1940 Supplement

To

Mason's Minnesota Statutes

1927

(1927 to 1940)

(Superseding Mason's 1931, 1934, 1936 and 1938 Supplements)

Containing the text of the acts of the *1929, 1931, 1933, 1935, 1937* and *1939* General Sessions, and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state and federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota together with digest of all common law decisions.

Edited by

William H. Mason

Assisted by

The Publisher's Editorial Staff

MASON PUBLISHING CO.

SAINT PAUL, MINNESOTA

1940

on the next succeeding annual list, and the clerk shall certify to the board at its annual January session the names on the last annual list not drawn for service during the preceding year, nor shall any juror at any one term serve more than thirty days and until the completion of the case upon which he may be sitting; provided however that the Court may with the consent of any such juror or jurors and with the consent of any parties having matters for trial after such 30 day period has expired hold and use such jurors so consenting to try and determine any jury cases remaining to be tried at such term between parties so consenting. And in counties having two or more terms of court in one year, after the jurors have been drawn for any term of such court, the clerk shall strike from the original list the names of all persons who were drawn for such term, and notify the board thereof, which at its next session shall likewise select and certify an equal number of new names, which shall be added by such clerk to the names in the original list. If such list is not made and delivered at the annual meeting in January, it may be so made and delivered at any regular or special meeting thereafter. Whenever at any term there is an entire absence or deficiency of jurors whether from an omission to draw or to summon such jurors or because of a challenge to the panel or from any other cause, the court may order a special venire to issue to the sheriff of the county, commanding him to summon from the county at large a specified number of competent persons to serve as jurors for the term or for any specified number of days, provided that before such special venire shall issue the jurors who have been selected by the county board and whose names are still in the box provided for in Section 9462 of said Mason's Minnesota Statutes, shall first be called and upon an order of the court the number of names required for such special venire shall be drawn from said box in the manner required by law and the jurors so drawn, shall be summoned by the sheriff as other jurors; and as additional jurors are needed successive drawings shall be ordered by the court until the names contained in said box have been exhausted. (R. L. '05, §4336; G. S. '13, §7971; '17, c. 485, §1; Feb. 13, 1929, c. 13; Apr. 20, 1931, c. 218.)

Where party to cause was member of jury panel it was error to deny continuance or the calling in of other jurors not on panel. 179M557, 230NW91.

Statute contemplates the striking of the names drawn without regard to actual service. Op. Atty. Gen., April 30, 1931.

9469-1. Juries in certain cities.—In all counties of this state now or hereafter having a population of more than 400,000 the jury in civil actions shall consist of six persons; provided, that any party may have the right to increase the number of jurors to twelve by paying to the clerk a jury fee of two dollars at any time before the trial commences. Failure to pay such jury fee shall be deemed a waiver of a jury of twelve. ('27, c. 345, §1, eff. May 1, 1927; Apr. 18, 1929, c. 236, §1.)

9469-2. Same—Jury of six.

The text of this and the next succeeding section is reenacted by Laws 1929, c. 236, but the title of the act purports to amend "section 1, chapter 345, Laws of 1927," set forth ante as §9469-1. Inasmuch as no change is made in sections 2 and 3, except that the closing words of section 2 are "the jury," instead of "a jury," the insufficiency of the title is probably immaterial.

9469-3. Same—Challenges.

See note under §9469-2.

CHAPTER 79

Costs and Disbursements

9470. Agreement as to fees of attorney—Etc.

½. In general.

Costs will not be allowed against corporation in a representative suit. Keough v. S., 285NW809. See Dun. Dig. 2207a.

Where a representative suit by minority stockholder was consolidated for trial with a stock division suit, separate statutory costs should be allowed in the two suits. Id. See Dun. Dig. 2207a.

2. Right to costs statutory.

Costs were unknown at common law and depend upon statutory authority. State v. Tifft, 185M103, 240NW354. See Dun. Dig 2226.

10. Contract with attorney.

Burden was upon attorney to prove that his services were rendered under circumstances from which a promise to pay should be implied. Ertsgaard v. B., 183M339, 237NW1. See Dun. Dig. 702(93).

Fact that court directed payment of attorney's fees to plaintiffs' attorneys instead of to them for plaintiffs was not error nor important. Regan v. B., 196M243, 264NW 803. See Dun. Dig. 699.

The sovereign may not be sued without its consent, but where government recognized existence of legal claims founded upon obligations imposed by virtue of Transportation Act and while Director General of Railroads was in charge, a remedial act passed to reimburse property owners who had suffered losses because of negligent operation of railroad is "debt legislation" not "favor legislation," as affecting validity of contracts for contingent attorney fees in obtaining such legislation. Hollister v. U., 199M269, 271NW493. See Dun. Dig. 664, 666, 698a.

There is a clear distinction in law respecting contingent fee contracts between an attorney and his client where same relates to "favor legislation" and legislation which provides means for settlements of debts or obligations founded upon contract or violation of a generally recognized legal right, latter being generally referred to as "debt legislation." If a contract comes within second class mentioned, it is generally recognized as a valid obligation. Id.

In contracts between attorneys and clients, usual test to apply is whether contract can by its terms be performed lawfully. If so, it will be treated as legal, even if performed in an illegal manner. On other hand, a contract entered into with intent to violate law is illegal, even if parties may, in performing it, depart from contract and keep within law. Id.

Under common-law rule in England, contracts for contingent fees between an attorney and his client were condemned as champertous, but general rule in this country is that great weight of authority recognizes validity of such contracts for contingent fees, provided they are not in contravention of public policy, and it is only when attorney has taken advantage of claimant by reason of his poverty, or surrounding circumstances, to exact an unreasonable and unconscionable proportion of such claim that it is condemned. Id.

Where plaintiff and defendants in good faith, but without knowledge or consent of plaintiff's attorney, settled their differences upon a basis whereby plaintiff waived all of her claims for damages arising out of an automobile collision on condition that defendants' insurers pay a given sum to settle five other personal injury actions arising out of the same accident, and payment was duly made pursuant to agreement, and intervenor, plaintiff's attorney, claimed an attorney's lien under express contract whereby he was to receive 25 per cent "of any sums received in settlement" of the cause, court erred in finding value of plaintiff's cause of action to be $5,000 as of date of settlement and awarding intervener $1,250 plus interest and costs. Krippner v. M., 287NW19. See Dun. Dig. 699a.

A client has the right, as an implied condition of the contract under the law, to discharge his attorney, with or without cause, but attorney may recover reasonable value of services rendered but he cannot recover damages as for breach of contract. Id. See Dun. Dig. 669a.

Amount of recovery where contract was entered into during existence of relationship. 20MinnLawRev429.

9471. Costs in district court.

1. Who prevailing party.

173M559, 218NW730.

2. On dismissal.

An assignee subrogated to part of a plaintiff's claim or alleged cause of action is not liable for costs and disbursements in a suit brought in the name of the assignor. Dreyer v. O., 287NW13. See Dun. Dig. 2195.

3. Several parties.

Interveners appearing separately, each represented by his own attorneys, plaintiff having joined issue on each complaint in intervention, held severally entitled to tax statutory costs. Pesis v. B., 190M563, 252NW454. See Dun. Dig. 4007.

When a principal employs competent attorneys to defend an action brought by a third party against agent

and principal for alleged false representations in a business deal, transacted by agent for principal, agent is not entitled to reimbursement for amounts paid or incurred to additional attorneys hired by agent to protect him in litigation; there being no showing of antagonistic defenses or of a failure of attorneys employed by principal to make a proper defense for agent. Adams v. N., 191M 55, 253NW3. See Dun. Dig. 207.

6. In general.

A party who succeeds and is awarded and paid his taxable costs and disbursements has no further claim against his adversary for attorney's fees and expenses in excess of taxable costs. 181M322, 232NW515. See Dun. Dig. 2194(4).

Judgment creditor waived payment of dollar fee charged upon writs of execution by stipulation for satisfaction of judgments and discharging them of record. Stebbins v. F., 185M336, 241NW315.

In action by state in its proprietary as distinguished from its sovereign capacity it is liable for costs the same as individuals, but it is not liable when sued, though in its proprietary capacity. Op. Atty. Gen., March 3, 1933.

Plaintiff suing to recover in excess of $100 but only recovering $100 is entitled to $10 costs in county where there is no municipal court. Op. Atty. Gen., July 5, 1933.

7. State as party.

State is not liable for costs and disbursements in civil action, whether brought by or against it, in its sovereign capacity, but is liable in actions brought in its proprietary capacity. Op. Atty. Gen., Mar. 3, 1933.

An illegitimacy proceeding is civil in nature rather than criminal and state is not liable for costs to a defendant receiving a favorable verdict. Op. Atty. Gen. (199a-1), Oct. 9, 1935.

9473. Disbursements—Taxation and allowance.

½. In general.

173M559, 218NW730.

Costs were unknown at common law and depend upon statutory authority. State v. Tifft, 185M103, 240NW354. See Dun. Dig. 2226.

Objectors to testamentary trustee's account were entitled to costs and disbursements as the prevailing party. Rosenfeldt's Will, 185M425, 241NW573. See Dun. Dig. 2206.

No costs or disbursements should be taxed against secretary of state unsuccessfully defending mandamus proceeding. State v. Holm, 186M331, 243NW133. See Dun. Dig. 2207.

3. Miscellaneous disbursements.

An illegitimacy proceeding is civil in nature rather than criminal and state is not liable for costs to a defendant receiving a favorable verdict. Op. Atty. Gen. (199a-1), Oct. 9, 1935.

Prevailing county in pauper settlement cases is entitled to clerk costs. Op. Atty. Gen. (144b-15), Apr. 12, 1938.

Where person was convicted of violation of ordinance in municipal court and appealed and was found not guilty in district court, clerk of district court is entitled to his fees from city. Op. Atty. Gen. (144b-15), Apr. 14, 1938.

6. Prevailing party.

As defendant city prevailed upon issues made by pleadings and litigated at trial, court correctly found that defendant should have its costs and disbursements, though judgment went for plaintiff. Judd v. C., 198M590, 272NW 577. See Dun. Dig. 2206.

9475. In equitable actions—Several defendants.

Attorney's fees and expenses were allowed unsuccessful party in probate proceedings. Butler v. B., 249NW38. See Dun. Dig. 699.

9478. Taxation—Objections and Appeal.

1. Time.

Costs cannot be taxed and judgment entered where a verdict has been vacated and a new trial granted. 178M 232, 226NW700.

2. Notice.

Costs and disbursements may be taxed after entry of judgment without notice. Wilcox v. H., 186M220, 243 NW709. See Dun. Dig. 2221.

9479. On motion, demurrer, etc.

Where plaintiff abandoned a garnishment proceeding without giving any notice of that fact to the garnishee, who appeared in court on return date ready and willing to make a disclosure, court did not err in awarding costs to garnishee. Physicians and Dentists Ser. Bur. v. L., 196 M591, 265NW820. See Dun. Dig. 2213.

9481. To defendant after tender.

Grill v. B., 249NW194; note under §9323..

9482. Chargeable on estate or fund.

Proceeding on petition by trustee for allowance of final account and discharge is not an action prosecuted or defended by trustee, but is a special proceeding brought by trustee, and is concluded by a final order, and costs may be taxed by supreme court in favor of prevailing party. Malcomson v. G., 199M258, 272NW157. See Dun. Dig. 2194, 2198.

9483. Relator entitled to, and liable for.

Prevailing defendant was entitled to costs and disbursements without specific directions by the court, and court did not err in denying motion to amend conclusions of law. 178M164, 226NW709.

9485. In criminal proceedings.

Amount paid attorney appointed by court to represent a defendant in justice court in a criminal case should not be included as part of costs in action. Op. Atty. Gen. (121b-17), Jan. 28, 1935.

An illegitimacy proceeding is civil in nature rather than criminal and state is not liable for costs to a defendant receiving a favorable verdict. Op. Atty. Gen. (199a-1), Oct. 9, 1935.

State is not required to pay costs in a criminal appeal from justice court to district court and verdict for defendant on appeal. Op. Atty. Gen. (199a-3), May 20, 1939.

Whether judge of municipal court in Waseca may include fees paid jurors as part of costs in a criminal case discussed but not determined because it involved a pending case. Op. Atty. Gen. (306B), June 27, 1939.

9486. Supreme court—Costs and disbursements.

½. In general.

Prevailing party may collect the expense of the record and briefs only when they are printed. State v. Tifft, 185M103, 240NW354. See Dun. Dig. 2239(8).

Whether taxation of costs and disbursements is opposed or not, it is the duty of the clerk to satisfy herself that the items are correct and taxable. State v. Tifft, 185M103, 240NW354. See Dun. Dig. 2226.

Where United States Supreme Court on reversal of state supreme court mandates that defendant have execution from state supreme court for costs taxed in United States Supreme Court, it is duty of clerk of state supreme court to tax such costs. Rambo v. C., 197M652, 268NW199, 870. See Dun. Dig. 2226.

Proceeding on petition by trustee for allowance of final account and discharge is not an action prosecuted or defended by trustee, but is a special proceeding brought by trustee, and is concluded by a final order, and costs may be taxed by supreme court in favor of prevailing party. Malcolmson v. G., 199M258, 272NW157. See Dun. Dig. 2194, 2198.

1. Statutory.

Successful appellant denied statutory costs for violation of rules in printing brief. McDermott v. M., 204M 215, 283NW116. See Dun. Dig. 2238.

2. No costs to defeated party.

An appellant may not dismiss his appeal and tax costs and disbursements against a respondent. Ridgway v. M., 192M618, 256NW521. See Dun. Dig. 2227.

3. Who is prevailing party.

Where supreme court reduced verdict because of error in instruction on damages, defendant should not be allowed statutory costs of $25 where no exception was taken at trial to the instruction nor in motion for new trial was amount of excessive damages pointed out. Hackenjos v. K., 193M37, 258NW433. See Dun. Dig. 2228.

Appellants were entitled to costs where orders below were modified, even though large part of record did not bear on parts of orders modified. Chicago & N. W. Ry. Co. v. V., 197M580, 268NW709. See Dun. Dig. 2228.

Because of disregard of rules of court, successful appellant was not allowed statutory costs. Lestico v. K., 204M125, 283NW122. See Dun. Dig. 2238.

4. Several prevailing parties.

Where there were three cases by different parties against same defendant, cost of printing evidence which was common to three cases was properly divided and allocated. Larson v. T., 185M652, 242NW378. See Dun. Dig. 2229.

8. Discretionary—When not allowed.

Statutory costs denied a successful appellant because of excessive length of his brief. Peterson v. P., 186M 583, 244NW68. See Dun. Dig. 2238.

A proceeding to vacate public grounds against a town is a special proceeding, but costs and disbursements may be taxed against unsuccessful plaintiff. Schaller v. T., 193M604, 259NW826. See Dun. Dig. 2198, 2239.

Statutory costs denied because of deliberate and extended reference in brief for respondents to facts outside record, said to have occurred since hearing. Whaling v. I., 194M302, 260NW299. See Dun. Dig. 2226.

9. Disbursements allowable.

Only where transcript is prepared exclusively for use on appeal and is in fact so used can it be taxed or allowed in supreme court. Larson v. T., 185M652, 242 NW378. See Dun. Dig. 2239.

When transcript is obtained and necessarily used in lower court in motion for amended findings, matter of expense thereof being allowed as disbursement is before lower court and not before supreme court. Larson v. T., 185M652, 242NW378. See Dun. Dig. 457a.

Costs should not be taxed for two appeal bonds where there was no need for two bonds and supersedeas should have been given in first place. Hackenjos v. K., 193M37, 258NW433. See Dun. Dig. 2239.

Where there are no affidavits supporting claims that charges for printing records were excessive, there is no basis of appeal from taxation of costs and disbursements by clerk of supreme court. Malcolmson v. G., 199M258, 272NW157. See Dun. Dig. 2239(6).

Disallowance of cost of transcript in taxation of costs was proper, transcript having been ordered for purpose of a second motion for new trial which, under Ross v. D. M. & I. Ry. Co., 201 Minn. 225, 275 N. W. 622, was in effect a motion "to vacate an appealable order," and was not appealable. Ross v. D., 203M312, 281NW271. See Dun. Dig. 2239.

10. Liability of United States.

Where Director of United States Veterans' Bureau brought proceeding against guardian of incompetent veteran and unsuccessfully appealed from an adverse order, the guardian was not entitled to tax costs. Hines v. T., 185M650, 241NW796. See Dun. Dig. 2207.

9487. Additional allowance—Costs, when paid, etc.

Where a judgment for costs against plaintiff in this court includes costs in supreme court of United States, reversing judgment this court affirmed, this court has power to grant remittitur without requiring such judgment for costs to be first paid. Rambo v. C., 197M652, 268 NW199, 870. See Dun. Dig. 2231.

9487-1. Additional costs on change of venue—Amount—Payment or waiver of—Taxation.

Phrase "no judgment shall be entered by plaintiff in any cause" refers to a judgment upon the cause of action, and not a judgment for plaintiff as relator in mandamus proceedings in the supreme court compelling a change of venue for convenience of witnesses. Dahl v. S., 202M661, 279NW578.

CHAPTER 80

Appeals in Civil Actions

9490. Appeal from district court.

An appeal does not vacate or annul a judgment, and the matters determined remain res judicata until reversal. Simonds v. N., (USCCA8), 73F(2d)412. Cert. den. 294US711, 55SCR507. See Dun. Dig. 5201.

An order permitting defendant to pay the amount into court and directing another claimant to be substituted as defendant does not finally determine any substantial right of plaintiff and is not appealable. 176 M11, 222NW295.

The order must finally determine the action or some positive legal right of the appellant relating thereto. 176M11, 222NW295.

District court has no jurisdiction in civil cases to certify questions to the Supreme Court. Newton v. M., 185 M189, 240NW470. See Dun. Dig. 2493.

Where one party serves notice of appeal on opposing party but takes *no further steps to perfect appeal*, trial court does not lose jurisdiction to vacate prior order and to amend findings. Lehman v. N., 191M211, 253NW663. See Dun. Dig. 288.

Statutes governing appeals are remedial in their nature and should be liberally construed, particularly when order or judgment appealed from involves finality. Stebbins v. F., 191M561, 254NW818. See Dun. Dig. 285.

Although condemnation proceedings may properly include in one petition numerous tracts of land which state desires to take for one highway, state cannot join in one appeal to district court or supreme court separate awards to two property owners, and such appeal must be dismissed for duplicity. State v. May, 204M564, 285 NW834. See Dun. Dig. 312.

9492. Requisites of appeal.

Jurisdiction on appeal cannot be conferred by consent of counsel or litigants. The duty is on appellant to make jurisdiction appear plainly and affirmatively from the printed record. Elliott v. R., 181M554, 233NW316. See Dun. Dig. 286.

½. Notice of appeal.

Appellant must file with the clerk of the lower court the notice of appeal with proof of service thereof on the adverse party. Costello v. D., 184M49, 237NW690. See Dun. Dig. 321(88).

3. On whom served.

Defendant was not necessarily a party to an appeal by garnishee from judgment against it. Rushford State Bank v. B., 194M414, 260NW873. See Dun. Dig. 310, 3979.

Where each defendant moved separately for judgment notwithstanding verdict or new trial, fact that one defendant did not make other defendant a party to motion nor to appeal does not entitle plaintiff to a dismissal of appeal. Kemerer v. K., 198M316, 269NW832. See Dun. Dig. 5081.

Failure to join as respondent a party to the action who is the real party in interest and whose interests are vitally affected by the result is fatal to the appeal and it will be dismissed. Long v. R., 203M332, 281NW75. See Dun. Dig. 312.

In suit for temporary injunction against sheriff alone to prevent execution of writ of restitution, on theory that court lost jurisdiction by certification and remand of forcible entry and unlawful detainer action, plaintiff in original action was a necessary party appellee on appeal by plaintiff from order denying injunction, where he was made a party defendant on his own application prior to taking of appeal. Id.

In action against corporation and individual stockholders to compel cancellation of shares of stock fraudulently issued to individual defendant, corporation was a necessary party who must be served with notice of appeal from a judgment in favor of plaintiff on appeal by individual defendant alone. Weiland v. N., 203M600, 281NW364. See Dun. Dig. 312.

7. Waiver of appeal.

Where one party serves notice of appeal on opposing party but takes no further steps to perfect appeal, trial court does not lose jurisdiction to vacate prior order and to amend findings. Lehman v. N., 191M211, 253NW 663. See Dun. Dig. 288.

10. Dismissal of appeal.

Failure of employee to make deposit of $10 as provided in §4315 did not require industrial commission to grant motion to dismiss appeal from decision of referee. Rutz v. T., 191M227, 253NW665. See Dun. Dig. 8954, 10385.

9493. Return to Supreme Court.

1. In general.

In reviewing orders pursuant to motions, and orders to show cause, and other orders based upon the record, the rule of Radel v. Radel, 123M299, 143NW741, and prior cases, requiring a settled case, bill of exceptions, or a certificate of the trial court as to the papers considered, or a certificate of the clerk of the trial court that the return contains all the files and records in the case, is no longer the rule when all the original files are returned to this court. 181M392, 232NW740. See Dun. Dig. 344a.

It was not error to exclude certain exhibits which were insufficient to make a prima facie case in support of claim that respondents had made certain agreements, there being no evidence in case to support such claim. Wilcox v. H., 186M500, 243NW711. See Dun. Dig. 3244.

A party moving for a certificate, now unnecessary, showing that order was based only upon records and files then in clerk's office, may withdraw such motion at any time before submission. Wilcox v. H., 186M504, 243 NW709. See Dun. Dig. 352.

A statement by court, on objection being made to something said by defendant's counsel in his opening statement to jury, where record does not show what counsel said in his opening statement, is too indefinite and incomplete a record to show error. State v. Lynch, 192M 534, 257NW278. See Dun. Dig. 350.

With respect to matters not shown by record, only question presented on appeal is whether findings of fact support conclusions of law. Malcolmson v. G., 199M 258, 272NW157.

On appeal from an order entered pursuant to petition by respondent trustee for allowance of final account and discharge, tabular exhibits originally expressly made a part of respondent's petition to resign his trust became a part of the pleadings and were proper matters to be included in record. Id. See Dun. Dig. 337(45).

Error in respect to charge cannot be considered if not discussed in brief or set out in motion for new trial. Pearson v. N., 200M58, 273NW359. See Dun. Dig. 366, 385.

Problem of preserving excluded evidence in the appellate record. 13MinnLawRev169.

3. Briefs.

Instructions assigned as erroneous will not be considered, where brief makes no effort to point out any error therein and no prejudicial error is obvious on mere inspection. Nelson v. B., 188M584, 248NW49. See Dun. Dig. 364, 366.

Cases must be argued upon appeal upon the theory upon which they were tried. Livingstone v. H., 191M623, 255NW120. See Dun. Dig. 401.

Unless error in admission or exclusion of evidence is manifest from a mere inspection of objection, it will not be considered on appeal where brief presents no argument in support of assignment. Greear v. P., 192M 287, 256NW190. See Dun. Dig. 362.

An unfit and defamatory brief will be stricken on appeal. Senneka v. B., 197M651, 268NW195. See Dun. Dig. 354b.

Appropriate quotations from relevant authority is always welcome, but repetition of same idea by quotation from other authorities is ordinarily futile and not welcome, and labored argument on familiar propositions of