shall be filed in the office of the clerk of the court, and a copy thereof served upon the adverse party, within (5) days after service of the notice of appeal. If subsequent pleadings have not been made before the first day of the term, the court shall fix the time within which the same shall be made.

RULE X.

Final Report.

The assignee or receiver shall, so soon as he shall have converted all of the assigned property into money and after the expiration of the time limited for filing releases, make to the court a full report and account of all moneys received, and expenses incurred by him in the execution of his trust; which expenses shall be itemized, and which report and account shall be filed in the office of the clerk of the court.

Upon the filing of such report and account, the court, upon application of the assignee or receiver, or of any creditor whose release shall have been filed, or if releases are not required, then upon application of any creditor whose claim shall have been proved, shall appoint a time and place for the hearing of such report and account, of which notice shall be given as the court may direct, to the insolvent, and to such creditors as have filed releases, or if no releases are required, then to such creditors as have filed proof of their claims.

Upon such hearing, the court shall disallow or reduce the amount of any item of such expense which shall be found to have been unnecessary or unreasonable in amount.

When such account is adjusted and allowed, the assignee or receiver shall forthwith distribute the net amount then remaining in his hands, pro rata, and in proportion to their respective claims, among the creditors entitled to the same, subject to the approval of the court.

RULE XI.

Assignee to Take Duplicate Receipts.

The assignee or receiver shall take duplicate receipts for all disbursements made by him, which receipts shall be plainly marked, the one "Original," the other "Duplicate," and which "Original" receipts shall be filed in the

office of the clerk of the court. No order discharging any assignee or receiver shall be made until after such original receipts are so filed.[4]

RULE XIII.

Application for Discharge of Assignees.

Applications for the discharge of assignees or receivers, or for the allowance of their accounts, whether final or otherwise, shall be made upon notice thereof, which shall be published in a newspaper of the county, once in each week for at least three successive weeks, prior to the day of hearing and which shall be served by mail upon the insolvent and upon all creditors entitled to participate in the distribution of the estate, at least twenty days before the time so named for such hearing. Such applications and accounts must be filed before notice is given.

RULE XIV.

Application to File Claims.

Applications by creditors for leave to file claims or releases after the time limited by the court therefor has expired, must be made upon affidavit filed, excusing the default, and upon notice of such application served person-

[4] Rule XII. was superseded by statute.

ally upon the assignee or receiver, and by mail upon all creditors who have filed their claims and releases, at least ten days before the hearing.

RULE XV.

Proofs and Release of Claim—Forms.

Proof of Claims and Releases shall be substantially in the following forms respectively:

PROOFS OF CLAIM.

State of Minnesota, } ss. District Court,
County of } Judicial District.

In the matter of the Assignment of
.....
.....
..... Insolvent.

Proof of Claim of .....

State of..... } ss.
County of..... }

On this ..... day of ..... A. D. 18.., before me personally came ..... who being by me first duly sworn on his oath doth say, (that he is one of the members of the firm of ..... which said firm is, and at all times herein mentioned or referred to, was composed of this affiant and)..... ..... that at and before the making of the assignment in this matter by the above named insolvent .....

[Insert names of Insolvents.]

..... he, was (or they as such co-partners were and now) is (are) justly and duly indebted unto the said.....
.....
(Name of Creditors.)
in the sum of .....
dollars and ..... cents, with interest thereon from and after the .....
day of ..... 18..., for .....
.....
[Here insert the true cause and consideration of the indebtedness.]
which said sum and interest is due over and above all payments, counter-claims and set-offs whatever. And deponent says that for the said indebtedness the said ..... ha.... not nor ha.... any person by ..... order, or for ..... use or benefit had, or received any manner of satisfaction or security whatever.

That a bill of the items of such merchandise so sold and delivered, (or a copy of said promissory note, or other written evidence of such indebtedness) (varying statement as the facts may be) is hereto attached and hereby made a part hereof.

Subscribed and sworn to before me this .... day of ..... A. D. 189.. } .....
..... }

RELEASE OF CLAIM.

State of Minnesota, } ss. District Court,
County of } Judicial District.

In the matter of the Assignment of } Release.
..... }
..... }
Insolvents.

Whereas, under and by virtue of an act of the Legislature of the State of Minnesota, approved March 7, 1881, entitled, "an act to prevent debtors from giving preference to creditors, and to secure the equal distribution of property of debtors among their creditors, and for the release of debts against the debtors;" and the several acts amendatory thereof, the above named insolvents did on the.....day ..... A. D. 189.., make unto ..... an assignment of all their property, and estate, for the equal benefit of all their creditors; and whereas the undersigned .....

[Insert names of creditors.]

creditors of the above named insolvents as such creditors, have, under said act, proved ..... claim against said insolvents, which claim has been allowed by said assignee as and for a just claim against said insolvents.

Now, therefore .....

[Insert names of creditors.]

the said creditors in consideration of the benefits to ..... of the provisions of the said act do hereby release to the said insolvents and debtors, said ..... all claims and demands upon said claim so proved, save and except only such as may be paid to ..... as dividends or otherwise, under the provisions of the said act and assignment.

In testimony whereof ..... have hereunto set ..... hand and seal this ..... day of ..... A. D., one thousand eight hundred and .....

Executed and delivered in presence of ..... Seal.
..... Seal.
..... Seal.
..... Seal.

State of.....
County of..... } ss.

Be it known that on this ..... day of ..... A. D., 19.... before me personally came ..... the signers and sealers of the foregoing instrument and acknowledged to be ..... own free act and deed.

.....

RULE XVI.

General Rules of Practice.

All rules of practice in so far as the same are applicable, shall govern proceedings in insolvency.

ADDITIONAL RULES OF THE DISTRICT COURT WITHIN AND FOR HENNEPIN COUNTY.

RULE I.

Special terms will be holden every Saturday (except on holidays), at nine o'clock in the forenoon. The preliminary call of the calendar will be followed at once by the peremptory

call, at which hearing will be had and causes finally disposed of as reached. No hearing will be set down for the afternoon, nor continued beyond the morning session, unless for urgent reasons. Only causes properly on the calendar when the court opens will be heard unless they have been omitted by mistake or inadvertence of the clerk: All pleadings, orders, notices, affidavits and other papers proper to be filed must, to entitle them to be read, be filed with the clerk before the day on which the special term is held, unless for some reason other than neglect the paper could not have been sooner filed, or unless the occasion for the use of the paper arises at the hearing, from some cause not previously apparent. The strict enforcement of the provisions of this rule may be relaxed in favor of attorneys from other counties.

RULE II.

Whenever a motion can be made upon notice, an order to show cause will not be granted, except upon showing of some exigency whereby delay for the time prescribed for the notice of motion will cause injury, or render the relief sought ineffectual.

Such exigency must also be briefly stated in the order as ground for shortening the notice, and if on the hearing it appear that there was

no such grounds, the order may be discharged.

Such order must be accompanied by notice of motion setting forth the grounds on which the relief asked is sought, and substantially in the ordinary form of such notices, except that the time of hearing if mentioned in the notice otherwise than by reference to the order, shall be the time fixed by the order, the only scope of the order in such case being to shorten and fix the time for hearing the motion.

RULE III.

Upon the rendering of a verdict of a jury, or the filing of a decision by the court in any case, no stay of proceedings after the first will be granted without notice to the counsel, or consent of counsel for opposite party.

The jury fee in civil cases must be paid before the jury is sworn; also the sum of $2.00 to cover contingent fee of trial.

RULE IV.

All notes of issue hereafter filed with the clerk of this court for the general terms thereof, shall contain a statement showing whether said cause is a court or jury case; and where said cause is a default divorce case, the words "Default Divorce" shall be entered upon said note of issue.

All motions shall be heard on the first day

of the term; and upon said day applications for a resetting of cases will be heard. But applications for resettings will only be granted upon a legal showing which would entitle the party to an adjournment.

RULE V.

No default divorce case not upon the calendar on the first day of the term, shall be tried during the term unless so ordered by three of the judges, including the judge having charge of the court calendar.

And no such order shall be made except upon a showing, first: that great prejudice will result to the plaintiff if such order is not made, which showing must be by petition verified by the plaintiff, setting out in detail the facts relied upon to obtain the order sought.

Second. No such order shall be made except upon a showing that the complaint in said action has been filed, and has remained on file continuously, for at least 30 days prior to the date of the application for such order.

RULE VI.

All exhibits offered in evidence shall be placed in the custody of the clerk of the court, who shall be responsible for their care and production thereafter. If exhibits are of such a character as to render it necessary or un-

desirable in the opinion of the clerk that they should be retained by or turned over to the party to whom they belong, the clerk shall take a receipt therefore in the same manner as for other files and records of his office.

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