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APPEALABLE ORDERS IN MINNESOTA

ALAN CUNNINGHAM*

INTRODUCTION**

Three years after the fusion of law and equity in Minnesota the Minnesota territorial legislature passed an act entitled "An Act to increase the Salaries of certain Territorial officers." Section 18 of that act of March 1, 1856, forms the basis of our present statutory provisions prescribing what orders are appealable, and in many respects remains today approximately as originally passed.

New rules having been promulgated for the Minnesota district court, it is only natural that the advisory committee of the supreme court should have turned its attention to the possibility of preparing new rules for appeals to the supreme court. To ascertain the desired future course in the field of appealable orders it is believed that it is first necessary to examine the past history and present status of the subject. Only by so doing can the future course be carefully platted. And only in that way can the proven pitfalls be avoided. It is therefore the purpose of this article to survey the past and present status of appealable orders in the State of Minnesota.

HISTORY

The first provision for the establishment of a court system for the area which is now Minnesota is contained in the Northwest Ordinance. Apparently a single court was to perform the entire

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**All references to Minnesota Statutes are to Minn. Stat. 1949, and references to Rules are to Minn. R. Civ. P.—unless otherwise indicated.
1. Minn. Laws 1853, c. 1.
2. Minn. Laws 1854-56, c. 5.
3. This article deals only with the general civil appeals statute contained in 2 Minn. Stat. c. 605 (1949). It does not treat review by the extraordinary writs such as prohibition and certiorari. Nor does it deal with the multitude of different special statutes relating to appeals under specific chapters in our statutes, some of which are cited in Note, 35 Minn. L. Rev. 640, at 653, n. 101 and 102 (1951).
judicial function. The first provision for an appellate tribunal seems to have been in the Act of Congress of April 20, 1836, establishing the Territorial Government of Wisconsin. The judges comprising the supreme court also were to act as district court judges. The Organic Act establishing the Minnesota territorial government was a carbon copy of the 1836 Congressional Act insofar as the courts were concerned. Since law and equity were not yet fused even though handled by the same court, our first territorial legislature passed two separate acts for appeals to the territorial supreme court. The first somewhat comprehensive appealable order statutes were three acts passed in 1851, one of which related solely to equity suits.

Since the 1856 Act by its very terms superseded only one of these three statutes there was some doubt as to whether this Act of 1856 affected Revised Statutes 1851, § 74, relating to appeals in equity suits. In 1861 Chief Justice Emmett in Folsom v. Evans stated that the Act of 1856 related only to actions which before the fusion of law and equity were actions at law, and did not apply to the former chancery suits. He thought as to the latter

5. See Minn. Laws 1849-53, at p. XXV, § 9
6. See Minn. Laws 1849-53, at p. XXXIII, § 9; 1 M. S. A. 163.
7. Passed November 1, 1849. See Minn. Laws 1849-53, c. XX, § 1; Minn. Laws 1849-53, c. XX, c. II, § 54 (confined to appeals in chancery).
8. Rev. Stat. 1851, c. 69, § 4; Id. at c. 81, § 11; Id. at c. 94, § 74 (the last statute related solely to appeals from final or interlocutory orders or decrees in chancery). The most important of these statutes was Rev. Stat. 1851, c. 81, § 11, which read:

"An appeal may be taken to the supreme court, in the following cases:

1. In a judgment in an action commenced in the district court, or brought there from another court; and upon the appeal from that judgment, to review any intermediate order, involving the merits, and necessarily affecting the judgment:

2. In an order affecting a substantial right, made in such action, when such order in effect determined the action, and presents [sic prevents] a judgment from which an appeal might be taken:

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

9. Minn. Laws 1854-56, c. 5, § 18, read:

"Section 11, on page 414 of the Revised Statutes is hereby amended so as to read as follows:

"Sec. 11—An appeal may be taken to the Supreme Court, or brought there from another court, and upon the appeal from such judgment the court may review any intermediate order involving the merits or necessarily affecting the judgment. 2. From an order granting or refusing a provisional remedy, or which grants, refuses or dissolves an injunction. 3. From an order involving the merits of the action or some parts thereof. 4. From an order granting a new trial. 5. From an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken. 6. From a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment."

10. 5 Minn. 418 (Gil. 338) (1861).
the act fusing law and equity saved the prior law as to appeals in equity suits. Whether or not this was the intent there is little need to speculate, for with the express repeal of such prior law as might relate to equity appeals in the Revision of 1866, it is obvious that Revised Statutes 1851, c. 94, § 74, was abolished. And since that time, at least, the court has treated the section which had its origin in section 18 of the 1856 Act as applying to all civil actions, after that term had come to include both law and equity actions.

**New York Origin**

The similarity between our appeals statute and that of New York was frequently mentioned in opinions by some of our earlier judges. And judicial construction of the New York statute was accepted as precedent in resolving problems under our statute.\(^\text{11}\) From these cases and a comparison of the New York appeals statute of this era, it is obvious that the Act of 1856 was derived from the Field Code as adopted in New York in 1849. More particularly, our present § 605.09 stems from that part of the Field Code, as enacted, which governed appeals taken to the Supreme Court, general term, today called the Supreme Court, Appellate Division.

The first report of the commissioners of the Field Code, submitted in 1848, dealt very summarily with appeals.\(^\text{12}\) Before adoption, the Field Code, as to appeals to the Supreme Court, general term, was considerably changed and expanded.\(^\text{13}\) But even that

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11. See, e.g., Chouteau v. Parker, 2 Minn. 118 (Gil. 95) (1858); Cummings v. Heard, 2 Minn. 34 (Gil. 25) (1858); Rondeau v. Beaumette, 4 Minn. 224 (Gil. 163) (1860); Holmes v. Campbell, 13 Minn. 66 (Gil. 58) (1868).

12. As to the Court of Appeals review could be read:

"1. In a judgment in an action commenced therein, or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

"2. In a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment." (Quoting § 11 of that report.)

As to appeals to the Supreme Court, § 299 of that report stated that appeals could be had in those cases:

"1. When the order grants or refuses a provisional remedy.

"2. When it involves the merit of the action, or some part thereof.

"But no appeal, under this section, shall be taken unless a judge of the supreme court certify that in his opinion, it is proper, that the question arising on the appeal should be decided before the judgment."

13. New York Code of Civil Procedure 1851, § 349, stated that an appeal could be taken:

"1. When the order grants or refuses a provisional remedy.

"2. When it involves the merits of the action, or some part thereof.

"3. When the order decides a question of practice which in effect determines the action without a trial, or precludes an appeal.

"4. When the order is made, upon a summary application in an action after judgment, and affects a substantial right."
statute was several times amended before our territorial legislature copied it.\textsuperscript{14}

Surprisingly enough, New York, like Minnesota, has retained these provisions in substantially the same form since that time.\textsuperscript{15}

\textit{Amendments}

With addition of another subdivision and the occasional alteration of some of its subdivisions, the law today is much the same as it was upon original passage in 1856.

Addition of the one subdivision was accomplished in the Revision of 1905 by transferring what had been subdivision six to its present position of subdivision seven and inserting a new subdivision six which referred to orders supplementary to execution. This provision for appeals from orders made supplementary to execution was first enacted in 1889\textsuperscript{16} and was codified under the execution statutes in the 1894 General Statutes.\textsuperscript{17} It was not transferred from there until 1905. The subdivision, however, has not been altered since 1889.

Absolutely no change has taken place since the time of the origi-\textsuperscript{\textit{\textsuperscript{14}}}By 1855 New York Code of Procedure 1855, § 349, read:

\begin{quote}
1. When the order grants or refuses, continues or modifies, a provisional remedy; or grants, refuses, or dissolves an injunction.
2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer.
3. When it involves the merits of the action, or some part thereof, or affects a substantial right.
4. When the order in effect determines the action, and prevents a judgment from which an appeal may be taken.
5. When the order is made upon a summary application in an action after judgment, and affects a substantial right.
\end{quote}

\textsuperscript{15}See Clevenger's Practice Manual 1950, § 609. Thus, today this old § 349 of the Code of Civil Procedure is now § 692 of the Civil Practice Act, and allows appeals to be taken to the appellate division of the supreme court:

\begin{quote}
1. Where the order grants, refuses, continues or modifies a provisional remedy; or settles, or grants, or refuses an application to resettle a case on appeal or a bill of exceptions.
2. Where it grants or refuses a new trial; except that where specific question of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for the purpose, an appeal cannot be taken from an order granting or refusing a new trial upon the merits.
3. Where it involves some part of the merits.
4. Where it affects a substantial right.
5. Where, in effect, it determines the action and prevents a judgment from which an appeal might be taken.
6. Where it determines a statutory provision of the state to be unconstitutional; and the determination appears from the reasons given for the decision thereupon or is necessarily implied in the decision.

\begin{quote}
An order made upon a summary application after after judgment is deemed to have been made in the action within the meaning of the section.
\end{quote}

\textsuperscript{16}Minn. Laws 1889, c. 106, § 2.

\textsuperscript{17}Gen. Stat. 1894, § 5489.
nal enactment in 1856 in three subdivisions of our appealable orders statute. These are what are now subdivisions three, five and seven. And the only change made in the first subdivision was to make its terminology, as first poorly drafted, conform with what was obviously intended from the beginning. Thus, the only changes of any substance that have taken place in the 97 years of the statute’s existence are the addition of what is presently subdivision six and the amendment from time to time of subdivisions two and four. Subdivision four has received the most legislative attention. The legislature has altered this subdivision five times, and possibly a sixth time. A more detailed statutory history of each subdivision since 1856 may be found under the ensuing separate discussion of each subdivision.

Since the supreme court at various times has considered compliance with § 605.09 a jurisdictional prerequisite to appealability and since that means that theoretically every case since 1856 has resolved the issue of appealability, the case law on the subject is vast. Only those cases, expressly dealing with the issue of appealability will be here considered. Even so the case law is extensive. Consequently, § 605.09 will be discussed subdivision by subdivision.

**SUBDIVISION ONE**

"From a judgment in an action commenced in the district court, or brought there from another court from any judgment rendered in such court; and upon such appeal the court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from:"

18. As might be expected, the numbering of this statute has been different in the various general Minnesota statutes. In chronological order the appeals provision appeared as: Rev. Stat. (Terr.) c. 81, § 11; Pub. Stat. 1858, c. 71, § 11; Rev. Stat. 1866, c. 86, § 8; Gen. Stat. 1878, c. 86, § 8; Gen. Stat. 1894, § 6140; Rev. Stat. 1905, § 4365; Gen. Stat. 1913, § 8001; Mason’s Stat. 1923 and 1927, § 9498; and since 1941 has appeared as 2 Minn. Stat. § 605.09.

19. There appears to be no legislative authorization for addition of an order denying a new trial in Pub. Laws 1858, c. 71, § 11(4).

20. E.g., Rogers v. Steiner, 206 Minn. 637, 289 N. W. 580 (1940), "Appeals from the district court to this court are governed by statute. [citing and quoting 2 Minn. Stat. § 605.01] * * * The appeal must be dismissed for want of jurisdiction." See also, e.g., State and R. R. & W. H. Comm. v. R. I. M. T. Co., 209 Minn. 105, 112, 295 N. W. 519, 524 (1940); In re Ahlman, 185 Minn. 650, 240 N. W. 890 (1932); Meacham v. Ballard & Co., 180 Minn. 30, 230 N. W. 113 (1930); Bakkensen v. Minneapolis St. Ry., 180 Minn. 344, 230 N. W. 787 (1930); Ebeling v. Bayerl, 162 Minn. 379, 202 N. W. 817 (1925).

21. The author at first hoped to exhaust the entire case law. The ensuing discussion falls short of that desire. But it is hoped that it is complete though not exhaustive.
History

As this subdivision originally appeared, the language made little sense. But the Revision of 1866\textsuperscript{22} changed this phraseology so that the subdivision read substantially as it does today. There are two short phrases that were not the same as the subdivision now stands but they in no way alter or render less clear its meaning. These two changes were made by the revision of 1905,\textsuperscript{23} and the terminology has remained unchanged since then.

Judgments

For an appeal to be allowed under this subdivision it must be an appeal from the judgment entered in the district court.\textsuperscript{24} For the appeal to lie from a judgment, the judgment must be complete. For example, where there has been no taxation of costs and it does not clearly appear that the prevailing party intended to waive the costs, then the judgment is incomplete and an attempted appeal will be dismissed as premature.\textsuperscript{25} This is not to say, however, that an appeal must be taken only from the whole judgment. It has been expressly held that under this subdivision an appeal can be taken from part of a judgment.\textsuperscript{26} Under this subdivision the fact that a judgment has been entered by default in no way affects the appealability of the judgment. It does, however, mean that the scope of review on the appeal will be limited to whether or not the judgment on default can be based upon the complaint and whether that judgment exceeds the prayer for relief.\textsuperscript{27} An application to the district court to correct the error does not first have to be made before an appeal may be taken, according to the White\textsuperscript{28} case. This would be one of the few instances where \textit{ex parte} action below may be directly brought to the supreme court, without first calling the district court's attention to the alleged error. The

\textsuperscript{22} Rev. Stat. 1866, c. 86, § 8.
\textsuperscript{23} Rev. Stat. 1905, § 4362.
\textsuperscript{24} See In re Ahlman, 185 Minn. 650, 241 N. W. 796 (1932); Ebeling v. Bayerl, 162 Minn. 379, 202 N. W. 817 (1925); Rase v. Minneapolis, St. P. & S. Ste. M. Ry., 116 Minn. 414, 133 N. W. 986 (1912); Darby v. Board of County Comm'rs, 109 Minn. 258, 123 N. W. 662 (1909); Johnson v. Northern Pacific, Fergus Falls & Black Hills Ry., 39 Minn. 30, 38 N. W. 804 (1888); Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712 (1885).
\textsuperscript{25} In re Estate of Colby, 223 Minn. 157, 25 N. W. 2d 769 (1947); Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270 (1887).
\textsuperscript{26} Patnode v. May, 182 Minn. 348, 234 N. W. 459 (1931) (defendant paid damages imposed by judgment, and appealed from judgment for plaintiff in ejectment); St. Paul Trust Co. v. Kittson, 84 Minn. 493, 87 N. W. 1012 (1901).
\textsuperscript{27} See e.g., Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9 (1897); White v. Ilitis, 24 Minn. 43 (1877).
\textsuperscript{28} White v. Ilitis, 24 Minn. 43 (1877).
continuing vitality of that case is, however, doubtful in view of later cases saying that such an application is required before an appeal may be taken.29 Further, the best practice would seem to dictate that such an application be made before an appeal be taken.30

Judgments of dismissal,31 whether with or without prejudice, are appealable as well as judgments rendered on the merits after full consideration.

This subdivision has been construed to authorize an appeal from a judgment entered pursuant to an order modifying a prior judgment, i.e., an appeal may be had from a modified judgment.32

The appeal authorized by this subdivision is from the judgment, and not from orders which have as their ultimate purpose the entry of judgment. The reason such orders are not appealable under this subdivision is that they are not judgments, and the reason that generally they are not appealable under other subdivisions is that they are intermediate orders looking to judgment, rather than final orders. However, this does not mean that the aggrieved party is denied all right to review for even if the prevailing party does not enter a judgment, the aggrieved party may cause judgment to be entered and then appeal from that judgment.33

Scope of Review

As indicated by the express terms of this subdivision, such intermediate orders as involve the merits or affect the judgment may be

29. Gederholm v. Davies, 59 Minn. 1, 60 N. W. 676 (1894) (default judgment); cf. Pope v. Ramsey County State Bank, 140 Minn. 502, 167 N. W. 280 (1918) (judgment entered upon ex parte application after remittitur).

30. But see the discussion of Halvorsen v. Orinoco Mining Co., 89 Minn. 470, 95 N. W. 320 (1930), and Nelson v. Auman, 221 Minn. 46, 20 N. W. 2d 702 (1945), in text to n. 45 and 46, infra, for a pitfall that an appellant must guard against after making such an application so as not to suddenly find all appellate review is barred.


32. Billsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16 (1910) ; Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649 (1896). On such an appeal the Billsborrow case, supra, states that:

"* * * any intermediate order affecting the merits or the judgment may be reviewed. The order in such cases does not become res judicata."

But a modified judgment must be entered; otherwise the order modifying the judgment may be considered a post-judgment order made on summary application and so appealable only under subdivision seven. See Fidelity-Philadelphia Trust Co. v. Brown, 181 Minn. 446, 233 N. W. 10 (1930).

33. For a case in which appellant did this, see Bolstad v. Paul Bunyon Oil Co., 215 Minn. 166, 9 N. W. 2d 346 (1943), and for a case in which the court said this procedure was proper, see Rase v. Minneapolis, St. P. & S. Ste. M. Ry., 116 Minn. 414, 133 N. W. 986 (1912). But see Judge Stone's dissent in Rodgers v. Steiner, 206 Minn. 637, 289 N. W. (1940), and 24 Minn. L. Rev. 859 (1940).
reviewed on appeal from the judgment. This is so regardless of whether or not the orders were themselves appealable (so long as they were not actually appealed from and heard on appeal) and regardless of whether or not the time for appeal from such orders has expired. Accordingly, on appeal from a judgment after a second trial on the issue of damages only, an order in the first trial on the issue of liability may be reviewed. This is so because the doctrine of law of the case does not make final and binding upon the supreme court the intermediate orders of the lower court; nor could the doctrine have such an effect in view of the statutory language used. But this rule must of necessity be subject to possible exception in certain lengthy statutory proceedings, where orders may be final unless appealed from.

But the review, of course, extends only to those prior proceedings which involve the merits or affect the judgment; those which are not of such a nature are not reviewable on appeal from the judgment. That is, an order which does not in any way lead up to the final judgment may not be reviewed on appeal from the judgment. Thus, for example, in Bolstad v. Paul Bunyan Oil Co., the court held non-reviewable a motion for judgment notwithstanding the disagreement of the jury on an appeal from a judgment of dismissal for it was no part of the proceedings resulting in that judgment.

An appeal from the judgment, however, does not bring up for review proceedings taken subsequent to its rendition. So in Bergman v. Williams, the appeal having been taken from the judgment, the court was without authority to review the lower court's denial of a motion for a new trial on the ground of newly discovered evidence, which motion was made after entry of judgment. Nor on an appeal from the judgment may the court review the lower

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34. Lundblad v. Erickson, 180 Minn., 230 N. W. 473 (1930); Billsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16 (1910); Keegan v. Peterson, 24 Minn. 1 (1877); see Zywiec v. City of South St. Paul, 234 Minn. 18, 47 N. W. 2d 465 (1951) (but this is not true where the appeal is from the order denying a new trial after the second trial).

35. Lundblad v. Erickson, 180 Minn. 185, 230 473 (1930); see Zywiec v. City of South St. Paul, 234 Minn. 18, 47 N. W. 2d 465 (1951).

36. See Billsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16 (1910).

37. Bolstad v. Paul Bunyan Oil Co., 215 Minn. 166, 9 N. W. 2d 346 (1943); Keegan v. Peterson, 24 Minn. 1 (1877); cf. Storey v. Weinberg, 226 Minn. 48, 31 N. W. 2d 912 (1948) (appeal from order granting new trial does not bring up denial of defendant's motion for dismissal on merits since that order involved no part of proceedings resulting in order granting new trial).

38. 215 Minn. 166, 9 N. W. 2d 346 (1943).


40. 173 Minn. 250, 217 N. W. 127 (1927)
court's later order refusing to settle a case,\textsuperscript{44} nor the denial of a 
motion to vacate the judgment and allow the plaintiff to amend his 
complaint to state a cause of action,\textsuperscript{45} nor the order relieving a 
party from default and granting him leave to answer or amend 
(made under the now superseded discretionary part of § 544.32) 
made after entry of judgment,\textsuperscript{46} nor the denial of a motion to amend 
a default judgment so as to conform with the prayer for relief.\textsuperscript{47} 

The last mentioned situation, that arising in the \textit{Halvorsen}\textsuperscript{48} case, 
seems extremely harsh since the court there declared that the de-
fendant was entitled to the relief requested and indicated that it 
would have granted it on an appeal from the judgment but for the 
fact that the denial of the motion to amend the order was itself 
appealable under subdivisions three and seven, and not having 
been appealed from, the lower court's action was held to be law of 
the case. Thus the court cut the defendant off from obtaining any 
of the relief to which he was admittedly entitled. Such a result seems 
too close an adherence to the doctrine of law of the case, and means 
that the defendant must either 1) not move the district court to 
correct its error, a result clearly in disharmony with the practice 
which the supreme court has consistently championed, or 2) appeal 
not only from the judgment but also from every subsequent order 
(and within the thirty-day time limit therefor) so as to prevent 
a rather blind following of the doctrine of law of the case re-
resulting in a denial of relief he both seeks and is entitled to. Un-
fortunately the \textit{Halvorsen} case was followed recently when the same 
situation arose in the \textit{Auman}\textsuperscript{49} case.

But this does not mean that on an appeal from the judgment 
the taxation of costs and disbursements cannot be reviewed. \textit{Fall v. 
Moore}\textsuperscript{50} holds that the taxation of costs may be reviewed on appeal 
from the judgment. Undoubtedly the reason for this view is that 
the judgment is, as previously stated, incomplete until costs are 
taxed. Thus, this is not a matter occurring subsequent to judgment 
but rather is part of the judgment. In this connection it has been

\begin{itemize}
\item \textsuperscript{41} McGovern \textit{v. Federal Land Bank}, 209 Minn. 403, 296 N. W. 473 (1941).
\item \textsuperscript{42} Van Slyke \textit{v. Andrews}, 146 Minn. 316, 178 N. W. 959 (1920).
\item \textsuperscript{43} Philadelphia Storage Battery Co. \textit{v. Hawley}, 154 Minn. 538, 191 N. W. 815 (1923).
\item \textsuperscript{44} Halvorsen \textit{v. Orinoco Mining Co.}, 89 Minn. 470, 95 N. W. 320 (1903); Nelson \textit{v. Auman}, 221 Minn. 46, 20 N. W. 2d 702 (1945).
\item \textsuperscript{45} Halvorsen \textit{v. Orinoco Mining Co.}, 89 Minn. 470, 95 N. W. 320 (1903).
\item \textsuperscript{46} Nelson \textit{v. Auman}, 221 Minn. 46, 20 N. W. 2d 702 (1945).
\item \textsuperscript{47} 45 Minn. 517, 48 N. W. 404 (1891). For a different interpretation 
of this case, see Note, 35 Minn. L. Rev. 640, at 642 (1951).
\end{itemize}
held that an aggrieved party may appeal from the judgment of the lower court which only taxes costs and disbursements, at least where the de minimus rule is not applicable.48

This subdivision was said to authorize appeals from judgments in civil actions only in the early McNamara10 case and did not authorize an appeal to be taken from a judgment entered in a special proceeding.

**Subdivision Two**

"From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve, an injunction, or an order vacating or sustaining an attachment:"

**History**

Since the time of its original enactment in 1856 this subdivision has been altered only twice. In 1861 the concluding phrase "... or vacating or sustaining an attachment" was added50 and in 1866 the words "... or refuses to dissolve..." were added to the provisions dealing with injunctions.51 Since 1866 the subdivision has remained unchanged.

The relatively little judicial attention that this subdivision has required to date is undoubtedly primarily caused by its clear and explicitly stated scope. In one instance, however, its scope is not clear.

**Provisional Remedy**

The supreme court once said that "... provisional remedies have been enumerated as including arrest, attachment, bail, claim and delivery, injunction, ne exeat, and receivership."52 It may, however, be doubted whether this was intended to be an all inclusive listing. The phrase "provisional remedy" was copied from the Field Code and although the phrase is used several times in that Code, there apparently was no attempt to define its meaning. Perhaps the

Contra: Fay v. Davidson, 13 Minn. 298 (Gil. 275) (1868). The Fay case might be harmonized with the prior case on one of two grounds: 1) the merits of the action yet remained for judicial determination in that case, whereas they had already been resolved in the Salo case, or 2) in the Fay case the costs were only $26.49 so as to make the de minimus rule applicable. This latter suggestion is of dubious merit when the early date of the case is considered. Probably the Fay case is no longer law on the subject, at least the Salo case.

49. McNamara v. Minnesota Central Ry., 12 Minn. 388 (Gil. 269) (1867).

50. Minn. Laws 1861, c. 22, § 1.


52. In re Trusteeship of Melgaard, 187 Minn. 632, 634, 246 N. W. 478, 479 (1933) (court offered no authority for the quoted statement).
truest judicial utterance on the scope of this term appears in *Folsom v. Evans*\(^5\) where Chief Justice Emmett said:

"What is and what is not a provisional remedy under our statute is not easily defined."

That language might appropriately be amended to read that it is still not clear what is meant.

In the *Folsom* case it was thought that the phrase referred only to legal provisional remedies and so would not include an order vacating the appointment of a receiver in an equitable proceeding. This, however, cannot be accepted as the law, for a short time later orders appointing a receiver\(^5\) and also refusing to appoint a receiver\(^5\) were held appealable as orders granting or refusing a provisional remedy.

As the judicial pronouncements now stand, it is impossible to determine the breadth of the phrase. There are few guide posts in the decided cases, one reason perhaps being that it has not often been necessary to rely on this provision to sustain an appeal. Five cases, other than those mentioned above, are about all that throw any light on the problem.

In *Brunn v. Brunn*,\(^5\) a divorce proceeding, an appeal was attempted from an order denying an application for suit money, attorney fees and alimony pendente lite. The court held such denial of monetary relief appealable as denying a provisional remedy. In doing so it relied upon a case reaching the same result but where the order was considered appealable under subdivision three.\(^5\) The order also divided custody of the children pendente lite and dissolved an order restraining the husband from interfering with his wife or children and from disposing of his property. These orders the court held nonappealable.

In *Meacham v. Ballard & Co.*,\(^5\) the court held that an order impounding funds pending the action to determine who is entitled to the funds is not the granting or denying of a provisional remedy.

An order granting or denying a motion for inspection of books and papers was held not to be a provisional remedy and so not appealable in the *Melgaard*\(^5\) case.

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53. 5 Minn. 418 (Gil. 338), at 420 (Gil. 340) (1861).
54.  State ex rel Burdic v. Egan, 62 Minn. 280, 64 N. W. 813 (1895).
55.  Grant v. Webb, 21 Minn. 39 (1874).
57.  Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014 (1901).
58. 180 Minn. 30, 230 N. W. 113 (1930).
59.  In re Trustship of Melgaard, 187 Minn. 632, 246 N. W. 478 (1933). This case will undoubtedly govern orders made under Rule 34.
The denial of a motion to have tried and determined the validity of a contract not to sue in a court other than in the state of residence or injury before that part of the action relating to negligence and damages was heard was in *Detwiler v. Lowden* held to be no denial of a provisional remedy, at least where it is apparent from the court's order that it was not a denial on the merits but only a postponement of its hearing until the trial of the entire action.

But an order cancelling and expunging from the record a notice of *lis pendens* filed with the register of deeds was held appealable under this subdivision in the *Rehnberg* case. However, the one sentence opinion shed no light on the court's reasoning.

In three of the five last mentioned cases it would seem that the court might be trying to place some limitations on the right to appeal where the order involved a provisional remedy. In the *Detwiler* case Judge Holt said the order was not final, and when taken to task for this, a per curiam opinion explained that the motion must be denied on the merits to be appealable as denying a provisional remedy, rather than merely postponing the determination of whether a provisional remedy should be granted or denied. And in the *Melgaard* case the court relied on cases from other states which held the order nonappealable because interlocutory. The opinion did not state that that was the ground for holding the order nonappealable as not granting or denying a provisional remedy. But Judge Stone felt compelled to dissent because he thought the court was writing into this subdivision the requirement that the order cannot be interlocutory, a requirement not justified by the plain language of the subdivision. And some of the language of *Brunn v. Brunn* would indicate that the court might have considered part of the order as not denying a provisional remedy because it did not deny even temporarily an absolute right.

It is impossible from any of these cases to lay down definite general rules. But they would seem to indicate a predisposition on the part of the court to treat as nonappealable an order involving a provisional remedy unless the order was based on the merits and clearly affected some right of the parties.

**Injunctions**

Little need be said about this part of the subdivision. It is clear and has caused the court very little difficulty. The court has con-

60. 198 Minn. 185, 269 N. W. 367, 838 (1936).
61. Rehnberg v. Minnesota Homes, Inc., 235 Minn. 558, 49 N. W. 2d 196 (1951). The order necessarily had to be considered as granting or refusing a provisional remedy since it in no way purported to invoke injunctive relief nor was attachment in any way involved in the strict sense of that word.
strued the word "injunction" as the generic term which includes a temporary injunction. Thus it has held appealable an order granting a temporary injunction as well as an order dissolving a temporary injunction where such orders were made after a hearing with both sides being present. The court has also held appealable an order modifying an injunction and suspending it in part since it was in effect an order dissolving the injunction pro tanto.

But an order for entry of judgment restraining the defendant is not appealable under this subdivision. This is because the subdivision refers to orders which in and of themselves grant the injunction and do not depend upon entry of judgment for their effectiveness. But where the order only directs entry of a judgment that would have injunctive effect, that order is not within the orders contemplated by this subdivision. Such reasoning seems a bit formalistic. Certainly the provision is susceptible to the opposite interpretation, with no great evil flowing from such an approach.

The court has at various times held that a temporary injunction issued ex parte is not an appealable order, even though the second subdivision contains no such restriction. This wholesome rule is based on the idea that the supreme court will not hear an appeal from an order until the district court has had an opportunity to pass on the matter after hearing both sides.

Two cases merit discussion on the provision relating to injunctions. In Kanevsky v. National Council of Knights and Ladies of Security an action had been commenced to cancel a benefit certificate. The substituted defendants in that action instituted an action to collect the proceeds of the certificate. Plaintiffs in the first named suit sought an order in that suit to restrain the other parties from

63. Arnoldy v. Northwestern State Bank, 142 Minn. 449, 170 N. W. 597 (1919). An order refusing to vacate or dissolve a temporary injunction is also appealable, see Bellows v. Ericson, 233 Minn. 320, 46 N. W. 2d 654 (1951).
64. Weaver v. Mississippi & Rum River Boom Co., 30 Minn. 477, 16 N. W. 269 (1883).
66. E.g., Fuller v. Schultz, 88 Minn. 372, 93 N. W. 118 (1903); State v. District Court, 52 Minn. 283, 53 N. W. 1157 (1893); Schurmeier v. First Division St. Paul & Pacific R. R., 12 Minn. 351 (Gil. 228) (1867); Hoffman v. Mann, 11 Minn. 364 (Gil. 262) (1866). But see Bellows v. Ericson, 233 Minn. 320, 46 N. W. 2d 654 (1951) (a writ of prohibition proceeding where an order granting a temporary injunction was said to be appealable although defendant did not appear, this point not being discussed).
67. 132 Minn. 422, 157 N. W. 646 (1916).
proceeding with the other action until the first suit had gone to judgment. The denial of this motion was held appealable under subdivision two as one denying a provisional remedy or an injunction. On the authority of the Kanevsky case the court recently held appealable an order denying a motion to restrain additional proceedings in the same action in which the motion was made.68 But in the same case the court held nonappealable an order which denied motions to postpone further proceedings in the suit.69

The result is that an appeal may be had from an attempt to temporarily enjoin the determination of certain issues in the same or an independent proceeding if phrased so as to seek an injunction, but precisely the same attempt will result in a nonappealable order if the relief sought is denominated a stay instead of an injunction—an extremely formalistic result.

The other case is Brunn v. Brunn.70 The court there held nonappealable an order dissolving an order restraining the husband from in any way interfering with his wife or the children and from disposing of his assets. Since it is unlikely that the dissolution was entered ex parte, the court at least did not base its result on this ground, the holding seems squarely contra to the express terms of the statute and may well not be followed in the future. It is a very short per curiam opinion and seems explainable only on the ground that it is erroneous.

Attachment

The case of Davidson v. Owens71 is interesting in that it was undoubtedly the cause of the specific reference to attachment in this subdivision and was also the case making that reference unnecessary. The court had dismissed an appeal from an order vacating a writ of attachment, not aware of the statutory change as to appeals brought about in 1856. Then on rehearing its attention was called to the existence of the Act of 1856 and, forfeited with this, the court promptly reversed itself by holding that the order was appealable as denying a provisional remedy.

An order refusing to dissolve and vacate an attachment is an order sustaining the attachment, and so is appealable.72 The same is true of an order setting aside an order dissolving a writ of attach-

68. Plunkett v. Lambert, 231 Minn. 848, 43 N. W. 2d 489 (1950).
69. To the same effect, see Detwiler v. Lowden, 198 Minn. 185, 269 N. W. 367, 838 (1936); Graves v. Backus, 69 Minn. 532, 72 N. W. 811 (1897).
70. 166 Minn. 283, 207 N. W. 616 (1926).
71. 5 Minn. 69 (Gil. 50) (1860).
72. Ely v. Titus, 14 Minn. 123 (Gil. 93) (1869).
ment and levy on real property and reinstating that levy. If the order does not also reinstate the writ, but only continues the matter for further hearings, the order is not appealable. In that case the order would neither sustain nor vacate an attachment, but would only vacate an order dissolving an attachment.

It would appear that where a writ of attachment is dissolved by giving a bond therefor, the plaintiff may appeal from the dissolution of the attachment, but the defendant who gave the bond cannot thereafter appeal from an earlier order refusing to dissolve the attachment.

SUBDIVISION THREE

"From an order involving the merits of the action or some part thereof:"

Judicial Limitations

Although short and although the legislature has not amended this subdivision since its original enactment, this subdivision has continually necessitated discussion in the supreme court's opinions. There are perhaps two major reasons for this. First, the use of indefinite and undefinable terms causes great uncertainty as to just what is intended to be included within its scope. Second, this subdivision squarely heads up the two basic, but conflicting, policy considerations in determining at what stage in the proceedings an appeal should be allowed to review error of the trial court. One consideration favors the earliest possible appeal so that the remainder of the trial will not be based on the earlier erroneous action. The other consideration is that it is desirable to facilitate the judicial machinery by being able to completely dispose of any given action in one appeal. Disgruntled attorneys desiring vindication for their position which was rejected at a preliminary skirmish are likely to favor the former, whereas our court, as have many others, tends to favor the latter. The court has several times noted that:

"This remarkably liberal provision has been a veritable stalking-horse behind which appeals from all kinds of intermediate orders have crept into the supreme court, causing vexatious delays in the trial of actions on the merits."

Thus, it is not surprising that the court has strictly construed the

73. Van Dam v. Baker, 164 Minn. 130, 204 N. W. 633 (1925).
74. See Van Dam v. Baker, 164 Minn. 130, 204 N. W. 633 (1925).
77. Rogers v. Steiner, 206 Minn. 637, 289 N. W. 580 (1940); Bond v. Welcome, 61 Minn. 43, 63 N. W. 3 (1895) (the court adding to this statement: "and in adding to the burdens of the court.").
phrase "involving the merits." Following the lead of New York, the court imposed the judicial limitation that to come within the purview of this phrase the order must affect the strict or positive legal rights of the parties; and if, instead, it merely relates to those questions of practice or procedure that the trial court regulates for itself, or relates to matters depending upon the discretion or favor of the trial court the order is not appealable. And this limitation has been retained by the court. Several cases, picking up the language McMahon v. Davidson, have added the requirement that the order must be finally determinative of that right relied upon to make the order appealable. Thus, if the order leaves the matter still pending before the court, it quite obviously will not be considered appealable under this subdivision. It may safely be assumed that this added requirement is firmly imbedded in the judicial determination of what constitutes "involving the merits."

Useful as these limitations are in preventing every order of the trial judge from being appealable and although the limitations are of some aid in predicting what orders may be appealable, even tested by these standards it is still difficult to determine just which of the host of various types of orders are or are not appealable under this provision. And since reference must necessarily be made to this subdivision to determine the appealability of most of the orders which may be made as a consequence of the adoption of the new rules of procedure in this state a more detailed examination of the case law is imperative.

Pleading Stage Orders

1. Setting Aside Pleading

An order refusing to set aside service of summons has been held appealable on the ground that it compels the defendant to

78. Chouteau v. Parker, 2 Minn. 118 (Gil. 95) (1858); Piper v. Johnston, 12 Minn. 60 (Gil. 27) (1866); McMahon v. Davidson, 12 Minn. 357 (Gil. 232) (1867) (adding that it must be decisive of the question involved); Holmes v. Campbell, 13 Minn. 66 (Gil. 58) (1868).
79. Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438 (1950); Rodgers v. Steiner, 206 Minn. 637, 289 N. W. 580 (1940); Gilmore v. City of Mankato, 198 Minn. 148, 269 N. W. 113 (1936); Edelstein v. Levine, 179 Minn. 136, 228 N. W. 558 (1930); Seeling v. Deposit Bank & Trust Co., 176 Minn. 11, 222 N. W. 295 (1928); Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124 (1902); Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224 (1896).
80. 12 Minn. 357 (Gil. 232) (1867).
81. See, e.g., Rodgers v. Steiner, 206 Minn. 637, 289 N. W. 580 (1940); Wilmore v. City of Mankato, 198 Minn. 148, 269 N. W. 113 (1936); Seeling v. Deposit Bank & Trust Co., 176 Minn. 11, 222 N. W. 295 (1928).
defend on the merits of the case when, if the court's determination is erroneous, it has no jurisdiction to hear the matter. So, thinks the court, this affects the defendant's strict legal rights and is not a mere question of practice. One case apparently assumed that an order setting aside service of summons was appealable and, contrary to the clear meaning of subdivision one, considered the order res judicata [sic law of the case] on an appeal from the judgment when no timely appeal was taken from the order. However, in one case the court has held nonappealable an order denying a motion to dismiss the action, even though the motion was made on the basis of lack of jurisdiction. But an order which denies a motion to set aside the complaint on the ground that it varies from the summons is not appealable. An order which did set aside the complaint on that or similar grounds, however, probably would be appealable by analogy to cases dealing with the striking of answers, but no cases have been found.

2. Amending Pleadings

On numerous occasions it has been held that no appeal could be had from an order granting or denying a motion to amend pleadings, if that motion was made before judgment. The order could be reviewed on an appeal from the judgment or ruling on motion for a new trial and to allow an appeal from the order would needlessly hinder and delay the proceedings. Finally, in Swanson v. Alworth the appeal was attempted from a denial of a motion for leave to file an amended complaint on the ground that it involved the merits. This view was rejected even though the trial court had said its denial was based on legal principles and not on its discretion. The court referred to the general rule enunciated in the above cases and pointed out that they did not think such rule should depend upon whether or not the order was based upon the judge's dis-

84. Pillsbury v. Foley, 61 Minn. 434, 63 N. W. 1027 (1895).
85. Board of County Comm'rs of Sibley County v. Young, 21 Minn. 335 (1875).
87. Burkholder v. Burkholder, 231 Minn. 285, 43 N. W. 2d 801 (1950) (supplemental paragraph to complaint); Chicago Great Western R. R. v. Zahnor, 149 Minn. 27, 182 N. W. 904 (1921) (amended answer); Blied v. Barnard, 130 Minn. 534, 153 N. W. 305 (1915) (supplemental answer); Itasca Cedar & Tie Co. v. McKinley, 129 Minn. 536, 152 N. W. 653 (1915) (amended complaint); Hanley v. Board of County Comm'rs of Cass Co., 87 Minn. 209, 91 N. W. 786 (1902) (amended notice of contest, i.e., complaint).
88. 157 Minn. 312, 196 N. W. 260 (1923).
cretionary power. At this juncture it should be noted that an order allowing the amendment of pleadings after judgment has been held appealable under this subdivision. 89

3. Striking Pleadings

An order striking all or a part of the pleading is appealable under this subdivision on the ground that the order determines that the matters struck are insufficient to make out the party's case and he is deprived of his right to prove his case by submission of evidence thereon. 90 The same reasoning has been applied so as to hold appealable an order to make the pleadings more definite and certain, or in default thereof, to strike. 91 It should be noted that these cases allowed the appeal from a conditional order while the condition yet remained, a fact which usually makes nonappealable an otherwise appealable order.

On the other hand, an order refusing to strike all or a part of the pleading is not appealable because it is not a final order disposing of the matter involved but instead leaves the question still pending before the court. 92 Likewise, an order denying a motion to make more definite and certain is nonappealable. 93

In addition to the arguments that might be asserted to sustain the above stated rules as to orders involving the striking of pleadings, such an interpretation of subdivision three seems to accord with the expressed legislative policy by analogy to that part of subdivision four which relates to demurrers. An order which strikes

89. North v. Webster, 36 Minn. 99, 30 N. W. 429 (1886) (complaint amended, the right not to have to relitigate apparently the reason for result); see Strommer v. Rieck, 110 Minn. 472, 125 N. W. 1021 (1910).
90. Lowe v. Nixon, 170 Minn. 391, 212 N. W. 896 (1927) (part of answer); Floody v. Chicago, St. P., M. & O. Ry., 104 Minn. 132, 116 N. W. 111 (1908) (demurrer to complaint stricken); Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832 (1884) (part of answer); Kingsley v. Gilman, 12 Minn. 515 (Gil. 425) (1887) (part of answer); Starbuck v. Dunklee, 10 Minn. 168 (Gil. 136) (1865) (part of answer). Whether the result would be the same where a pleading is stricken under Rule 37.02(c) is a question which only future decision can answer.
92. Lowe v. Nixon, 170 Minn. 391, 212 N. W. 896 (1927) (part of reply); Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224 (1896) (objection to report, treated as answer); National Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 570 (1888) (answer); Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436 (1886) (part of complaint); Rice v. First Div. St. P. & P. R. R., 24 Minn. 447 (1878) (part of complaint); see Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832 (1884).
93. State v. O'Brien, 83 Minn. 6, 85 N. W. 1135 (1901) (going to complaint); American Book Co. v. Kingdom Pub. Co., 71 Minn. 363, 73 N. W. 1089 (1898) (going to complaint).
or refuses to strike has substantially the same effect on the suit as an order sustaining or overruling a demurrer. An order sustaining a demurrer is appealable. So also is an order striking part of the pleadings. But an order overruling a demurrer is appealable only within a very limited area. An order refusing to strike is nonappealable. Thus, the interpretation under subdivision three parallels the policy expressed in subdivision four.

4. Changing Parties

Even though it may prevent removal of the action, an order amending the pleadings so as to make a former party defendant a party plaintiff is not appealable since it leaves for future disposition all the issues exactly as they had been prior to the order.94

There are at least three ways persons not originally parties to an action may become parties. These are 1) by motion of a party to bring in an additional party pursuant to Rule 14, 2) interpleader under Rule 22, or 3) intervention under Rule 24.

A. Bringing in Additional Parties

An order granting or denying a motion to bring in an additional party is nonappealable because it is not finally decisive of some positive legal right of either the movant or the person who would be brought in. Although the decisions referred to antedate the promulgation of Rule 14.01, the above stated principles will undoubtedly apply to Rule 14 orders.

B. Interpleader

An order granting an interpleader, when made under circumstances where the statute allowed such an order, does not involve the merits because it leaves unresolved the rights of the plaintiff to the fund and such rights may subsequently be determined between the adverse claimants. The court in the case announcing this rule, Seeling v. Deposit Bank & Trust Co.,96 expressly left open the appealability of an order granting an interpleader under circumstances other than those authorized by the now superseded statute governing interpleader. Since that case seems to be the

97. Seeling v. Deposit Bank & Trust Co., 176 Minn. 11, 222 N. W. 295 (1928).
98. 176 Minn. 11, 222 N. W. 295 (1928).
only one on the subject, this question still remains unanswered. Also unresolved is the appealability of an order refusing an interpleader where the statute, now the rule, authorized the interpleader. A prediction might be hazarded that such orders made under Rule 22 will be held nonappealable on the ground that such an order still leaves the issues as they had been. This rule, however, is susceptible of a practical interpretation that when a defendant has complied with its conditions he has a right to an order for interpleader and if so an order denying this might be considered to affect his strict legal rights.

C. Intervention

There seems to be only one old and somewhat unsatisfactory case on taking an appeal from an order involving intervention. This dearth of authority is undoubtedly due in part to the fact that intervention was accomplished by the act of the person who wanted to become a party and not by order of the court. In Bennett v. Whitcomb99 that court treated an order denying an intervention as though it were an order striking the intervention papers from the files on the ground that the statute did not authorize the intervention. The court then stated that for the order to be appealable it must adversely affect the strict rights of the intervenor, and to determine this it was necessary to see whether there was any merit in the attempt to intervene. Finding that there was no such merit, that the intervenor would realize neither gain nor loss by any judgment in the action, the court held that the order was nonappealable. Such an approach seems undesirable. By it the court must determine the exact issues that would be necessary to a disposition of the appeal on the merits. Consequently, it may be doubted whether the court will retain this approach if the question is again presented. If the intervenor is not allowed to come into the case it would seem that the appealability of the order would be determined by the same considerations as discussed in relation to an order denying a motion for interpleader. However, here there is one possible additional factor that might favor allowing an appeal. Such an order would not be reviewable on an appeal from the judgment or order denying a new trial because the aggrieved person would not be a party thereto and because it would not be an intermediate order leading to judgment or the order denying a new trial. Arguably, the last consideration could also be stressed as to an order denying an interpleader, but with less force. However,

99. 25 Minn. 148 (1878).
in In re Condemnation of Lands Owned by Luhrs, a special proceedings case, the court stated that the general rule is that an order granting intervention is not appealable, and then quoted Corpus Juris Secundum for the proposition that an order either permitting or refusing intervention is not appealable because it is addressed to the sound discretion of the court.

Rule 24 covers both intervention as of right and permissive intervention. It is conceivable that the court would hold appealable an order refusing intervention when intervenor claims to come under the "as of right" provision and hold a similar order nonappealable where permissive intervention is involved.

Change of Venue

The order granting or denying a motion for change of venue, at least where not as of right, is not appealable on the ground that it does not involve the merits. In the Allis case the court recognized that the order granting the motion is a final order disposing of the action in that particular court but deemed the practice favoring review of the order by other means too well established to hold the order appealable. The court urged mandamus as the best method to seek review of the order. Where, however, the filing of affidavits itself effects the change of venue review of the change of venue has been allowed two other ways. In Flowers v. Bartlett objection was made to hearing a demurrer in court to which the action had been transferred, and on appeal from the order overruling the demurrer the court said they could review the matter of change of venue. In Chadbourne v. Reed the case was noted on the calendar of the court from which the action had been transferred. An appeal was taken from the order striking the case from the calendar, and on the appeal the court reviewed the matter of change of venue.

The Chadbourne case stated that an order striking the action from the calendar, the effect of which was merely to postpone the trial, was not appealable. But the court went on to hold that when the effect of the striking order was to determine that no trial could

100. 220 Minn. 129, 19 N. W. 2d 77 (1945).
101. Winegar v. Martin, 148 Minn. 489, 182 N. W. 513 (1921), 5 Minn. L. Rev. 566.
102. McClearn v. Arnold, 173 Minn. 183, 217 N. W. 106 (1927); Allis v. White, 59 Minn. 97, 60 N. W. 809 (1894); Carpenter v. Comfort, 22 Minn. 539 (1876).
103. 59 Minn. 97, 60 N. W. 809 (1894).
104. 66 Minn. 213, 68 N. W. 976 (1896).
105. 83 Minn. 447, 86 N. W. 415 (1901).
ever be had in that court on that action the order is appealable
as involving the merits.

**Striking Case from Calendar**

When, however, a situation such as the *Chadbourne* case is not
presented, an order striking the case from the calendar is not
appealable. ¹⁰⁶

**Stipulations**

Two old cases have held an order setting aside a stipulation
appealable. ¹⁰⁷ They were based on the idea that the setting aside
of a stipulation was more than merely an amendment of the plead-
ings and that the order deprived a party of a positive legal right
to have the stipulation enforced. No subsequent cases have been
found directly passing on the appealability of such an order. It
may, however, be questioned whether these cases would be blindly
followed. Since stipulations may arise in different ways and go to a
great variety of matters, it might be supposed that the appealability
of such an order would hinge upon whether it took on the aspects
of a contract, or was less, what elements of the action it would
affect, and whether it could be set aside in the discretion of the court.
And although no cases have been found directly questioning the
appealability of an order refusing to set aside a stipulation it would
seem that the question would be resolved on the same consider-
ations. Nor would it be too surprising that if the court should in the
future hold an order setting aside or refusing to set aside a stipula-
tion appealable, that it might later hold other such orders non-
appealable by making a distinction based upon the above stated
factors.

**Relating to Trial and the Trial Itself**

The court has said that an order determining whether the case
should be tried by jury, the court or a referee relates only to the
practice and procedure and by no fair interpretation to the merits
of the action. Therefore, such an order is not appealable. ¹⁰⁸ Like-
wise, an order refusing to consolidate cases for trial is not appeal-
able. ¹⁰⁹ The same is true of an order refusing to stay proceed-
ings. ¹¹⁰

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¹⁰⁷ Rogers v. Greenwood, 14 Minn. 333 (Gil. 256) (1869); Bingham
v. Supervisors of Winona County, 6 Minn. 136 (Gil. 82) (1861).
¹⁰⁸ Bond v. Welcome, 61 Minn. 43, 63 N. W. 3 (1895) (order referring
case to referee).
¹⁰⁹ Plunkett v. Lambert, 231 Minn. 484, 43 N. W. 2d 489 (1950);
Webster v. Bader, 109 Minn. 146, 123 N. W. 289 (1909).
¹¹⁰ Plunkett v. Lambert, 231 Minn. 484, 43 N. W. 2d 489 (1950);
Graves v. Backus, 69 Minn. 532, 72 N. W. 811 (1897).
And it was long ago decided that no appeal would lie from a ruling on evidence during the course of the trial, even though a formal motion be made as to admission of the evidence. Such a holding is fully in accord with the general statement that matters of practice and procedure, over which the district judge has a wide range of discretion, are not a proper subject of appeal, though they may be a proper subject for review. It will take an extreme case to make these holdings inapplicable to any ruling of the trial judge relating to, or during, the trial.

Looking to Judgment

Orders having as their direct object the ultimate entry of judgment have been held nonappealable under the third subdivision for such orders merely seek direction that an act be done which involves the merits. That is, an appeal does not lie from an order that requires subsequent action to give it effect. Consequently, no appeal can be had under this or other subdivisions from the decision or opinion of the court, from the order for judgment, from the order denying a motion for judgment, or denying a motion for judgment notwithstanding the verdict.

111. Hullet v. Matteson, 12 Minn. 349 (Gil. 227) (1867).
112. See, e.g., Ryan v. Kranz, 25 Minn. 362 (1879) (decision and order for judgment).
113. See, e.g., Rodgers v. Steiner, 206 Minn. 637, 289 N. W. 580 (1940) (order denying motion for judgment).
114. Thompson v. Howe, 21 Minn. 1 (1874); Searles v. Thompson Bros., 18 Minn. 316 (Gil. 285) (1872); Glahn v. Sommer, 11 Minn. 203 (Gil. 132) (1866).
115. In re Estate of Colby, 223 Minn. 157, 25 N. W. 2d 769 (1947); Rieke v. St. Albans Land Co., 179 Minn. 392, 239 N. W. 557 (1930); Lowe v. Nye, 170 Minn. 391, 212 N. W. 896 (1927) (motion for judgment on pleadings granted); State in re Quale v. Penney, 144 Minn. 453, 174 N. W. 611 (1919); Arnoldy v. Northwestern State Bank, 142 Minn. 449, 172 N. W. 699 (1919); Supornick v. National Council of Knights & Ladies of Security, 141 Minn. 306, 170 N. W. 507 (1918); Nikannis Co. v. City of Duluth, 108 Minn. 83, 121 N. W. 212 (1909); Johnson v. Northern Pacific, Fergus Falls & Black Hills Ry., 39 Minn. 30, 33 N. W. 804 (1888); Croft v. Miller, 26 Minn. 317 (1879); Rogers v. Holyoke, 14 Minn. 514 (Gil. 387) (1869); Lamb v. McCanna, 14 Minn. 513 (Gil. 385) (1869) (motion for judgment on pleadings and plaintiff's evidence granted).
117. Sanderson v. Northern Pacific Ry., 88 Minn. 162, 92 N. W. 542 (1902). But see "Appeal from 'Whole Order,'" see text to n. 324-333, infra.
118. Lincoln v. Ravicz, 174 Minn. 237, 219 N. W. 149 (1928); Carls-}

from an order granting or denying a motion for judgment notwithstanding the disagreement of the jury; from an order for dismissal, from an order denying a motion to dismiss the action, from the findings of fact and conclusions of law, nor from an order denying a motion to affirm an order of an inferior tribunal. This, of course, is also true where the motion is made at the pleading stage by a motion for judgment on the pleadings.

Obviously the same would be true of orders relating to motions for summary judgment made under Rule 56.

**Vacating Appealable Order**

In *Levi v. Longini* an order of the district court was held appealable which affirmed an order of the probate court that it had no jurisdiction to vacate an order allowing an account of a guardian. The court went on to hold that an order vacating the district court's prior order of affirmance and reversing the probate court's order was appealable for the prior order would have finally disposed

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120. Quevli v. First National Bank of Windom, 226 Minn. 102, 32 N. W. 2d 146 (1948); State ex rel. Gagnon v. Bjornstad, 125 Minn. 526, 147 N. W. 104 (1914); Gottstein v. St. Jean, 79 Minn. 232, 82 N. W. 311 (1900); Searles v. Thompson Bros., 18 Minn. 316 (Gil. 285) (1872); Lamb v. McCanna, 14 Minn. 513 (Gil. 385) (1899).
121. Independent School District No. 84 v. Rittmiller, 235 Minn. 556, 51 N. W. 2d 664 (1952) (motion made after tender); Dady v. Peterson, 219 Minn. 198, 17 N. W. 2d 322 (1945); Pillsbury v. Foley, 61 Minn. 434, 63 N. W. 1027 (1895).
123. Johnson v. Giese, 230 Minn. 185, 40 N. W. 2d 909 (1950); State, by Peterson v. Anderson, 208 Minn. 334, 294 N. W. 219 (1940); Anderson v. Tuomi, 230 Minn. 490, 42 N. W. 2d 204 (1950); Dow v. Bittner, 185 Minn. 499, 241 N. W. 569 (1932); Hoyt v. Kittson County State Bank, 180 Minn. 93, 230 N. W. 269 (1930); Nikannis Co. v. City of Duluth, 108 Minn. 53, 121 N. W. 212 (1909); Savings Bank of St. Paul v. St. Paul Plow Co., 76 Minn. 7, 78 N. W. 873 (1899); Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511 (1883).
125. McClearn v. Arnold, 173 Minn. 183, 217 N. W. 106 (1927) (motion denied); Lowe v. Nixon, 170 Minn. 391, 212 N. W. 896 (1927) (motion granted); Rogers v. Holyoke, 14 Minn. 514 (Gil. 387) (1869) (motion granted); McMahon v. Davidson, 12 Minn. 357 (Gil. 232) (1866) (motion denied).
126. Shema v. Thorpe Bros. (Minn., opinion filed February 27, 1953) (order granting summary judgment nonappealable). Language in Settem v. Etter, 53 N. W. 2d 467 (Minn. 1952), also confirms this. In the *Settem* case a writ of certiorari to review an order denying a motion for summary judgment was denied, the court saying the order was an intermediate one.
127. 82 Minn. 324, 84 N. W. 1017 (1901).
of the matter on the merits. The vacation of that order deprived the party of the benefit of such disposition and so affected his strict legal rights. Apparently, however, had the order merely vacated the prior order for purposes of again hearing the matter there decided, that is, vacated the prior order provisionally, the vacating order would not be appealable. 128

Generalizing the Levi case, it might be said that an order vacating an appealable order is also appealable. The appealability of orders vacating or refusing to vacate nonappealable orders is considered later.

Post Judgment

1. Vacate Judgment

An order refusing to vacate a judgment claimed to be unauthorized may be appealed from for the party has a strict legal right to have an unauthorized judgment vacated and set aside. 129 But an appeal will not lie from an order refusing to vacate an erroneous judgment. 130 It should be noted that while Piper v. Johnston 131 placed this on subdivision three, the order more appropriately belongs under subdivision seven, as the court ruled in the Spalding 132 case.

It would also seem that the party who had obtained the judgment could appeal from an order which vacates the judgment on the ground that the judgment was unauthorized, since, if the judgment were authorized the order would adversely affect his rights in the judgment. In Holmes v. Campbell 133 the court, in holding appealable an order vacating a judgment, stated:

"Any order of the court which cancels it [the judgment], or modifies it effect, or suspends its operation, or the right of the plaintiff [prevailing party] to enforce the same, materially affects the legal rights of the party in whose favor it is rendered, and ... involves the merits of the action, and unless it is within the discretion of the court it is appealable."

128. State v. Crosley Park Land Co., 63 Minn. 205, 65 N. W. 268 (1895) (order vacating order vacating a judgment so as to hear over first vacating order); see In re Studdardt, 30 Minn. 553, 16 N. W. 452 (1883). But see Barrett v. Smith, 183 Minn. 431, 439, 237 N. W. 15, 19 (1931), where the court said the order entered after the provisional vacation would be appealable even if time to appeal from the vacated order had expired.

129. Kelly v. Anderson, 156 Minn. 71, 194 N. W. 102 (1923); Piper v. Johnston, 12 Minn. 60 (Gil. 27) (1865) (on appeal judgment found to be authorized).


131. 12 Minn. 60 (Gil. 27) (1866).


133. 13 Minn. 66 (Gil. 58) (1868).
The order there involved was not made within the discretion of the court because made after the time had run for a discretionary vaca-
tion of the judgment.\textsuperscript{134}

Where, however, an order vacates a prior order vacating a judgment for the purpose of another hearing on the merits as to whether the judgment should be vacated, the order which provisionally vacates the earlier order is not appealable\textsuperscript{135} for it neither denies the last vacating motion nor does it reinstate the judgment. The court has several times allowed an appeal from an order vacat-
ing a judgment entered after settlement and reinstating the case on the calendar when made well within the time for appeal from the judgment, the granting of which order was obviously within the sound discretion of the trial judge.\textsuperscript{136} Relying on these cases the court recently held that an order vacating a prior order of dismissal pursuant to a settlement, no judgment having been entered, was appealable under subdivisions three and seven.\textsuperscript{137} It must be assumed that this case stands for the proposition that the defendant's positive or strict legal rights not to have the case revived were affected with finality by this order and so the order "involved the merits." The court's reliance on subdivision seven is clearly unwarranted for it was neither a special proceeding nor was it made after judgment, no judgment ever having been entered. This being so there was nothing to which subdivision seven could apply.

2. Vacation Discretionary
(§544.32—Rule 60.02)

If the order vacating a judgment was made under the discretionary power of the now superseded § 544.32, the court at first held the order nonappealable.\textsuperscript{138} It soon adopted the view that the order was not appealable unless there was an abuse of discretion. Before long the court decided that an order vacating a judgment made under the discretionary power of the trial court was appealable as an order involving the merits. This final step was made by Judge

\textsuperscript{134} See also State \textit{ex rel.} Beede v. Funck, 211 Minn. 27, 299 N. W. 684 (1941) (order vacating a dismissal more than year after dismissal) ; County of Chisago v. St. Paul & Duluth R. R., 27 Minn. 109, 6 N. W. 454 (1880) (judgment set aside on ground that court had no jurisdiction to enter such judgment).

\textsuperscript{135} State v. Crosley Park Land Co., 63 Minn. 205, 65 N. W. 268 (1895).

\textsuperscript{136} Rishmiller v. Denver & R. G. R. R., 134 Minn. 261, 159 N. W. 272 (1916) ; Picciano v. Duluth, Missabe & Northern Ry., 102 Minn. 21, 112 N. W. 885 (1907).

\textsuperscript{137} Elsen v. State Farmers Mutual Insurance Co., 217 Minn. 564, 14 N. W. 2d 859 (1944).

\textsuperscript{138} Westervelt v. King, 4 Minn. 320 (Gil. 236) (1860).
Mitchell in *People's Ice Co. v. Schenker*,\(^{139}\) and is now well established.\(^{140}\) The court has also held that an order, made within the court's discretionary powers, refusing to vacate a judgment is appealable.\(^{141}\)

From the foregoing two things are obvious. First, although the court has adhered to the rule that this subdivision cannot be used for appealing from a discretionary order, orders made under the discretionary power of former § 544.32 are a major exception to the rule. Second, the court has used subdivision three for post judgment orders as well as for pre judgment orders. Whether its use for post judgment orders is generally necessary is open to doubt since post judgment orders would seem to fit more appropriately under subdivision seven.

**Miscellaneous**

Several other cases seem worthy of comment.

The granting of attorney fees to the wife's attorney in a divorce suit is appealable under this subdivision. This is so whether the order allowing the fees is made between the first and second trial of the action\(^{142}\) or after judgment of dismissal.\(^{143}\)

In *Edelstein v. Levine*\(^{144}\) the court opened a further method of obtaining review of an order granting a new trial. Where the time in which such an order may be made has run before it is made, the party adversely affected by such order may appeal from an order denying his motion to dismiss the motion for a new trial since such denial is deemed to determine the strict legal rights of the parties. But unless the time has run, or for some other reason the lower court is without authority to grant a new trial, an order refusing to vacate an order for a new trial will be nonappealable for it is in effect an order refusing to vacate a nonappealable order.\(^{145}\)

In *Johnson v. Burmeister*\(^{146}\) an appeal was unsuccessfully attempted from an order denying a motion for judgment nothwithstanding.

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\(^{139}\) 50 Minn. 1, 52 N. W. 219 (1892).

\(^{140}\) E.g., Peterson v. W. Davis & Sons, 216 Minn. 60, 11 N. W. 2d 800 (1943); Isenee Motors v. Rand, 196 Minn. 267, 264 N. W. 782 (1936); Stebbins v. Friend, Crosby & Co., 178 Minn. 649, 228 N. W. 150 (1929).


\(^{142}\) Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014 (1901).

\(^{143}\) Wagner v. Wagner, 34 Minn. 441, 26 N. W. 450 (1886) (said to affect strict legal rights because court without authority to so order).

\(^{144}\) 179 Minn. 136, 228 N. W. 558 (1930).

\(^{145}\) See Marty v. Nordby, 201 Minn. 469, 276 N. W. 739 (1937); Davis v. Royce, 174 Minn. 611, 219 N. W. 928 (1928).

\(^{146}\) 176 Minn. 302, 223 N. W. 146 (1929).
standing the disagreement of the jury. In holding the order non-
appealable the court said:

"The order denying a judgment notwithstanding leaves the
the issues involved 'still pending before the court [below] and
undetermined' and so cannot be said to be an order involving
the merits or affecting a substantial right of the appellant within
. . . [subdivision three]."

And it should be noted that no review of such an order can be had
on appeal from a judgment of dismissal subsequently entered for
such order is said not to lead to nor necessarily affect the judg-
ment within the meaning of subdivision one.147 Although it might
be urged that if the party moving for such judgment is upon the
facts entitled to the judgment the denial of the motion deprives him
of his rights by forcing him to be subjected to another suit, yet it
may well be submitted in support of the Burmeister case that it
accords with the declared legislative policy. After denial of the
motion for judgment notwithstanding the disagreement of the jury,
the movant stands in substantially the same position as though the
court had granted a new trial after he had received a verdict. In-
deed, he does not stand in as good a position for he had never
received a verdict. Yet, the legislature has said that a party's rights
are not sufficiently affected by the granting of a new trial to allow
an appeal, unless the new trial be granted only because of errors
of law. It is unlikely that in the situation presented by the Bur-
meister case the result was due solely to errors of law. Thus, it would
seem that the court's conclusion in that case is fully justified.

Subdivision Four

"From an order sustaining a demurrer, or from an order over-
ruling a demurrer if the court certifies that the question pre-
sented by the demurrer which it overrules by such order is im-
portant and doubtful and makes such certification a part of the
order, or from an order refusing a new trial, or from an order
granting a new trial if the court expressly states therein, or in a
memorandum attached thereto, that the order is based exclu-
sively upon errors of law occurring at the trial, and upon no
other ground; and the court shall specify such errors in its
order or memorandum, but upon appeal, such order granting
a new trial may be sustained for errors of law prejudicial to
respondent other than those specified by the trial court:"

History

As previously noted this subdivision has received the most

147. Bolstad v. Paul Bunyan Oil Co., 215 Minn. 166, 9 N. W. 2d 346
(1943).
legislative attention. Conversely, to date it has required surprisingly little judicial construction. The earliest "amendment" occurred in the unofficial statutes of 1858, and appears to have been made without legislative approval. This "change" consisted of allowing an appeal from an order denying a new trial as well as one granting it.148 The revision of 1866 took away the right to appeal from an order granting a new trial.149 But the legislature the next year restored this as an appealable order and went on to allow an appeal from an order sustaining or overruling a demurrer.150 The next change occurred in 1913 when the legislature curtailed the right to appeal from an order granting a new trial by allowing an appeal therefrom only when the new trial was granted expressly and solely because of errors of law occurring at the trial, or where a new trial had once before been granted because the evidence did not support the verdict and an appeal was allowed from a subsequent order granting a new trial on this same ground.151 The purpose of this was to make non-appealable those orders granting a new trial which lay in the sound discretion of the trial court. This same act also limited the right to appeal from an order overruling a demurrer. Although the statutory language is not exactly the same as now, the substance of this act is the same. Thus the Act of 1913 allowed an appeal only if the district judge certifies that the question presented by the demurrer is important and doubtful and further makes such certification a part of the order overruling the demurrer. From 1913 that part of subdivision four relating to an order overruling a demurrer remained in its same terminology until amended to read as it now appears by the 1945 legislature.152 The status of an order granting a new trial remained unchanged until the legislature in 1931 again tried to amend this subdivision.153

The 1931 amendment was poorly drafted and ambiguous as to whether the legislature intended to expand the scope of review on appeal from an order granting a new trial or intended to further limit the allowable scope of review. In Spicer v. Stebbins154 the court concluded that the legislature intended to further restrict the scope of possible appeal by: 1) requiring the reasons for granting a new trial on errors of law to appear in the order or

150. Minn. Laws 1867, c. 63, § 1.
151. Minn. Laws 1913, c. 474, § 1.
152. Minn. Laws 1945, c. 463, § 1.
153. Minn. Laws 1931, c. 252.
154. 184 Minn. 77, 237 N. W. 844 (1931).
memorandum (a requirement existing since 1913 and not affected by the 1931 act, although this apparently was overlooked by the court and the bar\textsuperscript{153}), and 2) removing the right to appeal from such an order where the same order had been made on a prior trial because of insufficiency of evidence to support the verdict.

This part of the subdivision as it now stands was enacted in 1945.\textsuperscript{156} Apparently no changes were intended; rather, it seems merely to have been intended to remove the ambiguity and to make explicit the construction the court had already placed on the subdivision as it previously read.

\textit{Sustaining a Demurrer}\textsuperscript{157}

The phrase "from an order sustaining a demurrer" is clear and has necessitated almost no judicial construction. One appellant recently, however, fell into trouble that he hardly could have anticipated when the court in \textit{Seagram-Distillers Corp. v. Lang}\textsuperscript{159} held that although he had appealed from an order sustaining a demurrer, he had appealed from a nonappealable order because he had appealed from that order after judgment had been entered against him. The court took the view that the entry of judgment cut off the appealability of such an intermediate order. Aware of an opposite rule pertaining to orders made appealable by another part of the fourth subdivision, orders denying a new trial, the court said that that was a distinguishable situation because the statute gives a right to move for such orders after as well as before judgment. The judgment terminated the order's appealability even though the judgment was irregular in that it neither provided for dismissal of the action nor for costs and disbursements for such judgment was still a final determination of the rights of the parties. The court did not, however, state that the judgment was final for purposes of appeal. But on the basis of the \textit{Lang} case, it would seem that such an argument might be made even though the previously existing rule was to the contrary.\textsuperscript{159}

Further, although the court had before it only an order sustaining a demurrer, much of the language as to a judgment cutting off the appealability of an order would apply to any order which

\textsuperscript{153} See Hudson-Duluth Furriers, Inc. v. McCullough, 182 Minn. 581, 235 N. W. 537 (1931).
\textsuperscript{154} See supra n. 152.
\textsuperscript{155} The part of subdivision four relating to the sustaining or overruling of a demurrer has been rendered obsolete by Rule 7.01.
\textsuperscript{156} 230 Minn. 118, 41 N. W. 2d 429 (1950). Case criticized Note, 35 Minn. L. Rev. 640, at 646 and 656 (1951).
\textsuperscript{157} See n. 25, supra, and text.
by its very nature must necessarily precede judgment. Thus, this newly created rule as to orders sustaining a demurrer may well be transferred to a large number of orders acquiring their appealability from the third subdivision.

The rule enunciated in the *Lang* case, however, has absolutely nothing to recommend itself save sheer formalism. To extend its application would be unfortunate.

**Overruling a Demurrer**

Several cases have arisen since the 1913 amendment construing the provision for an appeal from an order overruling a demurrer. Without a certificate of importance and doubt by the district court no appeal can be had from the order overruling a demurrer. But the mere fact of certification does not remove the case to the supreme court. The certificate merely preserves the right to appeal, and unless the losing party appeals from the order there is nothing before the court. But if there has been the required certificate of importance and doubt and if the losing party has appealed then the court has before it the issue of whether or not the demurrer should be sustained, and all questions involved therein are before the court. The fact that the district court certifies only certain specific questions has no effect in limiting the power of the supreme court to pass on all matters pertaining to the overruling order.

**Denying a New Trial**

Although used very often as the basis for appeal, in the main few difficulties have arisen in the decided cases as to orders denying a new trial.

The fact that judgment has been entered before the order denying the new trial was filed does not affect the appealability of the order. And an appeal may be had from an order denying a new trial regardless of whether it was made in a court or jury case. The mere fact that an appeal is taken from an order denying

161. Oehler v. City of St. Paul, 174 Minn. 66, 218 N. W. 234 (1928); Benton v. County of Hennepin, 125 Minn. 325, 146 N. W. 1110 (1914).
162. Marquette Trust Co. v. Doyle, 176 Minn. 529, 224 N. W. 149 (1929); Benton v. County of Hennepin, 125 Minn. 325, 146 N. W. 1110 (1914).
163. Marquette Trust Co. v. Doyle, 176 Minn. 529, 224 N. W. 149 (1929).
164. *In re* Estate of Hore, 220 Minn. 365, 19 N. W. 2d 778 (1945); Shuek v. Hagar, 24 Minn. 339 (1877).
165. Chittenden v. German American Bank, 27 Minn. 143, 6 N. W. 773 (1880).
a new trial will not prevent an appeal from the subsequently entered judgment. 166

Where a motion for a new trial is granted in part and denied in part, the movant may appeal from so much of the order as denies his motion for a new trial. 167 But the granting of a new trial unless the prevailing party agrees to a remittitur cannot be appealed from as an order denying a new trial until the condition has been complied with by the prevailing party. 168

Even though the order denying a new trial is appealable, it will be affirmed on appeal if the motion upon which it was made states no ground for a new trial. 169 And where the district court has entered an order denying a new trial pro forma with the consent of the appellant, the supreme court will refuse to review the merits of the case on the ground that the appellate court will not pass on questions that were not first considered below. 170

In passing it should be noted that the court has held that an order denying a new trial is not a "final order." 171 The court said that an order denying a new trial was "an interlocutory order which does not determine the rights of the parties so as to dispose of the case." 172 Therefore, the order of the district court, in an appeal from the Railroad and Warehouse Commission, denying the motion for a new trial was not appealable since it was not a "final order" within the meaning of § 217.30. Consequently, when it is a statutory action and the statute allowing the action has its own appeals provision, at least when similar to § 217.30, there may be no right of appeal from an order denying a new trial. The same view was early taken of an order granting a new trial in a special proceeding under subdivision seven. 173

Where an appeal to the district court is dismissed for lack of jurisdiction, there is no basis for a motion for a new trial (there

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166. In re Estate of Hore, 220 Minn. 365, 19 N. W. 2d 778 (1945).
168. See Swanson v. Andrus, 84 Minn. 168, 87 N. W. 363 (1901) (until compliance it is a conditional order, only upon compliance does it become a final, appealable order).
169. Julius v. Lenz, 212 Minn. 201, 3 N. W. 2d 10 (1942); Hoyt v. Kittson County State Bank, 180 Minn. 93, 230 N. W. 269 (1930); Spencer v. Stanley, 74 Minn. 35, 76 N. W. 953 (1898).
173. McNamara v. Minnesota Central Ry., 12 Minn. 388 (Gil. 269) (1867).
never having been a trial in the district court) and if such a motion is made an appeal to the supreme court will not lie from the order denying the motion.\footnote{174} The same reasoning and the same result applies where the district court denies a motion for a new trial after a demurrer to the complaint has been sustained,\footnote{176} or where the order is denied by the district court upon an appeal to it on questions of law only.\footnote{178} In neither case has there been a trial within the meaning of the new trial statute. But in McCord v. Knowlton,\footnote{177} where a district court judge dismissed a motion for a new trial on the ground that he did not have jurisdiction over the matter since the case (although the decision had been rendered) was pending before another judge, the court held that it could treat the order dismissing the motion as an order denying a motion for a new trial for appeal purposes. The last case is not inconsistent with the preceding ones in that the rationale of those cases does not apply to the McCord case.

The case in which the order denying a new trial after a demurrer to the complaint had been sustained, however, was distinguished in Hine v. Myrick\footnote{178} where judgment on the pleadings was entered when the case came on for trial. This order having been made at time for trial, the subsequent order denying a new trial was held appealable. But the court, on authority of the Myrick case, recently held appealable an order denying a new trial after an order for judgment on the pleadings where it did not appear that such order was made at time of trial.\footnote{179} That this last case will be followed may be doubted in view of the authority preceding it.

**Granting a New Trial**

In the main this part of the subdivision is self-explanatory and needs little comment.\footnote{180} Its terms apply even to an order granting

\footnotetext[174]{Samels v. Samels, 174 Minn. 133, 218 N. W. 546 (1928); In re Appeal of Seward, 156 Minn. 229, 194 N. W. 378 (1923).}
\footnotetext[175]{Dodge v. Bell, 37 Minn. 382, 34 N. W. 739 (1887).}
\footnotetext[176]{St. Cloud Common Council v. Karels, 55 Minn. 155, 56 N. W. 592 (1893).}
\footnotetext[177]{76 Minn. 391, 79 N. W. 397 (1899).}
\footnotetext[178]{60 Minn. 518, 62 N. W. 1125 (1895).}
\footnotetext[179]{Fox v. Swartz, 228 Minn. 233, 36 N. W. 2d 708 (1949) (appealability referred to in footnote only).}
\footnotetext[180]{For examples of orders granting a new trial which would be appealable under the present subdivision four, see Weatherland v. Burau, 54 N. W. 2d 570 (Minn. 1952) (memorandum stated new trial granted solely because sealed verdict was a nullity where juror changed mind on poll); Great Northern Ry. v. Beecher-Barrett-Lockerby Co., 200 Minn. 258, 274 N. W. 522 (1937) (memorandum stated that court had been without jurisdiction to enter the findings it had made and so court granted a new trial on this basis only); Gutman v. Anderson, 142 Minn. 141, 171 N. W. 303 (1919) (granted new trial solely because lower court deemed erroneous an instruction it had given).}
a new trial made upon the court's own motion.\textsuperscript{181} There are, however, some aspects of the power to appeal from an order granting a new trial that merit discussion.

The word "exclusively" used in the phrase "based exclusively on errors of law occurring at the trial" means just that. It must clearly and affirmatively appear that the occurrence of errors of law was the sole ground for granting a new trial and that judicial discretion played no part.\textsuperscript{182} The order or memorandum does not have to use the precise statutory terminology, although this is desirable, so long as one or the other clearly shows that no judicial discretion was involved in granting the order.\textsuperscript{183} But if the trial judge refuses to state the grounds for granting the new trial, a writ of mandamus will lie from the supreme court requiring him to state the grounds upon which he granted the new trial.\textsuperscript{184} Also, the error of law complained of must have occurred at the trial of the action. Error at the time of granting a new trial is not within the contemplation of this subdivision.\textsuperscript{185}

When the conditions for an appeal have been complied with, the respondent may sustain the order granting the new trial on an error of law properly raised though not relied upon by the trial court, but cannot question other matters, such as sufficiency of evidence, to sustain the order on appeal.\textsuperscript{186}

The trial judge's characterization of the ground for his granting a new trial as being an error of law is not decisive; that ground must in fact be an error of law.\textsuperscript{187} Also, as this subdivision indicates, the

\textsuperscript{181} Montee v. Great Northern Ry., 129 Minn. 526, 151 N. W. 1101 (1915).

\textsuperscript{182} Citizens State Bank of St. Paul v. Wade, 165 Minn. 396, 206 N. W. 728 (1925); Doerner v. English, 221 Minn. 398, 22 N. W. 2d 217 (1946); Seorum v. Marudas, 216 Minn. 364, 12 N. W. 2d 779 (1944); State \textit{ex rel.} Weiss v. Moriarty, 203 Minn. 29, 279 N. W. 835 (1938); Thompson v. Mann, 202 Minn. 318, 278 N. W. 153 (1938); Backstrom v. New York Life Insurance Co., 187 Minn. 35, 244 N. W. 64 (1932); Spicer v. Stebbins, 184 Minn. 27, 237 N. W. 844 (1931); Karnofsky v. Wells-Dickey Co., 183 Minn. 563, 237 N. W. 425 (1931); Cook v. Byram, 178 Minn. 230, 226 N. W. 699 (1929); Kramer v. Bennett, 174 Minn. 606, 219 N. W. 291 (1928); Miller v. County of Steele, 162 Minn. 85, 202 N. W. 68 (1925); Barwald v. Thuet, 149 Minn. 495, 182 N. W. 719 (1921); Schommer v. Eichens, 148 Minn. 486, 182 N. W. 166 (1921); Rust v. Holtz, 134 Minn. 266, 159 N. W. 564 (1916); Heide v. Lyons, 128 Minn. 468, 151 N. W. 139 (1915).

\textsuperscript{183} Weatherhead v. Burau, 54 N. W. 2d 570 (Minn. 1952).

\textsuperscript{184} State \textit{ex rel.} Weiss v. Moriarty, 203 Minn. 23, 279 N. W. 835 (1938).

\textsuperscript{185} See Master Poultry Breeders, Inc. v. Iowa Hardware Mutual Ins. Co., 219 Minn. 440, 18 N. W. 2d 39 (1945).

\textsuperscript{186} McAlpine v. Fidelity & Casualty Co., 134 Minn. 192, 158 N. W. 967 (1916).

\textsuperscript{187} Voller v. Schmitz, 52 N. W. 2d 284 (Minn. 1952) (trial court said new trial, unless plaintiff accept a lesser amount, was granted exclusively for
order or memorandum must state just what the error is.188

The requirement of granting a new trial because of "errors of law occurring at the trial" is not satisfied by a memorandum stating that as a matter of law the evidence was insufficient to support the verdict.189 In other words, insufficiency of evidence as a matter of law is not the type of "error of law" contemplated by the statute. Rather, it refers to the action of the trial judge upon such matters as for example rulings and instructions.190

Nor is inadequacy or excessiveness of damages such an error of law.191 Thus, if plaintiff moves for a new trial on the sole issue of damages the order granting a new trial on that issue only is not appealable.192 But this does not mean that an order granting a new trial on damages only is always nonappealable. If both plaintiff and defendant move for a new trial or if the new trial is granted upon defendant's general motion, then the order in effect denies a new trial as to all other issues and to that extent is therefore appealable as an order denying a new trial.193 On such an appeal no review can be had of the court's order granting a new trial on the issue of damages.194 The same is true where a new trial is ordered upon one issue after appellant's motion for a new trial made on more than just that one issue. Again the order is appealable because it does in effect deny a new trial as to all other issues.195

But in two cases the court appears to have disregarded the above stated principles as to what constitutes "errors of law." In Bakken-
sen v. Minneapolis Street Ry. the court held that a new trial granted on erroneous rulings as to laying foundation for evidence was not within the purview of this subdivision and so not appealable. And in State ex rel. Weiss v. Moriarty, a mandamus proceeding, the court said that granting a new trial because there was error in directing a verdict for defendant since it was contrary to law and fact would fall within an "error of law occurring at the trial."

The order granting a new trial after entry of judgment, even though not exclusively upon errors of law, is appealable as an order vacating the judgment. But where judgment has been entered between the time of the court's announcement that a new trial would be granted and the entry of the formal order, no appeal can be had from the order granting a new trial because the judgment was a "meaningless gesture."

**SUBDIVISION FIVE**

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

This subdivision has remained unaltered since its original enactment and has required the considered attention of the court very few times. This is no doubt partially due to its limited field of possible operation and perhaps caused in part by appellants not asserting its application.

The cases so far decided point up three or four main types of orders which are made appealable by this subdivision.

**Based on Jurisdiction**

First, an order dismissing the action on the basis of lack of jurisdiction, whether it be over the parties or the subject matter or for some other reason, which thereby purportedly terminates the authority of the court to act further in the matter comes within the

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196. 180 Minn. 344, 230 N. W. 787 (1930).
197. 203 Minn. 23, 279 N. W. 835 (1938).
198. Ayer v. Chicago, Milwaukee, St. Paul & Pacific R. R., 189 Minn. 90, 359, 248 N. W. 749, 249 N. W. 381 (1933); Vasatka v. Matsch, 216 Minn. 530, 13 N. W. 2d 483 (1944); Kruchowski v. St. Paul City Ry., 195 Minn. 537, 263, 616 (1935). *Contra:* Cook v. Byram, 178 Minn. 230, 226 N. W. 699 (1929) (order granting new trial held nonappealable because not in conformity with subdivision four. Court stated: "It is true it vacated a judgment entered by appellants before defendants had an opportunity to move for a new trial ***)

200. Its history antedates the 1856 enactment. This subdivision is substantially the same provision as Rev. Stat. 1851, c. 81, § 11(2).
express terms of the fifth subdivision, and thus is appealable. But it is essential that such order divests the court of authority to act further, i.e., enter judgment of dismissal, or the general rule that no appeal can be had from an order of dismissal will be applicable. Thus, an appeal was allowed under this provision from an order of the district court dismissing an appeal from a justice court on jurisdictional grounds in Ross v. Evans, but when the same basic fact situation again arose the appeal was dismissed because in the interim the legislature had extended the lower court's power to enter a judgment of dismissal on such an appeal from a justice court. So, the order of dismissal for jurisdictional reasons no longer prevented the district court from acting further—a judgment from which an appeal could be taken was made possible. Although an order which rejects a party's contention that the court lacks jurisdiction in the proceeding may be appealable as an order involving the merits, yet it is not appealable under subdivision five for it in no way determines the action or prevents entry of a judgment. In other words, the mere presence of a contest over jurisdiction does not affect the order's appealability under this subdivision unless by the court's assertion of lack of jurisdiction it has rendered itself impotent to act further.

On this aspect of the subdivision, it should be noted that although the court in Chadbourne v. Reed held an order permanently striking a case from the calendar appealable under the third subdivision its reasoning would seem to bring it more properly under this subdivision unless by the court's assertion of lack of jurisdiction it has rendered itself impotent to act further.

The general rule that no appeal can be taken from an order dismissing an action is illustrated by the early case of Jones v. Rahilly. There an order dismissing the action before trial on plaintiff's motion was held nonappealable under this subdivision. The order did not determine the action or prevent entry of an appealable judgment because the statutory predecessor of Rule 41.01 expressly provided for entry of judgment of dismissal in such circumstances.

201. Bulau v. Bulau, 208 Minn. 529, 294 N. W. 845 (1940); Samels v. Samels, 174 Minn. 133, 218 N. W. 546 (1928) (opinion may be based on subdivision five or seven, or both); Roth v. Evans, 30 Minn. 206, 14 N. W. 897 (1883).


203. 30 Minn. 206, 14 N. W. 897 (1883).


206. 83 Minn. 447, 86 N. W. 415 (1901).

207. 16 Minn. 177 (Gil. 155) (1870).
Phillips v. Brandt,\textsuperscript{208} the most recent case on this subdivision, appears to have entirely discarded the rule of the Rahilly and similar cases. In this taxpayers' representative suit, after entry of an order for judgment for plaintiff he moved from the area and so was no longer an appropriate party. Other taxpayers appealed from an order refusing to substitute them as named plaintiffs. Defendants argued that since a judgment of dismissal could still be entered the order was not appealable under this subdivision. But the court held the order appealable, saying: "We do not agree with this construction. \(* \ast \ast \ast \) an order which finally determines the action and prevents entry of a judgment already ordered in favor of a party thereto falls within the classification set forth in \S 605.09(5). While judgment for dismissal may constitute a final determination of the action, so also an order which denies to the prevailing party the right to enter a judgment previously ordered in his favor."

Since it is obvious that the court did not realize that the view enunciated in the \textit{Phillips} opinion was inconsistent with its prior decisions, we can only speculate whether the inability to enter a judgment of dismissal will now be dropped from the requirements of this subdivision.

\textbf{Dismissal of Appeal to District Court}

Second, Judge Mitchell, writing for the court, held that an order dismissing an appeal taken to the district court came within the express terms of this subdivision and was therefore appealable.\textsuperscript{209} This would seem to be true of any order dismissing an appeal to the district court, where the statute authorizing such appeal did not provide for any further action in disposing of the appeal. But if further action was contemplated, for example, judgment of dismissal, then the order of dismissal would not seem to be appealable by analogy to the jurisdictional dismissal cases.\textsuperscript{210} If the order denies a motion to dismiss an appeal taken to the district court, then, of course, the order is not appealable under this subdivision.\textsuperscript{211}

\textbf{Striking a Complaint}

Third, in Lovering v. Webb Publishing Co.,\textsuperscript{212} in addition to

\begin{itemize}
\item \textsuperscript{208} 231 Minn. 423, 43 N. W. 2d 285 (1950). Only case referred to by court is Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438 (1950). That case was not concerned with subdivision five. None of the cases which have discussed fifth subdivision and added requirement that no judgment of dismissal can be entered were so much as referred to.
\item \textsuperscript{209} Town of Haven v. Orton, 37 Minn. 445, 35 N. W. 264 (1887).
\item \textsuperscript{210} See n. 204, supra.
\item \textsuperscript{211} Rabitte v. Nathan, 22 Minn. 266 (1875) (nor, as this case held, under subdivision three).
\item \textsuperscript{212} 108 Minn. 201, 120 N. W. 688 (1909).
\end{itemize}
holding an order, requiring the complaint to be made more definite and certain and in default thereof to strike the complaint, appealable as an order involving the merits, the court also took the view that the order was appealable under subdivision five. It was considered so appealable because the order was one which in effect struck the complaint, and "when the complaint is stricken out, the action ends, and no judgment can be entered therein." This was perhaps unnecessary language since the appeal was held authorized under the third subdivision, but if it is followed by the court it would mean that orders striking the complaint, or setting aside service of summons and complaint, would be appealable under the fifth subdivision, as well as the third.

Reinstating a Judgment

Fourth, an order is appealable under this subdivision which vacates an order vacating a judgment and expressly or necessarily reinstates the judgment previously vacated after time to appeal from the original judgment has expired.\(^1\)\(^2\)\(^3\) Thus, although there was a judgment, that judgment would not be appealable when reinstated. Therefore, since the order of reinstatement is made it both determines the action and prevents entry of a judgment from which an appeal might be taken. But where the order vacating the previous order which vacated the judgment merely vacates the first order for the purpose of rehearing the motion to vacate the judgment on the merits, the last vacating order is not appealable.\(^2\)\(^4\) That order only provisionally vacates the prior order and thus neither denies the motion to vacate nor reinstates the judgment. It leaves the merits of the original motion to vacate the judgment yet to be heard. Consequently, it is not an order which in effect determines the action nor does it prevent the entry of an appealable judgment. Nor, as stated in the \textit{Crosley Park} case, can it gain an appealable status under either subdivision three or seven for the same reasons.

But in \textit{Picciano v. Duluth, Missabe & Northern Ry.}\(^2\)\(^5\) the court seems to have ignored this reasoning. An order was there held appealable which set aside a settlement, order for judgment, judgment, and leave of court.\(^2\)\(^6\) Thus, when judgment is reinstated, it is appealable. The court, however, held that the judgment was appealable because it was one which in effect struck the complaint, and "when the complaint is stricken out, the action ends, and no judgment can be entered therein." This was perhaps unnecessary language since the appeal was held authorized under the third subdivision, but if it is followed by the court it would mean that orders striking the complaint, or setting aside service of summons and complaint, would be appealable under the fifth subdivision, as well as the third.

\[^{1}\text{Wilson v. City of Fergus Falls, 181 Minn. 329, 232 N. W. 322 (1930); Marty v. Ahl, 5 Minn. 27 (Gil. 14) (1860). In each of these cases more than one year had elapsed from time of entry of judgment before judgment was reinstated.}\]

\[^{2}\text{State v. Crosley Park Land Co., 63 Minn. 205, 65 N. W. 268 (1895).}\]

\[^{3}\text{\textit{Ibid.}}\]

\[^{4}\text{\textit{Ibid.}}\]

\[^{5}\text{102 Minn. 21, 112 N. W. 885 (1907).}\]
ment of dismissal and an order striking the case from the calendar, and ordered the case reinstated on the calendar. The order doing so was entered within a month after entry of judgment. The court said: "The order is appealable, for the reason that it determines the strict legal rights of the parties, having put an end to the action and prevented the entry of a judgment from which an appeal might be taken." So far as the quoted language was intended to bring the case under subdivision three, the case seems unobjectionable. But so far as it is intended to be within the purview of the fifth subdivision the language seems clearly contrary to the facts. The order reinstated the case on the calendar, presumably it would go to trial and judgment would be ultimately entered. The mere fact that it wiped out one judgment does not bring it within this subdivision. The order did look toward the future entry of a new judgment—a judgment from which an appeal could be taken. For this reason the case seems clearly erroneous and of very questionable authority.

Nonappealable Orders

Other than as to the type of orders above discussed, reference to the fifth subdivision has crept into opinions in instances where the court has held the order then before it nonappealable. And then the order's nonappealability is usually predicated on an inability to come within the purview of other subdivisions and, in passing, the court summarily notes that the order is not rendered appealable by the fifth subdivision. A very frequent and time honored phrase, with variations in wording, is: "The order * * * is not appealable. It does not involve the merits of the action; it does not, in effect, determine the action; nor is it a final order affecting a substantial right in a special proceeding."217 Under this formula a number of orders have been held nonappealable under the fifth subdivision. Such orders seem so obviously nonappealable as not to merit discussion. Consequently, they will be disposed of by merely listing them: order refusing leave to file an amended complaint,218 order allowing an amendment to the reply,219 order appointing a committee to condemn land for a cemetery,220 order denying a motion for judg-

217. Forest Cemetery Association v. Constans, 70 Minn. 436, 73 N. W. 153 (1897).
218. Swanson v. Alworth, 157 Minn. 312, 196 N. W. 260 (1923) (even as against claim that such is necessary to constitute a complete cause of action).
220. Forest Cemetery Association v. Constans, 70 Minn. 436, 73 N. W. 153 (1897).
ment, order denying a motion to dismiss for laches, order refusing to set aside report of commissioners in proceedings for condemnation of land for a railroad, order refusing to affirm an order of the probate court allowing account of executor, order denying motion to dismiss appeal from probate court and an order impounding money until determination of whom is entitled thereto.

**Subdivision Six**

"From an order or judgment made or rendered in proceedings supplementary to execution:"

As earlier noted this provision was first enacted in 1889. It was compiled with the statute relating to proceedings supplementary to execution, and was not transferred to its present position until the revision of 1905.

At least three times prior to this it had been determined that orders made in proceedings supplementary to execution were orders made upon a summary application in an action after judgment. For such orders to be appealable, they had to fit within that part of the present subdivision seven which states: "from a final order affecting a substantial right made upon a summary application in an action after judgment."

In two of those cases the court held appealable under that subdivision an order directing a judgment debtor to pay the judgment creditor. In the other case, appeals were attempted from an order directing the appellant judgment debtor to appear for examination concerning his property, and from an order referring the matter to a referee to take appellant's answers. The former order was "in its nature, only initial or preliminary, to set the proceedings in motion. The latter was simply interlocutory and looked to further proceedings that would result in a final determination." Hence, neither order was final and so the court held them both nonappealable since neither fell within the scope of the seventh subdivision.

Although subdivision six has been a part of § 605.09 since 1905, only three cases have directly considered its scope—and only the

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222. Dady v. Peterson, 219 Minn. 198, 17 N. W. 2d 322 (1945).
225. Kelly v. Hopkins, 72 Minn. 258, 75 N. W. 74 (1898).
228. Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461 (1892) (order
first of the three contains any extended discussion of the intended scope of the subdivision. The dearth of authority on this part of the appeals statute is in part due to its very limited application—it is necessarily confined to only proceedings under chapter 575 of our statutes—and in part to the fact that thus far the court has contented itself with immediately proceedings to the merits of the appeal from orders made in proceedings supplementary to execution.

Although there is nothing in the terms of this subdivision to indicate that the order must be final, the first case dealing with it, by reference to Rondeau v. Beaumette, quite wisely read in the requirement of finality. Thus in West Publishing Co. v. De La Mott the order attempted to be appealed from, and held non-appealable, was an *ex parte* order directing the appealing defendant to appear before a referee for examination. The court said that it would be a reproach to the administration of justice to construe the subdivision so as to allow an appeal from *every* order in a proceeding supplementary to execution. The court also said: "We hold that the statute here in question does not give an appeal from an *ex parte* or preliminary or interlocutory order in proceedings supplementary to execution."

Thus it would seem that the requirement of finality of subdivision seven has been read into the sixth subdivision.

The court in Freeman v. Larson, the next case on the subject, recognizing that ordinarily an order for judgment is not under subdivision six. The court rested its holding that an order for judgment is appealable when made in a proceeding supplementary to execution solely upon quotation of the sixth subdivision.

Whether this was predicated upon a departure from the requirement of finality laid down in the *De La Mott* case is an open question. But if that was the intent it would seem safe to predict that the *De La Mott* case will remain the law and that *Freeman v. Larson* will not be extended to orders other than the one there before the court.

appealable); Knight v. Nash, 22 Minn. 452 (1876) (order appealable); Rondeau v. Beaumette, 4 Minn. 224 (Gil. 163) (1860) (order not appealable). 229. 4 Minn. 224 (Gil. 163) (1860). This is the case last mentioned in the text following n. 228, *supra*.

230. 104 Minn. 174, 116 N. W. 103 (1908).

231. 199 Minn. 446, 272 N. W. 155 (1937).

232. *Freeman v. Larson* was relied upon by way of footnote reference in Park Enterprises, Inc. v. Trach, 233 Minn. 473, 47 N. W. 2d 197 (1951). The order there held appealable was one releasing part of the funds caught by a levy of execution and to pay over the remainder, this order being made after parties requested the court to make findings of fact and conclusions of law upon stipulated facts.
The last case\textsuperscript{233} held appealable, as against the contention that it was not a final order in a special proceeding, an order made in a proceeding supplementary to execution requiring appellants to pay over funds to the receiver in the supplementary proceeding and denying appellant's motions for amended findings or a new trial. The order was held appealable under subdivision seven, and apparently also under subdivision six, and apparently also as "a final order in a summary proceeding." The pay over order would seem clearly appealable under subdivision six, or on authority of the \textit{Tostevin}\textsuperscript{234} case, under subdivision seven. That the court held the case appealable is clear; but the court's reasons therefor are unfortunately not so clear.

\textbf{SUBDIVISION SEVEN}

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

\textit{Definition of Special Proceeding}

Although this provision has never been altered\textsuperscript{235} it has caused the court, and perhaps the bar, a great deal of difficulty. Unfortunately it is impossible to give any precise definition of a "special proceeding." The Field Code as originally enacted defined it by stating that it was every remedy other than an action,\textsuperscript{236} "action" being defined as: "An action is an \textit{ordinary proceeding in a court of justice} by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence."\textsuperscript{237}

Our court has several times attempted a similar noble, but none to helpful, definition by stating: "'a special proceeding' is a generic term for any civil remedy in a court of justice which is not of itself an ordinary action and which, if incidental to an ordinary action, independently of the progress and course of procedure in such action, terminates in an order which, to be appealable pursuant to § 605.09(7), must adjudicate a substantial right with decisive

\textsuperscript{233} Northern National Bank v. McLaughlin, 203 Minn. 253, 280 N. W. 852 (1938).

\textsuperscript{234} Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461 (1892). One of the two cases referred to immediately following n. 228, \textit{supra}.

\textsuperscript{235} This subdivision antedates the enactment of the general appeal statute in 1856. It is found in almost precisely the same wording in Rev. Stat. 1851, c. 81, § 11(3). The provision appears to have been patterned after § 11(2) of the First Report of the Commissioners of the Field Code (1848).

\textsuperscript{236} New York Code of Procedure 1851, § 3.

\textsuperscript{237} New York Code of Procedure 1851, § 2.
finality separate and apart from any final judgment entered or to be entered in such action upon the merits.\textsuperscript{238}

Such definitions can be of only slight assistance in determining whether a certain matter is or is not a special proceeding within the meaning of this subdivision. Loose as the definitions are, they are probably as specific as the subject allows for the term "special proceeding" by its very nature covers a vast and diversified area and is desirably flexible enough to embrace new situations. Included within the framework of the term are: the extraordinary remedies,\textsuperscript{239} contempt,\textsuperscript{240} condemnation proceedings (eminent domain),\textsuperscript{241} determination of ownership of award paid into court in condemnation proceedings,\textsuperscript{242} garnishment,\textsuperscript{243} proceedings for attorney fees after divorce suit,\textsuperscript{244} proceedings by drainage engineer to obtain pay for services,\textsuperscript{245} corporate dissolution proceedings,\textsuperscript{246} proceedings to vacate a town plat,\textsuperscript{247} proceedings to establish a township road,\textsuperscript{248} proceedings for release from hospital for insane,\textsuperscript{249} insolvent proceedings (now suspended by federal bank-

\textsuperscript{238.} Chapman v. Dorsey, 230 Minn. 279, 41 N. W. 2d 438 (1950); Anderson v. Langula, 180 Minn. 250, 230 N. W. 645 (1930); Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014 (1901).

\textsuperscript{239.} Johnson v. City of Minneapolis, 209 Minn. 67, 295 N. W. 406 (1940) (certiorari); Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 615 (1890) (certiorari); State v. Webber, 31 Minn. 211, 17 N. W. 339 (1883) (mandamus); State \textit{ex rel.} Keyes v. Buckham, 29 Minn. 462, 13 N. W. 902 (1882) (habeas corpus).

\textsuperscript{240.} Semrow v. Semrow, 26 Minn. 9 (1879).

\textsuperscript{241.} \textit{In re} Condemnation of Lands Owned by Luhrs, 220 Minn. 129, 19 N. W. 2d 77 (1945) (dam); State, by Burnquist, Attorney General v. Fuchs, 212 Minn. 452, 4 N. W. 2d 361 (1942) (highway); Duluth Transfer Ry. v. Duluth Terminal Ry., 81 Minn. 62, 83 N. W. 497 (1900) (railroad); Conter v. St. P. & S. C. R. R., 24 Minn. 313 (1877) (railroad); Minnesota Valley R. R. v. Doran, 15 Minn. 230 (Gil. 179) (1870) (railroad); McNamara v. Minnesota Central Ry., 12 Minn. 388 (Gil. 269) (1867) (railroad); Turner v. Holleran, 11 Minn. 253 (Gil. 168) (1866) (mill dam). But see King v. Board of Education, 116 Minn. 433, 133 N. W. 1018 (1912) (damages appeal in district court said to be governed by rules relating to civil actions, including appealability of order).

\textsuperscript{242.} State, by Peterson v. Anderson, 207 Minn. 357, 291 N. W. 605 (1940).


\textsuperscript{244.} Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014 (1901).

\textsuperscript{245.} Gove v. County of Murray, 147 Minn. 247, 179 N. W. 569 (1920).

\textsuperscript{246.} \textit{In re} Dissolution of Olivia Co-op Merc. Co., 169 Minn. 131, 210 N. W. 628 (1926).

\textsuperscript{247.} Koochiching Co. v. Franson, 91 Minn. 404, 98 N. W. 98 (1904).

\textsuperscript{248.} \textit{In re} Appeal of Seward, 156 Minn. 229, 194 N. W. 378 (1923).

\textsuperscript{249.} State \textit{ex rel.} Sundberg v. District Court, 185 Minn. 396, 241 N. W. 39 (1932).
ruptcy act),\textsuperscript{250} election contests,\textsuperscript{251} proceedings in district court relating to receivers, executors, trustees and guardians.\textsuperscript{252}

The above list of instances of special proceedings for purposes of the appeals statute is not intended to be exhaustive but merely illustrative.\textsuperscript{253} Nor is it to be assumed that the court in the above types of situations always considers the appeal under subdivision seven. For example, the court in \textit{Security State Bank of Waldorf v. Brecht}\textsuperscript{254} considered a garnishment proceeding as a special proceeding within the meaning of this subdivision, but in \textit{Fulton v. Okes}\textsuperscript{255} spoke of garnishment as a civil action in determining the appealability of an order.

\textbf{Final Order}

Difficulty in determining what may or may not be deemed a special proceeding is only an initial problem. As indicated by the court's quoted definition of a special proceeding, to be appealable it must be a "final order" in a special proceeding. There is hopeless confusion in the various opinions of the court as to just what constitutes a final order. This confusion is caused partly by the diversified scope of proceedings and methods by which such proceedings may be finally concluded. It is due in part to an insistence by the court that the first six subdivisions relate to ordinary civil actions, whereas this is the only subdivision relating to special proceedings and thus the rules applicable to other subdivisions are not precedent here, a rule of thumb which the court itself continually violates with consequent unexplainable, inconsistent results. It is also

\textsuperscript{250} \textit{In re Jones}, 33 Minn. 405, 23 N. W. 840 (1885); \textit{In re Graeff}, 30 Minn. 358, 16 N. W. 395 (1883).

\textsuperscript{251} \textit{Hanson v. Emanuel}, 210 Minn. 51, 297 N. W. 176 (1941) (but seems to take proceeding out of subdivision seven by statute saying "as in other civil actions").

\textsuperscript{252} \textit{Atwood v. Holmes}, 229 Minn. 37, 38 N. W. 2d 62 (1949) (attorney fees in trust proceeding, not specifically so held, but by reference to earlier case); \textit{In re Melgaard}, 200 Minn. 493, 274 N. W. 641 (1937) (order setting aside order settling trustee's accounts appealable, not expressly held special proceeding, but by reference to \textit{In re Rosenfeldt}, infra); \textit{Macolmson v. Goodhue County Nat. Bank}, 198 Minn. 562, 272 N. W. 157 (1936) (trustee); \textit{In re Jaus}, 198 Minn. 242, 269 N. W. 457 (1936) (guardian); \textit{Fleischmann v. Northwestern Nat. B. & T. Co.}, 194 Minn. 234, 260 N. W. 313 (1935) (trustee); \textit{In re Rosenfeldt}, 184 Minn. 303, 238 N. W. 687 (1931) (trustee); \textit{Duncan v. Barnard Cope Mfg Co.}, 176 Minn. 470, 223 N. W. 775 (1929) (receiver).

\textsuperscript{253} A pauper's settlement proceeding, although not stated not to be a special proceeding, was said not to come under subdivision seven in \textit{In re Stewart}, 216 Minn. 485, 13 N. W. 2d 375 (1944) (appeal from judgment allowed). Basis for decision was long standing practice of dealing with the orders under other subdivisions. A settlement proceeding would, however, seem as much a special proceeding as many of those enumerated above.

\textsuperscript{254} 150 Minn. 502, 185 N. W. 1021 (1921).

\textsuperscript{255} 195 Minn. 247, 262 N. W. 570 (1935).
in part due to the feeling that § 605.08, relating to time to appeal, must be read in conjunction with subdivision seven so as to limit the time for appeal in special proceedings to thirty days. This latter, though based on the sound proposition that the time for attacking an action in special proceedings should be cut to a minimum, seems to produce a predisposition toward finding an order appealed from nonappealable. Perhaps the safest generalization that can be advanced as to this part of the subdivision is that a respondent seeking dismissal of the appeal stands a good chance of finding precedent for the order's nonappealability, regardless of what that order happens to be.

Because of this, no attempt will be made to exhaustively review what the court has done in applying this part of the seventh subdivision. Rather, illustrative examples of what has arisen will be briefly mentioned.

When the special proceeding, whether originally commenced in, or only removed to, the district court, is dismissed by that court for jurisdictional defects an appeal will lie to the supreme court on the basis that that constitutes a final order affecting a substantial right in the special proceeding.256 This is because the order finally disposes of the matter before the court. So also, an order refusing to dismiss a special proceeding is appealable when the motion denied raises jurisdictional questions.257 Even when the dismissal is not on jurisdictional grounds, the order of dismissal is nevertheless appealable under the seventh subdivision,258 and a later order refusing to vacate the dismissal order is not appealable.259 However, when the motion for dismissal is not based on jurisdictional grounds, an order refusing to dismiss the proceeding is not appealable, since the matter remains undisposed of before the court.260 The above stated rules would seem to fit any proceeding properly under this subdivision.

256. *In re* Appeal of Seward, 156 Minn. 229, 194 N. W. 378 (1923) (town plat); Gove v. County of Murray, 147 Minn. 24, 179 N. W. 569 (1920) (drainage engineer compensation).
257. Fulton v. Okes, 195 Minn. 247, 262 N. W. 570 (1935) (garnishment, calls this a civil action); Krafft v. Roy & Roy, 98 Minn. 141, 107 N. W. 966 (1906) (garnishment, relies on civil action cases).
258. *In re Jaus*, 198 Minn. 242, 269 N. W. 457 (1936); Cummings v. Edwards-Wood Co., 95 Minn. 118, 103 N. W. 709 (1905) (order discharging a garnishee for any cause is appealable); Mc'Connell v. Rakness, 41 Minn. 3, 42 N. W. 539 (1889) (discharge of garnishee).
259. *In re Jaus*, 198 Minn. 242, 269 N. W. 457 (1936).
Despite an early holding to the contrary, it is now well established that no appeal will lie from an order appointing commissioners in condemnation proceedings on the basis that such is merely an interlocutory order which is subject to later review even though the order determines that the land involved is necessary for the public use for which the condemnation proceedings have been instituted.

But under the old insolvency law an order appointing a receiver was deemed appealable under this subdivision. If the basis for this was that it adjudged the debtor insolvent and immediately and adversely affected his interests in his assets, similar reasons would be applicable where our present statutes provide for the appointment of a receiver. Consequently, it might be supposed that the court would allow an appeal from the order appointing a receiver, rather than to follow the rule of the condemnation cases.

It is also clear that an order refusing to set aside the report of the commissioners in condemnation proceedings is not appealable since it does not determine the proceedings. The court has also held that an order refusing to set aside the award of damages made by the commissioners is nonappealable.

Under the suspended insolvency statute an order requiring payment over to the receiver of the insolvent was an appealable order since it with finality affected substantial rights of the person compelled to make the payment. The same rule governed proceedings supplementary to execution while they were yet under the seventh subdivision. And it may well be assumed that such rule will pertain to any special proceeding, such as receivership, where the court may compel another to pay over. In garnishment proceedings the court in Security State Bank of Waldorf v. Brecht held that where the creditor of a garnishee is brought into the proceedings by an ex parte order that order is nonappealable because ex parte, but the order refusing to vacate that ex parte order deprives the creditor.

262. In re Condemnation of Lands Owned by Luhrs, 220 Minn. 129, 19 N. W. 2d 77 (1945); State, by Burnquist, Attorney General v. Fuchs, 212 Minn. 452, 4 N. W. 2d 361 (1942); Duluth Transfer Ry. v. Duluth Terminal Ry., 81 Minn. 62, 83 N. W. 497 (1900); Forest v. Cemetery Assn. v. Costans, 70 Minn. 436, 73 N. W. 153 (1897).
263. In re Graeff, 30 Minn. 358, 16 N. W. 395 (1883).
265. Kane v. Minneapolis & St. Louis Ry., 33 Minn. 419, 23 N. W. 854 (1885).
266. In re Jones, 33 Minn. 405, 23 N. W. 840 (1885).
268. 150 Minn. 502, 185 N. W. 1021 (1921).
of substantial rights and so is appealable under this subdivision. The substantial rights affected are that the creditor must either come in and defend or give up his claim to the debt owing. That these are such rights as merit protection by allowing an appeal at this early stage any more than analogous orders looking to lengthy proceedings in condemnation cases is open to serious doubt. In *Chapman v. Dorsey* the court recently cited the *Brecht* case with express approval, and if for no other reason, it may be assumed that the *Brecht* case will remain the law.

Many cases, however, based on the idea that the order refusing to vacate an *ex parte* order is appealable are not likely to be followed since the *Dorsey* case. Those cases blindly accepted a generalized statement of the *Brecht* case and said that an order refusing to vacate is appealable without also determining whether the last order affected substantial rights as was claimed to be so in the *Brecht* case. It was such a blind adherence that the *Dorsey* case repudiated. An example of such a case that probably would not be followed today is *Carlson v. Stafford.* In a garnishment proceeding the court there relied upon cases arising under the third subdivision in concluding that an order for judgment was nonappealable. But the court went on to hold that an order refusing to vacate the order for judgment was appealable. This latter order was said to fall within the *Brecht* case exception to the rule that an order refusing to vacate a nonappealable order is also nonappealable. So the court held the order to be a final order in a special proceeding, doing so chiefly on the admitted equities of that case.

Contempt cases present an extremely strict construction of what constitutes a final order. The early case of *Semrow v. Semrow* held that an order adjudging a party to be in contempt for failure to pay alimony and directing him to be committed to jail unless he purge himself of the contempt within a stated time was a conditional order, and not a final order until one of the two alternatives had occurred. Therefore, until it so became final it was not appealable under this subdivision. In less drastic situations appeals have been allowed from conditional orders. This rule places the contemnor in the precarious position of either having to pay that which on appeal might be determined he need not pay or go to jail for violation of an allegedly erroneous order. Why this "con-

269. 230 Minn. 279, 41 N. W. 2d 438 (1950).
270. 166 Minn. 481, 208 N. W. 413 (1926).
271. 26 Minn. 9, 46 N. W. 446 (1879).
272. See n. 91, *supra.*
ditional” order is not sufficiently final for purposes of appeal is hard to ascertain. The rule seems to be born of formalism rather than reality.

Unfortunately, later cases have fully accepted the Semrow case. Thus, in Plankers v. Plankers\(^{273}\) the court went to the extreme of holding conditional, and therefore nonappealable, an order compelling the defendant husband to pay arrearages within ten days, application for punishment for contempt having previously been dismissed by his wife. *Quaere:* did it take the passage of ten days to make this a final order? Also based on the Semrow case, the court early held nonappealable an order adjudging a party in contempt, but reserving till later the imposition of punishment.\(^{274}\)

One break in the stringent Semrow rule occurred when in Jackson v. Jackson\(^{275}\) the court held a *stayed* commitment order appealable. Under the Semrow rule the order committing (not conditional) is, of course, appealable under this subdivision.\(^{276}\)

Orders which allow the final accounts of the trustee, guardian or receiver are considered final orders for purposes of subdivision seven.\(^{277}\) The judgment purportedly entered upon such an order is not appealable.\(^{278}\)

The rule that the judgment entered pursuant to a final order is not appealable under subdivision seven cases is quite well established.\(^{279}\) The only trouble is that the rule is not always followed in cases that would seem to be clearly special proceedings; instead the rules as to new trial, judgment and orders looking to judgment of the other subdivisions are applied so as to make the “final” order a nonappealable intermediate order.\(^{280}\)

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273. 173 Minn. 464, 217 N.W. 488 (1928).
275. 168 Minn. 196, 209 N.W. 901 (1926).
280. E.g., *In re* Guardianship of Hudson, 220 Minn. 493, 20 N.W. 2d 330 (1945) (suit for restoration to competency, order denying new trial held appealable and court said could appeal from judgment, relying on § 605.09(1) to (6)). And in Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N.W. 224 (1896) the court held nonappealable an order refusing to strike objections to the account of a receivership trustee on the ground that it left
It was early held that an order granting a new trial, though appealable at the time under subdivision four, was not appealable when entered in a special proceeding because it was not a final order. At about the same time the court held that an appeal would lie from an order denying a new trial in a special proceeding because it denies the right to be heard over and substantially disposes of the case. But since then in State and Railroad & Warehouse Comm'n v. R. I. M. T. Co., arising under a special appeals statute which provided for appeals to be heard from judgments and final orders "as in civil actions," the court held that an order denying a new trial is not a final order so as to make it appealable. Since the reasoning of this case is fully applicable to subdivision seven cases, it is questionable whether the earlier case would be followed today.

In the field of domestic relations numerous incidental, although not necessary, orders may possibly come within the requirements of subdivision seven as a consequence of the court's language in Schuster v. Schuster. The court there felt that since an order awarding alimony pendente lite is ancillary to the main divorce action, the order might well be considered a final order in a special proceeding.

the matters still standing before the court. When the reverse situation arose in Fleischmann v. Northwestern Nat. B. & T. Co., 194 Minn. 234, 260 N. W. 313 (1935), and the lower court had discharged an order to show cause why an accounting by the trustee should not be had, the court relied on the Menage case to hold the order nonappealable on the ground that it did not finally dispose of the matter. This decision is either 1) clearly wrong or 2) based on the idea that this was merely an order preliminary to an appealable judgment. If the latter, then the court must have thought the rules as to the first six subdivisions, and not the last subdivision, were applicable. In re Hudson, 220 Minn. 493, 20 N. W. 2d 330 (1945) (action to restore an incompetent to competency, order denying new trial held appealable under subdivision four); Salo v. State, 188 Minn. 614, 248 N. W. 39 (1933) (state bank insolvency proceeding, appeal from order denying new trial allowed); In re Ahlman, 185 Minn. 650, 240 N. W. 890 (1932) (district court order affirming order of probate court requiring guardian and not ward to bear certain losses held not appealable); Ebeling v. Bayerl, 162 Minn. 379, 202 N. W. 817 (1925) (order of district court affirming order to probate court refusing to allow final account of administrator held nonappealable, court saying an appeal would lie from the judgment entered on district court's order). A partial explanation for this inconsistent treatment of appeals from judgments might be that the court at times seems to have felt this brought the action under subdivision one where the statute governing the special proceeding provides for entry of judgment, see, e.g., Ebeling v. Bayerl, supra. Citation of further such instances would be of slight value.


283. 209 Minn. 105, 295 N. W. 519 (1940).

284. 84 Minn. 403, 87 N. W. 1014 (1901).
There are numerous special appeals statutes. Many of them provide that appeals shall be had "as in civil actions." The court has taken two completely opposite views as to the applicability of subdivision seven where such a provision is involved. The clause has been construed not to take the case out of the subdivision. The opposite approach is taken in such cases as Hanson v. Emanuel where the court was of the opinion that when the statute had a provision that an election contest, admittedly a special proceeding, was to be tried as a civil action then an appeal lies from the order denying a new trial or from the judgment as in civil actions. The court said that such an order or the judgment would not be appealable if the appeal had to come under the seventh subdivision. Which line of cases will be followed in the future is impossible to predict.

Summary Application

The part of the seventh subdivision relating to orders made upon summary application encompasses those orders which may be entered after the judgment which are based upon or seek relief which affects the judgment. But to be appealable the order must be final and must substantially affect some rights of the parties. If one or the other of these is absent an appeal will not lie. But these requirements have not proved to be particularly difficult. If anything, this part of the seventh subdivision has not been utilized as fully as possible.

Supplementary to Execution

As was mentioned under subdivision six, before 1905 final orders in proceedings supplementary to execution were appealable under this part of the present subdivision seven. Should the sixth subdivision be repealed, such orders would yet retain their appealable status as orders made upon summary application. In addition to the pre-1905 orders discussed under the sixth subdivision an order granting leave to issue execution on the judgment was held to come within the terms of the summary application part of sub-

286. E.g., Johnson v. City of Minneapolis, 209 Minn. 67, 295 N. W. 406 (1940); McNamara v. Minnesota Cent. Ry., 12 Minn. 388 (Gil. 269) (1867).
287. 210 Minn. 51, 297 N. W. 176 (1941). See also, e.g., King v. Board of Education, 116 Minn. 433, 133 N. W. 1018 (1912) (appeal from order for new trial in condemnation case); Witt v. St. Paul & Northern Pacific Ry., 35 Minn. 404, 29 N. W. 161 (1886) (appeal from judgment in condemnation case).
288. See Rondeau v. Beaumett, 4 Minn. 224 (Gil. 163) (1860).
289. See Gasser v. Spalding, 164 Minn. 443, 205 N. W. 374 (1925).
division seven and so was appealable.\(^{290}\) Also, an order vacating an execution sale and the sheriff's certificate was a final order affecting a substantial right made upon summary application in an action after judgment.\(^{291}\) And an order requiring a sheriff to pay over the proceeds of an execution sale was similarly appealable.\(^{292}\)

**Satisfaction of Judgment**

An order which refuses to satisfy the judgment of record after settlement wherein it is agreed that judgment should be cancelled and satisfied as of record is a final determination of a substantial right after judgment so as to be appealable.\(^{293}\) An order which modifies a judgment after it has been satisfied of record is appealable for the same reason\(^{294}\) even though such modification is proper. Nor is it necessary that the judgment be satisfied. An order which amends the judgment comes within the purview of this part of the subdivision.\(^{295}\)

**Unauthorized Judgment**

An order refusing to modify a default judgment so that the judgment does not exceed the prayer for relief is appealable under the provision here considered.\(^{296}\) Such judgments are unauthorized and thus may be vacated on motion. The court early suggested that where a clerk enters a default judgment upon insufficient proof of service of summons, this was not to be corrected by a direct appeal to the supreme court but rather the correction should be sought from the district court. From the district court's determination thereon an appeal will then lie to the supreme court under this subdivision.\(^{297}\)

**Vacating Judgment**

The court at an early date held that an appeal would lie from an order refusing to open a judgment when the court by the special statute under which the action arose (tax case) was given discre-

\(^{290}\) Entrop v. Williams, 11 Minn. 381 (Gil. 276) (1866) (at time of decision could get execution upon district court's approval after five years after judgment).

\(^{291}\) Hutchins v. Carver County, 16 Minn. 13 (Gil. 1) (1870); Tillman v. Jackson, 1 Minn. 183 (Gil. 157) (1854).

\(^{292}\) Coykendall v. Way, 29 Minn. 162, 12 N. W. 452 (1882).

\(^{293}\) Ives v. Phelps, 16 Minn. 451 (Gil. 407) (1871).


\(^{295}\) McElroy v. Board of Education, 184 Minn. 357, 238 N. W. 681 (1931).

\(^{296}\) Nelson v. Auman, 221 Minn. 46, 20 N. W. 2d 702 (1945); Halvor森 v. Orinoco Mining Co., 89 Minn. 470, 95 N. W. 320 (1903) (see text to n. 45 and 46, supra, for comments and criticism of rule of these cases).

\(^{297}\) Masterson v. Le Claire, 4 Minn. 163 (Gil. 108) (1860).
tionary power to vacate the judgment. The basis for this was that the order was a final order affecting a substantial right made upon summary application. It would seem that this case placed the appealability of the order refusing to vacate under the proper subdivision, and that similar orders which arose under the now superseded § 544.32 and other orders vacating or refusing to vacate a judgment that have been held appealable under the third subdivision should have been brought under this subdivision as orders made upon summary application in an action after judgment.

The court, however, has not permitted an appeal from all orders refusing to vacate a judgment. In Gasser v. Spalding the court held that when the motion preliminary to the order refusing to vacate the judgment is not based on the discretionary or "good cause shown" (e.g., fraud on the court) parts of § 544.32 nor on the contention that the judgment was unauthorized (as opposed to erroneous), then the order refusing to vacate the judgment is not appealable. The court said that such an order affects no substantial rights of the movant. The Spalding case has been followed in later cases which have laid down the proposition that when the grounds for moving for such an order were matters that could be raised on an appeal from the judgment itself, the order is not appealable. The court in these cases was concerned with the fact that an opposite rule would open the door to making meaningless the legislature's limit upon the time to appeal from a judgment.

Greater Possible Use

One case seems particularly appropriate to illustrate the greater use to which this part of the subdivision could be put. After a divorce an application was made to reduce the required alimony payments. After a hearing on the merits an order was made refusing the requested reduction. On the appeal therefrom the court held the order appealable even though prior cases had questioned the appealability of such an order. No reasons were given for holding the order appealable even though prior cases had questioned the appealability of such an order. No reasons were given for holding the order appealable. But the order would seem to come squarely within "from a final order, affecting a substantial right, made upon a summary application in an action after judgment" and so should be appealable.

299. 164 Minn. 443, 205 N. W. 374 (1925).
ORDERS REFUSING TO VACATE PRIOR ORDER\textsuperscript{302}

It has already been pointed out that the court has held that an order vacating an appealable order is itself appealable.\textsuperscript{303} The court has recently clarified the appealability of orders in the two other possible situations of orders refusing to vacate prior orders. In each of the two situations there had been cases reaching opposite results, and the court expressly overruled each line which favored appealability. Thus, in Bennett v. Johnson\textsuperscript{304} the court held that an order refusing to vacate a prior appealable order was itself nonappealable, reaffirming that line of cases which so held.\textsuperscript{305} And in Chapman v. Dorsey\textsuperscript{306} the court held that an order refusing to vacate a nonappealable order was also nonappealable, and further said that the same is true of an order vacating a prior nonappealable order. In doing so Chapman v. Dorsey also reaffirmed a long series of cases.\textsuperscript{307}

But there is an exception to the rule of Chapman v. Dorsey, as that case itself noted. Where the first order is nonappealable only because made upon ex parte application, then the motion to vacate cures that feature and so the order refusing to vacate gains the appealable status which the first order would have had but for its ex parte nature.\textsuperscript{308} The express terms of the second subdivision so provide as to injunctions for an order refusing to vacate an ex parte injunction (or restraining order) is an order refusing to dissolve an injunction.

\textsuperscript{302} For a fuller discussion of the problem, see Note, 35 Minn. L. Rev. 640, at 648-52, 657 (1951).

\textsuperscript{303} See text to n. 127 and 128, supra.

\textsuperscript{304} 230 Minn. 404, 42 N. W. 2d 44 (1950). For subsequent cases reaching same result, see Burkholder v. Burkholder, 231 Minn. 285, 43 N. W. 2d 801 (1950); In re County Ditch No. 27, Renville County, 232 Minn. 329, 45 N. W. 2d 555 (1951).

\textsuperscript{305} E.g., Trickel v. Calvin, 230 Minn. 322, 41 N. W. 2d 426 (1950); Kolb v. City of Minneapolis, 229 Minn. 483, 40 N. W. 2d 619 (1949); In re Jaus, 198 Minn. 242, 269 N. W. 457 (1936); Barret v. Smith, 183 Minn. 431, 237 N. W. 15 (1931); Worrell v. Maier, 177 Minn. 474, 225 N. W. 399 (1929); Little v. Leighton, 46 Minn. 201, 48 N. W. 778 (1891).

\textsuperscript{306} 230 Minn. 279, 41 N. W. 438 (1950).

\textsuperscript{307} E.g., Marty v. Nordby, 201 Minn. 469, 276 N. W. 739 (1937); Davis v. Royce, 174 Minn. 611, 219 N. W. 928 (1928); Brochin v. Lifson, 172 Minn. 51, 215 N. W. 180 (1927); Lockwood v. Bock, 46 Minn. 73, 48 N. W. 488 (1891); Brown v. Minnesota Thresher Mfg. Co., 44 Minn. 322, 46 N. W. 560 (1890).

\textsuperscript{308} McNamara v. Minnesota Central Ry., 12 Minn. 388 (Gil. 269) (1867); State v. District Court, 52 Minn. 283, 53 N. W. 1157 (1893); Security State Bank v. Brecht, 150 Minn. 502, 185 N. W. 1021 (1921).
APPEALABLE ORDERS IN MINNESOTA

Appeal from the "Whole Order"

§ 605.06

As already noted no appeal lies from an order granting or denying a motion for judgment notwithstanding the verdict.\textsuperscript{308a} Nor since 1913 has an order granting a new trial been appealable except in increasingly limited situations.\textsuperscript{309} But if a blended, \textit{i.e.}, alternative, motion for judgment n.o.v. or a new trial is made, will the court's order then be appealable?

If the court denies both parts of the motion then no difficulty arises because the order denying a new trial is appealable under § 605.09(4).

If, however, the court grants any of the other alternatives a problem may arise if the appeal is from the "whole order." The solution depends upon whether § 605.06 is an appealable order statute. Curiously enough, the court has considered it as both increasing its appellate jurisdiction and not expanding it.\textsuperscript{310}

Section 605.06 was the first enacted in 1895\textsuperscript{311} and was four times amended\textsuperscript{312} before being partially superseded by Rule 50.02.\textsuperscript{313}

\textsuperscript{308a} See n. 117 and 118, supra.

\textsuperscript{309} See text to n. 180-199, supra.

\textsuperscript{310} Compare, \textit{e.g.}, Snyder v. Minnetonka & W. B. Nav. Co., 151 Minn. 36, 185 N. W. 959 (1921) (blended motion, judgment n.o.v. granted, order appealable under § 605.06); Kernan v. St. Paul City Ry., 64 Minn. 312, 67 N. W. 71 (1896) (same), with Johnson v. Burmeister, 176 Minn. 302, 223 N. W. 146 (1929): "Note the wording on 'appeal from the judgment,' not on appeal from the order. We do not think § 9495 [§ 605.06], as it now reads, was mean to increase the appealable orders beyond the ones specified in § 9498 [§ 605.09]." See also, \textit{e.g.}, Kommerstad v. Great Northern Ry., 125 Minn. 297, 146 N. W. 975 (1914) (present § 605.09 considered controlling over present § 605.06).

\textsuperscript{311} Minn. Laws 1895, c. 320: "In all cases where at the close of the testimony in the case tried a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted."

\textsuperscript{312} Rev. Laws 1905, § 4362; Minn. Laws 1913, c. 245; Minn. Laws 1915, c. 31; Minn. Laws 1917, c. 24. The only amendment important for our purpose was the rather thorough one of the revisors of 1905. The statute was then amended to read in part: "If the motion for judgment notwithstanding the verdict be denied, the supreme court may order judgment to be so entered 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." This language has remained the same since 1905.

\textsuperscript{313} Rule 50.02 and § 605.06 now read so far as is here pertinent: Rule 50.02 "(2) A motion for judgment notwithstanding the verdict may include in the alternative a motion for a new trial. When such alternative motion
The only two significant changes for appeal purposes were those in 1905 and that effected by the Rules.

This statute relates only to jury trials. And for appeal purposes the court has held it inapplicable to orders entered after blended motions in court cases.\textsuperscript{314}

Before 1913 the only problem that could arise if a new trial was granted after a blended motion, was whether the movant who sought the new trial could take the appeal. He could not appeal from only that part which denied his motion for judgment n.o.v.\textsuperscript{315} But, relying on § 605.06, the court in the \textit{Kals}\textsuperscript{316} and \textit{Handley}\textsuperscript{317} cases held that where a new trial was granted the movant could appeal from the "whole order." Certainly the movant was not an "aggrieved party"\textsuperscript{318} as to the order granting a new trial, and the order denying his motion for judgment non obstante is not separately appealable. Thus, appealability had to depend upon a notice of appeal which specified an appeal from the "whole order."

After the 1913 act drastically reduced the appealability of an order granting a new trial, the court in \textit{Kommerstad v. Great Northern Ry.}\textsuperscript{319} threw out the \textit{Kals} and \textit{Handley} rule. On a blended motion the court in that case denied judgment n.o.v. but granted a new trial, doing so in one order. Neither order was separately appealable, "so *** we have two nonappealable orders, embodied in one, and the fact that they are so blended does not give them an

\begin{itemize}
  \item is made and the court grants the motion for judgment notwithstanding the verdict, the court shall at the same time grant or deny the motion for a new trial, but in such case the order on the motion for a new trial shall become effective only if and when the order granting the motion for judgment notwithstanding the verdict is reversed, vacated, or set aside." Section 605.06 "If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be entered, *** and it may also 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."
\end{itemize}

\textsuperscript{314} Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N. W. 428 (1909); Noble v. Great Northern Ry., 89 Minn. 147, 94 N. W. 434 (1903); Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768 (1901). When the applicability of this section to a court case was first presented, the issue was expressly left undecided, see Savings Bank of St. Paul v. St. Paul Plow Co., 76 Minn. 7, 78 N. W. 373 (1899). See also Marso v. Graif, 226 Minn. 540, 33 N. W. 2d 717 (1948).

\textsuperscript{315} St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077 (1897).

\textsuperscript{316} Kalz v. Winona & St. Peter Ry., 76 Minn. 351, 79 N. W. 310 (1899).

\textsuperscript{317} Westacott v. Handley, 109 Minn. 452, 124 N. W. 226 (1910). In St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077 (1897), when this issue was first raised by the court, it questioned the right of the movant to appeal, but expressly left the issue undecided.

\textsuperscript{318} § 605.09.

\textsuperscript{319} 125 Minn. 297, 146 N. W. 975 (1914).
appealable character. ** the joinder of two nonappealable orders does not transform them into one that is appealable.**

The court rejected the claim that § 605.06 made them appealable. Since Kommerstad neither party can appeal from the whole order which grants a new trial,** unless the order comes within § 605.09(4), and then only the person thus deprived of the verdict may appeal.

Since an order denying judgment notwithstanding the disagreement of the jury is nonappealable,** by analogy an order which permits a retrial of the action after a blended motion would also be nonappealable.

Although the supreme court's power to act under the 1895 act was predicted upon an "** appeal from an order granting or denying a motion for a new trial **,"** in 1896 the court in the Kernan** case held appealable an order granting judgment n.o.v. upon a blended motion. It reasoned that the legislature must have intended such an order to be appealable as were orders denying the whole motion or which granted a new trial. Twice thereafter the court said the order granting judgment n.o.v. after a blended motion was appealable.** But by way of dictum in Kommerstad** case the court said such an order was not appealable.

320. Kommerstad v. Great Northern Ry., 125 Minn. 297, 146 N. W. 975 (1914).

321. Drcha v. Great Northern Ry., 178 Minn. 286, 226 N. W. 846 (1929); Snure v. Joseph Schlitz Brewing Co., 139 Minn. 516, 166 N. W. 1068 (1918); Greenberg v. National Council K. & L. of S., 132 Minn. 84, 155 N. W. 1053 (1916); Ness v. Supreme Lodge of Order of Columbian Knights, 129 Minn. 530, 152 N. W. 1102 (1915); Hansen v. Great Northern Ry., 125 Minn. 524, 146 N. W. 976 (1914); see Snyder v. Minnetonka & W. B. Nav. Co., 151 Minn. 36, 40, 185 N. W. 959, 961 (1921), where the court said: "** if a new trial is granted neither party can appeal, unless the order recites that it is granted exclusively for errors of law, and then only the party against whom the motion was made can appeal." But see Lincoln v. Ravicz, 174 Minn. 237, 219 N. W. 149 (1928), where defendant tried to appeal from that part of the order denying judgment n.o.v., the court said: "The appeal ** is ineffectual. The result might be different had the appeal been from the whole order." Citing the obsolete Katz and Handley cases.


324. Minn. Laws 1895, c, 320, supra n. 311.


326. Peterson v. Minneapolis Street Railway Co., 90 Minn. 205, 95 N. W. 751 (1903); Steidl v. McClymonds, 90 Minn. 205, 95 N. W. 906 (1903). In the Peterson case he opinion is silent as to whether the appeal was from the "whole order." In the Steidl case the appeal was from the judgment and what was said is dictum relying on the Peterson case.

327. Kommerstad v. Great Northern Ry., 125 Minn. 297, 299, 146 N. W. 975, 976 (1914). The court stated: "Under the present statutory provisions upon the subject, plaintiff could not appeal ** from the whole order had defendant's motion for judgment been granted." The Kernan case was not mentioned.
This *Konnerstad* dictum was expressly repudiated as inadvertent and the *Kernan* rule reaffirmed in *Snyder v. Minnetonka & W. B. Nav. Co.* But under the *Snyder* case for the order granting granting judgment after a blended motion to be appealable, the appeal must be from the "whole order."329

In the *Snyder* case the court adopted the reasoning of the *Kernan* case. It also argued that because judgment n.o.v. was granted, had the court passed on the motion for a new trial it would have been granted exclusively for the error of law in not directing a verdict. The court's unstated by necessary conclusion that the order therefore is appealable under § 605.09(4) is questionable for two reasons. First, the court in fact did not grant a new trial. Second, even assuming it had, insufficiency of evidence as a matter of law is not an "error of law" contemplated by § 605.09(4).330

The holding in the *Kernan* and *Snyder* cases is also subject to criticism upon two grounds. First, there is nothing to suggest that § 605.06 as originally enacted or subsequently amended was intended as an appealable order statute. Quite obviously it was first enacted as a legislative sanction of the practice of moving for judgment non obstante. It more properly belongs with the practice statute than in the chapter of our statutes dealing with appeals from the district court. The court at least once has said: "We do not think § 9495 [§ 605.06], as it now reads, was meant to increase the appealable orders beyond the ones specified in § 9498 [§ 605.09]."331 Even if it were an appealable order statute, this section has always been entirely devoid of any language authorizing an appeal from an order granting judgment notwithstanding. Since 1905, when the "whole order" phrase first appeared, the section has read: "* * * on appeal from the whole order denying such

328. 151 Minn. 36, 185 N. W. 959 (1921). Again the opinion does not affirmatively disclose that the appeal was from the "whole order."

329. Mallery v. Northfield Seed Co., 194 Minn. 236, 259 N. W. 825 (1935) (new trial granted after blended motion, thereafter a motion to vacate this order and order judgment n.o.v. was granted. Appeal from latter order dismissed as not being from whole order); Rieke v. St. Albans Land Co., 179 Minn. 392, 229 N. W. 557 (1930). In the Rieke case the appeal was dismissed where it was only from the portion of the order granting judgment n.o.v. (judgment n.o.v. ordered as to part and a new trial denied as to part) entered after a blended motion. The court's own headnote states: "Where an alternative motion for judgment non obstante or for a new trial is made an appeal may be taken from the whole order disposing of the motion, but not from only that part granting or denying judgment."


motion [for judgment n.o.v.] when made in the alternative form * * *.” Yet, the court has held that the right to appeal is statutory; a jurisdictional prerequisite to appealability.322

However, until the Snyder case is discarded § 605.06 is important as an appealable order statute in the single situation of making orders for judgment n.o.v. appealable if the appeal is taken from the “whole order.”323

CONCLUSION

From the foregoing it is obvious that some changes are in order. Others will present themselves upon further reflection.

Basic to any proposal to improve appeals statutes is the determination of the proper balance between two conflicting goals. On the one side is the desire for one-package appeals. On the other side is the undesirability of continuing without correction proceedings in an action which would be predicated upon an error of the trial court that would ultimately require reversal on appeal. Unlike the Rules of Civil Procedure, the federal practice does not provide a tailor-made solution.324 Blind adoption of the federal practice would only compound the confusion and further entangle us in the mesh of jurisdictional prerequisites.

But even more important than changing some details of what orders are appealable and clearing away much of the confusion existing in the case law is the consideration of a possible alteration of approach to appealable orders. The most urgent need in Minnesota is to repudiate either by judicial pronouncement or by legislative enactment the “jurisdictional prerequisite” approach to appealable orders. Only then can the proper perspective between the merits of the action and the technique of getting the case before the supreme court be realized. If this is to be accomplished by legislative action then the supreme court should be specifically authorized to hear appeals from nonappealable orders should it choose to do so in the exercise of its discretion.

322. See n. 20, supra.
333. Rule 50.02 is obviously predicated in part upon the continuing vitality of the Snyder case.
324. For instance, what is a “final decision” within the meaning of 28 U. S. C. A. § 1291? E.g., compare United States v. 243.22 Acres of Land, 129 F. 2d 678 (2d Cir. 1942), with City of Louisa v. Levi, 140 F. 2d 512 (6th Cir. 1944), and compare St. Louis Amusement Co. v. Paramount Film Distri. Corp., 156 F. 2d 400 (8th Cir. 1946), with In re Forstner Chain Corporation, 177 F. 2d 572 (1st Cir. 1949).