GENERAL STATUTES

OF THE

STATE OF MINNESOTA

IN FORCE

JANUARY 1, 1889.

COMPLETE IN TWO VOLUMES.

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VOL. 2.

SUPPLEMENT, 1879-1888,

WITH

ANNOTATIONS AND GENERAL INDEX TO BOTH VOLUMES.

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§ 15. Appeal after issuance of writ—Certificate—Stay.

If a writ of restitution has been issued previous to the taking of an appeal, as provided in this chapter, the justice shall forthwith give the appellant a certificate of the allowance of such appeal, except in case where judgment has been entered in an action brought upon a written lease to recover possession of the property therein described, after the expiration of such lease. Upon the service of such certificate upon the officer having such writ of restitution, the said officer shall forthwith cease all further proceedings by virtue of such writ, except in the cases as hereinbefore provided; and, if such writ has not been completely executed, the defendant shall remain in the possession of the premises until the appeal is determined, except in case where the action is brought upon a written lease to recover possession after the expiration of the term in said lease specified. (*Id.* § 5.)

§ 18. Answer.

This language is very broad and comprehensive, and would seem to embrace every character of defense which would defeat the complainant's right to a restitution. Steele v. Bond, 28 Minn. 272, 9 N. W. Rep. 772.

CHAPTER 86.

APPEALS IN CIVIL ACTIONS.

§ 1. Appeal from district court.

No appeal lies to the supreme court from a mere opinion of the district court. Thompson v. Howe, 21 Minn. 1.

An appeal will not lie from the statement filed (on trial by the court without a jury) of the court's findings of fact and law. The appeal should be from the judgment entered upon it. Von Glahn v. Sommer, 11 Minn. 203, (Gil. 132.)

Except in such special proceedings as the statute has provided for, this court acquires jurisdiction only by writ of error, or appeal. Parties cannot confer it by stipulation. Rathbun v. Moody, 4 Minn. 364, (Gil. 273.)

The supreme court will not review a judgment of the district court, after it has been settled by the parties. Babcock v. Banning, 3 Minn. 191, (Gil. 123.)

McNamara v. Minn. Cent. Ry. Co., 12 Minn. 388, (Gil. 269;) Conter v. St. Paul & S. C. R. Co., 24 Minn. 313.

§ 3. Notice of appeal.

The notice of appeal to this court, filed with the clerk of the district court, is not rendered invalid, because addressed to the attorney for the opposite party instead of to the clerk. Baberick v. Magner, 9 Minn. 232, (Gil. 217.)

See Hodgins v. Heaney, 15 Minn. 185, (Gil. 142, 146.)

§ 4. Return on appeal.

Upon an appeal to the supreme court, where there is no "statement of the case," or bill of exceptions in the record, the evidence, even though consisting of depositions, will not be considered. Claflin v. Lawler, 1 Minn. 297, (Gil. 231.) Case dismissed for want of a return, the place of which cannot be supplied by a stipulation, as attempted in this instance. American Ins. Co. v. Schroeder, 21 Minn. 331.

This court will strike from the record any matter or paper improperly included in it, and allow proof by affidavit of the facts on which the impropriety depends. Daniels v. Winslow, 2 Minn. 113, (Gil. 93.) An extract from the minutes of a referee attached to the return to this court, there being no case settled or agreement by the parties in regard to it, is improperly embraced in the return, and will be struck out. Robinson v. Bartlett, 11 Minn. 410, (Gil. 302.)

See Keegan v. Peterson, 24 Minn. 1, 3; Hodgins v. Heaney, 15 Minn. 185, (Gil. 142.)

§ 5. Powers of appellate court.

On appeal from a judgment, this court may review an order refusing a new trial. Mower v. Hanford, 6 Minn. 535, (Gil. 372.) On appeal from a judgment, this court may review an order before judgment, directing a delivery to the sheriff, and a sale of certain property, the subject of the action. Id.

Upon a joint appeal by several parties, this court may reverse, affirm, or modify the judgment or order appealed from as to any or all of the parties. Nelson v. Munch, 28 Minn. 314, 9 N. W. Rep. 863.

See Anderson v. Hanson, 28 Minn. 400, 404, 10 N. W. Rep. 429; Hodgins v. Heaney, 15 Minn. 185, (Gil. 142, 146.)

*§ 5*a*. Dismissal of appeal in vacation.

That any judge of the supreme court shall, during vacation, have the same power as the court at term to dismiss any appeal and remand the cause to the court below, upon the stipulation of the parties to such appeal consenting to such dismissal, to be filed with the clerk of said court. (1879, *c.* 70, § 1.)

§ 6. Limitation of time for appealing.

This section is prospective in its operation, does not apply to judgments entered prior to its passage, nor does it repeal *c.* 83, Laws 1868, as to such judgments. Kerlinger v. Barnes, 14 Minn. 526, (Gil. 398.)

An appeal taken before the filing of the record or entry of the judgment is premature. Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436.

The time for bringing an appeal or writ of error begins to run with the entry of the judgment or order. Humphrey v. Havens, 9 Minn. 318, (Gil. 301.)

The judgment is not perfected, for the purpose of limiting the time for taking an appeal, until costs have been duly taxed and inserted therein. Richardson v. Rogers, 35 N. W. Rep. 270.

An appeal taken within six months after the *entry* of the judgment appealed from is in time. Hostetter v. Alexander, 22 Minn. 559.

See Papke v. Papke, 30 Minn. 260, 262, 15 N. W. Rep. 117; Keegan v. Peterson, 24 Minn. 1, 3; Hodgins v. Heaney, 15 Minn. 185, (Gil. 142, 146;) Beaupre v. Hoerr, 13 Minn. 366, (Gil. 339, 340.)

§ 7. Papers to be furnished by appellant.

See American Ins. Co. v. Schroeder, 21 Minn. 331.

§ 8. Appealable judgments and orders.

See, generally, Shepard v. Pettit, 30 Minn. 119, 14 N. W. Rep. 511; Conter v. St. Paul & S. C. R. Co., 24 Minn. 313; Thompson v. Howe, 21 Minn. 1; Schurmeier v. First Div. St. P. & P. R. Co., 12 Minn. 351, (Gil. 228.)

SUBD. 1. The supreme court will not review the acts of a court commissioner till they have been passed on by the court below. Gere v. Weed, 3 Minn. 352, (Gil. 249.) Followed, Pulver v. Grooves, 3 Minn. 359, (Gil. 252.)

An appeal cannot be taken from an order denying a motion on a case made for judgment, notwithstanding the report of a referee. The appeal should be from the judgment after it is entered on the report. Ames v. The Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

The order of a probate court admitting a will to probate is a judgment within the meaning of this subdivision, and an appeal lies to the supreme court from a judgment of a district court affirming such order. In re Penniman, 20 Minn. 245, (Gil. 220.)

In an action for a penalty imposed by statute for neglect of official duty, though it be brought by an informer, no appeal lies from a judgment of acquittal. Kennedy v. Raught, 6 Minn. 235, (Gil. 155.)

See State v. District Court, 26 Minn. 235, 2 N. W. Rep. 698.

SUBD. 2. An appeal does not lie to this court from an *ex parte* order of the judge of the district court at chambers. Hoffman v. Mann, 11 Minn. 364, (Gil. 262;) Schurmeier v. First Div. St. P. & Pac. R. Co., 12 Minn. 351, (Gil. 228.)

An order vacating an attachment is not appealable. Humphrey v. Hezlep, 1 Minn. 239, (Gil. 190.)

An order modifying an injunction, and suspending its operation in part, is in effect one dissolving an injunction *pro tanto*, and is appealable under this subdivision. Weaver v. Mississippi, etc., Boom Co., 30 Minn. 478, 16 N. W. Rep. 269.

An order refusing to appoint a receiver, in accordance with the report of a referee, is appealable as an order refusing a provisional remedy, notwithstanding such order was made without prejudice to a new motion for the appointment of a receiver with less authority. Grant v. Webb, 21 Minn. 39.

An order or decision which constitutes part of the record, and is appealable, need not be excepted to. Ely v. Titus, 14 Minn. 125, (Gil. 93.)

SUBD. 3. There is no appeal given upon the refusal of the court below to entertain a motion. Mayall v. Burke, 10 Minn. 285, (Gil. 225.)

Where the summons contains the proper notice prescribed in the case of an "action arising on contract for the payment of money only," but the complaint on file indicates an "action for the recovery of money" other than one arising on contract, etc., held, that an order denying a motion made to set aside the complaint on the ground of such non-conformity is not an appealable order. Sibley Co. v. Young, 21 Minn. 335.

An order denying a motion to change the place of trial is not appealable. Carpenter v. Comfort, 22 Minn. 539.

An order refusing to strike out portions of a pleading for duplicity is not appealable. Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436. An order striking out portions of an answer is appealable. Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136;) Kingsley v. Gilman, 12 Minn. 515, (Gil. 425.)

An order referring a cause not referable is appealable. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

An order setting aside a stipulation in an action between the parties agreeing to the existence of facts in the case is appealable. Bingham v. Supervisors Winona Co., 6 Minn. 136, (Gil. 82.)

An appeal will not lie from an order made on a trial denying a motion for judgment on the pleadings. McMahon v. Davidson, 12 Minn. 357, (Gil. 232.) Nor from an order made at the trial granting such a motion. Lamb v. McCanna, 14 Minn. 513, (Gil. 385.)

An appeal will not lie from the rulings of a court during a trial admitting or excluding evidence. Hulett v. Matteson, 12 Minn. 349, (Gil. 227.)

When the case is one of failure of proof, and not of variance, a denial of an application, on trial, for leave to amend the complaint, will not be reviewed if there be no abuse of discretion. White v. Culver, 10 Minn. 192, (Gil. 155.)

An order setting aside a stipulation for dismissal of an action deprives a party of a legal right, and is appealable, as an order "involving the merits of the action, or some part thereof." Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

An appeal will not lie from an order dismissing an action. Searles v. Thompson, 18 Minn. 316, (Gil. 285.)

An order for judgment is not appealable. Hodgins v. Heaney, 15 Minn. 185, (Gil. 142.)

An order refusing to vacate an unauthorized judgment is appealable. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

An order setting aside a judgment upon a question of practice as to the service of the answer is not appealable. Westervelt v. King, 4 Minn. 320, (Gil. 236.)

An order setting aside a judgment in proceedings to enforce payment of taxes under Gen. St. 1878, c. 11, if it determine only the strict legal rights of the parties, and not merely questions of practice or discretion, is reviewable under this subdivision. County of Chisago v. St. Paul & D. R. Co., 27 Minn. 109, 6 N. W. Rep. 454.

An order permitting defendants to answer, made under § 105, c. 66, Gen. St., more than one year after the entry of judgment, involves the merits of the action, or some part thereof, under this subdivision. Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

An order dismissing an application for the settlement of a bill of exceptions is not appealable. Richardson v. Rogers, 35 N. W. Rep. 270. An order denying leave to make and serve a statement of the case, after the time given by statute has expired, is not, in the absence of abuse of discretion, appealable. Irvine v. Myers, 6 Minn. 558, (Gil. 394.)

An order refusing to set aside garnishee proceedings for insufficiency of the affidavit, and granting plaintiff leave to file a supplemental complaint under § 12 of the act of 1860 relating to garnishment, is not appealable. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

An order made by a court commissioner, in a case where he has no power to act, is a nullity, and cannot be appealed from. To purge the record of the void order, the proper course is by motion in the court below. Black v. Brisbin, 3 Minn. 360, (Gil. 253.)

See Wagner v. Wagner, 34 Minn. 441, 443, 26 N. W. Rep. 450; Rabitte v. Nathan, 22 Minn. 266.

SUBD. 4. Formerly the decision of the district court upon a demurrer could not be appealed from until judgment thereon was perfected. Cummings v. Heard, 2 Minn. 34, (Gil. 25.)

The state cannot take an appeal or writ of error in a criminal case. State v. McGrorty, 2 Minn. 224, (Gil. 187.)

An order deciding a demurrer is appealable. Sons of Temperance v. Brown, 9 Minn. 151, (Gil. 141.)

The failure of a party demurring to appear at the hearing upon it in the court below, does not prevent him being heard on it here on an appeal from an order overruling it. Hall v. Williams, 13 Minn. 260, (Gil. 242.)

An order denying a motion to vacate an order sustaining a demurrer, and for a new trial on the demurrer, is not an order refusing a new trial, so as to be appealable under this section. Dodge v. Bell, 34 N. W. Rep. 739.

The granting of a new trial is a matter in the discretion of the court, and not reviewable. Dufolt v. Gorman, 1 Minn. 302, (Gil. 234.)

After an order had been made granting a new trial, a subsequent order was made, modifying it by providing that on the retrial, certain depositions read on the first might be read. Held, that this subsequent order is not appealable. Chouteau v. Parker, 2 Minn. 119, (Gil. 95.)

When an action is tried by a district court without the intervention of a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an appeal lies to this court. Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. Rep. 773.

An appeal cannot be taken from an order granting a new trial in proceedings to ascertain the compensation to be paid for taking private property for public use. McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, (Gil. 269.)

SUBD. 5. An appeal will not lie from an order dismissing an action before trial. Jones v. Rahilly, 16 Minn. 177, (Gil. 155.)

An order of the district court, dismissing an appeal from a justice's judgment for want of jurisdiction apparent on the face of the record, is a final order, putting an end to all proceedings upon the appeal, and is appealable under this subdivision. Ross v. Evans, 30 Minn. 206, 14 N. W. Rep. 897.

An order dismissing an appeal from an order of the town supervisors laying out a highway, and from their award of damages, is appealable. Town of Haven v. Orton, 35 N. W. Rep. 264.

SUBD. 6. An order committing for contempt is appealable. Register v. State, 8 Minn. 214, (Gil. 185.) An appeal does not lie from an order which adjudges a defendant in contempt for disobeying a previous order of the court requiring him to pay to plaintiff a specified sum as temporary alimony, and which directs a warrant to issue for his arrest and commitment in case he refuses to pay the amount of such alimony, with interest and costs of motion, within ten days after the personal service upon him of such order. Semrow v. Semrow, 26 Minn. 9.

An order setting aside a judgment, and the report of the referee, and directing a new trial, is not appealable under § 11, p. 414, Rev. St. Chouteau v. Rice, 1 Minn. 121, (Gil. 97.)

An order dismissing a motion under § 255, *c.* 66, Gen. St., to compel entry of satisfaction of a judgment, is an order of the court, and is appealable. Ives v. Phelps, 16 Minn. 451, (Gil. 407.)

An order granting leave to issue execution after five years from the entry of judgment is appealable. Entrop v. Williams, 11 Minn. 381, (Gil. 276.)

An order vacating an execution sale of real estate, the certificate, and sheriff's return, is appealable. Hutchins v. County Commissioners Carver Co., 16 Minn. 13, (Gil. 1.) The defendant, in an execution, may appeal from an order made on application of the plaintiff in it, setting aside a sale under the execution, and ordering an *alias* to issue. Tillman v. Jackson, 1 Minn. 183, (Gil. 157.)

An order made pursuant to *c.* 8, § 198, *supra*, upon the hearing of an order to a sheriff to show cause why he should not pay over money collected or received by him on execution, is appealable as "a final order affecting a substantial right made * * * upon a summary application in an action after judgment." Coykendall v. Way, 29 Minn. 162, 12 N. W. Rep. 452.

An order to appear and answer, and of reference in proceedings supplementary to execution, are not final orders, and not appealable. Rondeau v. Beaumette, 4 Minn. 224, (Gil. 163.)

An order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor, and appointing a receiver to collect the same, is an appealable order. Knight v. Nash, 22 Minn. 452.

The execution creditor may appeal from an order appointing the receiver, and directing the sheriff to deliver to him the property levied upon. In re Jones, 33 Minn. 405, 23 N. W. Rep. 835.

An order appointing a receiver under Laws 1881, *c.* 148, § 2, is a final order, affecting a substantial right, made in a special proceeding, within the meaning of this subdivision. In re Graeff, 30 Minn. 359, 16 N. W. Rep. 395.

A final order directing a receiver to distribute the proceeds of the estate of the insolvent equally among all his creditors, and setting aside the liens of attaching and execution creditors, is appealable under this subdivision. State v. Severance, 29 Minn. 269, 13 N. W. Rep. 48.

An order vacating the order discharging the relator in *habeas corpus* is appealable. State v. Hill, 10 Minn. 63, (Gil. 45.) An order discharging a person brought up on a writ of *habeas corpus* may be brought to this court for review by appeal, but not by *certiorari*. State v. Buckham, 29 Minn. 462, 13 N. W. Rep. 902.

This chapter, with the exception contained in this subdivision, only authorizes an appeal from a judgment or order in a civil action, and does not extend to special proceedings, as for the condemnation of lands. McNamara v. Minnesota Cent. R. Co., 12 Minn. 388, (Gil. 269.) An order in the district court in a special proceeding, as for the condemnation of lands, granting a new trial therein, is not a final order, affecting a substantial

right, and not an appealable order, under this subdivision. Id. An order denying a motion for new trial, on appeal from award of commissioners in condemnation proceedings, under charter of Minnesota Valley Railroad Company, is a final order in a special proceeding, and appealable, under this subdivision. Minnesota Valley R. Co. v. Doran, 15 Minn. 230, (Gil. 179.)

In condemnation proceedings, an order dismissing the appeal from the award of the commissioners to the district court is appealable. Warren v. First Div. St. P. & Pac. R. Co., 18 Minn. 384, (Gil. 345.)

See State v. Webber, cited in note to *c.* 80, § 14; Gurney v. City of St. Paul, 36 Minn. 163, 30 N. W. Rep. 661.

§ 9. Bond.

See County of Hennepin v. Robinson, 16 Minn. 381, (Gil. 340, 341.) Bennett v. Whitcomb, 25 Minn. 148, 150; County of Aitkin v. Morrison, Id. 295.

§ 10. Appeal from order—Stay—Bond.

A clause granting defendant ten days to answer in an order denying his motion to set aside the summons is not affected by his appeal from the order and giving the undertaking provided in *c.* 22, Laws 1861, and it is improper for the plaintiff to enter judgment before the end of the ten days. Yale v. Edgerton, 11 Minn. 271, (Gil. 185.)

Where there is an appeal to this court from an order striking out portions of the answer, and an undertaking to stay proceedings executed, the cause cannot, while the appeal is pending, be noticed for trial in the court below. Starbuck v. Dunklee, 12 Minn. 161, (Gil. 97.)

The condition of the bond does not require appellant to pay the judgment that may be afterwards entered on the verdict or decision. Reitan v. Goebel, 35 Minn. 384, 29 N. W. Rep. 6.

Where an order of the district court requiring the payment of money is appealed to this court, and a stay-bond executed, conditioned "to abide and satisfy the judgment or order which the appellate court may give therein," and the order appealed from is affirmed, an action may be maintained upon the bond for the sum of money required to be paid by the order appealed from, with interest thereon. Erickson v. Elder, 34 Minn. 370, 25 N. W. Rep. 804.

See Exley v. Berryhill, 33 N. W. Rep. 567; State v. Webber, 31 Minn. 211, 17 N. W. Rep. 339; State v. District Court, 35 Minn. 461, 29 N. W. Rep. 60.

§ 11. Appeal from money judgment—Bond.

A levy made previous to an appeal from the judgment is not discharged by the giving of a bond for a stay on the appeal. First Nat. Bank of Hastings v. Rogers, 13 Minn. 407, (Gil. 376.)

The sureties in a bond for a stay on an appeal may, in an action against them on the bond, set up any defense which the principal may set up. If, as to him, the judgment is satisfied *sub modo*, it is a good defense for them. Id. Such a bond does not estop the parties from setting up a previous levy of execution on sufficient personal property to satisfy the judgment. Id.

§ 15. Stay of proceedings—Extent.

An appeal does not supersede prior proceedings, but simply stays them. Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

The district court ought not to hear a motion for a new trial while an appeal from the judgment is pending in the supreme court. McArdle v. McArdle, 12 Minn. 122, (Gil. 70.)

See First Nat. Bank v. Rogers, 13 Minn. 407, (Gil. 376, 379.)

*§ 21. Death of respondent—Substitution.

This court has power to relieve an appellant, and reinstate an appeal where it has been dismissed, under this section. Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79.