

89022

# GENERAL STATUTES OF MINNESOTA

## SUPPLEMENT 1917

CONTAINING THE AMENDMENTS TO THE GENERAL STATUTES  
AND OTHER LAWS OF A GENERAL AND PERMANENT  
NATURE, ENACTED BY THE LEGISLATURE  
IN 1915, 1916, AND 1917

WITH NOTES OF ALL APPLICABLE DECISIONS

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1918

**7989. Supreme court—Costs and disbursements—**

**Costs allowable**—On appeal by the state from an adverse judgment in an action by the state against the members of the state board of medical examiners to recover license fees collected and not turned into the state treasury, costs are properly taxed in favor of defendants on affirmance of the judgment (124-151, 144+755). States, ⇨215.

Expenses of serving notice of appeal by a private person cannot be allowed as costs. Where notice of appeal is served on the attorney of a party, appellant is not entitled to costs for service of notice on the parties, as such additional service is unnecessary. Sheriff's fees for serving notice of appeal, the record and briefs on defendants, who were not adverse parties, cannot be allowed as part of appellant's costs and disbursements (134-148, 159+564). Costs, ⇨247.

Costs cannot be allowed appellant for certified copies of the records, where it does not appear that they were for use in the appellate court (134-148, 159+564). Costs, ⇨256(1).

**Disbursements allowable**—Disbursements for printing matter unnecessary for the presentation of the assignments of error will not be allowed (124-183, 144+768, 1135). Costs, ⇨256(2).

A charge for copying exhibits which were incorporated into the settled case used on the motion for new trial will not be allowed (124-183, 144+768, 1135). Costs, ⇨254(2), 256(1).

The prevailing party will not be allowed for disbursements for the printing of matter unnecessary to present the questions urged on appeal (128-129, 150+618). Appeal and Error, ⇨764.

In view of the practice in the three large cities of the state to charge 60 cents per page for printing the paper book and brief, where the printing is done in one of those cities, a charge of 75 cents per page, the rate prevailing in the rest of the state, will be reduced to 60 cents per page (127-462, 149+940). Appeal and Error, ⇨764.

**Costs in partition suit**—On reversal of judgment denying partition, costs will be taxed against the losing party, and are not expenses of partition under § 8037 (128-539, 151+1102). Partition, ⇨114(1).

An appeal in a partition suit is an adversary proceeding, and the rule as to apportionment of costs laid down for the district court by § 8037 does not apply (135-134, 160+496). Partition, ⇨114(1).

**Several cases between same parties**—On appeals in three actions between the same parties and involving identical questions of law, with one record, one brief, one oral argument, and one attorney on each side, and presented together under stipulation, only one allowance of statutory costs should be made (132-69, 156+1). Costs, ⇨250.

That the printed record was used in another case, with which the case under consideration was tried, does not require that but one-half of the cost of printing be taxed as costs (127-304, 149+955). Costs, ⇨254(1).

**7990. Additional allowance—Costs, when paid—**

The proviso to this section does not apply to a receiver, unless it appears that the creditors are unable to pay the costs and disbursements (122-531, 142+200). Appeal and Error, ⇨1189.

Award in case of appeal for delay (see 134-464, 157+327). Costs, ⇨260(1).

## CHAPTER 80

## APPEALS IN CIVIL ACTIONS

**7995. Notice of appeal—Service—Bond and notice to be filed—Deposit, etc.**—An appeal shall be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specific part thereof. To render the appeal effective for any purpose the party appealing shall, within the time provided by law for taking such appeal, file said notice together with the bond on appeal with the clerk of the lower court, and at the time of filing such notice and bond, such appellant shall deposit with the clerk the sum of \$15, of which ten dollars shall be transmitted to the Clerk of the Supreme Court as provided in section 7996, General Statutes 1913, as and for the filing fee required in the Supreme Court by chapter 177, Laws 1915 [5761-1], and the remainder retained by the clerk of the court below as and for the fee provided in section 5756, General Statutes 1913, subdivision 50. Whenever a party, in good faith, gives notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just. (Amended '17 c. 66 § 2)

Where service of notice of appeal is made on the attorney of the adverse party service on such party is unnecessary (134-148, 159+564). Appeal and Error, ⇨424.

An appeal held from the judgment, and not rendered ineffective by reference in the notice of appeal to nonappealable orders, or to items claimed to have been erroneously omitted from the judgment (124-361, 145+114). Appeal and Error, [§422](#).

The notice of plaintiff's appeal from the order granting their motion for a new trial does not in terms embrace an appeal from the court's orders on the demurrers interposed; even if such orders were appealable (127-105, 149+3, L. R. A. 1915B, 287). Appeal and Error, [§418](#).

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

Record not authenticated will not be reviewed (122-43, 141+806). Appeal and Error, [§612\(1\)](#).

An apparent mistake in making up the record cannot be corrected on an ex parte application for a rehearing (132-437, 157+991). Appeal and Error, [§653\(1\)](#).

A ruling of the trial court excluding a document from evidence cannot be reviewed, when the document is not in the record, and there is no testimony to show its materiality (123-214, 143+357). Appeal and Error, [§692\(1\)](#).

A record excluded by the trial court, not having been returned to the appellate court, the ruling of the trial court cannot be considered (135-229, 160+787). Appeal and Error, [§692\(3\)](#).

Where an order sustaining a demurrer does not appear in the record, the appeal will be dismissed (135-480, 160+486). Appeal and Error, [§635\(1\)](#).

The rule that the trial court may settle and allow a case after an appeal has been taken from an order denying a new trial is not changed by the amendment of this section (127-533, 149+550). Appeal and Error, [§567\(1\)](#).

### 7997. Powers of appellate court—

**Necessary parties on appeal**—A judgment affecting a party below, who is not made a party on appeal, cannot be reversed or modified as to such party (132-357, 157+500). Appeal and Error, [§1173\(2\)](#).

**As to findings of fact**—Generally the supreme court cannot make nor direct specific findings of fact, but, where all the evidence is before it, an erroneous finding is amendable as a matter of law, and an amendment will be directed without a retrial (132-357, 157+500). Appeal and Error, [§1176\(1\)](#).

The supreme court is without power to make findings of fact, or to direct the trial court to find a particular fact, except perhaps where the evidence is conclusive (129-380, 152+774). Appeal and Error, [§1122\(2\)](#).

**Decisions in former appeals**—A decision on a former appeal in the same case is the law of the case on a subsequent appeal (134-432, 159+955). Appeal and Error, [§1099\(7\)](#).

Decision of the court on a former appeal is the law of the case on a subsequent appeal in the same case (133-464, 158+251). Appeal and Error, [§1099\(7\)](#).

**New trial on part of the issues**—Where the only error urged is the amount of damages, a new trial may be awarded on that issue alone (124-421, 145+173). Appeal and Error, [§1140\(1\)](#), [1178\(3\)](#).

Where, in an action for personal injuries, the errors at the trial affected only the matter of damages, and not the question of liability, a new trial may be ordered as to the matter of damages alone (133-192, 158+46). New Trial, [§9](#).

In granting a new trial it may in a proper case be limited to a part of the issues; and where the only error of the trial court was the exclusion of evidence as to certain distinct claims, a new trial may be granted as to such claims, without disturbing the verdict in other respects (131-389, 155+391). Appeal and Error, [§1172\(3\)](#).

Where, in a contest over the right of a mortgagor to receive the rents and profits during the period of redemption, the only finding of the trial court was that the mortgagor had received one quarterly payment of such rent, the supreme court, on affirming the right of the mortgagor to such rents and profits, cannot enter judgment for the rents of the remaining three quarters, but will remand the cause for a new trial on the question as to the amount that the mortgagor is entitled to recover (135-443, 161+165). Mortgages, [§491](#).

**New trials granted when**—A reversal on the ground that the findings of fact are not supported by the evidence is not a direction to the trial court to change its findings without a

further trial. Where a judgment is reversed on the ground that the findings of fact are not sustained by the evidence, and new findings are necessary to support any judgment subsequently rendered, a new trial follows as of course, where the reversal is without specific direction as to new trial (129-380, 152+774). Appeal and Error, [↔1210\(1\)](#).

On reversal and remand without directions as to a new trial, a new trial follows in the court below as a matter of course (134-471, 158+908). Appeal and Error, [↔1210\(1\)](#).

Where the supreme court determines that the statute of limitations has run against appellants' claim of title, unless they are under disability, a matter not shown by the record, judgment will not be directed for appellee, but new trial will be ordered (122-235, 142+198). Appeal and Error, [↔836](#).

Where material facts found by the trial court are not supported by the evidence, and the record contains evidence which might support the finding of other material facts, a new trial will be ordered (132-417, 157+645). Appeal and Error, [↔1001\(3\)](#).

Where, on appeal from an order denying a new trial, the order is reversed without any express statement as to a new trial or limitation as to the issues to be retried, there must be a new trial of all the issues, and the opinion of the appellate court cannot be resorted to, to establish the claim that it was intended to grant a new trial as to certain issues only (134-5, 158+704). Appeal and Error, [↔1210\(1\)](#).

**Newly discovered evidence arising after appeal**—The supreme court has jurisdiction to remand a case, to enable appellant to renew his motion for a new trial for newly discovered evidence arising since the appeal. In determining whether a motion to remand, to enable appellant to renew his motion for a new trial upon the ground of newly discovered evidence arising since the appeal, shall be granted, the court is limited to an inquiry whether the showing made is such that the moving party should have the opportunity to present his motion to the trial court, and the appellate court will not consider the merits (132-475, 157+498). Appeal and Error, [↔1106\(4\)](#).

**Judgments affirmed**—Motion for affirmance granted, where appellant delayed for an unreasonable time to file his printed briefs and record (see 135-464, 160+663). Appeal and Error, [↔773\(4\)](#), 818.

A plaintiff, whose action is erroneously dismissed, will not be awarded a new trial in order to give him merely nominal damages (134-209, 158+979). Appeal and Error, [↔1169\(2\)](#), 1171(6).

Where, pending appeal in injunction proceedings, the period of time for which injunction is sought expires, judgment will be affirmed (121-528, 141+97). Appeal and Error, [↔1138](#).

Though the evidence is not conclusive in support of the findings, the judgment must be affirmed, where the evidence reasonably tends to support the findings (132-476, 157+590). Appeal and Error, [↔1010\(1\)](#).

**Moot questions**—Dismissal of appeal on question involved becoming moot (141+1134). Appeal and Error, [↔781\(1\)](#).

**Equally divided court**—Equally divided court (121-254, 141+115). Appeal and Error, [↔1123](#).

**7998. Judgment notwithstanding verdict or disagreement and discharge of jury**—When, at the close of the testimony, any party to the action moves the court to direct a verdict in his favor, and such motion is denied, upon a subsequent motion that judgment be entered notwithstanding the verdict, or notwithstanding the jury has disagreed and been discharged, the court shall grant the same if the moving party was entitled to such directed verdict. An order for judgment notwithstanding the verdict may also be made on a motion in the alternative form asking therefor, or, if the same be denied, for a new trial. If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be entered, when it appears from the testimony that a verdict should have been so directed at the trial; and it may also so order, on appeal from the whole order denying such motion when made in the alternative form, whether a new trial was granted or denied by such order. (Amended '17 c. 24 § 1).

126-491, 148+304; 129-530, 152+1102.

**Motion for directed verdict**—The provision of this section abolishing directed verdicts does not apply to equitable actions in which the court has ordered the submission of specific issues to the jury (129-59, 151+532). Trial, [↔171](#).

The provision of this section that a directed verdict shall not be given if the adverse party objects does not deprive the courts of their constitutional power to determine whether a cause of action or defense has been made out, but merely regulates or postpones the exercise of the power (129-4, 151+412). Trial, [↔171](#).

Arguing the merits of a motion for a directed verdict does not waive the provisions of this section, but remaining silent after the court has stated its understanding that objection has been waived precludes a claim of the benefit of the statute (129-4, 151+412). Trial, [↔181](#).

Where there is an objection to an instructed verdict under this section, the objecting party is not required to request the submission of particular issues. While such request may be made, the trial court will, without a request, submit such issues as are presented by the pleadings and evidence, as the court deems proper (123-465, 151+182). Trial, [↔255\(1\)](#).

This section does not deprive the court of the power to strike out immaterial evidence, nor

require it to submit to the jury questions having no bearing upon the outcome of the suit. Where the court states the case, and explains the rules of law applicable, and permits the jury to return such verdict as they may deem proper under the circumstances, the court has fully performed the duty imposed upon it by the statute (127-262, 149+370, L. R. A. 1915B, 1121). Trial, ☞89, 253(10).

Whether this section applies to dismissals at the close of plaintiff's case, *quære* (127-369, 149+541).

**Motion for judgment**—A motion for judgment notwithstanding the verdict does not bar a subsequent motion for a new trial (134-292, 157+499). New Trial, ☞10.

Judgment notwithstanding the verdict can be granted only when a motion for a directed verdict was made at the trial, and a motion to dismiss an appeal from probate court is not equivalent to such motion (124-191, 144+941). Judgment, ☞199(5, 6).

Where defendant moves for judgment notwithstanding the verdict, but makes no motion for a new trial, the only questions for consideration on appeal are whether the trial court had jurisdiction and whether there is any competent evidence tending to sustain the verdict (134-245, 158+975). Appeal and Error, ☞863.

Motion under this section does not answer the purposes of a motion for new trial in presenting questions for review on appeal (128-514, 151+419, L. R. A. 1915D, 1077; 129-25, 151+421). Appeal and Error, ☞289, 292; New Trial, ☞10.

The trial court may entertain a motion for a new trial after the decision upon an appeal from a judgment; there having been a motion for a judgment notwithstanding the verdict, but no motion for a new trial (134-292, 157+499). Appeal and Error, ☞1202.

Application in the appellate court for judgment under this section must be denied after the cause has been remitted to the lower court (130-530, 152+866).

**When judgment should be ordered**—Where the evidence is conflicting, it is error to grant judgment notwithstanding the verdict (130-52, 153+133). Judgment, ☞199(1).

Judgment notwithstanding the verdict will only be granted when the evidence is conclusive against the verdict (131-313, 155+202). Carriers, ☞320(28); Judgment, ☞199(3).

Judgment notwithstanding the verdict will not be ordered, where it appears probable from the record that the defendant has a good defense and can supply the defects in the evidence on another trial (133-230, 158+253). Judgment, ☞199(3).

A motion for judgment notwithstanding the verdict should be granted only where it clearly appears that the cause of action sought to be established does not in point of substance constitute a right of recovery (133-167, 157+1090). Judgment, ☞199(1).

That the cause of action arose under the federal employers' liability act did not deprive the state court to direct entry of judgment notwithstanding the verdict (133-460, 157+638). Judgment, ☞199(1).

Judgment notwithstanding the verdict cannot be ordered merely because the evidence is such that, had the trial court granted a new trial, this court would have sustained its action. Evidence as to negligence in the construction or maintenance of a bridge by which a child was injured held not to warrant an order for judgment notwithstanding the verdict (126-33, 147+710). Judgment, ☞199(3).

Where pails of hot tar used by a street-repairing gang which traveled from place to place to make repairs in the asphalt pavement were usually carried on a special fire wagon or swung under the wagons, the fact that a pail was by some unknown cause placed in a wagon in which the men rode, so that plaintiff, one of such laborers, inadvertently put his foot therein and was injured, presented no more than a question of the negligence of the foreman of defendant city, and, under this section, it was error to direct a verdict for plaintiff (130-260, 153+516). Master and Servant, ☞286(3); Trial, ☞181.

Where the trial court submits a case to the jury on a ground of negligence which does not show liability, but the pleadings and evidence make a case on grounds not submitted, a new trial, and not final judgment, is the remedy. Defendant in a negligence case is not entitled to judgment notwithstanding the verdict, where it appears probable that plaintiff has a good cause of action and that defects in evidence may be supplied on the trial (133-301, 158+430). Judgment, ☞199(1).

In an action by an employe for injuries, judgment directed for defendant notwithstanding the verdict, for the reason that the finding of negligence by the jury is not sustained by the evidence (131-34, 154+616). Master and Servant, ☞278(17), 279(5).

On the evidence in a boundary dispute, held, that the supreme court, on reversing the judgment for insufficiency of the evidence to support the verdict, would not order judgment notwithstanding the verdict (124-233, 144+758). Appeal and Error, ☞1177(8).

Evidence in ejectment held to warrant direction of judgment notwithstanding verdict (122-184, 142+155). Landlord and Tenant, ☞76(3).

Evidence held to justify granting new trial and denying judgment notwithstanding verdict (121-431, 141+806). Judgment, ☞199(1).

Judgment held properly rendered in action for injury to property by fire set out by locomotive (121-439, 141+523).

Verdict exonerating superintendent held not inconsistent with verdict against employer (121-383, 141+488). Master and Servant, ☞297.

Where the pleadings and evidence show a substantial right of action, judgment notwithstanding the verdict will not be granted for defects in the evidence, when it appears from the record that such defects may be supplied on another trial (129-432, 152+840). Judgment, ☞199(1).

A servant held to have conclusively assumed the risk of injury, so that judgment notwithstanding verdict in his favor would be ordered (128-479, 151+183).

The parents of an intestate, suing for his wrongful death, held to have proved pecuniary loss, so that defendant was not entitled to judgment notwithstanding the verdict for plaintiffs (128-332, 150+1088). Death, ☞77.

In an action for injuries to an employé, evidence held not to warrant judgment notwithstanding the verdict (128-270, 150+919).

In an action by a servant for injuries, held, that the evidence was not such as to require judgment notwithstanding the verdict (128-239, 150+784).

In an action on a benefit certificate, evidence on the issue of payment of dues held not to warrant judgment notwithstanding verdict for plaintiff (125-72, 145+798).

Evidence held to establish probable cause for a criminal prosecution, so that a motion for judgment notwithstanding the verdict was properly overruled (126-128, 147+1093). Malicious Prosecution, ☞64(2).

In an action for wrongful discharge of a servant, held, on the evidence, that it was improper to render judgment notwithstanding the verdict for plaintiff (127-117, 149+8). Judgment, ☞199(3).

In an action by an employé for injuries, defendant held not entitled to judgment notwithstanding the verdict on the ground that the evidence failed to show that plaintiff was acting within the scope of his employment or that contributory negligence conclusively appeared (126-203, 148+113). Judgment, ☞199(3).

To warrant judgment notwithstanding the verdict on the ground of contributory negligence of plaintiff's intestate, the evidence must conclusively establish a state of facts from which no other reasonable inference can be drawn, except that of contributory negligence; it not being sufficient that the verdict is manifestly against the preponderance of the evidence (132-307, 156+346). Death, ☞58(1); Judgment, ☞199(3).

Evidence held insufficient to warrant judgment notwithstanding the verdict (133-73, 157+993).

Whether judgment notwithstanding a verdict against defendant master and in favor of defendant servant in an action for injuries resulting from the negligence of the latter, should be awarded, *quære* (131-313, 155+202).

**Appealability of order on motion**—This section, as amended by 1915 c. 31, does not repeal § 8001 subd. 4, and hence, where plaintiff had a verdict, and defendant's motion for judgment notwithstanding the verdict was denied, but a new trial, not exclusively for errors occurring at the trial, was granted, defendant could not appeal from the whole order (132-84, 155+1053). Appeal and Error, ☞110.

An order denying a motion for judgment notwithstanding the verdict is not appealable in the absence of a motion for a new trial (132-467, 155+1039). Appeal and Error, ☞109.

An order denying judgment notwithstanding the verdict, but granting motion for new trial, on the ground that the verdict was not sustained by the evidence, is not appealable (125-297, 146+975). Appeal and Error, ☞110.

The supreme court has jurisdiction of an appeal from an order denying a new trial after affirmance on a former appeal of a judgment entered on a motion for judgment notwithstanding the verdict, without motion for new trial (134-292, 157+499). Appeal and Error, ☞110, 1202.

**Disposal on appeal**—Failure to submit a case to the jury as required by this section, where it clearly appears that such submission could not have changed the result, is error without prejudice (130-111, 153+259). Appeal and Error, ☞1061(4).

Where the judge who tried the case was required by this section (1913 c. 245) to submit the case to the jury, and he retired from the bench without opportunity for review, and the judge who signed the order denying a new trial was without the usual opportunity for review, the judgment will be reversed and a new trial granted (130-277, 153+736).

On appeal from a motion for judgment notwithstanding the verdict or for a new trial, whether the verdict can be sustained must be determined, not by considering the evidence opposed to it, but by considering whether there is any evidence fairly tending to support it (133-467, 158+417). Appeal and Error, ☞863.

#### 7999. Dismissal of appeal in vacation—

Moot question (see 129-535, 152+654). Appeal and Error, ☞781(1).

#### 8000. Appeal, when taken—

Admission of due service of notice of appeal does not give validity to an appeal attempted to be taken after the time limited by this section (135-23, 160+80). Appeal and Error, ☞355.

After the expiration of six months from entry of judgment no appeal lies from an order made before judgment denying a motion for a new trial, though no notice of the entry of the order was given (135-23, 160+80). Appeal and Error, ☞330(6).

After affirmance of a judgment on appeal without a motion for new trial, and after the lapse of six months, a motion for a new trial on the grounds of insufficiency of the evidence and errors occurring at the trial will not lie (134-292, 159+623). New Trial, ☞4.

Thanksgiving Day not being a legal holiday, where the time for perfecting appeal expires on that day, an appeal perfected on the following day will be dismissed (129-522, 151+273). Time, ☞10(2).

#### 8001. Appeal to supreme court—

Wrong citation; should be 7490 (133-124, 155+906).

**Subd. 1**—Appeal will not lie from an order denying a motion for judgment; the proper remedy being an appeal from the judgment (126-13, 147+668). Appeal and Error, ☞337(2).

In a divorce suit, defendant may appeal from an adverse judgment, though her attorney

has received the attorney's fee allowed him by the court, and charged against plaintiff, and has satisfied the judgment to that extent (129-531, 152+269). Divorce, [§178](#).

A party aggrieved by a judgment dissolving a corporation and distributing its assets may appeal from the part of the judgment which dissolves the corporation, though he has accepted his part of the assets under the distribution, and is estopped to question that part of the decree (134-148, 156+780). Appeal and Error, [§161](#), 884.

Waiver of right to appeal from judgment granting relief to both parties by acceptance of benefits (see 130-281, 153+756). Appeal and Error, [§161](#).

An appeal lies from a judgment involving only costs and disbursements, where these accrued before the cause of action was settled, were excluded from the settlement, and are not trifling in amount (124-361, 145+114). Appeal and Error, [§119](#).

**Subd. 2**—Review of discretion of trial court in allowing or refusal of temporary injunction (see 130-510, 153+1088). Appeal and Error, [§954\(2\)](#).

In an action on a beneficiary certificate, denial of defendant's application for an injunction restraining the prosecution of the action until a prior suit in equity, brought by defendant against the insured in his lifetime, to cancel the certificate, had proceeded to judgment, was appealable (132-422, 157+646). Appeal and Error, [§1001\(1\)](#).

The discretion of the trial court in refusing a temporary restraining order will not be disturbed on appeal, the evidence being evenly balanced (123-231, 143+728). Appeal and Error, [§954\(3\)](#).

Review where evidence is conflicting as to right to dissolution of temporary injunction (128-391, 151+139). Appeal and Error, [§954\(3\)](#).

**Subd. 3**—An order of the district court denying a motion to dismiss certiorari proceedings instituted to review the action of the county commissioners in apportioning school funds under § 2696 does not involve the merits and is not appealable (129-300, 152+541). Certiorari, [§70\(1\)](#).

**Subd. 4**—An order granting a new trial is not appealable, unless it appears therefrom, or from the memorandum attached thereto, that it is granted exclusively on the ground of errors of law occurring at the trial (128-488, 151+139). Appeal and Error, [§110](#).

The trial court's discretion in awarding a new trial will not be disturbed on appeal, where the evidence is not manifestly and palpably in favor of the verdict (123-530, 143+1123). Appeal and Error, [§979\(2\)](#).

An order denying judgment notwithstanding the verdict, but awarding a new trial on the ground that the verdict was not justified by the evidence, and a subsequent order amending the former order, "so as to read that the court erred in denying the motion of defendant to dismiss the action of the plaintiff at the close of the plaintiff's testimony for the reason that there was no evidence sufficient to sustain the claim made by the plaintiff," held not to show that the order granting a new trial was based exclusively on errors occurring at the trial, so as to support an appeal under this subdivision (134-266, 159+564). Appeal and Error, [§110](#).

1915 c. 31 does not repeal this subdivision, and hence, where plaintiff had a verdict, and defendant's motion for judgment notwithstanding the verdict was denied, but a new trial was granted, not for errors occurring on the trial, defendant was not entitled to appeal from the whole order (132-84, 155+1053). Appeal and Error, [§110](#).

The supreme court cannot interfere with an order granting a new trial unless the evidence is manifestly in favor of the verdict (122-523, 141+812). Appeal and Error, [§979\(2\)](#).

Review of discretion in granting new trial (122-118, 142+10). Appeal and Error, [§979\(2\)](#).

Under this subdivision the sufficiency of the evidence to sustain the verdict is not reviewable on the plaintiff's appeal from an order granting defendant a new trial (134-192, 158+967). Appeal and Error, [§854\(6\)](#), 867(4).

On plaintiff's appeal from an order denying a new trial the defendant cannot have reviewed an appealable order adverse to it made upon its motion to set aside the service of the summons for want of personal jurisdiction (131-122, 154+945). Appeal and Error, [§878\(2\)](#).

A motion in an action of claim and delivery to "vacate and set aside the action" was in effect a motion to dismiss, and an order denying the same was not appealable (132-473, 157+114). Appeal and Error, [§105](#).

This section, as amended by 1913 c. 474, does not contemplate certification of questions to the supreme court, but merely saves the right of appeal from an order overruling a demurrer upon the conditions prescribed thereby; the case being reviewable the same as prior to the amendment (125-325, 146+1110). Appeal and Error, [§308](#).

**Subd. 6**—Whether an appeal will lie from an order denying a new trial to an intervener in garnishment from an adverse verdict on a special issue submitted to a jury to be used by the court in the ultimate determination of the controversy, upon which no judgment was or could have been rendered held questionable (131-224, 154+1078).

**Subd. 7**—134-473, 159+129.

An order requiring defendants, the officers of a village, to levy a special assessment to pay for paving, following a judgment restraining the doing of the work without levying a certain percentage of the cost on property benefited, from which judgment no appeal was taken, is appealable as a final order affecting a substantial right (161+1055).

An order modifying a judgment after it had been entered and satisfied of record affects a substantial right, and is appealable (128-321, 150+180). Appeal and Error, [§113\(1\)](#).

An appeal from an order denying a new trial held to have been seasonably taken, the or-

der of the district court directing a dismissal of the appeal from an order of consolidation not being a final order (122-383, 142+723). Schools and School Districts, [§ 39](#).

**Who is aggrieved party**—A foreign administrator, who has no right to sue for wrongful death in the state of his appointment, nor in the state where the injury occurred, and consequently not in this state, is not aggrieved by an order in such suit brought by him for the benefit of the next of kin denying his motion to substitute the next of kin as parties plaintiff (126-31, 147+667). Appeal and Error, [§ 151\(2\)](#).

A receiver in proceedings to enforce the liability of stockholders of an insolvent corporation has no interest in the disallowance of claims against the insolvent, nor in an order granting a rehearing, and cannot appeal from such an order as a party aggrieved (134-376, 159+826). Appeal and Error, [§ 150\(3\)](#).

The creditor, upon whose complaint a proceeding to enforce the liability of stockholders of an insolvent corporation is founded, has no interest in an order disallowing claims of other creditors, and cannot appeal from such disallowance as a party aggrieved (134-376, 159+826). Appeal and Error, [§ 150\(6\)](#).

A party whose motion for new trial has been granted is not aggrieved by the order, and rulings on the trial adverse to him cannot be reviewed on his cross-appeal (127-105, 149+3, L. R. A. 1915B; 287). Appeal and Error, [§ 882\(1\)](#).

**Orders held appealable in general**—An order vacating an order of dismissal and reinstating the case is appealable (134-261, 159+272). Appeal and Error, [§ 113\(4\)](#); Dismissal and Nonsuit, [§ 81\(2\)](#).

An order, made on motion of plaintiff, after death of defendant, substituting appellants as parties defendant, is appealable (131-365, 155+396). Appeal and Error, [§ 95](#), 128.

An order permitting plaintiff to prosecute his action to final determination, that defendants be permitted to serve an answer within 20 days, that plaintiff may serve a reply, and that the action may be placed on the calendar for trial at the next term, is not appealable (161+783). Appeal and Error, [§ 73\(1\)](#).

**Orders held not appealable in general**—No appeal lies to the supreme court from an order made by a court commissioner (131-129, 154+748). Appeal and Error, [§ 30](#).

From an order imposing punishment for a civil contempt an appeal lies, but no provision has been made for an appeal from an order punishing for criminal contempt. The two forms of contempt defined, and held, in the present case, that the contempt was criminal, and appeal would not lie (128-153, 150+383). Contempt, [§ 3](#), 66(2).

An order of the district court transferring a cause to the federal district court upon petition and bond filed by a foreign corporation is not appealable; the proper remedy being a motion to remand presented in the federal court (128-77, 150+224, Ann. Cas. 1916D, 1047). Removal of Causes, [§ 89\(3\)](#).

An appeal does not lie from an order denying a judgment non obstante veredicto (128-10, 150+169). Appeal and Error, [§ 109](#).

An order made before judgment denying an application to file a supplemental complaint is not appealable (129-536, 152+653). Appeal and Error, [§ 103](#).

A second appeal from an order granting a new trial, based on a motion to vacate the order granting the new trial, filed and denied after affirmance of the original order, will not be entertained (129-528, 152+270). Appeal and Error, [§ 1097\(1\)](#).

An order made before trial, denying an application for leave to serve and file a supplemental answer, is not appealable (130-534, 153+305). Appeal and Error, [§ 103](#).

An order denying a motion for such judgment as the moving party may be entitled to on the files, records, and pleadings, including the decision of this court on appeal, is not appealable (132-413, 157+591). Appeal and Error, [§ 118](#).

**Orders concerning blended motions**—Where alternative motion for amended findings, refusal of which is not appealable, or for new trial, order refusing which is appealable, is made, order denying both motions is appealable (162+522). Appeal and Error, [§ 110](#).

An order based on an alternative motion denying judgment, but granting a new trial, on the ground that the verdict was not sustained by the evidence, is not an appealable order. The former rule of the court sustaining the right of appeal from such orders was abrogated by 1913 c. 474 (125-297, 146+975). Appeal and Error, [§ 110](#).

An order denying a motion for judgment notwithstanding the verdict and granting a motion for a new trial is not appealable (129-530, 152+1102). Appeal and Error, [§ 109](#).

Where court, after denying motion for judgment, granted a new trial on its own motions, but without a statement in the order from a memorandum that the new trial was based exclusively upon errors occurring at the trial, the order was not appealable (129-526, 151+1101). Appeal and Error, [§ 110](#).

#### 8002. Bond or deposit for costs—

No order of the court is necessary to enable a party to make a deposit in lieu of an appeal bond (134-148, 156+780). Appeal and Error, [§ 388](#).

A deposit made under this section does not stay proceedings on the judgment (124-148, 156+780). Appeal and Error, [§ 472](#).

#### 8003. Appeal from order—Supersedeas—

A deposit in lieu of an appeal bond, given under § 8002, does not stay proceedings on the judgment (134-148, 156+780). Appeal and Error, [§ 472](#).

An appeal under § 8311 from an order denying a writ of habeas corpus and remanding the prisoner does not, in view of this section, stay issuance of commitment upon the conviction (123-84, 142+1051). Habeas Corpus, [§ 113\(8\)](#).

Appellant may by agreement of the parties, give a common-law bond to pay all judg-

ments which may be rendered against them in the action. The bond in this case held a common-law bond. Such a bond must be supported by a valid consideration, and an agreement to stay proceedings and forbear entering judgment is a sufficient consideration (123-218, 143+355). Appeal and Error, Ⓒ1223.

Evidence held to show that an agreement was made between the parties to an action to the effect that appellant should give a common-law bond (123-218, 143+355). Appeal and Error, Ⓒ1246.

Where the bond on appeal, though in form a supersedeas, was not approved, it did not stay proceedings, and the trial court had power to dismiss the action for want of prosecution (135-474, 159+1067). Appeal and Error, Ⓒ452, 470.

An appeal from a nonappealable order and a supersedeas thereon do not deprive the district court of jurisdiction to proceed further in the case (128-10, 150+169). Appeal and Error, Ⓒ436.

#### 8014. Death of respondent—Substitution—

Upon suggestion in the supreme court of the death of a party a hearing of the appeal will not be had without a substitution. If the death occurred before commencement of the action, the proper practice is to move to dismiss the appeal. Respondents are not entitled to a remand in order that proof may be made in the trial court of the death of the party (132-409, 157+648). Appeal and Error, Ⓒ334(1), 780(1), 1106(4).

#### 8015. Death of party after submission of appeal—

132-409, 157+648; note under § 8014.

## CHAPTER 82

### ACTIONS RELATING TO REAL PROPERTY

#### GENERAL PROVISIONS

#### 8025. Notice of lis pendens—

The defendant, not claiming ownership of the land included in a highway, an obstruction in which plaintiff seeks to abate, and who is not an abutting owner, and who has no interest in the highway, except as a member of the general public, cannot move for a cancellation of a lis pendens improperly filed by plaintiff. A lis pendens filed in an action not of an authorized class, may be canceled on motion, and an action brought to abate a nuisance consisting of the obstruction of a public highway and recover damages, is not of such class (123-342, 143+911). Lis Pendens, Ⓒ3(1), 20.

#### 8026. Notice of no personal claim—

Failure to publish notice of lis pendens required by § 8061 was not cured by the publication, in connection with the summons, of a notice of no personal claim under this section, where such notice did not contain the information required by § 8061 (123-199, 143+361). Quieting Title, Ⓒ31.

#### 8027. Transfer of title by judgment—

Jurisdiction of the person is not essential to the operation of this section (123-431, 144+138, 52 L. R. A. [N. S.] 1061). Judgment, Ⓒ807.

The courts of the state may determine plaintiff's interest in real estate within the state, as against his nonresident partner, served by publication, though a partnership accounting is necessary (123-431, 144+138, 52 L. R. A. [N. S.] 1061). Partnership, Ⓒ323.

An intestate's estate, having been reduced to personalty, the probate court had jurisdiction to determine the rights of a child, claiming under a common-law adoption of her mother, therein, and to award to such child the share to which she was entitled under a contract of the mother with the adopting parents (124-85, 144+455). Descent and Distribution, Ⓒ71(1).

#### ACTIONS FOR PARTITION

#### 8028. Action for partition or sale, who may bring—

The grantee in a deed from a tenant in common granting the absolute right for a period of five years to take and remove all the sand he might wish and find use for, with the right of entry for such purpose, the value of which right was alleged to be \$1,500, did not have an "estate of inheritance \* \* \* or for years" within this section (129-276, 152+534). Partition, Ⓒ16.

A cotenant has a right to compel partition, actual or by sale, unless he has waived such right by agreement. An agreement between cotenants as to possession of the common property held not to prevent partition (128-207, 150+798, Ann. Cas. 1916D, 925). Partition, Ⓒ14, 22.