APPEALS AND REVIEWS IN CIVIL ACTIONS

CHAPTER 605

APPEALS FROM DISTRICT COURT

605.01 APPEAL TO SUPREME COURT.

The admission of expert testimony is largely a matter of discretion with the trial judge. He may, upon motion for a new trial, decide that he abused that discretion and order a new trial on the ground of error of law occurring at the trial. When a motion is made in the alternate for judgment notwithstanding or a new trial, and a new trial is granted, the moving party may not appeal from the order denying judgment. Simon v Larson, 207 M 605, 292 NW 270.

Appellate jurisdiction may not be conferred or enlarged by the consent of the litigants. Simon v Larson, 207 M 605, 292 NW 270; Bulau v Bulau, 208 M 529, 294 NW 845; Corwin v Hudson, 220 M 493, 20 NW(2d) 330.

An order dismissing a cause for want of jurisdiction is appealable. The question whether an order dismissing the action in the district court is properly appealable was not raised in the record, but since the jurisdiction of the supreme court is only appellate, the supreme court cannot overlook it. Appellate jurisdiction cannot be conferred by consent. Darby v Board, 109 M 258, 123 NW 662; Simon v Larson, 207 M 605, 292 NW 270; Bulau v Bulau, 208 M 529, 294 NW 845.

A close adherence to the rules of court is essential to the orderly and proper disposition of appeals. Kimball v Southern Land, 57 M 37, 58 NW 868; Schnedler v Warren, 209 M 605, 297 NW 35.

Where an appellant has accepted the benefit awarded to him by a judgment, he may yet appeal therefrom challenging it so far as it is unfavorable to him, if reversal or modification cannot possibly affect his right to the benefit he has taken. Bass v Ring, 210 M 598, 299 NW 679.

Redress of grievances must be sought by exhaustion of intra union remedies before there can be recourse to the courts. Mixed Local v Hotel and Restaurant Employees, 212 M 587, 4 NW(2d) 771.

If contempt of court is one simply to impose a punishment, it is a criminal contempt and may be reveiwed only by certiorari; but if the person adjudged in contempt is to deliver property in his possession, or is in any way the enforcement of a civil remedy, it is deemed civil contempt and is reviewable by appeal. Paulson v Johnson, 214 M 202, 7 NW(2d) 338.

An order removing a person from public office will not be reviewed by certiorari after the repeal of a statute under which such person claimed the right to hold such office. On appeal, there must be a substantial and real controversy before the case will be considered by the supreme court. State ex rel v Brown, 216 M 135, 12 NW(2d) 180.

Where in an action by the receiver of a corporation to recover for wrongs done to the corporation by its officers and others, and where after judgment was rendered against the receiver he, with the stockholders' consent and approval, abandoned the case, the plaintiff, a stockholder, will be denied leave of the appellate court to procure as plaintiff an appeal on behalf of the corporation. Singer v Allied Factors, 216 M 443, 13 NW(2d) 378.

A special guardian has a right of appeal to the district court from an order of the probate court restoring an incompetent to capacity. Upon the trial of the merits after an appeal from probate to district court, no appeal lies from the findings of the court. Appellant has a choice of appeal either from a judgment entered

pursuant to the findings or from the order denying a new trial. Corwin v Hudson, 220 M 493, 20 NW(2d) 330.

Appeals to the supreme court should be discouraged by counsel where a small amount of money and nothing else is involved in the litigation. Standard Heating v Reichert, 222 M 492, 25 NW(2d) 87.

Preservation of excluded evidence in the appellate record. 13 MLR 168.

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

Orders involving the merits, or in effect determining the action, are appealable. 24 MLR 859.

Assignments of error. 27 MLR 89.

605.02 TITLE ON APPEAL.

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

A guardian has no personal interest in or title to his ward's property. His position and authority to deal with the property are limited to the execution of his trust which must be for the benefit of his ward. Where an action purported to be brought by a special guardian for an incompetent against the general guardian, the action should be brought on behalf of the ward by the guardian and not by the guardian for the benefit of the ward. Hoverson v Hoverson, 216 M 237, 12 NW(2d) 497.

605.03 REQUISITES OF APPEAL.

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

1. Generally

Where a motion for a new trial is made upon the minutes and is noticed for hearing within 30 days after the coming in of the verdict or notice of the filing of the decision and is heard after the 30-day period without objection by the opposing party, the statutory requirements of a written stipulation extending the time for hearing the motion or an order of court doing so for cause are waived by the opposing party, and the court has jurisdiction to hear and determine the motion. Estate of Hore, 220 M 365, 19 NW(2d) 778.

2. Notice of appeal

Failure of appellants to serve notice of appeal on a party affected by the judgment from which the appeal was taken is remedied when such party files in the appellate court his consent to be bound by the disposition of the case. Cavli v Leifmin, 207 M 549, 292 NW 210.

Where no return is made by the clerk of the district court in response to notice of appeal and no fee paid in supreme court, the appeal was not before the supreme court either on the merits or on a motion to dismiss. Henckè's Estate, 220 M 414, 19 NW(2d) 718.

A misdescription in the notice of appeal, of date of judgment appealed from, did not require dismissal of appeal where there was only one judgment and respondent was not misled. Hore's Estate, 220 M 374, 19 NW(2d) 778.

3. Service

Any party who would be prejudiced by a reversal or modification of an order, award, or judgment is an "adverse party" on whom a writ of certiorari or notice of appeal must be served. Larson v Le Mere, 220 M 25, 18 NW(2d) 696.

5. Waiver of appeal

Where the defendant failed to comply with requirements of statute relative to time of hearing on his motion for new trial on the minutes, the order on the motion was a nullity, and the appeal therefrom must be dismissed. Farmers Assn. v Kotz, 222 M 153, 23 NW(2d) 576.

605.04 RETURN TO SUPREME COURT.

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

1. Generally

The plaintiff for quite evident reasons is denied statutory costs, but a minor reason is the fact that in printing the record he included the summons, a matter in which nobody would be interested since the defendants general appearance. Rigby v Nord, 208 M 88, 292 NW 751.

Respondent filed objections to appellant's motion for additional time within which to file a record and brief. At about the close of a 72-day extension he now asks for 30 days additional within which to procure the exhibits, but as those exhibits were filed, indexed, and stored at the conclusion of the trial before the trial court, and could have been obtained during any time during the 72 days, the appeal must be dismissed. Anderson v High, 210 M 613, 297 NW 321.

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

Inconsistent statements in a memorandum must give way to specific provisions in the order. The order of the court herein clearly vacated an order approving a minor's settlement. The order of approval having been vacated, the settlement is invalid under section 540.08. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

A finding of fact in a prior action is not admissible in a subsequent one between the parties as evidence of the fact found. Where no exception is taken to a ruling excluding evidence, and no motion for a new trial is made, the ruling is not reviewable on appeal from the judgment. Stevens v Mpls. Fire Relief Assn. 219 M 276, 17 NW(2d) 642.

A memorandum of a trial judge attached to his findings or order, even though expressly made a part of such findings or order, may not be used to impeach or modify the positive and unambiguous terms of such findings and order. Bicanic v Campbell, 220 M 107, 19 NW(2d) 7.

Where no return was made by the clerk of the district court in response to a notice of appeal and no fee paid in the supreme court, the appeal is not before the supreme court for consideration either on the merits or on a motion to dismiss. In re Hencke's Estate, 220 M 414, 19 NW(2d) 718.

L. 1945, c. 282, providing that every ruling shall be deemed excepted to manifests no legislative intent that the statute should operate retroactively. Welsh v Barnes, 221 M 37, 21 NW(2d) 43.

A venue statute being remedial is to be liberally construed so as to carry out the obvious legislative intent. A statute specifically authorizing an action against the owner, operator, or driver of a motor vehicle, arising out of the negligent operation of such motor vehicle, to be brought in the county where the action arises, is construed to authorize also the bringing of such action against the personal representative of the owner, operator or driver, in the county where such action arises. Blankholm v Fearing, 222 M 51, 22 NW(2d) 853.

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

2. Settled case or bill of exceptions

The appellate court is bound by the settled case as approved and allowed by the trial court, particularly where such settled case is in accordance with both the trial court's and the court reporter's version thereof, where counsel claiming as prejudicial comments by the court which did not appear in the settled case as presented, made no exception thereto at the time such comments were alleged to have been made. Merchants Mutual v St. Paul-Mercury, 218 M 386, 216 NW 463.

3. Assignments of error

Assignment of error which merely alleges that the court erred in denying a motion for new trial, and containing no other specifications and raising no question of law, is insufficient. Slawik v Christensen, 209 M 428, 296 NW 496.

Assignments of error directed to several pages of the judge's charge which contained separate and disconnected paragraphs, is in practice disapproved. Jones v Johnson, 211 M 123, 300 NW 447; First Church v Lawrence, 210 M 37, 297 NW 99; Peterson v New England Co. 210 M 449, 299 NW 208.

Where, as here, there are eight separate findings of fact, some of which are admitted by the findings, the finding of fact desired to be challenged as not sustained by the evidence must be specified in the assignment of errors. Barnard v County of Kandiyohi, 213 M 100, 5 NW(2d) 317.

Each assignment of error is required to be single, concise, certain and complete in itself. Whipple v Mahler, 215 M 578, 10 NW(2d) 771.

Claimed errors amounting to mere assertions, without more, are for reasons stated in the opinion, not in compliance with the supreme court rules, and therefore not considered. Seabloom v Krier, 219 M 371, 18 NW(2d) 88.

Assignment of error based on a mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection. Koehler v Koehler, 219 M 536, 18 NW(2d) 312; Ranum v Swenson, 220 M 170, 19 NW(2d) 327.

Appellant's assignments of error are indefinite and insufficient and raise no particular question for consideration by the court. Where a case is tried to the court and findings are made, the specific finding which is asserted to be without evidentiary support must be challenged in the supreme court by specific assignments of error. Raymond v McKensie, 220 M 234, 19 NW(2d) 423.

A finding of fact will not be reviewed unless specifically challenged in an assignment of errors. Starks v Starks, 220 M 313, 19 NW(2d) 741.

4. Briefs

Respondent improperly included in his brief what occurred in the first trial, there having been a new trial granted from which no appeal was taken. City of Mpls. v Township of Independence, 216 M 485, 13 NW(2d) 375.

Claimed errors amounting to mere assertions without citation of authority or argument to show any basis upon which the error is claimed, is not in compliance with the rules of the supreme court and will not be considered. Seabloom v Krier, 219 M 362, 18 NW(2d) 88.

It seems probable that if another appeal is taken after this case has again been tried and decided in the federal district court, much that is contained in the present record and briefs could be used on a second appeal to the circuit court of appeals. It may be understood that on second appeal parties may use such part of the present record and briefs as are pertinent, and supplement them as may be necessary. Dennis v Village of Tonka Bay, 151 F(2d) 411.

5. Dismissal on appeal

The supreme court will not review a decision of the trial court on mere fact questions unless the record contains all evidence introduced on the trial pertaining to such questions. State v Andrews, 208 M 334, 294 NW 219; Gubbins v Irwin, 210 M 428, 298 NW 715.

The validity of the stays granted by the trial court cannot be presented in the supreme court on the instant motion. Plaintiff's remedy was by writ of prohibition. Stevens v Stevens, 220 M 457, 19 NW(2d) 744.

Where defendant failed to comply with the requirements of the statute relative to time of hearing on his motion for a new trial on the minutes, the order on the motion was a nullity and appeal therefrom must be dismissed. Farmers Cooperative v Kotz, 222 M 153, 23 NW(2d) 576.

605.05 POWERS OF APPELLATE COURT.

2. Generally thereafter

A party defendant to a cause whose rights and liabilities under a contract will be adversely affected if the order from which the appeal is taken by all defendants jointly was permitted, may maintain in his own name a right to such appeal, even though his co-appellants, with plaintiff's consent, dismissed their appeal. Rice v City of St. Paul, 208 M 509, 295 NW 529.

Upon review the testimony must be considered in the light most favorable to the party who prevailed before the trial court. Ristow v Von Berg, 211 M 150, 300 NW 444; Hasse v Victoria Assn. 212 M 337, 3 NW(2d) 593; Borg v Reiling, 213 M 539, 7 NW(2d) 310; Murphy v Barlow, 214 M 64, 7 NW(2d) 684; Meixner v Bueckssler, 216 M 586, 13 NW(2d) 754; Landeen v De Jung, 219 M 287, 17 NW(2d) 648; Gillson v Osborne, 220 M 122, 19 NW(2d) 1; Burke v Johnson, 221 M 274, 21 NW(2d) 805; Nees v Mpls. St. Ry. 221 M 338, 22 NW(2d) 164; Solosky v Johnson, 223 M 390, 27 NW(2d) 282.

A respondent who has not appealed cannot assign error. Forster v 1st & Amer. Bank, 212 M 407, 4 NW(2d) 353.

Consideration of the acceptance and favorability of the evidence of the respective parties. Calich v Counsel of Jugo-Slavia, 214 M 292, 8 NW(2d) 337; Parrish v Peoples, 214 M 589, 9 NW(2d) 225; Bloomquist v Thomas, 215 M 35, 9 NW(2d) 337; Jensen v Christensen, 216 M 92, 11 NW(2d) 798; Rebne v Rebne, 216 M 379, 13 NW(2d) 18; Visneski v Visneski, 219 M 217, 17 NW(2d) 313; Laabs v Hagen, 221 M 89, 21 NW(2d) 91; Fleetham v Lindgren, 221 M 544, 22 NW(2d) 637; Ostlund v Stearns Co. 221 M 329, 22 NW(2d) 173; Zuckman v Freiermuth, 222 M 172, 23 NW(2d) 541.

Where an appeal is taken from an order denying a motion for a new trial in a land title registration proceeding upon the ground, among others, that the trial court, after denial of a prior motion for a new trial upon other grounds, erred

in refusing to allow the applicant to dismiss without prejudice before entry of the final decree, the appeal will lie to bring up for review the propriety of the refusal to permit the dismissal; Barrett v Smith, 183 M 431, 237 NW 15, distinguished. Mitchell v Bazille, 216 M 368, 13 NW(2d) 20.

An order denying a motion to vacate an authorized judgment is non-appealable. Colby v Colby, 223 M 157, 25 NW(2d) 769.

Affirmance of judgment on condition of remittitur of excessive damages. 14 MLR 675.

Jurisdiction of appellate court after remand. 16 MLR 700.

Effect of failure of appellee to file brief. 30 MLR 396.

3. Allegations thereafter

An appellant may not assign errors affecting other parties because they are not prejudicial to him. Teschendorf v Strangeway, 223 M 409, 27 NW(2d) 429.

4. Scope of review

In determining whether the trial court properly overrules defendant's demurrer or motion for interpleader, the allegations of the complaint are assumed to be true. Diones v Zeches, 212 M 200, 3 NW(2d) 432; Sartori v Capital Lodge, 212 M 538, 4 NW(2d) 339; Tankar v Lumbermen's Mutual, 215 M 265, 9 NW(2d) 754; Thiede v Town of Scandia Valley, 217 M 218, 14 NW(2d) 400.

Plaintiff petitioned for reargument, which is denied. It presents nothing new. It is not the function of such petition to afford the party an opportunity to reargue matters fully considered by the court in the opinion filed. Standard Clothing v Wolf, 219 M 140, 17 NW(2d) 329.

Examination of the pleadings and the record further indicates that the transfers in question and the reasons motivating them were neither litigated nor determined by the trial court, and are therefore not before the supreme court on review. Crowley v Crowley, 219 M 350, 18 NW(2d) 40.

Unless the inferences adopted by the triers of fact are based on mere conjecture or manifestly contrary to the weight of evidence, or where the conflicting inferences stand in equilibrium, the inference adopted by the fact-finding body in appraising the weight of circumstantial evidence should be sustained. Burke v Nelson, 219 M 381, 18 NW(2d) 121.

Plaintiffs having prevailed upon the issue of the right of recovery, the only errors at the trial available to them are such as bear upon the amount of damages. Maas v Midway Chevrolet, 219 M 461, 18 NW(2d) 233.

Based on supreme court rules of practice, Rule VIII 3 (e), no issue will be considered by the supreme court which is not urged in points and authorities in appellant's brief nor orally argued. First & Lumbermen's Bank v Buchholz, 220 M 97, 18 NW(2d) 771.

On appeal, a respondent, without a cross-appeal, may urge in support of an order or judgment under review any sound reason for affirmance, even though it is one not assigned by the trial court. Olson v Buskey, 220 M 155, 19 NW(2d) 57.

Where a motion in the trial court is made and determined on special grounds stated in the notice of motion, the moving party will not be heard in the appellate court upon new or additional grounds. Pierce v Grand Army, 220 M 552, 20 NW(2d) 490.

On appeal from an order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial, an assignment of error to the effect that plaintiff was entitled to judgment upon the evidence is good as raising the question whether the evidence as a matter of law compels a recovery in his favor; but assignments of error involving rulings made on the trial which were not excepted to at the time or assigned as error in the notice of motion for a new trial will not be considered. Welsh v Barnes-Duluth Shipbuilding Co. 221 M 37, 21 NW(2d) 43.

Order of trial court denying a motion to modify a judgment could not be reviewed on appeal from judgment where it was made after judgment was entered; but the order was appealable as a final order affecting a substantial right in a summary application in the action after judgment, and also as a final order involving the merits. Nelson v Auman, 221 M 46, 20 NW(2d) 703.

A point not raised in the trial court, that the judgment and an order amending it leave uncertain the amount of temporary alimony in arrears to be paid, cannot be raised for the first time on appeal. Trutnau v Trutnau, 221 M 462, 22 NW(2d) 321.

Order of railroad and warehouse commission fixing maximum rates which defendants might charge for freight switching in specified district and directing them to make and publish tariffs in accordance therewith are not to be a tariff of rates, fares, charges, and classification made by the commission. District court, upon compliance with M.S.A. 1941, section 216.25, may stay enforcement of such an order pending appeal therefrom, notwithstanding provision in section 216.19 to the effect that tariff made by the commission shall be in full force during pendency of appeal therefrom. State & Port Authority of St. Paul v N. P. Ry. 221 M 400, 22 NW(2d) 569.

Error is never presumed and where it is claimed that a large verdict for personal injuries is excessive but it is not pointed out by appellant in what respect, if any, its claim if true, the verdict will not be disturbed on appeal. Jacobson v C. & G. W. Ry. 221 M 454, 22 NW(2d) 455.

As an exception to the general rule that litigants are usually bound upon appeal by the theory or theories, however erroneous or improvident, upon which the case was tried below, the appellate court has a duty to, and upon its own motion may, consider and determine a case upon the ground of illegality, although such ground was neither presented to nor considered by the trial court, if such illegality (a) is apparent upon undisputed facts, (b) is in clear contravention of public policy, and (c) if a decision thereon will be decisive of the entire controversy on its merits. Hart v Bell, 222 M 69, 23 NW(2d) 375, 24 NW(2d) 41.

Failure to urge on appeal that the trial court erred in not granting plaintiff an allowance for the future support of the minor child of the parties constitutes a waiver of any point concerning the question. Haugen v Swanson, 222 M 203, 23 NW(2d) 535.

A party defeated on appeal is not required to ask that the mandate give him leave to move for a new trial upon the ground of newly discovered evidence, since the whole matter of leave to make such motion, as well as its decision, rests with the trial court. In re Hore's Estate, 222 M 197, 23 NW(2d) 590.

Issues not covered by the pleadings or litigated by consent at the trial will not be considered for the first time in the supreme court on appeal. Safranski v Safranski, 222 M 358, 24 NW(2d) 834.

The jury might, on the evidence, have found that the conduct of defendant's motorette, who observed plaintiff's action in endeavoring to capture the wild truck, and did not stop her car, was sufficient intervening cause to eliminate as a proximate cause the act of plaintiff in parking the truck in the place and manner he did. The rule of intervening efficient cause may eliminate the prior act of negligence as the proximate cause. Seward v Mpls. Street Ry. 222 M 454, 25 NW(2d) 221.

The supreme court has jurisdiction to remand a case to the trial court to enable appellant to renew motion for new trial on ground of newly discovered evidence arising during pendency of appeal. Fyfe v Gt. Northern, 222 M 490, 25 NW(2d) 219.

Conflicts in evidence are not to be resolved on appeal, and the trial court's findings will not be disturbed unless they are manifestly and palpably contrary to the evidence. Prince v Sonnesyn, 222 M 528, 25 NW(2d) 469.

A court of equity will mould its relief so as to determine the rights of all the parties, and it will not allow the pleadings to prevent it from getting at the heart of the controversy. Prince v Sonnesyn, 222 M 528, 25 NW(2d) 469.

On appeal from a judgment after trial by the court, no motion for a new trial having been made and no errors in rulings or proceedings at the trial being involved,

the questions for review are limited to a consideration of whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and judgment. Venier v Forbes, 223 M 69, 25 NW(2d) 705.

In the instant case there was a motion for a new trial limited, however, to the single question as to whether the evidence sustains the findings. For that reason, since this is an appeal from the judgment, the supreme court will consider and determine that particular question. Erickson v Synykin, 223 M 232, 26 NW(2d) 172.

Where a case is tried to the court and findings are made, the specific finding which is asserted to be without evidentiary support must be challenged in the supreme court by a specific assignment of error under Rule VIII (3)(4). Erickson v Synykin, 223 M 232, 26 NW(2d) 172.

On appeal from a judgment, the question for consideration is whether there is any competent evidence tending to sustain the verdict. Solosky v Johnson, 223 M 390, 27 NW(2d) 282.

On appeal, the findings of the triers of fact will be considered in the light most favorable to the prevailing party. Fewell v Tappan, 223 M 483, 27 NW(2d) 649.

On appeal, error is never presumed, but must be made to appear affirmatively before a reversal can be had. Nor does the court reverse unless there is error causing harm to appellant. Error without prejudice is not ground for reversal. Potter v Potter, 224 M 29, 27 NW(2d) 785.

A city is not liable for damage to private property by surface water resulting from inadequacy of its drains where such property was the natural depository of all water discharged thereon and the city improvements did not cause water to discharge on plaintiff's property where it did not naturally belong. Roche v City of Mpls. 223 M 359, 27 NW(2d) 295.

Compliance with judgment or decree of a federal court by payment of the judgment or performance of the decree does not bar an appeal from such judgment or decree where repayment or restitution may be enforced. Chicago, Gt. Western v Beecher, 150 F(2d) 394.

Absence of conflict was not conclusive. The court must determine whether there was substantial evidence upon which the verdict could properly be based; and the reviewing court is required to assume as established all facts supporting plaintiff's claims which reasonably tended to prove his case. C.N.W. v Grauel, 160 F(2d) 820.

5. Dismissal of appeal

Notwithstanding the fact that the rights of the contingent remainderman are very remote of possible succession and the probabilities of his ever succeeding to his rights as remainderman, the appeal cannot be dismissed as frivolous where there is admittedly an ambiguous provision in the will. N.W. Bank v Pirich, 215 M 313, 9 NW(2d) 773.

Supreme court may dismiss as nonappealable an appeal from a judgment which is incomplete because containing no costs or waiver thereof although respondent has not made a motion therefor. Colby v Colby, 223 M 157, 25 NW(2d) 769.

The supreme court in its discretion and on its own motion may dismiss an appeal for failure of an appellant to include in the printed record such an abridgement or abstract of the settled case as is essential to a proper consideration and understanding of the questions raised by the appeal. Seerup v Swanson, 223 M 230, 26 NW(2d) 33.

A defendant against whom a default judgment has been entered cannot raise for the first time on appeal the question whether he was entitled, under section 543.16, to notice of the proceedings in which the judgment was granted. Duenow v Lindeman, 223 M 505, 27 NW(2d) 421.

6. Affirmance

Where a party invites a particular verdict upon which judgment is finally rendered, he cannot complain on appeal that the decision was erroneous. Briggs v

Kennedy, 209 M 312, 297 NW 342; Cohen v Steinke, 223 M 292, 26 NW(2d) 843.

In an action against an issuing bank by the named payee to recover on a cashier's check issued for a special purpose and subject to a contract between the payee and the purchaser by which the check was used as an earnest money deposit, and, by the terms of the contract, was to be returned to the purchaser in the event that the payee could not perform his contract, the trial court was justified in interpleading the purchaser of the check and discharging the bank as defendant. Deones v Zeches, 212 M 260, 3 NW(2d) 432.

Since defendants are not appealing they may not urge error before the supreme court, or attack the decision of the trial court; but this does not deny to them the right to stress as ground for affirmance any sound reason presented by the record in support of the decision, even though it is not the one assigned by the trial judge. Droege v Brockmeyer, 214 M 182, 7 NW(2d) 538.

7. Reversal

The question whether the complaint did or did not state a cause of action is not before the appellate court on appeal from a judgment by the plaintiff where the defendant in open court expressly waived all objections to the complaint. Lee v Zaske, 212 M 244, 6 NW(2d) 793.

The law aims to protect the property and estate of one who is in fact incapable of doing so for himself. On conflicting testimony, the issue of insufficiency of consideration cannot be disturbed on review unless the finding is palpably contrary to the evidence. Parrish v Peoples, 214 M 589, 9 NW(2d) 225.

Where a new trial is ordered, the appellate court will consider questions not technical before it which will arise on a new trial, especially where they may be decisive. Christensen v Hennepin Transportation Co. 215 M 394, 10 NW(2d) 406.

While trial is had upon only a part of several issues raised by pleadings in trial court, the reviewing court, upon finding that conclusions were wrong upon the issues tried, will not render judgment in favor of either party, but will remand case for trial upon those issues joined which were not tried. Olson v Buskey, 220 M 155, 19 NW(2d) 57.

Defendant requested the court to charge the jury that the burden of proof was upon plaintiff to show the presence of water, oil, peanut shells, or other debris on its floor and that the same had been on the floor for such period of time that defendant had notice thereof. The court denied the request and did not cover the subject in its general charge. This was error for which a new trial must be granted. Hubbard v Montgomery, 221 M 133, 21 NW(2d) 229.

Where the supreme court reverses an order or judgment and remands the case with specific directions as to the order or judgment to be entered, upon remittitur it is the duty of the trial court to execute the mandate of the supreme court precisely according to its terms, without alteration, modification, or change in any respect. In re Hore's Estate, 222 M 197, 23 NW(2d) 590.

8. Modification

As an exception to the general rule that the supreme court will not for the first time on appeal consider a theory that was not litigated below, this court has a duty to, and upon its own motion may, consider and determine a case upon the ground of illegality, although such ground was neither presented to nor considered by the trial court, if such illegality (a) is apparent upon undisputed facts, (b) is in clear contravention of public policy, and (c) if a decision thereon will be decisive of the entire controversy on its merits. Ray v Homewood Hospital, 223 M 440, 27 NW(2d) 509.

9. Discretionary rulings

There is no evidence in the record to show how the step on which plaintiff slipped became wet and slippery and, therefore, no negligence in that regard is established against the defendant. Pangolas v Calvet, 210 M 249, 297 NW 741.

Whether error in charge was prejudicial and likely to or did mislead or influence jury is a question which trial court is in better position to determine than this court, and if the trial court deems such error prejudicial and ground for a new trial, there must be a clear showing of error or abuse of discretion to warrant reversal by this court. Larson v Sventek, 211 M 385, 1 NW(2d) 608.

Unless there is a showing of abuse of discretion, the action of the trial court in relieving parties from default, will not be disturbed. Bonley v Rickmeyre, 213 M 214, 6 NW(2d) 245; Peterson v Davis, 216 M 60, 11 NW(2d) 800.

Presumption controlling the appellate court in its determination as to the granting or denying a new trial. Radloff v Bragmus, 214 M 130, 7 NW(2d) 491; Weber v McCarthy, 214 M 76, 7 NW(2d) 681; Merritt v Stuve, 215 M 44, 9 NW(2d) 329; Bloomquist v Thomas, 215 M 35, 9 NW(2d) 337; Schendel v Klein, 215 M 73, 9 NW(2d) 342; Ickler v Hilger, 215 M 82, 10 NW(2d) 277; Ranum v Swenson, 220 M 170, 19 NW(2d) 327; Prince v Sonnesyn, 222 M 528, 25 NW(2d) 468; Hall v Mpls. St. Ry. 223 M 243, 26 NW(2d) 178; Squillace v Village of Mountain Iron, 223 M 8, 26 NW(2d) 197; Leitner v Gamble-Robinson, 223 M 260, 26 NW(2d) 228.

The granting of a continuance or postponement of a cause is a matter lying in the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of discretion. Under the facts and circumstances of this case, there was no clear abuse of discretion in refusing to grant a motion for continuance. Lehman v Lehman, 216 M 538, 13 NW(2d) 604.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court; and if such evidence is merely cumulative, contradictory, or impeaching of evidence at the trial, denial of a new trial is not an abuse of discretion. Skog v Pomush, 219 M 322, 17 NW(2d) 641.

Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused or whether the verdict should be reduced rests in the sound discretion of the trial court, and upon review the appellate court will be guided by the general rule applicable to other discretionary orders. Maas v Midway Chevrolet Co. 219 M 462, 18 NW(2d) 233.

It was not an abuse of discretion for a trial court to deny a motion for change of venue from defendant's resident county, for convenience of witnesses and to promote the ends of justice, where only 18 miles separate the county seats; and that an equal, if not greater number of witnesses live in the county of the present venue; and that files and proceedings of previous actions material to the issues may be made readily available for trial in the county of defendant's residence. Bowen v Johnson, 221 M 99, 21 NW(2d) 226.

Supreme court will not hold as a matter of law that trial court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence where such evidence is merely cumulative or corroboration of testimony already submitted in the action. State v Smith, 221 M 359, 22 NW(2d) 318.

Trial courts determination relative to alimony, allowances, or support will not be disturbed by the appellate court except for abuse of discretion. Wilcox v Wilcox, 222 M 279, 24 NW(2d) 237.

10. Proceedings in trial court on reversal

A party will not be permitted to shift his position on appeal. A determination in a prior action that plaintiffs, as holders of the third mortgage, were entitled to have the rents due under the renewal of a lease applied to reduce the amount due on the first mortgage, is res judicata in this action between the same parties. Gandrud v Hansen, 215 M 474, 10 NW(2d) 372.

11. Law of the case

The complaint sounds in conversion but the case was tried and determined on the theory of an action for a breach of contract. Defendant is not entitled to raise the question of the ambivalence before the appellate court. Stanton v McCue, 209 M 458, 296 NW 521.

Absent timely exceptions, the charge as given by the court in the instant case became the law of the case and objections thereafter are unavailing on appeal. Ickler v Hilger, 215 M 82, 10 NW(2d) 277; Katzmerek v Weber, 214 M 580, 8 NW(2d) 822.

Matters considered and determined on the first appeal cannot again be raised on a subsequent appeal. Kane v Locke, 218 M 486, 16 NW(2d) 545; Skog v Pomush, 221 M 11, 20 NW(2d) 530.

No consideration is necessary to support an agreement by a creditor to accept less than the amount due on a liquidated past-due indebtedness in discharge of the whole. Brack v Brack, 218 M 503, 16 NW(2d) 557.

An assignment of error based upon mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection. Shepstedt v Hayes, 221 M 74, 21 NW(2d) 200.

Decision on former appeal, 217 M 629, 15 NW(2d) 95, construing L. 1943, c. 621, as the law of the case, and the rule so announced controls decision in all subsequent proceedings. State v Prickett, 221 M 179, 21 NW(2d) 474.

Where there are two or more succeeding verdicts all in accord, the reviewing court is less inclined to set aside the latter verdict than was its inclination with the first. State v Drescher, 222 M 120, 23 NW(2d) 533.

Where a question of law is decided on appeal, without limitation as to the particular kind of legal question involved, it becomes the law of the case, which the trial court is bound to follow on a new trial and the appellate court will not reexamine on a subsequent appeal. State v Schabert, 222 M 261, 24 NW(2d) 847.

The decision was for the defendant, and where the evidence was conflicting, the version most favorable to the defendant must be taken by the appellate court. Hare v Bauer, 223 M 285, 26 NW(2d) 359; Bliss v Griswold, 222 M 494, 25 NW(2d) 302; Pierce v G. A. R. 220 M 552, 20 NW(2d) 489.

12. Moot questions

Termination of the contract prior to a decision on appeal from the court's refusal to grant injunction restraining interference with the contract required dismissal because the question became moot when the contract terminated prior to the decision on the appeal. McDonald v Brewery Drivers Union, 215 M 274, 9 NW(2d) 770.

Under the facts herein, where the evidence overwhelmingly preponderated in plaintiff's favor on the issue of defendant's negligence so that a directed verdict would have been justified, any claimed errors in the court's charge would not justify a new trial. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

An alleged error relating to conclusions to be drawn from findings of fact will not be considered here, because they will be corrected in the supreme court's direction for judgment. An error corrected below will not be considered by the appellate court though it is claimed the correction was not adequate, where it is not pointed out in what respects, if any, this is true. Standard v Wolf, 219 M 128, 17 NW(2d) 329.

In an action for personal injuries suffered by falling in a stormshed entry to defendant's building, exclusion of Minneapolis building ordinance, section 2901, forbidding obstructions in the street, was proper, because the shed's position had no causal connection with the injury to plaintiff. Hahn v Diamond Iron Works, 221 M 33, 20 NW(2d) 705.

Where supreme court dismisses as nonappealable an appeal from an order or judgment, it may, to obviate further futile proceedings in the matter, give its opinion as to the merits of the case. Colby v Colby, 223 M 157, 25 NW(2d) 769.

Where the controversy resulting in the order appealed from is extinguished by a compliance, the case is moot and the court will not proceed. Chicago, Gt. Western v Beecher, 150 F(2d) 395.

13. Findings of fact

Whether or not the evidence supports the verdict. Smith v Ostrov, 208 M 77, 292 NW 745; Norling v Stempf, 208 M 143, 293 NW 250; Anderson v High, 211 M 227, 300 NW 597; Becker Co. Bank v Miller, 215 M 336, 9 NW(2d) 923; Ickler v Hilger, 215 M 82, 10 NW(2d) 277; Warren v Merchants Loan, 217 M 445, 14 NW(2d) 450; Kundiger v Metropolitan Life, 218 M 273, 15 NW(2d) 487; Clabots v Badeaux, 221 M 303, 22 NW(2d) 19.

Verdict determined upon findings of fact. Dennis v Colman's, 211 M 597, 2 NW(2d) 33; Hanse v St. Paul Ry. 217 M 432, 14 NW(2d) 473; Koch v Lidberg, 219 M 199, 17 NW(2d) 308.

Cases involving amount of recovery. Olson v Davis, 215 M 18, 9 NW(2d) 344; James v C. St. P. & O. Ry. 218 M 333, 16 NW(2d) 188.

Weight of evidence given to the credibility of witnesses by the triers of fact. Diettrich v Brown Co. 215 M 234, 9 NW(2d) 510; Shockman v Union Transfer Co. 220 M 334, 19 NW(2d) 812; Cohen v Steinke, 223 M 292, 25 NW(2d) 843.

Reversal or affirmance based upon fact determination. Anderson v Farwell, 217 M 110, 14 NW(2d) 311; Albert v Edgewater Beach Co. 218 M 20, 15 NW(2d) 460; Kundiger v Waldorf, 218 M 168, 15 NW(2d) 486; Murtha v Olson, 221 M 240, 21 NW(2d) 607; Williams v Jayne, 210 M 594, 299 NW 853; Calich v Counsel of Jugo-Slavia, 214 M 292, 8 NW(2d) 337; Ley v Doherty, 215 M 104, 9 NW(2d) 327; Bicanik v Campbell, 220 M 107, 19 NW(2d) 7; Corwin v Hudson, 220 M 493, 20 NW(2d) 330; Anderson v Sears, Roebuck, 223 M 1, 26 NW(2d) 355; Solosky v Johnson, 223 M 390, 27 NW(2d) 282.

Since only exclusively fact questions are involved and there is ample evidence to sustain the court's findings, the appellate court has no choice but to affirm. In re Lund, 217 M 625, 15 NW(2d) 426.

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

Trial court did not err in refusing to submit question of plaintiff's contributory negligence to the jury where such claimed negligence was not a material element or substantial factor in bringing about the accident. Garland v Nelson, 219 M 7, 17 NW(2d) 28.

A finding by the trial court if sustained by the evidence, must be sustained by the appellate court. Standard v Wolf, 219 M 128, 17 NW(2d) 329.

Clear and explicit findings are not subject to construction and cannot be explained or impeached by other parts of the record; but where findings are of ambiguous or of doubtful meaning, they should be construed in the light of the entire record. Stevens v Mpls. Firemens Relief Assn. 219 M 282, 17 NW(2d) 642.

The jury accepted defendant's version of the accident, and therefore on appeal the appellate court is required to consider the evidence most favorable to them. Landeen v De Jung, 219 M 288, 17 NW(2d) 648; Ranum v Swenson, 220 M 170, 19 NW(2d) 327.

Where, upon circumstantial evidence in civil cases, there is a reasonable basis for diverse inferences, the choice of an inference made by the fact-finding body is to be sustained, unless (1) the conflicting inferences stand in equilibrium so that reasonable minds cannot prefer one over another, or unless (2) the choice of inference is otherwise based on mere conjecture and speculation, or unless (3) the inference adopted is manifestly and undeniably contrary to the weight of the evidence as a whole. It is not necessary that the evidence in support of the inference adopted must outweigh other reasonable inferences so as to demonstrate their impossibility. Burke v Nelson, 219 M 381, 18 NW(2d) 121.

Findings of fact based upon conflicting evidence will not be disturbed on appeal unless manifestly against the clear preponderance of evidence. Koehler v Koehler, 219 M 536, 18 NW(2d) 312.

Findings of fact concerning faulty performance, defects in the building constructed, and the amount of damage occasioned thereby, will not be disturbed on

appeal where they have reasonable support in the evidence. Knutson v Lasher, 219 M 594, 18 NW(2d) 688.

Evidence will disclose whether trial court in exercise of its discretion may grant plaintiff a temporary or permanent injunction under section 585.02. The supreme court cannot in advance determine whether evidence will establish violation of plaintiff's property or contract rights to the extent that the trial court in the exercise of proper discretion may enjoin defendants from organizing a new state council in violation of plaintiff's rights. Minn. Council v Amer. Federation, 220 M 179, 19 NW(2d) 415.

In employee's action for accounting based on contract for share of profits in business financed by defendant, evidence supported finding in favor of plaintiff. Altendorf v Hogenson, 220 M 240, 19 NW(2d) 431.

Where trial court grants motion for judgment non obstante, the appellate court must view the record in the light most favorable to the prevailing party below. The question in the instant case is whether, as a matter of law, defendant was entitled to judgment on the merits. Greenwood v Evergreen Mines, 220 M 296, 19 NW(2d) 727.

Appellant had the burden of showing that there was no substantial evidence reasonably tending to sustain the trial court's findings as to the amount due on a disputed account. Shepherdson v Central Fire Ins. Co. 220 M 401, 19 NW(2d) 773.

In conflict between oral testimony and physical facts, the alleged improbability of facts as related by plaintiffs in collision case, and conclusions to be drawn from the testimony, are largely questions going to the credibility of witnesses for jury to determine, rather than for the supreme court on appeal. Shockman v Union Transfer, 220 M 334, 19 NW(2d) 812.

The supreme court's responsibility as appellate court is not to decide facts, but whether there is reasonable evidence to support the finding of the trial court. Corwin v Hudson, 220 M 493, 20 NW(2d) 330.

Where there is a conflict in the evidence as to whether a warranty was made or not, it is a question for the jury, whose verdict will not be disturbed by this court. Walley v Sweet, 220 M 545, 20 NW(2d) 528.

It is not the province of the appellate court to go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court. Its duty is fully performed when it has fairly considered all the evidence and from it has determined that it reasonably supports the findings. Meiners v Kennedy, 221 M 6, 20 NW(2d) 539; Saari v Dunwoody, 221 M 95, 21 NW(2d) 95.

In an action for damages resulting from breach of contract, where defendant's only claim on appeal was that the findings were "not justified by the evidence" and were "contrary to law," upon full consideration of the evidence appearing in the record and summarized in the opinion, it is found that the findings were adequately supported. Standard Heating Co. v Reichert, 222 M 492, 25 NW(2d) 87.

A finding by the industrial commission upon a question of fact will not be disturbed unless the evidence and inferences therefrom clearly required reasonable minds to adopt a contrary conclusion. Baker v MacGillis, 222 M 460, 25 NW(2d) 219.

It is the duty of the trial court to pass upon the credibility of the witnesses and the weight of the evidence, and its findings will be sustained except for abuse of discretion. Roth v Swanson, 145 F(2d) 262.

On motion to set aside a verdict, the evidence and all inferences that reasonably can be drawn therefrom must be viewed in the light most favorable to the verdict. Cole v Chgo. Milwaukee & Omaha, 59 F. Supp. 443.

605.06 JUDGMENT NOTWITHSTANDING VERDICT.

1. **Prior to enactment of Laws 1913, Chapter 246**
2. **Motion on trial for directed verdict necessary**
3. **Motion for judgment**
4. **Constitutional**

5. **Inapplicable to trial by court**
6. **Appealability of order on motion**
7. **Disposition of case on appeal**
8. **Scope of review on appeal from judgment**

2. Motion on trial for directed verdict necessary

A party cannot for the first time on appeal raise the question that his opponent specified grounds for judgment notwithstanding the verdict which were not specified in the motion for a directed verdict, where without objection the trial court entertained all the grounds specified in the motion for judgment. Blomberg v Trupukka, 210 M 523, 299 NW 11.

It was error to grant judgment notwithstanding the verdict where there was sufficient evidence to present a jury question. Weber v St. Anthony Power Co. 214 M 1, 7 NW(2d) 339.

In a negligence action arising out of a collision between plaintiff's auto and defendant's streetcar where, on conflicting testimony as to the speed of each vehicle and the opportunity of each operator to see the other vehicle the jury returned a verdict for plaintiff, motion by defendant for judgment non obstante should not have been granted. Solberg v Mpls. Street Ry. 214 M 274, 7 NW(2d) 926.

Where a party moves only for judgment notwithstanding the verdict, the judge of the court is the law of the case determining the effect of the judgment as to the issues adjudicated. Fidelity v Mpls. Brewing Co. 214 M 436, 8 NW(2d) 471.

Motion for directed verdict at the close of testimony is a condition precedent to subsequent motion for judgment notwithstanding verdict on basis of evidence submitted at trial. Nunc pro tunc entries of judicial action are permitted to correct the record in furtherance of justice where error or delay is caused by action of court. It is the office of such entries to record and not supply judicial action. Nunc pro tunc order directing that record indicate that motion for directed verdict was made at close of testimony and denied, when in fact no such motion was then made, is a nullity. Wilcox v Schloner, 222 M 45, 23 NW(2d) 20.

The irregular and undesirable practice of granting a dismissal on the merits in a jury trial is equivalent in effect to the granting of a motion for a directed verdict. Anderson v Sears, Roebuck Co. 223 M 1, 26 NW(2d) 355.

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

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

Dismissal and directed verdict. 23 MLR 363.

Appealable orders in Minnesota. 24 MLR 860.

Validity of directed verdict after jury has been discharged. 25 MLR 659.

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

3. Motion for judgment

Judgment notwithstanding the verdict should not be ordered unless it 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 legal defense. Building Assn. v Van Nispen, 220 M 504, 20 NW(2d) 90.

The evidence is practically conclusive that the consignor's instructions in regard to the re-icing en route of the car in which the frozen eggs were shipped were carried out by the carrier. The trial court did not err in ordering judgment for the defendant notwithstanding the verdict. Sutton v Mpls. & St. Louis, 222 M 233, 23 NW(2d) 561.

In the absence of a motion for a directed verdict at the close of testimony in the trial court, defendants are not entitled to move for judgment notwithstanding the verdict. Leitner v Pacific-Gamble-Robinson, 223 M 260, 26 NW(2d) 228.

6. Appealability of order on motion

On appeal from an order denying a motion in the alternative for judgment notwithstanding the verdict or for a new trial, an assignment of error to the effect that plaintiff was entitled to judgment upon the evidence is good as raising the question whether the evidence as a matter of law compels a recovery in his favor. Welsh v Barnes Co. 221 M 37, 21 NW(2d) 44.

7. Disposition of case on appeal

Where the trial court grants a motion for judgment non obstante, the appellate court, upon appeal must view the record in the light most favorable to the prevailing party. Greenwood v Evergreen Mines, 220 M 296, 19 NW(2d) 726.

Where there has been a full trial upon a motion affecting substantial rights or involving the merits, the order made upon such motion is as conclusive upon the issues necessarily decided as is a final judgment, and as to such issues the entire matter is res judicata. Nelson v Auman, 221 M 46, 20 NW(2d) 702.

Defeated party who moves for judgment notwithstanding the verdict without moving for a new trial waives objections to pleadings, to rulings on the trial, to charge, and to amount of verdict, and scope of review on appeal in such case is limited to questions whether trial court had jurisdiction, whether it erred in denying motion for directed verdict, and whether evidence is sufficient to justify verdict. Louko v Village of Hibbing, 222 M 463, 25 NW(2d) 234.

8. Scope of review on appeal from judgment

On an appeal from a judgment entered after denial of motion for judgment notwithstanding the verdict, the appellate court in considering the evidence will accept the view most favorable to the verdict. Wolfangel v Prudential Co. 209 M 439, 296 NW 576; Harris v Wood, 214 M 492, 8 NW(2d) 819; Merritt v Stuve, 215 M 44, 9 NW(2d) 329; Ickler v Hilger, 215 M 82, 10 NW(2d) 277; Saturnini v Rosenblum, 217 M 155, 14 NW(2d) 108; Kundiger v Metropolitan Life, 218 M 273, 15 NW(2d) 487; Greenwood v Evergreen Mines, 220 M 296, 19 NW(2d) 726; Johnson v Evanski, 221 M 323, 22 NW(2d) 213.

Taking the view of the evidence most favorable to the verdict, a motion for a judgment notwithstanding, whether based on negligence or on contributory negligence, should be denied unless the evidence in support of the verdict, and all reasonable inferences to be drawn therefrom, be so wholly incredible and unworthy of belief or so conclusively overcome by other uncontradicted evidence that the want of negligence or the presence of contributory negligence is so clear as to leave no room for an honest difference of opinion among reasonable men. Johnson v Evanski, 221 M 323, 22 NW(2d) 213.

605.08 APPEAL, WHEN TAKEN.

Under our practice, certiorari is a writ of review in the nature of a writ of error or an appeal, its office being to review and correct decisions and determinations already made. Johnson v City of Mpls. 209 M 67, 295 NW 406.

By taking an appeal from an order denying a motion for a new trial, a party does not waive the right to appeal from the judgment. Hore's Estate, 220 M 365, 19 NW(2d) 778.

Order of the trial court denying a motion to modify a judgment could not be reviewed on appeal from the judgment where it was made after the judgment was entered; therefore the order was appealable as a final order affecting a substantial right in a summary application in the action after judgment and also as a final order involving the merits. Order denying a motion for a modification of a judgment must be appealed from within the statutory 30-day period after service of written notice thereof by the adverse party. Nelson v Auman, 221 M 46, 20 NW(2d) 702.

That a judgment is erroneous because of judicial error is ground for appeal, writ of error, or certiorari, according to the case, but it is no ground for setting

aside the judgment on motion after the time for review has expired. State ex rel v Probate Court, 221 M 333, 22 NW(2d) 448.

Where there is no assignment of error challenging finding of fact upon the ground that it is not sustained by the evidence, the appellate court will consider the finding to be true. Carl v DeToffol, 223 M 24, 25 NW(2d) 419.

A party is not entitled to a jury trial in land title registration proceedings. Carl v DeToffol, 223 M 24, 25 NW(2d) 419.

A purchaser of real estate after final judgment from the party obtaining title under the judgment but before the time to appeal from the judgment or to vacate the judgment has expired takes his chances on the title being effective under such appeal provisions. Carl v DeToffol, 223 M 24, 25 NW(2d) 419.

Claimant against decedent's estate who appealed from a judgment on the pleadings for administrator, and from an order denying her motion to amend and set aside the judgment that contained no costs or waiver thereof, was estopped to assert that the judgment was complete for the purpose of maintaining appeal but was not a complete judgment within contemplation of the rule that time for appeal from a judgment is limited to six months from time of its entry. Colby v Colby, 223 M 157, 25 NW(2d) 769.

605.09 APPEAL TO SUPREME COURT.

I. APPLICABLE TO CLAUSE (1)

1. From judgment on appeal to district court
2. From judgment originating in district court
3.[1] Default judgments appealable

II. CLAUSE (2)

1. Orders appealable
2. Orders not appealable

III. CLAUSE (3)

1. Construed strictly
2. Orders appealable
3. Orders not appealable

IV. CLAUSE (4)

Note as to amendment
1. Orders appealable
2. Orders not appealable
3. Demurrers

V. CLAUSE (5)

1. Orders appealable
2. Orders not appealable

VI. CLAUSE (6)

1. Order in supplementary proceedings

VII. CLAUSE (7)

1. Final orders in special proceedings
2. Orders appealable
3. Not appealable

VIII. APPEALABILITY OF ORDERS GENERALLY

1. **Orders appealable**
2. **Not appealable**
3. **Miscellaneous**

IX. RELATIVE TO SPECIAL CASES

1. **Application to special proceedings**
2. **Appeal from several orders**
3. **Orders vacating non-appealable orders**
4. **Who may complain**
5. **Scope of act**

I. APPLICABLE TO CLAUSE (1)

2. From judgment originating in district court

The order for sale is reviewable on appeal from the final judgment in a partition action. Burke v Burke, 209 M 386, 297 NW 340.

Where, for default of a receiver for a corporation to bring an action for wrongs done it by its officers and others, a stockholder brings such action as the representative of the corporation and its stockholders, and in open court stipulates that the receiver is the real party in interest and the owner of the cause of action sued upon, and thereupon the receiver takes over the prosecution of the action, the stockholder ceases to be a party in interest, and is not a party aggrieved by a judgment therein against the receiver, and is not entitled to appeal after the receiver has been discharged. Singer v Allied Factors, 216 M 443, 13 NW(2d) 378.

Where separate appeals taken from an order denying a new trial and from a judgment raised identical questions which are submitted on the same record, briefs, and argument, the appeal from the judgment will not be dismissed, but both appeals would be decided by one decision without allowing any costs on appeal from the judgment. Hore's Estate, 220 M 365, 19 NW(2d) 778.

The purpose of right of appeal from the judgment after affirmance by supreme court of an order denying a motion for a new trial is to correct such errors as could not have been reviewed on prior appeal, and which affect substantial rights of parties. Skog v Pomush, 221 M 11, 20 NW(2d) 531.

On appeal from a judgment after trial by the court, no motion for a new trial having been made and no errors in rulings or proceedings at the trial being involved, the questions for review are limited to a consideration of whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and judgment. Venier v Forbes, 223 M 69, 25 NW(2d) 705.

II. CLAUSE (2)

1. Orders appealable

Where the court, without consent of defendants, made an order appointing a general receiver for a partnership business in connection with an action for an accounting, which order contained an alternative provision that the receivership would be limited to the books and records and the taking of an inventory if defendants would furnish a bond conditioned to pay plaintiff such sums as might be found due him on the accounting, and defendants furnished such bond for the purpose of thus limiting the receivership, defendants did not thereby waive the right of appeal. Such a choice does not fall within the contemplation of the general rule that one who accepts the benefits of an order or judgment waives the right to appeal therefrom. Bliss v Griswold, 222 M 494, 25 NW(2d) 302.

Where no assignment of error challenged the finding of fact on ground that it was not sustained by the evidence, the supreme court on appeal considered the

finding true, since an assignment of error is necessary to raise the question. Carl v DeToffol, 223 M 24, 25 NW(2d) 479.

2. Orders not appealable

An appellant may not assign errors affecting other parties, because they were not prejudicial to him. Teschendorf v Strangeway, 223 M 409, 27 NW(2d) 430.

III. CLAUSE (3)

1. Construed strictly

An order denying the state the right to interpose and file an answer to a petition in intervention in condemnation proceeding instituted by the state and from having a full hearing of matters as to which an issue is raised is appealable. State ex rel v Anderson, 220 M 139, 19 NW(2d) 70.

3. Orders not appealable

An order granting the motion of an omitted property owner to intervene in eminent domain proceedings by the state is not appealable; nor is an order appointing commissioner in such proceeding. Antl v State, 220 M 129, 19 NW(2d) 78.

An order denying an alternative motion to amend original findings or for a new trial, insofar as it denies amendment to the findings, is not appealable. Magee v Odden, 220 M 498, 19 NW(2d) 87.

IV. CLAUSE (4)

1. Orders appealable

When a motion for amended or for additional findings is coupled with an alternative motion for a new trial, only that part of the order denying a new trial is appealable. State v Riley, 213 M 448, 7 NW(2d) 770; Droege v Brockmeyer, 214 M 182, 7 NW(2d) 538; Motzko v Motzko, 222 M 36, 22 NW(2d) 920.

Where a six inch riser in floor level was not merely in plain sight but was indicated by a discernible change in color pattern, a customer found no trouble in mounting the riser in the first instance but was injured on his return trip, the garage owner was free from negligence as a matter of law in maintaining the riser. Anderson v Sears, Roebuck Co. 223 M 1, 26 NW(2d) 355.

Questions of negligence, contributory negligence and causation, are generally for the determination of the jury. It is only when different minds can reasonably arrive at but one result that these, or any fact issues, become questions of law justifying the trial court in directing the jury how such questions must be answered. Folsom v Hogney, 223 M 223, 26 NW(2d) 219.

The rule that a storekeeper must exercise reasonable care to keep his premises in safe condition for customers, or others present at his express or implied invitation for business purposes, includes persons delivering goods to his store. Folsom v Hogney, 223 M 223, 26 NW(2d) 219.

Plaintiff's failure to look downward and discover open trap door did not constitute negligence in the instant case as a matter of law. Folsom v Hogney, 223 M 223, 26 NW(2d) 219.

2. Orders not appealable

An order denying an alternative motion for amended findings or a new trial is not appealable as a final order under section 217.30. Railroad & Warehouse Commission v Rock Island Motor, 209 M 105, 295 NW 519.

Where a motion for a new trial is denied and, without vacation of that order, irrespective of whether time to appeal therefrom had expired or not, a second motion for a new trial is denied, the latter order is nothing more than one refusing to

vacate an appealable order and so not appealable. Proper practice requires an application of a vacation of the first order pending consideration of the second motion, leave to submit the latter being first secured. Crawford v Duluth, Missabe, 219 M 523, 18 NW(2d) 317.

An order granting a new trial on the ground of newly discovered evidence made before the entry of the judgment is not appealable under the statute. Stevens v Stevens, 220 M 457, 19 NW(2d) 744.

V. CLAUSE (5)

1. Orders appealable

A district court order, denying incompetent's motion for amended finding on new trial after reversal of probate court's order restoring incompetent to capacity, was appealable. Corwin v Hudson, 220 M 493, 20 NW(2d) 330.

Fact issues when determined by the jury upon conflicting evidence, will not be disturbed on appeal if the record discloses that there is evidence reasonably sustaining the verdict; and where the verdict was for the plaintiff and the circumstances were as in the instant case, the facts upon which the verdict was obtained are founded in the light most favorable to the plaintiff. Hall v Mpls. Street Ry. 223 M 243, 26 NW(2d) 178.

In an action tried by the court, defeated party may move for a new trial on the court's minutes on the ground that conclusions of law are not supported by findings of fact. On such motion the court has no authority to grant a new trial. Its power is limited to modifying the conclusions of law to meet the facts. The court's order denying such motion may be reviewed in the supreme court without a settled case or a bill of exceptions. Johnson v Johnson, 223 M 420, 27 NW(2d) 289.

The supreme court has a duty to, and upon its own motion may, consider and determine a case upon the ground of illegality, although such ground was neither presented to nor considered by the trial court, if such illegality, (a) is apparent upon undisputed facts, (b) is in clear contravention of public policy, and (c) if a decision thereon will be decisive of the entire controversy on its merits. Ray v Homewood Hospital, 223 M 440, 27 NW(2d) 409.

2. Orders not appealable

A district court's fact findings in its order reversing probate court's order restoring an incompetent to capacity were not appealable, but the incompetent had the choice of appealing from the judgment entered pursuant to such findings or from an order denying her motion for a new trial. Corwin v Hudson, 220 M 493, 20 NW(2d) 330.

An order denying amended findings was not reviewable on appeal. Koenig v Journeymen Barbers, 220 M 522, 20 NW(2d) 332.

VII. CLAUSE (7)

2. Orders appealable

Order of trial court denying a motion to modify a judgment could not be reviewed on appeal from a judgment where it was made after judgment was entered. The order was appealable as a final order affecting a substantial right in a summary application in the action after judgment, and also as a final order involving the merits. Nelson v Auman, 221 M 46, 20 NW(2d) 703.

VIII. APPEALABILITY OF ORDERS GENERALLY

1. Orders appealable

It is a well settled rule that a decision on a first appeal becomes the law of the case and controls determination on a second appeal if no new facts are established. Nees v Mpls. Street Ry. 221 M 396, 22 NW(2d) 164.

An order granting a new trial is not appealable where neither the order nor the memorandum attached thereto expressly states that such order is based exclusively upon errors occurring at the trial. Doerner v English, 221 M 398, 22 NW(2d) 217.

Estoppel by verdict, as distinguished from estoppel by judgment, is limited in its application to the issues of fact actually adjudicated in the prior action, and such adjudication of questions of fact, so placed in issue, and determined by the jury or other triers of fact, is res judicata and is final and conclusive on the parties and their privies in all subsequent litigation, although different causes and forms of action are involved. Bernstein v Levitz, 223 M 46, 25 NW(2d) 289.

An assignment of error that the trial court "erred in making its decision," there being seven specific findings in as many numbered paragraphs, presents nothing for the appellate court to review, since Rule 8 (3)(d) provides that "where a finding of fact is attacked as not sustained by the evidence, it shall be particularly specified." Peterson v James, 223 M 33, 25 NW(2d) 301.

2. Not appealable

An order which denied a motion to vacate an order granting respondent's motion for judgment on the pleadings and denying relatrix' motion for judgment on the pleadings was not an appealable order. State ex rel v Delaney, 212 M 519, 4 NW(2d) 348.

An order refusing to amend findings of fact and conclusions of law is not an appealable order. State v Riley, 213 M 448, 7 NW(2d) 770.

An order requiring defendant to do certain acts and if he fails to do them to show cause why he should not be adjudged in contempt is not a final order and is not appealable. Paulson v Johnson, 214 M 202, 7 NW(2d) 338.

An order denying a motion for amended findings is not appealable. Raymond v McKenzie, 220 M 234, 19 NW(2d) 423; Motzko v Motzko, 222 M 36, 22 NW(2d) 920.

Admissibility of evidence of collateral facts is not ordinarily a question of law alone, but is addressed to the sound and practical judgment of the trial judge, whose discretion will not be disturbed on appeal except where the case is settled by a settled rule of law. Henderson v Bjork, 222 M 241, 24 NW(2d) 42.

An order denying a motion to vacate an authorized judgment is not an appealable order. Colby v Colby, 223 M 157, 25 NW(2d) 769.

IX. RELATIVE TO SPECIAL CASES

5. Scope of act

The right of appeal is governed by statute. Bulau v Bulau, 208 M 529, 294 NW 845; State v Rock Island, 209 M 105, 295 NW 519.

Appeals to the supreme court should be discouraged by counsel where a small amount of money and nothing else is involved in the litigation. In the instant case, much less was involved than the actual expenses incurred on this appeal. Standard Heating Co. v Reichert, 222 M 492, 25 NW(2d) 87.

Effect of L. 1931, c. 252. 16 MLR 82.

Denial of new trial on defendant's consent to additur. 19 MLR 661.

Appealable orders. 24 MLR 859.

Requirement of specification in assignment of error under rule 8. 27 MLR 89.

Brief, effect of the failure of appellee to file brief. 30 MLR 396.

605.10 BOND OR DEPOSIT FOR COSTS.

Where respondent moved to dismiss the appeal because of improper bond, the appellate court held that mistake of the attorney should not preclude appellant from having the appeal heard and determined, and ordered the appeal dismissed

unless the appellant within 10 days filed a proper bond or deposited the necessary cash. Geddes v Broman, 209 M 603, 295 NW 518.

A new bond with new unobjectionable sureties in place of the bond on which the attorney was a surety obviated the objection by respondent and reinstated the case. Hanson v Emanuel, 210 M 51, 297 NW 176.

Notwithstanding conflicting affidavits and letters, the appellate court finds that the attorneys were authorized to complete the appeal. Larson v Dahlstrom, 213 M 596, 6 NW(2d) 636.

Where the respondent or appellee procures the dismissal of an attempted appeal from a judgment in an unlawful detainer case as premature, because taken before entry of the judgment, the obligors on a supersedeas bond given on appeal under section 605.11, are not liable for rents accruing between the dates of the appeal and the dismissal, because of the invalidity of the appeal and of lack of consideration for the bond. Hampshire Arms Hotel Co. v St. Paul Indemnity Co. 215 M 60, 9 NW(2d) 413.

Cash deposit of $250 was insufficient to stay proceedings in trial court on the judgment of over $1,000. Manemann v Manemann, 218 M 602, 17 NW(2d) 74.

Surety's liability upon appeal bond when principal debtor was discharged through bankruptcy. 9 MLR 486.

605.11 APPEAL FROM ORDER; SUPERSEDEAS.

The validity of stays granted by the trial court cannot be presented to the supreme court on motion to dismiss an appeal. Plaintiff's remedy against unauthorized stays was by writ of prohibition. Stevens v Stevens, 220 M 457, 19 NW(2d) 744.

605.12 MONEY JUDGMENT; SUPERSEDEAS.

Where the respondent or appellee procures the dismissal of an attempted appeal from a judgment in an unlawful detainer case as premature, because taken before entry of the judgment, the obligors on a supersedeas bond given on appeal under section 605.11 are not liable for rents accruing between the dates of the appeal and the dismissal because of the invalidity of the appeal and of lack of consideration for the bond. Hampshire Arms Hotel Co. v St. Paul Indemnity Co. 215 M 60, 9 NW(2d) 413.

Stay of execution on appeal from judgment. 24 MLR 816.

605.14 DIRECTING CONVEYANCE; STAY.

Modus levandi fines. 11 MLR 220.