

MASON'S MINNESOTA STATUTES

1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-
UTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT
THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED
BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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printed as required by rule of court the cost of printing them cannot be recovered (5-522, 416). Objection that an excessive price was paid for printing the paper book will not be considered in the absence of an affidavit (45-471, 48+1, 526). If a brief contains improper reflections on the trial court the expense of printing will not be allowed (66-49, 68+462). 1903 c. 239 authorized the taxation by a prevailing appellant of such reasonable sum as may have been paid to a surety company for an appeal bond (92-415, 100+104, 362). Apportionment on cross-appeals (98-198, 103+7, 803). See 124-191, 144+768, 1135; 127-312, 149+955; 127-467, 149+940; 128-130, 150+620; 128-539, 151+1102; 134-155, 156+780, 158+820; 159+564. No statutory costs allowed (151-553, 186+688; 153-239, 190+56).

9487. Additional allowance—Costs, when paid—In an action for the recovery of money only, the court, if of opinion that the appeal was taken merely for delay, may allow plaintiff, in addition to costs and disbursements, not more than three per cent. of the judgment in the trial court. Except when otherwise ordered by the court, the losing party shall pay the costs and disbursements before he shall be entitled to a remittitur, or to proceed further in the trial court: Provided that, if it shall appear to the satisfaction of the court that he is unable to pay such costs in full, it shall grant a remittitur upon payment of the clerk's fees only, and thereupon he may proceed in the trial court. (4354) [7990]

Appeal for delay (40-394, 42+87; 51-343, 53+645; 55-414, 57+141; 57-140, 58+372). Payment as condition of remittitur (72-1, 80+366). Cited (112-250, 127+923). Inapplicable to receiver unless it appears that creditors are unable to pay (122-531, 142+200). Three per cent penalty (134-465, 157+327). See also (139-466, 166+1081; 141-223, 169+804).

9487-1. Additional costs on change of venue—Amount—Payment or waiver of—Taxation—Whenever service of summons is made upon a defendant within a county of which he is an actual resident at the time of such service, and the place of trial of such action is thereafter changed to such county in the manner provided by Section 7722, General Statutes of 1913, or whenever service of summons is made upon a defendant in a county of which he is not a resident, and the place of such trial is in like manner changed to a county of which the defendant has been an actual resident for more than one year immediately preceding such service, which fact shall be set forth in defendant's affidavit for change of venue, the plaintiff shall forthwith in either case, pay to each defendant demanding such change of venue the sum of Ten Dollars as additional costs.

No judgment shall be entered by plaintiff in any cause, the venue of which has been changed as aforesaid, until the plaintiff shall have filed with the clerk of court a receipt for, or a waiver of, such sum by all of the defendants who demanded such change of venue, or their respective attorneys. Such sums if not paid

by plaintiff, or waived by defendant, may be taxed against plaintiff by defendant as other costs if defendant prevails, or deducted from plaintiff's judgment, if plaintiff prevails. Provided, that the provisions of this act shall not apply to causes where there are several defendants residing in different counties, or an even number of defendants, and the place or trial is determined by joinder of demands or nearness to the county seat and not by actual residence of the defendants as of right. ('25, c. 242, § 1)

Explanatory note—For G. S. '13, § 7722 see § 9215, herein.

9488. Security for costs—When an action is begun in the district court by a plaintiff who is committed for a crime, or is a non-resident or a foreign corporation, or when such action is brought into the district court on appeal by defendant, such plaintiff shall file a bond to the clerk, before service of summons, or in case of appeal within five days after perfecting the same, in the sum of at least seventy-five dollars, conditioned for the payment of all costs and disbursements that may be adjudged against him. If, after the commencement of the action or the taking of an appeal, all parties plaintiff therein become non-residents, or the sureties on the bond remove from the state or become insolvent, the court, on motion, may require such bond, or an additional bond, to be filed, conditioned as aforesaid; but this section shall not apply to any action brought for the recovery of wages or claims for personal services. (4355) [7991]

G. S. 1894 § 5518 cited (100-76, 110+341).

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

9489. Neglect to file security—Prosecution of bond—Whenever any party shall commence an action without filing a bond, or fail to provide an additional bond when so required, the court, on motion of defendant, may order a stay of all proceedings in such action, or a dismissal thereof at the cost of the attorney commencing the same. Whenever judgment is entered against any party who has given security as required, and the costs and disbursements adjudged against him remain unpaid in whole or in part for ten days, such bond may be put in suit and prosecuted to final judgment. (4356) [7992]

43-295, 45+444.

165-184, 206+384.

CHAPTER 80

APPEALS IN CIVIL ACTIONS

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9490. Appeal from district court—A judgment or order in a civil action in a district court may be removed to the supreme court by appeal, as provided in this chapter, and not otherwise. (4357) [7993]

Application to special proceedings (12-388, 269; 24-313; 27-14, 6+401; 35-404, 29+161; 91-404, 98+98). Right of state to appeal (107-506, 121+395).

Mandamus cannot be resorted to for the purpose of reviewing an order of the district court, determining the manner of trial of a civil action. If a jury trial is denied, where a litigant is entitled to it and asserts his right, the error can be reviewed only on appeal. 159-193, 198+453.

9491. Title of action on appeal—The party appealing shall be known as the appellant, and the adverse party as the respondent; but the title of the action shall not be changed in consequence of the appeal. (4358) [7994]

A party whose interests would be adversely affected by the reversal of an order should be made a party to the appeal therefrom, but, if there must be an affirmation on the merits, a motion to dismiss the appeal will not be granted. 160-502, 200+744, 940.

9492. Requisites of appeal—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 specific part thereof. To render the appeal effective for any purpose the party appealing shall, within the time provided by law for taking such appeal, file said notice together with the bond on appeal with the clerk of the lower court, and at the time of filing such notice and bond, such appellant shall deposit with the clerk the sum of \$15, of which ten dollars shall be transmitted to the Clerk of the Supreme Court as provided in section 7996, General Statutes 1913 [9493], as and for the filing fee required in the Supreme Court by chapter 177, Laws 1915, and the remainder retained by the clerk of the court below as and for the fee provided in section 5756, General Statutes 1913, subdivision 50 [6987]. Whenever a party, in good faith, gives 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 proceedings, the court may permit an amendment on such terms as may be just. (R. L. '05 § 4359, G. S. '13 § 7995, amended '17 c. 66 § 2)

Explanatory note—For Laws 1915, c. 177, see § 6992, *heretofore*, 211+11.

¾. Notice of appeal.

Whatever form the adjudications of matters may take to the district court, they must be treated as final orders for the purpose of appeals to this court, and an appeal taken more than 30 days after receipt of written notice of the decision is not effective. The written notice received through the mail by the aggrieved party set the time for appeal running. 158-467, 197+847.

The notice of appeal must be served within the time provided by statute. If so served, the court may for cause shown relieve the appellant from a mistake in failing to file the appeal bond and pay the fee on appeal within the prescribed time. 164-466, 203+228.

A receiver was appointed for a firm operating a public local grain warehouse. The surety on their bond appealed from the allowance of certain claims, but served notice of appeal upon only one of the claimants. The appeal is dismissed as to other claimants for lack of jurisdiction. 212+198.

1. One notice of appeal from several orders—92-143, 99+638.

2. Contents of notice—Must contain a description of the order or judgment (8-188, 160; 25-272; 37-445, 35+264; 46-237, 48+1022). On appeal by guardian ad litem (25-39).

124-361, 145+114; 127-105, 149+3.

3. On whom served—Must be served on each adverse party as to whom it is sought to review any order or judgment, although he did not appear in the proceeding

or action in the district court (57-325, 59+308; 60-82, 61+902; 66-185, 68+834; 74-8, 76+790. See 78-408, 80+953, 81+210). A party not served is not before the supreme court (84-30, 86+767). An appeal may be taken against a co-plaintiff or co-defendant and notice of appeal should be served on them as well as on the opposite party (49-57, 52+26).

4. Service on clerk—9-232, 217; 32-434, 21+471; 46-343, 43+54.

5. Service on attorney—32-443, 21+474.

6. Amendment—87-205, 91+756, 92+331; 141-81, 169+476, 597.

7. Waiver of appeal—Appeal from order setting aside service of summons held not waived by subsequent personal service pending appeal; nor did such service render validity of the first moot question (108-62, 121+212).

8. See in general—(134-148, 156+730; 158+820, 159+564).

9. Appeal fee.

Appeal fee must be deposited in time to make appeal effective 158-530, 197+219.

10. Dismissal of appeal. 160-535, 202+329.

Dismissal of appeal. 160-535, 202+829.

9493. Return to Supreme Court—Upon an appeal being perfected, the clerk of the court appealed from shall immediately transmit to the clerk of the supreme court the ten dollar fee prescribed by section 7995, General Statutes 1913 [9492], together with a certified copy of the notice and bond upon appeal, and the filing thereof shall vest in the supreme court jurisdiction of the cause. Upon the filing of such return the supreme court may fix the time within which the printed record and briefs shall be served and filed, and also set a date for the argument of the questions presented by the appeal. Upon request of either party, the clerk of the court appealed from shall at the time required by the rules of the supreme court transmit to the clerk of the supreme court the original record, judgment roll, settled case, or bill of exceptions, and such exhibits as may be on file in his office, the same to remain in the supreme court for its use until the case is disposed of and then returned to the clerk of the court appealed from. (R. L. § 4360, amended '13 c. 55 § 1; '17 c. 66 § 3) [7996]

1. In general.

Memorandum, not made part of order granting new trial (107-457, 120+749). Review of record only when authenticated (122-43, 141+806). Ruling reviewable only when document affected is in record (123-214, 143+357). Settlement of case after appeal and denial of new trial; rule unchanged (127-533, 149+550). Correction of mistake in making up record cannot be had on ex parte application for rehearing (132-442, 157+991). Ruling reviewable as to excluded record only on return to appellate court (135-234, 160+787). Order not in record (135-480, 160+486; 141-79, 169+476, 597).

165-482, 205+888.

2. Authentication.

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

3. Briefs.

Where a brief is filled with scandalous and libelous statements concerning the opposing party and his witnesses and attorneys, it will be stricken from the files. 163-141, 203+979.

This court will on its own motion strike from its files and refuse to consider briefs which attack the fairness, honesty, or ability of the trial court. 164-466, 205+449.

Matter not a part of the record should not be printed in briefs of counsel or comment made thereon. 166-45, 207+178.

4. Settled case or bill of exceptions.

On an appeal from a judgment entered on findings of fact made by the trial court, where there is neither a settled case nor a bill of exceptions, the only question for review is whether the findings of fact, aided by the admissions in the pleadings, are sufficient to sustain the judgment. 165-268, 206+396.

A stipulation, not approved by the trial court, cannot be substituted for a settled case or bill of exceptions. 165-268, 206+396.

Where there is no motion for a new trial, the record must show exceptions to rulings at the time they were made in order to have them reviewed on appeal. 165-266, 206+404.

Motion to dismiss appeal for failure to print the set-

tled case denied, where the printed record reflects enough of the proceedings below to enable us to pass upon all of the questions raised by appellant. 167-84, 208+546.

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

Documents received in evidence but not included in the settled case are not before the court on appeal. If the settled case shows that documents were received, and the certificate of settlement makes no mention of them, the fact as shown in the settled case prevails over the certificate. 210+282.

5. Appeal fee.

Appeal fee must be deposited in time to make appeal effective. 158-530, 197+219.

6. Assignments of error.

Assignments of error not discussed and assignments which do not point out the alleged error in the record will not be considered on appeal. 156-52, 194+752.

The record presents only a question of fact with respect to which the findings are controlling. Assignments of error not discussed, because, among other things, of the failure of appellant to put material exhibits before the court and comply with rule 9 requiring reference to the folios and pages of the record. 167-428, 209+817.

7. Dismissal of appeal.

Dismissal of appeal. 160-535, 202+829.

9494. Powers of appellate court—Upon an appeal from a judgment or order, the appellate court may 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, if necessary or proper, may order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. (4361) [7997]

Prior to amendment—On joint appeal by several the court may reverse, affirm or modify the judgment or order as to any or all the parties (28-314, 9+863). Modification of judgment (28-400, 10+429). Cited (19-464, 406; 57-37, 58+868). Where new trial is ordered, parties may waive fact that mandate has not been sent down (100-434, 111+399). Decision of former appeal, reviewing former trial, when law of case (96-387, 104+1089, 106+112). Order or decision, otherwise right as a matter of law, will not be reversed because of wrong reasons assigned (97-135, 106+108). Justices equally divided (121-255, 141+116). Moot case (121-528, 141+97; 121-529, 141+1124). Statute of limitations operative, not disclosed by record, justifies new judgment, but new trial (122-240, 142+198). New trial on error as to part of issues (124-421, 145+173). Limitation with rest of verdict intact (131-389, 155+391; 133-192, 158+46). Remanding cause for new trial after findings as to fractional part to determine total (135-444, 161+165). No power to make findings of fact or direct court, except on conclusive evidence (129-380, 152+774). Erroneous finding is amendable (132-357, 157+500). Material facts found without evidence but record affords finding of other material facts in support, justify new trial (132-417, 157+645). Power to remand for renewal of motion for new trial on newly discovered evidence since appeal (132-475, 157+498). Evidence sustaining findings (132-476, 157+590). Erroneous dismissal does not warrant new trial for merely nominal damages (134-210, 158+979). Judgment affirmed because of unreasonable delay in filing briefs, etc. (135-464, 160+664). Decision in former appeal (133-464, 158+251; 134-432, 159+955). Effect of reversal of order denying a new trial as to issues triable (134-7, 158-705). Effect of reversal and remand without directions (134-471, 158+908).

1. In general.

165-482, 205+888.

2. Dismissal of appeal.

Court will dismiss appeal on own motion where order is not appealable. 167-522, 209+30.

3. Affirmance.

Order affirmed for failure of appellant's brief to comply with rule 8, requiring a concise statement of the case and of the points relied upon for reversal. 163-193, 203+624.

Under the circumstances stated in the opinion, it is held not an abuse of discretion to deny a new trial, notwithstanding some of the new evidence, if believed, would result in an acquittal, one of the grounds for such holding being that such evidence is flatly contrary to the testimony of both defendant and his wife. 210+45.

4. Reversal.

Where the trial court grants a new trial solely upon an alleged error in the charge to the jury, and the charge given is proper and without error, the order granting a new trial reversed. 210+44.

5. Proceedings below on reversal.

Effect of reversal. 165-374, 206+716.

When an order denying a new trial is reversed without directions, either party has a right to insist upon a retrial of all the issues. When reversed with directions, the district court should dispose of the case in accordance with the holding of this court expressed in its opinion, without putting the parties to the expense of a retrial of all the issues, if it can be avoided. 161-409, 201+617.

A retrial of all the issues is the inevitable result of the reversal of a judgment on the ground that the findings on which it is based are not justified by the evidence, or of the reversal without directions of an order denying a motion for a new trial. 161-409, 201+617.

6. Law of case.

A former decision is the law of the case only in so far as it is applicable to the facts developed on the second trial, and the special findings of a jury found by the appellate court to be sustained by the evidence and undisturbed by the trial court on final disposition of the case are to that extent the law of the case. 157-1, 195+627.

The ruling on a former appeal that the question of contributory negligence was for the jury is the law of the case as the evidence remains the same in substance. 158-136, 196+929.

A question decided on a former appeal on the same facts will not be reconsidered. 158-356, 197+743.

Decision on former appeal (McCarty v. Chicago, Milwaukee & St. Paul Railway Co., 154 Minn. 350, 191 N. W. 819, adherer to as the law of the case. 159-339, 198+814.

Decision on a former appeal, determining the effect of evidence erroneously excluded on the first trial, but now in the record and uncontroverted, is the law of the case. 165-136, 205+945.

The decision of the first appeal becomes the law of the case, and controls the determination of a second appeal, if no new facts were established at the second trial. 165-237, 206+392.

The record of a second trial found to be so far the same in substance as that of the first that the opinion on a former appeal is held to be the law of the case. 167-132, 208+541.

Questions determined by Supreme Court on former appeal held law of the case on subsequent appeal. 209+632.

7. Moot questions.

165-484, 205+894.

Moot questions. 165-484, 205+894.

8. Findings of fact.

Verdict on conflicting evidence will not be set aside, it having been confirmed by trial court. 157-374, 196+483.

This court will not determine questions of fact concerning which the evidence is conflicting. 157-459, 196+491.

The evidence made the issues in this case questions for the jury and, two juries having found for defendant, the litigation should end. 157-489, 196+651.

That vendors were not able, ready, and willing to perform punctually, that defendant was, that plaintiffs then refused to perform, and that thereupon defendant rescinded, are findings made upon conflicting evidence, and must stand. 162-452, 203+215.

Disputed questions of fact. 162-508, 202+50.

Findings of fact. 162-518, 202+729.

The court under established practice must give the same effect to findings of the trial court, made upon depositions or stipulated testimony, as upon testimony given by witnesses orally in the presence of the court. 167-37, 208+423.

In this case the verdict for the employee and against the employer is so perverse as to require a new trial. 167-84, 208+547.

A finding of fact by the jury upon conflicting testimony, approved by the trial court, should not be disturbed on appeal, unless the testimony in support of the finding is demonstrably false or incorrect. 210+290.

9. Rehearing.

166-118, 207+560.

9495. Judgment notwithstanding verdict—When, at the close of the testimony, any party to the action moves the court to direct a verdict in his favor, and such motion is denied, upon a subsequent motion that

judgment be entered notwithstanding the verdict, or notwithstanding the jury has disagreed and been discharged, the court shall grant the same if the moving party was entitled to such directed verdict. An order for judgment notwithstanding the verdict may also be made on a motion in the alternative form asking therefor, or, if the same be denied, for a new trial. If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be entered, when it appears from the testimony that a verdict should have been so directed at the trial; and it may also so order, on appeal from the whole order denying such motion when made in the alternative form, whether a new trial was granted or denied by such order. (R. L. § 4362, amended '13 c. 245 § 1; '15 c. 31 § 1; '17 c. 24 § 1) [7998]

1. Prior to amendment—When judgment should be ordered—Judgment should not be ordered unless it clearly appears from the whole evidence that the cause of action or defense sought to be established does not, in point of substance, constitute a legal cause of action or a legal defense. When it appears probable that a party has a good cause of action or defense and that deficiencies of proof might be remedied on another trial judgment should not be ordered (72-181, 75-221; 75-266, 77-958; 77-442, 80-617; 78-232, 80-1052; 79-14, 81-533; 80-67, 82-1097; 80-205, 83-137; 80-488, 83-446; 81-1, 83-459; 81-112, 83-503; 81-130, 83-511; 81-337, 84-114; 83-145, 85-942, 87-847; 83-385, 86-413; 84-314, 87-919; 84-397, 87-1117; 84-415, 87-1015; 85-391, 89-64; 86-77, 90-122; 87-525, 92-471; 89-280, 94-871; 90-503, 97-384; 94-421, 103-502). It is not alone sufficient to authorize judgment that the evidence was such that the trial court, in its discretion, ought to have granted a new trial (77-442, 80-617). If there is some evidence reasonably tending to prove a good cause of action or defense judgment cannot be ordered (81-130, 83-511). Where it is perfectly obvious that fatal deficiencies of proof could not be supplied on another trial judgment should be ordered (66-119, 68-851; 80-205, 83-137; 81-1, 83-459; 86-263, 90-534; 95-333, 104-133). Judgment not authorized where clear conflict in evidence on material issues (98-198, 108-7, 803). Inconsistency in verdicts, general or special, furnishes no basis for judgment notwithstanding verdict (112-488, 128-829).

2. Motion on trial for directed verdict necessary—64-136, 66-366; 66-355, 68-1099; 84-216, 87-617.

3. Motion for judgment—A party is not entitled to a judgment under the statute unless, after verdict, he specifically moves for it. The court cannot grant such relief on a mere motion for a new trial (64-312, 67-71; 65-447, 68-79; 66-355, 68-1099). The motion may be in the alternative; that is, for judgment notwithstanding the verdict, or, in case that is denied, for a new trial (66-355, 68-1099; 67-313, 69-1077). The notice of motion must state that the party will ask for a judgment in his favor and this notice must appear in the record on appeal (66-355, 68-1099). Motion for judgment notwithstanding verdict, made at conclusion of trial and denied, does not bar motion for new trial on a settled case, if seasonably made (102-358, 113-884). Under amendment '17 c. 24, 139-517, 166-1068. No verdict being rendered, the trial stopping with no formal disposition, appellant is not entitled to judgment non obstante but to a new trial (152-419, 188-1014).

164-300, 204-965; 164-425, 205-286; 213-541.

Motion for judgment notwithstanding verdict cannot be considered where there is no motion for a directed verdict. 158-408, 197-752.

The court has no authority under the statute to grant a motion for judgment notwithstanding the verdict, where the moving party did not ask for a directed verdict at the close of the testimony. 158-265, 197-280.

At common law the motion for judgment notwithstanding the verdict is based upon the pleadings. It must be apparent from the plea that it is without merit. Such motion is granted because the issues settled by the verdict are wholly immaterial. 158-265, 197-280.

After a motion for a new trial has been granted, in a case where no motion for a directed verdict is made at the close of the testimony, a motion for judgment notwithstanding the verdict under the statute is not cured by the court on its own motion revoking the order granting a new trial. 158-265, 197-280.

Defendants were not entitled to judgment non obstante, for no motion for a directed verdict was made at the trial. 158-389, 197-751.

The evidence considered, and held such as to entitle defendant to judgment notwithstanding the verdict. 157-29, 195-531.

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

Defendant moved for judgment, notwithstanding the verdict, but not for a new trial, which was denied. Upon an appeal from the judgment following, assignments of evidence will not be considered. 162-102, 202-345.

Upon an appeal from a judgment entered pursuant to an order granting a motion for judgment notwithstanding the verdict, where a new trial is not asked, the inquiry is directed to the sufficiency of the evidence tending to support the verdict. 162-235, 202-727.

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

Defendant is not entitled to judgment non obstante, for, as to one item included in the verdict, there is no assignment of insufficiency of the evidence to support a recovery. 163-257, 203-969.

When an order for judgment is granted by the trial court on an alternative motion for judgment or a new trial, and on appeal the order is reversed, upon the going down of the remittitur the motion for judgment stands as denied, and the motion for a new trial is before the court for disposition. 165-41, 205-433.

Upon an appeal from an order granting judgment notwithstanding the verdict, the only question presented is whether the evidence is sufficient to sustain the verdict. 165-374, 206-716.

Motion for a directed verdict at close of the trial held a statutory condition precedent to the granting of a motion for judgment notwithstanding the verdict. 166-124, 207-23.

A verdict should not be directed nor judgment non obstante ordered for defendant, if from all the facts developed in the trial it appears that plaintiff has a cause of action. 209-487.

The failure of plaintiff to adduce proof through a misapprehension of the effect of admissions should not result in judgment non obstante, but a new trial. 210-70.

Where the appealing defendant rests upon a motion for judgment notwithstanding the verdict, the only question is whether it clearly appears that the plaintiff is not entitled to recover. 210-618.

Upon a reversal of an order for judgment non obstante made pursuant to an alternative motion for such judgment or a new trial, the motion for a new trial stands before the trial court for determination. 213-536.

Judgment non obstante will be ordered only when the evidence is conclusive against the verdict. 513-536.

This court cannot hold that the evidence, to the effect that the signature of defendant to the promissory note in suit was obtained by the trickery, fraud, and wrongful conduct of the payee charged in the answer, is so improbable or incredible that the jury was not justified in returning a verdict which so finds. 156-424, 195-141.

In this, an action to recover damages for personal injuries, it is held, that the evidence justified the refusal to direct a verdict in favor of the defendant, at the close of the testimony, and therefore the motion for judgment, notwithstanding the verdict, was properly denied. 156-471, 195-144.

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

A bridge constructed and maintained by defendant on a highway crossing its track had steep grades and sharp curves, but had no wheel or rail guard, the evidence justified the jury in finding defendant negligent in failing to provide such rail guard, and that such negligence caused or contributed to plaintiff's injuries, received when an automobile in which he was riding, but not driving, went through the railing and dropped 18 feet to the track below. 157-345, 196-177.

The evidence justified a finding that the automobile, insured against fire loss by defendant was damaged by an accidental fire; hence defendant cannot have judgment notwithstanding the verdict. 162-34, 202-32.

Upon the facts stated in the opinion it is held: That, because of the construction and operation of the machinery involved and the nature of plaintiff's injury, the accident could not have occurred in the way claimed by plaintiff; therefore the trial court properly granted judgment notwithstanding the verdict. 167-140, 208-655.

The evidence as to the negligence of the plaintiff and the defendant were for the jury, and judgment for the defendant notwithstanding the verdict should not have been ordered. 167-399, 208-1007.

The defenses of want of consideration and fraud in obtaining defendant's signature to a promissory note were not sustained by the evidence, and the court properly ordered judgment notwithstanding the verdict. 209+484.

4. **Constitutional**—The statute is constitutional (64-312, 67+71), but it must be construed and applied so as not to invade the constitutional right of trial by jury (84-397, 87+1117).

5. **Inapplicable to trial by court**—84-226, 87+768; 89-147, 94+434; 107-104, 119+428.

6. **Appealability of order on motion**—64-312, 67+71; 67-318, 69+1077; 71-50, 73+631; 76-7, 78+873; 76-351, 79+310; 88-162, 92+542; 89-147, 94+434; 90-52, 95+751; 90-205, 95+906. Denying motion for judgment notwithstanding verdict (109-509, 124+213; 116-389, 133+966). 151-40, 185+960, 195+145.

7. **Disposition of case on appeal**—75-266, 77+958; 77-442, 80+617; 79-14, 81+533; 80-67, 82+1097; 81-130, 83+511; 84-314, 87+919.

8. **Scope of review on appeal from judgment**—71-45, 73+637.

9496. **Dismissal of appeal in vacation**—Any justice of the supreme court, during vacation, shall have the same power as the court in term to dismiss any appeal and remand the cause to the court below, upon the stipulation of the parties, consenting thereto, filed with the clerk of said court. (4363) [7999]

9497. **Appeal, when taken**—An appeal from a judgment may be taken within six months after the entry thereof, and from an order within thirty days after written notice of the same from the adverse party. (4364) [8000]

1. **When judgment entered**—Judgment must be made a matter of record in order to limit the time for taking an appeal (9-318, 301; 15-185, 142; 22-559, 36-117, 30+436). A judgment is not perfected for the purpose of limiting the time for taking an appeal until costs have been taxed and inserted therein (37-461, 35-270; 45-517, 43+404; 80-524, 83+415) unless the prevailing party has waived them (81-228, 83+836).

2. **Appeal from judgment**—Time to appeal from judgment, complete and perfect on its face, expires six months from date of entry. Pendency of appeal from the clerk's taxation of costs, which are allowed and included in judgment, does not suspend operation of statute fixing time (101-65, 111+923). Where plaintiff recovers judgment, but not for all relief claimed, and defendant appeals and assigns errors only as to part unfavorable to him and judgment is affirmed on his appeal, plaintiff within time limited may appeal from that part which is to his disadvantage (99-280, 109+238, 110+975). Time to appeal expiring on Thanksgiving day (129-522, 151+273). After lapse of six months (134-292, 159+623; 146-429, 178+954).

2½. **Notice of appeal**. Actual notice does not take place of written notice. 163-383, 202+52.

3. **Appeal from order**—An appeal may be taken from an order within thirty days after written notice of the same (91-226, 97+974). Actual notice does not take the place of written notice. The obligation to give written notice rests on both parties and each must be served with notice to set the statute running as to him (83-145, 85+942, 87+847). Notice cannot be given to a party for the purpose of limiting the time for appealing from a conditional order until the order becomes as to him a final order and therefore appealable. The correct practice requires the party on whom the condition is imposed to perform it and then give written notice of the making of the order and of his compliance with its terms. The opposite party must then, if he desires to appeal from the order, do so within thirty days after receiving such notice (84-168, 87+363, 88+252). The time within which to appeal cannot be extended by a second entry of the same order (9-249, 235). Appeal from order modifying prior order (34-266, 26+6. See 67-35, 69+477). Though no notice is given, no appeal lies from order for judgment notwithstanding verdict, pursuant to which judgment is entered, after expiration of time for appeal from judgment, and more than year from entry (110-414, 125+1017). Appeal from order before judgment is barred by lapse of judgment limitation (135-23, 160+80). 147-3, 179+369; 147-202, 179+907. Appeal from order denying new trial made eleven months after conviction and not within six month period from judgment (195+635).

4. **Appeal from a modified judgment**—65-25, 67+649.
5. **Appeal in action for claim against county**—82-542, 85+550.

9498. **Appeal to supreme court**—An appeal may be

taken to the supreme court by the aggrieved party in the following cases:

1. 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 such appeal the court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from.

2. 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.

3. From an order involving the merits of the action or some part thereof.

4. From an order refusing a new trial, or from an order sustaining a demurrer, provided that when an order granting a new trial is based exclusively upon errors occurring at the trial and it is so expressly stated in the order or memorandum of the trial court, an appeal therefrom may be taken but in such case only.

Provided further that where the trial court has once granted a new trial in the exercise of its discretion, on the ground that the evidence is not sufficient to support the verdict, an appeal may be taken from any subsequent order granting a new trial wholly or in part upon that ground.

Provided further that when upon the entry of an order overruling a demurrer, the trial court shall certify that the question presented by the demurrer is in his opinion important and doubtful, and such certification is made part of the order overruling the demurrer, an appeal from such order may be taken.

5. From an order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.

6. From an order or judgment made or rendered in proceedings supplementary to execution.

7. From a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment.

When an appeal is perfected under subdivisions 2 or 7 of this section, and notice and bond on appeal is filed with the clerk of the supreme court, the party appealing or the respondent, may apply to the supreme court, upon ten days' notice, for an order fixing the time and manner of the hearing of the appeal; and the court may, in its discretion, if it be of opinion that the substantial interests of the parties involved, or of the public, require a speedy hearing, summarily fix the time of hearing, whether the court be then in session or in vacation, and may summarily determine the time for filing paper books and briefs, and the method of submission. (R. L. § 4365, amended '13 c. 474 § 1) [8001]

STATUTE GENERALLY

¾. **In general**. 209+904; 210+868; 166-481, 208+413, note under § 9384.

Mandamus cannot be resorted to for the purpose of reviewing an order of the district court, determining the manner of trial of a civil action. If a jury trial is denied, where a litigant is entitled to it and asserts his right, the error can be reviewed only on appeal. 159-193, 198+453.

Where a court having jurisdiction of the subject matter and of the defendant erroneously denies an application for change of judge, the remedy is by appeal. The defendant is not entitled to be discharged on a writ of habeas corpus. 159-403, 199+103.

Whether an appeal from a judgment upon an audit made pursuant to Laws 1919, c. 471, lies directly to this court, quære. 161-66, 200+233.

An order denying a motion for judgment and also a motion for a new trial, except upon a single issue, is appealable. 162-436, 203+218.

The order of the district court directing the Railroad Commission to make a return is appealable to this court. 163-274, 203+972.

Errors in findings corrected by motion in trial court. 165-293, 206+454.

Orders, made under the statute, allowing claims against an insolvent corporation and assessing its stockholders are final and do not authorize or require the entry of judgment thereon. They must be appealed from, if at all, within 30 days from notice. 210+628.

Order denying motion to vacate and set aside an information is not appealable. 211+469.

Jurisdiction cannot be conferred by stipulation, where the court has only appellate jurisdiction. 212+198.

An order granting a motion for judgment on the pleadings is not appealable. 212+896.

An order denying a motion to strike out a portion of a pleading as immaterial, irrelevant, and redundant is not appealable. 212+896.

4. Party aggrieved.

The defendant, against whom a judgment was recovered in an action by a father for an injury to his minor child, is not a proper party to the appeal of plaintiff's attorneys from an order fixing the fees to be paid to them out of the money received by the father in satisfaction of the judgment. 160-122, 199+579.

As the representative of the creditors of the corporation, a receiver may enforce their rights against stockholders, and appeal from an order disposing of money in his custody, if there are corporate creditors whose rights are prejudiced thereby. 210+38.

Where a vendee, who has deposited a part of the purchase price with a third party, to be delivered to the vendor on performance on his part, obtains a judgment against the vendor and such third party for the return of the money, the third party cannot question the correctness of the judgment on appeal to this court, as he has no interest in the fund. 210+859.

Appeals from orders denying motions for new trials were taken by and in the name of the plaintiff after it had been adjudged a bankrupt and a receiver of its property had been appointed. Respondents moved to dismiss the appeals because they had not been taken by the receiver. Thereupon the receiver applied to this court for an order substituting him as appellant, and the application was granted. Held, that the motions to dismiss should be denied. 212+196.

1. Application to special proceedings—12-388, 269; 24-313; 27-14, 6+401; 35-404, 29+161; 91-404, 98+98.

2. Appeal from several orders—92-143, 99+638.

3. Orders vacating non-appealable orders—That which cannot be done directly cannot be done indirectly. An appeal will not lie from an order granting or refusing a motion to vacate a non-appealable order (44-322, 46+560; 46-73, 48+458).

SUBDIVISION 1

4. From judgment on appeal to district court—A judgment affirming an order of the probate court admitting a will to probate (20-245, 220). A judgment in unlawful detainer proceedings (14-469, 351); a judgment on an appeal from the award of commissioners in condemnation proceedings (35-404, 29+161).

5. From judgment in action commenced in district court—An appeal does not lie from an order for judgment (4-320, 236; 8-467, 417; 14-513, 385; 14-514, 387; 15-185, 142; 18-316, 285; 25-362; 25-509; 26-303, 3+695; 26-317, 4+45; 28-156, 9+635; 30-119, 14+511; 30-156, 14+794; 38-278, 37+338; 39-30, 38+804; 50-332, 52+898; 67-318, 69+1077; 71-50, 73+631; 72-99, 75+4; 79-232, 82+311; 88-162, 92+542). Aliter in habeas corpus proceedings, 93-294, 101+303). Judgment must be the final determination of the rights of the parties in the action (1-24, 8; 2-50, 37; 2-59, 46; 8-96, 71; 12-437, 326; 20-245, 220; 27-376, 7+732; 44-526, 47+171; 86-509, 91+29). It is not necessary that it should be on the merits and preclude the parties from bringing another action. It is only necessary that it should be final in the sense of terminating the particular action. Judgments of dismissal are appealable as well as judgments on the merits (34-350, 25+712). Form is not controlling and if an order is in effect a final judgment it is appealable as such (20-245, 220; 86-509, 91+29; 92-242, 99+807). A judgment which is such only in name is not appealable (2-50, 37; 2-59, 46). Judgment in partition (44-526, 47+171). Judgment in action for foreclosure (27-376, 7+732; 58-365, 59+1086; 86-509, 91+29). Judgment in mandamus proceedings (92-242, 99+807). An appeal may be taken from a part of a judgment (31-280, 17-620; 84-493, 87+1012). Immaterial whether action is legal or equitable (7-487, 393). Judgment in condemnation proceedings (35-404, 29+161). Judgment ordered by the court notwithstanding the verdict stands on the same footing as a judgment entered on a verdict (71-45, 73+637). Judgment must be formally entered in the judgment book before the appeal is taken. No appeal lies from a mere opinion, decision or finding

of the court (15-185, 142; 11-203, 132; 17-61, 40; 21-1; 39-30, 38+804). A judgment vacating a town or village plat held appealable as an order (91-404, 98+98). Appeal from judgment on demurrer after denial of leave to amend brings up for review orders sustaining demurrer and denying leave to amend (110-237, 125+115). Judgment for costs and disbursements (124-361, 145+114). No appeal from order denying a motion for judgment (126-13, 147+668). Appeal from adverse judgment in divorce, where appellant's attorney received the attorney's fee allowed, and satisfied the judgment to that extent (129-531, 152+269). Acceptance of benefits waives right of appeal (130-281, 153+756; 134-148, 156+780, 158+820).

An order of the district court, sustaining an order of the probate court from which an appeal has been taken, is not appealable; the appeal must be taken from the judgment entered pursuant to such order. 162-373, 202+817.

6. Default judgments appealable—2-313, 268; 4-163, 108; 4-190, 131; 10-178, 144; 11-314, 219; 15-81, 59; 15-102, 77; 22-1; 24-1; 24-43; 28-501, 11+64; 33-372, 23+541; 36-341, 31+56; 38-521, 38+613; 55-53, 56+463; 61-271, 63+735; 68-112, 71+9.

SUBDIVISION 2

7. Orders held appealable—Vacating attachment (5-69, 50; 39-171, 39+69. See 52-283, 53+1157); modifying injunction and suspending its operation in part (30-477, 16+269); refusing to vacate attachment (14-125, 93; 60-501, 62+1133); refusing to appoint receiver (21-39); appointing receiver (62-280, 64+813); vacating appointment of receiver (see 5-418, 338); granting temporary injunction on a hearing (88-372, 93+118). 132-424, 157+647.

Order in a divorce action denying an allowance to the wife for suit money, attorney's fees and temporary alimony is appealable as one denying a provisional remedy. 166-283 207+616.

8. Orders held not appealable—Granting injunction ex parte (52-283, 53+1157; 88-372, 93+118); granting or refusing order for inspection of documents (32-353, 100+92. See 106-539, 118+664; 120-507, 139+805). Findings in injunction and order for judgment (120-507, 139+805; 123-232, 143+728; 128-391, 151+139; 130-510, 153+1088).

SUBDIVISION 3

9. Construed strictly—An order involving the merits is one which determines "the strict legal rights of the parties as contradistinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court" (2-118, 95; 10-168, 136; 12-60, 27; 13-66, 58; 27-109, 6+454; 39-477, 40+570; 86-13, 89+1124). It "must be decisive of the question involved, or of some strictly legal right of the party appealing. An order which leaves the point involved still pending before the court, and undetermined, cannot be said to involve the merits or affect a substantial right" (12-357, 232; 39-477, 40+570; 66-447, 69+224). The order should be, in effect, in the nature of a final judgment in the action or at least a final determination of some material question involved therein. It must be something more than a mere intermediate order made in the course of the trial on a question of procedure (12-349, 227; 71-363, 73+1089; 83-6, 85+1135).

10. Orders held appealable—Striking out pleading or a portion of pleading (3-202, 133; 10-168, 136; 12-515, 425; 15-43, 25; 31-427, 18+147; 32-499, 18+832, 21+736); opening default (13-66, 58; 50-1, 52+219); setting aside stipulation for dismissal (14-333, 256); setting aside stipulation as to facts of a case (6-136, 82. See 82-544, 85+549); refusing to vacate unauthorized judgment (12-60, 27); setting aside judgment in proceedings to enforce payment of taxes (27-109, 6+454); allowing counsel fees in a divorce case (34-441, 26+450; 84-403, 87+1014); denying motion to strike from files a settled case or bill of exceptions for irregularities in the settlement thereof (30-322, 33+190); vacating a previous order affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian (82-324, 84+1017, 86+333); striking cause from calendar on the ground that it had been transferred to another court (83-447, 86+415); confirming sale in proceedings to wind up an insolvent corporation (41-256, 43+180); allowing amendment of complaint after judgment and directing certain issues to be placed on calendar for trial (36-99, 30+429); denying motion to set aside summons (86-13, 89+1124); denying motion to modify judgment (89-470, 95+320).

166-497, 207+631; 167-525, 209+30.

11. Orders held not appealable—Denying motion on the trial for judgment on the pleadings (12-357, 232); directing compulsory reference (61-43, 63+3); refusing to strike out pleading (24-447; 32-499, 18+832; 36-117, 30+436; 39-477, 40+570); denying motion to make pleading more definite and certain (71-363, 73+1089; 83-6, 85+1135); denying motion to change place of trial (10-285, 224; 22-539; 59-97, 60+809); vacating prior order vacating judgment (63-205, 65+268); denying motion to set aside complaint on the ground that it did not conform to the

notice in the summons (21-335); modifying prior order granting new trial (2-118, 95); denying motion to strike out and dismiss objections filed to allowance of account of trustee (66-447, 69+224); refusing application to intervene (25-148); refusing to dismiss an appeal (22-266); appointing committee in proceedings to condemn land for enlarging a cemetery (70-436, 73+153); denying motion to affirm an order of probate court (85-117, 88+430); granting or refusing order for inspection of documents (92-353, 100+92); denying motion to amend findings (106-539, 118+664; 108-83, 121+212; 116-414, 133+986); denying motion to amend findings, to set aside conclusions, and for judgment (108-523, 121+395); order for judgment (108-83, 121+212); allowing amended or supplemental pleading, before judgment (110-472, 125+1061). 129-300, 152+541. Order denying motion to amend complaint (196+261).

SUBDIVISION 4

11a. Amendment of 1913—Formerly this subdivision read: "From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer," without further.

12. Orders held appealable—Granting or denying motion for new trial after trial by court (27-143, 6+773; 28-330, 9+876), or after trial by referee (12-502, 406); after entry of judgment (9-318, 301; 24-339); after dismissing appeal from town board (108-224, 120+526); for new trial of right in action of ejectment (10-397, 316); granting or denying new trial under (28-251, 9+756); refusing to entertain motion for new trial (28-330, 9+876; 76-391, 79+397); granting or denying a blended motion for a new trial or for judgment notwithstanding the verdict after trial by court (89-147, 94+434; 95-396, 104+131; 109-452, 124+226; 115-414, 132+911). 122-119, 142+112; 122-523, 141+812; 123-530, 143+1123; 125-325, 146+1110. New trial because of insufficient evidence when appealable (149-232, 183+147; 151-39, 185+960).

13. Orders held not appealable—Made pro forma (25-553); denying motion to vacate order sustaining demurrer and for new trial on demurrer (37-382, 34+739); refusing to vacate order denying new trial (46-201, 48+778); modifying a prior order granting new trial (2-118, 95). 125-298, 146+975. Unless granted exclusively on ground of errors of law occurring at trial (128-488, 151+139). 129-527, 151+1101; 131-124, 154+945; 132-35, 155+1054; 132-473, 157+114; 134-195, 158+968; 134-266, 159+564; 142-146, 171+305; 148-486, 182+166; 148-487, 182+166; 149-495, 182+719; 151-39, 185+960.

An appeal from an order granting a new trial cannot be taken, unless the order, or a memorandum made a part thereof, expressly states that the order is based exclusively upon errors occurring at the trial. 162-85, 202+63.

Under this subdivision an appeal is authorized from order granting new trial when order is based exclusively on errors occurring at trial, but appeal from order granting new trial for insufficiency of evidence is allowed only when second verdict is set aside on such ground, it being wholly within discretion of trial court to set aside first verdict as not supported by evidence, and certiorari will not lie to review such order. 165-50, 205+691.

An order granting a new trial is not appealable, unless the court states expressly that it is granted exclusively for errors of law. 165-396, 206+728.

14. Orders sustaining or overruling a demurrer—See change by amendment of 1913. 9-151, 141; 42-202, 43+115; 46-207, 48+782; 52-55, 53+1024; 61-17, 63+95.

SUBDIVISION 5

15. Orders held appealable—Vacating prior order setting aside judgment, the second order being made after time to appeal from judgment had expired (5-27, 14); dismissing appeal from order of town supervisors laying out highway and from their award for damages (37-445, 35+264); discharging garnishee (41-3, 42+539); setting aside insurance money as exempt in insolvency proceeding (59-415, 61+456); denying petition of creditor in insolvency proceedings to be permitted to file his claim after time limited (65-237, 67+995); for judgment without proof on demurrer being overruled in an equitable action (2-50, 37); dismissing appeal from justice court (30-206, 14+897. See 66-470, 69+215; 81-492, 84+301). 166-497, 207+631; 167-522, 209+30.

16. Orders held not appealable—Dismissing action before trial on application of plaintiff (16-177, 155); dismissing appeal from justice court (66-470, 69+215); denying motion to dismiss appeal from probate court (22-266; 72-258, 75+374); appointing committee in condemnation proceedings to enlarge a cemetery (70-436, 73+153); denying motion to set aside report of commissioners in condemnation proceedings (67-339, 69+1085); denying motion to set aside complaint on the ground that it does not conform to notice in summons (21-335); denying motion to affirm order of probate court allowing account of executor (85-117, 88+430); refusing to strike cause from calendar (83-447, 86+415); denying motion to set aside service of summons (86-13, 89+1124). 196+261.

SUBDIVISION 6

17. Cases—4-224, 163; 22-452; 33-132, 22+177; 51-230, 53+461. Order supplementary to examination, requiring judgment debtor to appear for examination, concerning his property, not appealable (104-174, 116+103). 131-227, 154+1079.

SUBDIVISION 7

18. Definitions—A final order is one that ends a proceeding so far as the court making it is concerned (4-224, 163). A mere interlocutory or administrative order is not a final order (44-322, 46+560). A judgment may be in effect a final order (91-404, 98+98). The phrase "special proceeding" is a generic term for all civil remedies in courts of justice which are not ordinary actions (84-403, 87+1014).

19. Orders held appealable—Granting leave to issue execution after statutory time (11-381, 276); on disclosure in proceedings supplementary to execution directing assignment of claims belonging to debtor and appointing receiver to collect same (22-452); directing sheriff to pay over moneys collected on execution (29-162, 12+452, 453); appointing receiver in insolvency (30-358, 16+395; 33-405, 23+835; 44-322, 46+560); directing receiver to distribute proceeds of estate of insolvent among creditors and setting aside liens of attaching and execution creditors (29-269, 13+48. See 44-322, 46+560); in insolvency dismissing petition under G. S. 1894 § 4249 (46-331, 48+1132); denying motion to correct judgment entered by clerk and not conforming to findings (47-257, 49+981); in proceedings for contempt other than criminal (8-214, 185; 26-9, 46+446; 30-260, 15+117; 30-487, 16+398; 40-4, 41+1076; 41-42, 42+598; 61-120; 63+169; 89-253, 94+679); dismissing motion under G. S. 1894 § 5435 to compel entry of satisfaction of judgment (16-451, 407); vacating an execution sale on real estate and the certificate and sheriff's return (1-183, 157; 16-13, 1); discharging a person on habeas corpus (29-462, 13+902); vacating order discharging a person on habeas corpus (10-63, 45); allowing peremptory writ of mandamus (31-211, 17+339. See 74-371, 77+221; 92-242, 99+807); directing sheriff to turn over property in replevin (71-390, 73+1095); denying motion to open tax judgment (25-295. See 27-109, 6+454); denying motion to vacate judgment of divorce and allow defendant to answer (17-181, 153); denying motion to vacate judgment rendered against party after his decease (22-542); on a motion to correct a judgment entered by the clerk on insufficient evidence of personal service of summons (4-163, 108); appointing or refusing to appoint receiver in supplementary proceedings (22-452; 33-132, 22+177); in condemnation proceedings dismissing appeal from award of commissioners (18-384, 345. See 24-313); directing payment of money in supplementary proceedings (51-230, 53+461); setting apart to insolvent in insolvency proceedings exempt insurance money (59-415, 61+456); denying new trial in condemnation proceedings (15-230, 179); setting aside judgment in tax proceedings (27-109, 6+454); in certiorari proceedings quashing proceedings of county commissioners in forming new school district (43-312, 45+435); in bastardy proceedings denying defendant application for discharge (79-27, 81+536); granting attorney's fees in divorce proceedings (84-403, 87+1014); permitting creditors of insolvent to share in estate without filing releases (62-427, 64+922); discharging garnishee after examination (41-3, 42+539); confirming sale in proceedings to wind up corporation (41-256, 43+180); assessing stockholders in proceedings under G. S. 1894 c. 76 (84-144, 86+872); allowing claims of creditors in proceedings under G. S. 1894 c. 76 (84-144, 86+872); vacating town or village plat (91-404, 98+98); denying motion to modify judgment (89-470, 95+320). 124-361, 145+114; 127-108, 149+3; 128-321, 150+180, 906; 131-365, 155+396; 134-261, 159+272; 136-443, 162+522; 136-461, 161+1055; 147-25, 179+569. "Final Order" (194+378).

An order dismissing an appeal to the district court from an order establishing a cartway in township highway proceedings, for jurisdictional defects, is appealable as a "final order" in a special proceeding. 156-229, 194+378.

Neither an order removing a receiver nor an order refusing to limit authority of successor were appealable. 156-502, 195+273.

20. Orders held not appealable—In proceedings supplementary to execution (4-224, 163) overruled by statute); refusing application to intervene (25-148); denying motion to strike out and dismiss objections to allowance of account of trustee (66-447, 69+224); denying motion to set aside report of commissioners in condemnation proceedings (67-339, 69+1085); appointing committee in condemnation proceedings for the purpose of a cemetery (70-436, 73+153); denying motion to dismiss appeal from probate court (72-258, 75+374); dismissing appeal from award of water commissioners under Sp. Laws 1881 c. 183 (36-163, 30+661); granting new trial in condemnation proceedings (12-388, 269. See 35-404, 29+161); denying motion to dismiss petition under statute relating to dams and mills (11-253, 168); appointing commissioners in condemnation proceedings (81-62, 83+497); refusing to dismiss appeal from probate court (72-258, 75+374); denying motion to affirm order of probate

court allowing account of executor (85-117, 88+430); vacating previous order of dismissal in insolvency proceedings (30-553, 16+452); denying motion for new trial after entry of judgment in tax proceedings under charter of St. Paul (22-492); administrative order in action to wind up corporation (44-322, 46+560); order removing receiver appointed to wind up insolvent corporation, except when it goes beyond fact of removal and adjudicates rights of receiver (104-367, 116+656); 122-386, 142+724; 125-297, 146+975; 126-31, 147+667; 128-10, 150+169; 128-77, 150+224, 128-153, 150+383; 129-526, 151+1101; 129-528, 152+270; 129-536, 152+653; 130-534, 153+305; Order made by a Court Commissioner (131-129, 154+748; 132-413, 157+691; 134-376, 159+826; 134-474, 159+129; 136-463, 161+783). Motion for new trial, without basis for same, when made, no appeal lies from denial thereof (194-379, 195+273).

APPEALABILITY OF ORDERS GENERALLY

21. Orders held appealable.—Granting or denying new trial (note 12 supra); granting or denying, dissolving or refusing to dissolve, injunction (note 7 supra); vacating or refusing to vacate attachment (note 7 supra); sustaining or overruling demurrer (note 14 supra); in insolvency proceedings (22-452; 33-132, 22+177; 33-405, 23+835; 46-331, 48+1132; 59-415, 61+456; 62-427, 64+922; 65-237, 67+995); in condemnation proceedings (15-230, 179; 18-384, 345; 24-313; 34-227, 25+345); in civil contempt proceedings (8-214, 185; 26-9, 46+446; 30-260, 15+117; 30-487, 16+398; 40-4, 41+1076; 41-42, 42+598; 61-120, 63+169; 89-253, 94+679); in proceedings to wind up corporations (41-256, 43+180; 84-144, 86+872); in garnishment proceedings (41-3, 42+533; 95-118, 103+709); in habeas corpus proceedings (10-63, 45; 29-462, 13+902; 93-294, 101+303. See § 8311); in supplementary proceedings (30-358, 16+395; 33-405, 23+835; 51-230, 53+461); for judgment notwithstanding the verdict under § 7998 (64-312, 67+71; 89-147, 94+434; 90-52, 95+751. See § 7998 note 6); opening default (13-66, 58; 50-1, 52+219); striking out pleading (3-202, 133; 10-168, 136; 12-515, 425; 15-43, 25; 31-427, 18+147; 32-499, 18+832); refusing to vacate unauthorized judgment (12-60, 27); setting aside tax judgment (27-109, 6+454); denying motion to correct judgment entered by clerk (47-257, 49+981); appointing receiver in foreclosure proceedings (62-280, 64+813); refusing to appoint receiver (21-39); vacating appointment of receiver (5-418, 338); directing sheriff to deliver property levied on to receiver in insolvency (33-405, 23-835); directing sheriff to deliver property taken in replevin to receiver (71-390, 73+1095); denying motion to strike from files settled case (80-322, 83+190); setting aside stipulation for dismissal (14-333, 256); setting aside stipulation as to facts of case (6-136, 82. See 82-544, 85+549); allowing counsel fees in divorce proceedings (34-441, 26+450; 84-403, 87+1014); directing sheriff to pay over money (29-162, 12+452, 453); dismissing motion to compel entry of satisfaction of judgment (16-451, 407); denying motion to open tax judgment (25-295. See 27-109, 6+454); granting leave to issue execution after time limited (11-381, 276); vacating execution sale (1-183, 157; 16-13, 1); dismissing appeal from order of town supervisors laying out highway (37-445, 35+264); vacating previous order of probate court refusing to vacate order allowing account of guardian (82-324, 84+1017, 86+333); striking case from calendar because transferred to another court (83-447, 86+415); allowing amendment of complaint after judgment and directing issues to be placed on calendar for trial (36-99, 30+429); denying motion to vacate judgment of divorce and to allow defendant to answer (17-181, 153); denying application to vacate judgment against party after his decease (22-542); quashing proceedings of county commissioners in forming new school district (43-312, 45+435); denying application for discharge in bastardy proceedings (79-27, 81+536); allowing creditor to share in estate without filing release (62-427, 64+922); vacating prior order setting aside judgment (5-27, 14); denying motion to set aside service of summons (86-13, 89+1124); denying motion to modify judgment (89-470, 95+320); adding new parties defendant (92-143, 99+638). 125-325, 146+1110; 133-124, 155+906; 136-462, 161+1055; 142-450, 172+699.

22. Orders held not appealable.—Ex parte (11-364, 262; 12-351, 228; 12-388, 269; 52-283, 53+1157; 88-372, 93+118; 92-143, 99+638); dismissing action on trial for insufficiency of evidence (15-185, 142; 18-316, 285; 29-232, 82+311), or for insufficiency of pleadings (34-350, 25+712); refusing to dismiss action on trial for insufficiency of evidence or for insufficiency of pleading, or for want of jurisdiction (12-357, 232; 61-434, 63+1027); granting motion on trial for judgment on pleadings (14-513, 385; 14-514, 387; 15-185, 142; 46-73, 48+458; 50-332, 52+898; 112-487, 128+669); denying motion on trial for judgment on pleadings (12-357, 232; 46-73, 48+458; 92-242, 99+807); directing compulsory reference (61-43, 63+3); granting or refusing amendment of pleadings on trial (5-505, 399; 10-192, 155; 25-328; 55-507, 57+151; 87-209, 91+756); admitting or excluding evidence on trial (12-349, 227); refusing to strike out pleading as sham (39-447, 40+570); refusing to strike out allegation claimed to be irrelevant and redundant (24-447; 32-499, 18+832); denying motion to make pleading more definite and certain (71-

363, 73+1089; 83-6, 85+1135); refusing to strike out portions of pleading for duplicity (36-117, 30+436); denying motion for change of venue (10-285, 224; 22-539, 59-97, 60+809; denying motion for additional or amended findings (70-441, 73+252; 86-509, 91+29); for judgment (note 5 supra); setting aside judgment on question of practice as to service of answer (4-320, 236); requiring bill of particulars to be made more specific (54-202, 55+863); denying motion for settlement of case (26-214, 2+494; 30-98, 14+459; 37-461, 35+270; 38-137, 36+108); settling and allowing case (76-201, 78+1108, 1119); denying motion to amend or change conclusions of law (30-119, 14+511; 71-322, 73+975; 76-7, 78+873; 86-509, 91+29); vacating prior order vacating judgment (63-205, 65+268); refusing to set aside garnishment proceedings for insufficiency of affidavit and granting plaintiff leave to file supplemental complaint (5-347, 279); refusing to dismiss appeal from probate to district court (22-266; 72-258, 75+374); appointing committee in condemnation proceedings for cemetery (70-436, 73+153); in condemnation proceedings (31-42, 16+456; 67-339, 69+1085; 81-62, 83+497); granting receiver leave to bring action to enforce statutory liability of stockholders (70-414, 73+175); denying motion for judgment on findings after reversal on appeal (72-99, 75+44); denying motion for new trial on issue of law (55-155, 56+592); denying motion to set aside complaint not conforming to notice in summons (21-335); denying motion to intervene (25-148); dismissing action before trial on motion of plaintiff (1-179, 153; 16-177, 155); dismissing appeal from justice court (66-470, 69+215; 81-492, 84+301); refusing to dismiss appeal from award of water commissioners under St. Paul charter (36-163, 30+661); refusing leave to serve case after statutory time (6-558, 394); setting aside taxation of costs and ordering retaxation (28-156, 9+635; 30-156, 14+794); on default under rule 10, district court (28-387, 10+420; 34-12, 24+199); denying motion for removal from state to federal court (23-186); requiring payment of costs as condition of continuance (13-238, 275); affirming taxation of costs in justice court (29-86, 12+146); determining party's right to costs (14-552, 421; 29-86, 12+146); in proceedings for criminal contempt (26-9, 46+446; 30-487, 16+398; 40-4, 41+1076; 41-42, 42+598; 61-120, 63+169); granting or denying motion to vacate non-appealable order (44-322, 46+560; 46-73, 48+458); modifying prior order granting new trial (2-118, 95); denying motion to strike out and dismiss objections filed to allowance of account of trustee (66-447, 69+224); directing judgment on appeal from justice court (26-303, 3+695); "opinion" of court (21-1); "findings" of court (11-203, 132); "decision" of court (17-61, 40; 39-30, 38+804); refusing to dismiss appeal from probate court (22-266, 72-258, 75+374. See 85-117, 88+430); dismissing action for want of prosecution (79-232, 82+311); opening case and permitting party to offer further evidence (82-544, 85+549); denying or granting motion for judgment notwithstanding the verdict (67-318, 69+1077; 71-50, 73+631; 88-162, 92+542; 90-52, 95+751). See (85-117, 88+430); conditional order before compliance with condition (84-168, 87+363, 88+252); refusing to discharge garnishee (84-353, 87+944); striking or refusing to strike cause from calendar (83-447, 86+415); granting peremptory writ of mandamus (74-371, 77+221; 92-242, 99+807); denying stay of proceedings (69-532, 72+811); granting leave to file claim in insolvency proceedings after time limited (65-237, 67+995); vacating previous order of dismissal and reinstating petition in insolvency proceedings (30-553, 16+452); discharging order to show cause and restraining order (26-62, 1+585, question left open); denying new trial after judgment in tax proceeding under St. Paul charter (22-492); denying motion to amend notice of election contest (87-209, 91+756); granting or denying motion for inspection of documents (92-353, 100+92); denying motion to consolidate separate actions (109-146, 123+289). See 125-298, 146+975; 128-488, 151+139; 129-527, 151+1101; 132-84, 156+1053; 135-24, 160+80; 139-516, 166+1068; 142-450, 172+699; 144-70, 174+525.

23. Time for appeal.

The provision limiting the time to appeal from the judgment which the home rule charter of the city of St. Paul prescribes shall be entered in assessments for local improvements is valid. 212+811.

24. Moot questions. 210+877.

25. Waiver of right to appeal. 163-114, 203+614.

Waiver of right to appeal. 163-114, 203+614.

26. From order refusing to vacate judgment or order.

An order refusing to vacate an unauthorized judgment is appealable. 156-71, 19+102.

An order refusing to vacate an unauthorized judgment is appealable; but one refusing to vacate a judgment authorized by order, the argument being that the judgment was erroneous rather than unauthorized, is not appealable. In such a case, the statutory appeal from the judgment itself is exclusive. 164-443, 205+374.

Order denying motion to vacate judgment, based on points which could have been considered on appeal therefrom, is not appealable, and refusal to settle case or approve appeal bond was proper. 165-479, 205+637.

It is doubtful whether an appeal can be taken from an order denying a motion to vacate an order dismissing an appeal from a judgment of a justice court. 209+488.

27. From ex parte orders.

The rule that an ex parte order is not appealable when made in a judicial proceeding is applicable to an order made in a drainage proceeding sought to be reviewed by certiorari. For the purpose of such review, a drainage proceeding is to be regarded as a judicial proceeding. 156-401, 194-1623.

An order vacating an ex parte order bringing in an additional party defendant is appealable. 211+470.

28. From order denying leave to amend.

An order denying a motion for leave to file an amended complaint is not appealable. 157-312, 196+260.

29. From order denying motion to strike.

An order denying a motion to strike is not appealable. 158-231, 197+277.

30. Order striking answer.

An order striking out an answer as sham and frivolous, and granting plaintiff judgment, is appealable only as to that part which eliminates the pleading. 160-440, 200+636.

An order denying a motion to vacate an order striking out an answer as sham is appealable, but the motion to vacate must be made returnable before the time to appeal from the original order expires. 160-530, 200+807.

If the original order is nonappealable, then the order denying a motion to vacate is nonappealable. 160-530, 200+807.

31. From order on motion to amend findings or conclusions.

A motion to amend findings is not appealable, though it was coupled with a motion for a new trial. 161-409, 201+617.

An order, denying a motion for amended findings, is not appealable. 163-46, 203+434.

An order refusing to amend findings is not appealable. 165-361, 206+642.

An order denying a motion to amend the conclusions of law is not appealable. 210+37.

32. From order dissolving attachment.

An order vacating an order dissolving an attachment and levy, and reinstating the same, is in effect a denial of the original motion, and is therefore appealable. 164-130, 234+633.

33. From order opening divorce case.

Order opening divorce case to take evidence to determine residence of defendant, and whether he had kept himself concealed, was not appealable. 161-523, 201+304.

34. Contempt proceedings.

An order directly committing a person for constructive civil contempt is appealable. 161-122, 200+936.

35. Drainage proceedings.

The drainage law does not give the petitioners the right to appeal from an order of the district court dismissing proceedings to establish a ditch. The order may be reviewed by certiorari. 159-140, 198+455.

An order of the district court merging six public drainage systems and several private tile drains, held to be such a final order as may be reviewed by certiorari. 150-428, 199+383.

36. From order concerning custody of children.

An order concerning the custody of minor children pendente lite, is not appealable. 166-283, 207+616.

9499. Bond or deposit for costs—To render an appeal effectual for any purpose, a bond shall be executed by the appellant, conditioned that the appellant shall pay all costs and charges which may be awarded against him on the appeal not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the judgment of the appellate court; but such bond or deposit may be waived by the written consent of the respondent. (4366) [8002]

Defective bond may be amended or a new bond substituted (87-205, 91+756, 92+331). Does not operate as stay (95-118, 103+709). Does not operate as supersedeas (104-127, 116+211). Procedure to obtain money deposited (111-74, 126+402). Cited (23-415; 34-370, 25+804; 100-71, 110+257). Court order unnecessary for deposit in lieu of bond (134-150, 156+780, 158+820). Waiver by stipulation of cost or supersedeas bonds (144-232, 175+543). Bond on appeal is enforceable as a common law bond (155-111, 190+740).

9500. Appeal from order—Supersedeas—Such appeal, when taken from an order, shall stay all proceedings thereon, and save all rights affected thereby, if the appellant, or some one in his behalf as principal, give bond in such sum 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 shall be affirmed, or the appeal dismissed, and to 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. (4367) [8003]

Proceedings on order stayed and rights under it saved as of date of filing bond (14-554, 422; 45-96, 47+460; 48-18, 50+1018. See 63-115, 65+255). Effect of stay bond on appeal from order refusing new trial (53-102, 54+940); on injunction proceedings (37-10, 32+787; 47-369, 50+332, 52-283, 53+1157; 69-532, 72+811; 78-464, 81+323); on order dissolving attachment (40-470, 42+298); on order appointing receiver (63-115, 65+255); on order striking out portions of answer (12-161, 97); on order allowing peremptory writ of mandamus (31-211, 17+339); on proceedings for location of crossings (35-461, 29+60); on order setting aside judgment (71-255, 73+967); on order refusing to open default (37-182, 33+567. See 53-102, 54+940); on order sustaining demurrer but allowing adverse party to plead over (50-258, 52+861). Effect of stay limited to order from which appeal taken (11-271, 184). Bond for costs does not operate as stay (95-118, 103+709). Liability on bond (10-75, 53; 13-407, 376; 33-143, 22+182; 34-370, 25+804; 35-384, 29+6; 52-55, 53+1024; 57-37, 58+868; 63-265, 65+445; 77-523, 80+640). Supreme Court has jurisdiction, after appeal perfected, to direct appellant to give new supersedeas bond, and on default to vacate stay, when bond insufficient (100-71, 110+257). When issuance of commitment not stayed upon conviction (123-85, 142+1051). Common law bond in substitution (123-219, 143+366). Appeal from non-appealable order with supersedeas, does not divest district court of jurisdiction (128-10, 150+169). Deposit in lieu of appeal bond is no stay of proceedings on judgment (134-148, 156+780). Bond on appeal, in form a supersedeas bond, unapproved, is no stay (135-474, 159+1067). Power to protect against improvident stay bonds (141-415, 168+97, 170+587). Stipulation for stay without cost or supersedeas bonds (144-232, 175+543; 155-111, 192+740; 155-510, 193+596).

208+953, note under § 9385.

Effect of failure to give bond. 162-133, 202+708.

9501. Money judgment—Supersedeas—If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment unless a bond is executed by the appellant 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 part thereof as to which it is affirmed, if it is affirmed only in part, and all damages awarded against appellant upon the appeal. (4368) [8004]

Not applicable to bastardy proceedings (63-328, 65+639). Cited (17-113, 90; 23-415; 34-370, 25+804). See 149-114, 182+985; 155-111, 192+740.

9502. Delivery of chattels, etc.—Stay—If the judgment appealed from directs the assignment or delivery of documents or personal property, its execution shall not be stayed by 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, 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. (4369) [8005]

17-113, 90; 23-415; 34-370, 25+804; 155-111, 192+740.

9503. Directing conveyance—Stay—If the judgment appealed from directs the execution of a conveyance or other instrument, its execution shall not be stayed by the appeal until the instrument shall be executed

and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (4370) [8006]

23-415, 155-111, 192+740.

9504. For sale of real property—Supersedeas—If the judgment appealed from directs the sale or delivery of possession of real property, its execution shall not be stayed unless a bond be executed on the part of the appellant conditioned that during the possession of such property by him he will not commit, or suffer to be committed, any waste thereon, and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment. (4371) [8007]

9505. Stay of proceedings—Extent thereof—Whenever an appeal is perfected as provided by §§ 9501, 9502, 9504, it shall stay all further proceedings in the court below upon the judgment appealed from or the matter embraced therein; but such court may proceed upon any other matter included in the action, and not affected by the judgment appealed from; and the court below may dispense with or limit the security required when the appellant is an executor, administrator, trustee, or other person acting in another's right (4372) [8008]

Effect of stay on jurisdiction of district court (12-122, 70; 31-211, 17+339; 44-76, 46+204; 48-218, 50+1037). Effect of stay to preserve proceedings in existing condition (6-564, 400; 13-407, 376; 14-554, 422; 17-113, 90; 44-76, 46+204). Effect on levy (6-564, 400; 13-407, 376). Effect on judgment lien (17-113, 90). Effect of bond when order or judgment not appealable (52-283, 53+1157).

9506. Bond to vacate stay on money judgment—Notwithstanding an appeal from a money judgment and security given for a stay of proceedings thereon, the court below, on motion and notice to the adverse party, may grant leave to the respondent to enforce the judgment upon his giving bond to the appellant as herein provided, if it be made to appear to the satisfaction of the court that the appeal was taken for the purpose of delay. Such bond shall be executed by the respondent, or some one in his behalf, and shall be conditioned that if the judgment be reversed or modified the respondent will make such restitution as the appellate court shall direct. (4373) [8009]

9507. Bonds may be in one instrument—How served—The bonds in the several cases of appeals provided for in §§ 9499-9502, 9504, or such of them as may be required in any case, may be in one instrument or several, at the option of the appellant; and a copy, including the name and residence of each surety, shall be served on the adverse party with the notice of appeal, unless a deposit be made as provided in § 9499 and notice thereof given. (4374) [8010]

9508. Justification of sureties—A bond upon an appeal is of no effect unless it is accompanied by the affidavit of the sureties that each is worth double the amount specified therein; the adverse party may except to the sufficiency of the sureties within ten days after notice of the appeal; and unless they or other sureties shall justify before a judge of the court below,

as prescribed by law in other cases, within ten days thereafter, the appeal shall be regarded as if no bond had been given; the justification shall be upon not less than five days' notice. (4375) [8011]

Court cannot compel ordinary sureties to justify (76-220, 78+1114); otherwise as respects surety companies (58-351, 59+1055). Failure to justify may be remedied by amendment (87-205, 91+756, 92+331).

9509. Stay in other cases—Sale of perishable property—In cases not specified in §§ 9501-9504, the perfecting of an appeal by giving the bond mentioned in § 9499 shall stay proceedings in the court below upon the judgment appealed from, except that when it directs the sale of perishable property said court may order the property to be sold, and the proceeds thereof deposited or invested to abide the judgment of the appellate court. (4376) [8012]

Except as here provided bond for costs does not operate as stay (95-118, 103+709). Cited (23-415), 155-111, 192+741.

9510. Dismissal not to preclude another appeal—No discontinuance or dismissal of an appeal in the supreme court shall preclude the party from taking another appeal in the same cause, within the time limited by law. (4377) [8013]

No second appeal while valid appeal is pending (109-303, 123+666).

9511. Death of respondent—Substitution—If the respondent dies, after notice of the appeal and before it has been heard, the appellant shall apply to the supreme court, if in session, otherwise to a justice thereof, to have the legal representative or successor in interest of such deceased respondent substituted as respondent. In case the appellant fails to cause substitution to be made within sixty days from such death, upon the filing of an affidavit, by his legal representative or successor in interest, with the clerk of the supreme court, showing the taking of the appeal, the death of the respondent, and that the appellant has failed to cause such substitution to be made, the appeal shall be deemed abandoned, and the clerk of the supreme court shall enter an order dismissing the same. Upon the filing of a certified copy of such order with the clerk of the court below, such court shall proceed in the action as if no appeal had been taken. (4378) [8014]

Court may reinstate appeal dismissed under this section (28-68, 9+79). Duty to have administrator substituted (92-42, 99+357). When respondent is not entitled to a remand (132-412, 157+649).

9512. Death of party after submission of appeal—Whenever an appeal has been taken and submitted to the supreme court, and either party shall die before entry of judgment therein, and the surviving party, or the legal representative or successor in interest of the deceased party, shall file with the clerk of the supreme court an affidavit showing such death, said clerk shall substitute the name of such legal representative or successor in interest, and the action shall thereupon proceed and judgment be entered for or against such representative or successor in interest. (4379) [8015]