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NOTE

SCOPE OF REVIEW IN MINNESOTA AND ITS DEPENDENCE UPON THE FORM OF APPEAL TAKEN

INTRODUCTION

In Crawford v. Woodrich Construction Co.,1 a 1952 per curiam decision of the Minnesota Supreme Court, there appeared the following statement:

"as any person who is informed in this matter knows, questions that can be raised for review on appeal from an order denying a motion for a new trial are quite different from and broader than those that can be raised on appeal from an adverse judgment."2

This Note will address itself to the determination of the meaning and significance of this statement and will also attempt to ascertain what questions are reviewable by the supreme court when an appeal is taken from a judgment or from any of the other orders which are appealable under the Minnesota Statutes.3 The problem here is not to discover what orders are appealable, but rather to show what questions can be reviewed on the various appeals that the statute allows. This Note will include a discussion of the proper methods of preserving a question for review only insofar as that problem relates to the principal problem.

The scope of review requires definition because in many instances the supreme court has refused to review a particular question on the ground that the order appealed from does not properly raise the question for which review is asked. Accurate knowledge of the scope of review is especially important to the lawyer’s decision whether to appeal from the judgment or from the order denying new trial. It may seem that the danger of raising a particular question on the wrong appeal can be eliminated by appealing from both the judgment and the order denying new trial.4 The Minnesota bar, however, has not shown a tendency to adopt such a practice, probably because of several factors. First, it seems that an entered judgment carries with it a stigma which attorneys seek to avoid. Second, it appears that lawyers appeal from an order denying new trial rather than from a judgment as a matter of habit, the source of which is unknown. Also, there seems to be some prac-

1. 236 Minn. 547, 51 N. W. 2d 822 (1952).
4. See In re Estate of Hore, 220 Minn. 365, 19 N. W. 2d 778 (1945).
tical advantage to an appeal from an order denying new trial. The Minnesota Rules of Civil Procedure and the statutes make it possible to avoid entry of judgment before the appeal from an order denying new trial is consummated.\(^5\) The risk run on appeal from a judgment that a judgment lien may attach\(^6\) and that execution may be levied between the time of the entry of judgment and the filing of supersedes bond\(^7\) may thus be avoided by appealing from the order denying new trial.

Appeals from most of the intermediate orders pose no intricate problems in scope of review because our court has held reviewable only the single issue presented by the motion upon which the intermediate order is made.\(^8\) In this respect these appeals differ not only from appeals taken from orders determining a motion for new trial and alternative motions for judgment notwithstanding the verdict or new trial, but also from appeals from a judgment entered, all of which may require the review of more than one question.

**Appeals from a Judgment or an Order Denying a New Trial**

The problems of which questions are reviewable on appeal from a judgment and which are reviewable on appeal from an order denying new trial will be considered together in order to make clearer the differences in scope of review which exist between them.

In *Shema v. Thorpe Bros.*,\(^9\) the court held that “in determining the proper scope of review on appeal from a judgment, this court looks to the origin of the judgment.”\(^10\) In defining the scope of review on appeal from an order denying new trial, the court has said that “an appeal from an order brings up for review only the regularity of those things which were involved in the order.”\(^11\) Obviously

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5. Minn. R. Civ. P. 58.02 allows the trial court to stay entry of judgment not more than thirty days after determination of the motion for new trial, during which time appellant may file supersedes bond pursuant to Minn. Stat. § 605.11 (1953) and thus suspend the power of the trial court to enter judgment.
6. Minn. Stat. § 548.09 (1953) provides that a judgment lien does not attach until docketing of the judgment.
7. Minn. Stat. § 605.12 (1953) provides that supersedes bond may be filed to suspend execution of an entered judgment pending appeal therefrom.
8. Potter v. Holmes, 72 Minn. 153, 75 N. W. 591 (1898); Hospes v. Northwestern Mfg. & Car Co., 41 Minn. 256, 43 N. W. 180 (1889); Papke v. Papke, 30 Minn. 260, 15 N. W. 117 (1883); Griffin v. Jorgenson, 22 Minn. 92 (1875).
9. 238 Minn. 470, 57 N. W. 2d 157 (1953).
neither statement really defines the scope of review for a practitioner dealing with a specific problem. He still must determine what can constitute the "origin of the judgment" and what "things" can be "involved" in a particular order. It is necessary, therefore, to examine the cases that have classified specific questions assigned as error within the scope of review of either appeal.

**Intermediate Orders**

Section 605.09(1) of the Minnesota Statutes provides that on appeal from the judgment "the court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from." Generally, both non-appealable orders and appealable orders from which no appeal has been taken come within the scope of this provision, and it does not matter that the time for appeal from the appealable orders has run.

The case law does not set down any clear definition of the words "involving the merits or necessarily affecting the judgment." Some help is derived from the cases which interpret the phrase "involving the merits" as it is used in section 605.09(3) of the statutes. These cases construe the phrase to refer to an order which decides the "positive" or strict legal rights of the parties as opposed to an order which settles questions of practice and procedure or which depends upon the discretion of the trial court. An enlightening discussion of what constitutes an order "involving the merits" can be found in an article by Alan Cunningham, cited in footnote three of this Note. Because this phrase does not appear to have had any real limiting effect on the scope of review on appeal from a judgment, any discussion of particular orders here would not be helpful.

There does not appear to have been any attempt by the court to define comprehensively which orders are orders "affecting the judgment." The court has been content instead to decide whether a given question is reviewable or not as specific questions arise. It may be helpful to examine first the orders which the court has refused to review on appeal from judgment.

On an appeal from a judgment of dismissal without prejudice, the court, in *Bolstad v. Paul Bunyan Oil Co.* refused to review

14. Minn. Stat. § 605.09(3) (1953). This section makes possible an appeal "from an order involving the merits..."
15. See, e.g., National Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 570 (1888); County of Chisago v. St. Paul & Duluth R. R., 27 Minn. 109, 6 N. W. 454 (1880). See also Cunningham, supra note 3, at 323-36.
16. 215 Minn. 166, 9 N. W. 2d 346 (1943).
an order denying a motion for judgment notwithstanding the
disagreement of the jury. The court’s reason for so refusing was
that the order was not a part of the proceedings resulting in the
judgment of dismissal. In that case the decision of the court seems
to have been motivated by the logical conclusion that an order
involving a consideration of the merits of the action could not be
said to affect a judgment based upon an order dismissing the
action on a procedural ground. Although the order did involve
the merits, the judgment itself did not. Thus it may be possible that
this case engrafts an exception on the statute that judgments grant-
ed on procedural grounds may only be attacked on the same
grounds.

In Keegan v. Peterson the defendant, appealing from a judgment
notwithstanding a demurrer, sought review of an order refusing
leave to file an answer, but the court would not review the order
because it did not involve the merits or affect the judgment. The
reason underlying the Keegan holding was not set out in the
opinion, but the likelihood of that decision’s having any future
effect is minimal in view of the fact that the question in that case
arose out of the technical procedural practices of 1877, which have
been replaced by the less technical Rules of Civil Procedure. Thus
the cases holding that a particular order does not affect the judg-
ment are only two, and these involve special situations. Of course,
orders made subsequent to entry of judgment are not intermediate
orders and, therefore, are not reviewable on appeal from the judg-
ment. There is no indication from the cases that the phrase “affect-
ing the judgment” has any real limiting effect on the scope of
review on appeal from the judgment.

The word “affect” is defined to mean “to act upon, change, or
influence.” As it is used in the present context it could have either
a broad or narrow meaning. If used broadly, it would mean that
any order which might change or influence the judgment shall be
reviewed. If used narrowly, it would mean that only those orders
shall be reviewed which if reversed would definitely result in

17. 24 Minn. 1 (1877).
18. Rule 12.01 of the Minnesota Rules of Civil Procedure provides for
the serving of an answer after denial of a motion equivalent to the demurrer
of the defendant in the Keegan case.
19. Nelson v. Auman, 221 Minn. 46, 20 N. W. 2d 702 (1945); Mc-
Govern v. Federal Land Bank, 209 Minn. 403, 296 N. W. 473 (1941); In re
Liquidation of People’s State Bank, 197 Minn. 479, 267 N. W. 482 (1936).
This rule does not, however, prohibit review of the taxation of costs and
disbursements on appeal from a judgment, since they are an integral part of
the judgment even though it be entered prior to their determination. Fall v.
Moore, 45 Minn. 517, 48 N. W. 404 (1891).
judgment for the appellant. An example of the latter type of order is one denying a motion for judgment notwithstanding the verdict.

There is no evidence, however, of the adoption of such a limited meaning in the decisions of the court. On the contrary, the court has stated that an order of reference, an order denying a motion for joinder of additional parties, an order on a motion to make a complaint more definite and certain, and a ruling on the admissibility of evidence are reviewable on appeal from a judgment. Since none of these is an order "involving the merits," they must have been regarded as orders "affecting the judgment:" yet a contrary decision on any of the motions would not definitely produce a contrary judgment.

The adoption of the broader definition of the word "affecting" would seem to be grounded in justice. An erroneous order on any of the above motions might well dilute the rights of the appealing party, and thereby entitle him to a reversal of the judgment against him. With respect to those orders mentioned which could be made before trial, if they could not be reviewed on appeal from the judgment, they would never be reviewed, and the party opposing the order might be done an injustice. It seems, therefore, that any intermediate order should be reviewable on appeal from the judgment, unless it falls within the scope of the Bolstad holding.

There is language in support of this proposition in Rase v. Minneapolis, St. P. & S. Ste. M. Ry. Furthermore to adopt the narrow interpretation of the word "affecting," so that the only reviewable orders would be those which if reversed would result in certain judgment for the appellant, would be to render meaningless the supreme court's statutory power to grant a new trial on appeal from the judgment.

The court has stated that the following orders are reviewable on appeal from the judgment entered: an order on a motion to

25. See cases cited notes 21-24 supra.
26. Orders made before trial are not reviewable on appeal from an order denying new trial. See discussion below at pp. 116-118.
27. Bolstad v. Paul Bunyan Oil Co., 215 Minn. 166, 9 N. W. 2d 346 (1943) (orders not a part of the proceedings resulting in judgment may not be reviewed on appeal from that judgment).
28. 118 Minn. 437, 443, 137 N. W. 176, 179 (1912).
29. Minn. Stat. § 605.05 (1953).
amend the pleadings;\textsuperscript{30} an order refusing to set aside service of summons;\textsuperscript{31} an order refusing to strike a case from the calendar;\textsuperscript{32} pre-trial discovery orders;\textsuperscript{33} an order sustaining a demurrer and denying leave to amend;\textsuperscript{34} an order by the district court dismissing an appeal from municipal court;\textsuperscript{35} an order submitting the cause to arbitration;\textsuperscript{36} an order for judgment notwithstanding the demurrer, the demurrer not being stricken out;\textsuperscript{37} an order granting or denying a change of venue;\textsuperscript{38} an order on a motion to strike a part of the complaint;\textsuperscript{39} an order on a motion to amend the findings of fact and conclusions of law;\textsuperscript{40} an order denying a motion to strike out a bill of exceptions;\textsuperscript{41} an order dealing with taxation of costs;\textsuperscript{42} an order granting a partial judgment notwithstanding the verdict;\textsuperscript{43} an order directing delivery of personal property to the sheriff for sale;\textsuperscript{44} and an order for more definite and certain findings of fact and conclusions of law.\textsuperscript{45}

It is important to note that the supreme court has held that an order denying new trial made before entry of judgment is reviewable on appeal from the judgment.\textsuperscript{46} This fact seems to imply that all questions reviewable on appeal from an order denying new trial are reviewable on appeal from the judgment if an order deny-

\textsuperscript{31}. Crow v. Erie R. R., 153 Minn. 553, 190 N. W. 339, 340 (1922) (dictum); State ex rel. Eau Claire Dells Improvement Co. v. District Court, 26 Minn. 233, 235, 2 N. W. 698, 700 (1879) (dictum).
\textsuperscript{32}. Chadbourn v. Reed, 83 Minn. 447, 449, 86 N. W. 415, 416 (1901) (dictum).
\textsuperscript{34}. Dishbrow v. Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115 (1910); Seagram-Distillers Corp. v. Lang, 230 Minn. 118, 120, 41 N. W. 2d 429, 430 (1950) (dictum); Johnson v. Union Savings Bank & Trust Co., 196 Minn. 588, 589, 266 N. W. 169, 170 (1936) (dictum).
\textsuperscript{35}. Thompson v. Berg, 154 Minn. 149, 150, 191 N. W. 412 (1923) (dictum).
\textsuperscript{36}. Heglund v. Allen, 30 Minn. 38, 14 N. W. 57 (1882).
\textsuperscript{37}. Keegan v. Peterson, 24 Minn. 1 (1877).
\textsuperscript{38}. Schoo v. Winona & St. Paul R. R., 55 Minn. 479, 57 N. W. 208 (1893); Hinds v. Backus, 45 Minn. 170, 47 N. W. 655 (1891).
\textsuperscript{39}. Haug v. Haugen, 51 Minn. 558, 53 N. W. 874 (1892).
\textsuperscript{40}. Rase v. Minneapolis, St. P. & S. Ste. M. Ry., 118 Minn. 437, 137 N. W. 176 (1912); Louis F. Dow Co. v. Bittner, 185 Minn. 499, 500, 241 N. W. 500 (1932) (dictum).
\textsuperscript{41}. Baxter v. Coughlin, 80 Minn. 322, 324, 83 N. W. 190 (1900) (dictum).
\textsuperscript{42}. Felber v. Southern Minnesota Ry., 28 Minn. 156, 158, 9 N. W. 635 (1881) (dictum).
\textsuperscript{43}. Rieke v. St. Albans Land Co., 180 Minn. 540, 231 N. W. 222 (1930).
\textsuperscript{44}. Mower v. Hanford, 6 Minn. 535 (Gil. 372) (1861).
\textsuperscript{45}. Frisbie v. Frisbie, 226 Minn. 435, 33 N. W. 2d 23 (1948).
\textsuperscript{46}. Thayer v. Duffy, 240 Minn. 234, 63 N. W. 2d 28 (1953); Mower v. Hanford, 6 Minn. 535 (Gil. 372) (1861).
ing new trial has been made before entry of judgment. It is also important to realize the scope of review on appeal from a judgment when the appellant questions only the denial of his motion for judgment notwithstanding the verdict. In that case the supreme court is restricted to deciding whether the trial court had jurisdiction, whether it erred in denying the motion for a directed verdict, and whether the evidence is sufficient to justify the verdict.\textsuperscript{17}

On appeal from a judgment modifying an earlier judgment, any intermediate order involving the merits or affecting the modified judgment may be reviewed.\textsuperscript{48} Examples of such orders are an order denying new trial and the very order which modifies judgment. Where modification is denied, however, the appeal must be from the denying order itself, and it must be taken, if at all, within thirty days after denial.\textsuperscript{49} It is not reviewable on appeal from the judgment previously entered because, coming after entry of that judgment, it does not qualify as an intermediate order affecting the judgment.\textsuperscript{50}

The scope of review of intermediate orders on appeal from an order denying new trial is not as broad as it is on appeal from a judgment. Generally, on an appeal from an order denying a new trial, orders made before and after trial are not reviewable. This rule is based on the logical conclusion that a motion for new trial should only involve the trial court's consideration of occurrences arising during trial. It will be seen that this logical rule has not been strictly observed.

The court, in accordance with the logical rule stated above, has held that pre-trial discovery orders,\textsuperscript{51} an order sustaining a demurrer,\textsuperscript{52} orders made on a motion to amend the pleadings,\textsuperscript{53} and an order striking a portion of the answer\textsuperscript{44} are not reviewable on appeal from an order denying new trial, since they are orders made before trial. \textit{Brown v. St. Paul City Ry.}\textsuperscript{55} finally determined that

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{47} Louko v. Village of Hibbing, 222 Minn. 463, 25 N. W. 2d 234 (1946); Eichler v. Equity Farms, Inc., 194 Minn. 8, 259 N. W. 545 (1935).
\item\textsuperscript{48} Billsborrow v. Pierce, 112 Minn. 336, 128 N. W. 16 (1910).
\item\textsuperscript{49} Nelson v. Auman, 221 Minn. 46, 20 N. W. 2d 702 (1945); Halvorsen v. Orinoco Mining Co., 89 Minn. 470, 95 N. W. 320 (1903).
\item\textsuperscript{50} See cases cited note 19 supra.
\item\textsuperscript{51} Brown v. St. Paul City Ry., 241 Minn. 15, 62 N. W. 2d 688 (1954).
\item\textsuperscript{52} Grimes v. Ericson, 94 Minn. 461, 103 N. W. 334 (1905).
\item\textsuperscript{53} Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1 (1899); Minneapolis, St. P. & Ste. M. Ry. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132 (1896).
\item\textsuperscript{54} Johnson v. Maryland Cas. Co., 177 Minn. 103, 104, 224 N. W. 700, 701 (1929) (dictum).
\item\textsuperscript{55} 241 Minn. 15, 62 N. W. 2d 688 (1954). The holding in this case overruled dictum to the contrary in the earlier case of \textit{In re Trusteeship under Will of Melegaard}, 187 Minn. 632, 633, 246 N. W. 478, 479 (1933).
\end{enumerate}
\end{footnotesize}
pre-trial discovery orders are not reviewable on appeal from an order denying new trial. In that opinion the court intimates that a writ of prohibition might be the remedy for the plight of an individual who will be subject to a contempt citation if he does not comply with the discovery order, but who might make any subsequent review of the question on appeal meaningless by complying and thereby "letting the cat out of the bag."

As was stated above, the court has not always observed the logical rule. It has allowed the review of venue orders on appeal from an order denying a new trial. In so doing the court admitted that the practice was illogical, but acceded to it because it was "convenient and calculated to end litigation. . ." In another instance where the court strayed from the logical rule, it consented to decide the issue raised by an order made before trial refusing to set aside a stipulation. Before doing so, the court expressed its doubts as to the reviewability of such an order on an appeal from an order denying a new trial because it "was technically no part of the trial." Also two early cases include dictum to the effect that an order of reference and an order dismissing on the ground that the complaint did not state a cause of action are reviewable on appeal from an order denying a new trial.

Because of this inconsistent pattern in the court's decisions on questions of reviewability of orders made before trial on appeal from an order denying new trial, it is difficult to predict the future course. It seems, however, in view of the strong position taken in the Brown case and in Zywiec v. South St. Paul, the two most recent decisions on the subject, that the court will abandon its earlier position relating to orders refusing to set aside a stipulation, orders of reference, and orders dismissing a complaint, and that the rule of Brown and Zywiec will be followed, if any new and related problems arise. As to venue orders, where the court has consistently admitted the deviation from the logical rule, a change does not appear likely.

In the area of the post-trial orders the court has upheld the

56. Wilson v. Richards, 28 Minn. 337, 9 N. W. 872 (1881); Winegar v. Martin, 148 Minn. 489, 490, 182 N. W. 513 (1921) (dictum).
57. Wilson v. Richards, 28 Minn. 337, 339, 9 N. W. 872 (1881). The court prefers the use of mandamus for review of this question in the interest of avoiding the waste of throwing out a whole trial. See Winegar v. Martin, 148 Minn. 489, 182 N. W. 513 (1921); Delasca v. Grimes, 144 Minn. 67, 174 N. W. 523 (1919).
59. Id. at 451, 125 N. W. at 1023.
60. Bond v. Welcome, 61 Minn. 43, 45, 63 N. W. 3, 4 (1895) (dictum).
62. 234 Minn. 18, 47 N. W. 2d 463 (1951).
logical rule. It has refused to review an order denying a motion to settle a case and an order granting a new trial on the issue of damages only. In the case involving the latter order, decided in 1954, the court had this to say in support of the logical rule: “since a new trial cannot be predicated upon post-trial errors, allegedly erroneous post-trial errors cannot be reviewed on an appeal from an order denying a new trial.”

The court will not review an order denying a motion to amend the findings of fact and conclusions of law, but it will review the errors assigned to the findings and conclusions as part of its review of an order denying new trial. The court will make the necessary modifications where an issue is settled as a matter of law, “in order to avoid the delay and expense of further litigation.” Thus where a record discloses a dispute over the facts, the court will review the findings as part of the order denying new trial, and it will grant a new trial, if it finds the evidence insufficient to support the findings. Where the record discloses no dispute over the facts on an issue, the court will decide the question as a matter of law and amend the findings and conclusions.

Errors of Law Occurring at the Trial

Errors of law occurring during the course of the trial are reviewable on appeal from the judgment. The court has stated that rulings on the admissibility of evidence and the instructions to which exceptions have been taken as well as orders made on motions to amend the pleadings and motions for a jury trial are reviewable. There is no indication that the review of rulings on the admissibility of evidence is restricted to those rulings which if

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63. State v. Atanosoff, 138 Minn. 321, 164 N. W. 1011 (1917) (a criminal case in which the same rule was applied).
64. Thiesen v. Hellermann, 242 Minn. 218, 64 N. W. 2d 762 (1954).
65. Id. at 224, 64 N. W. 2d at 766.
66. Wilcox v. Nelson, 227 Minn. 545, 35 N. W. 2d 741 (1949); In re Estate of Wilson, 223 Minn. 409, 27 N. W. 2d 429 (1947).
68. In re Estate of Arnt, 237 Minn. 245, 251, 54 N. W. 2d 333, 337 (1952).
71. Hanley v. Board of County Commissioners, 87 Minn. 209, 211, 91 N. W. 756, 757 (1902) (dictum); Macauley v. Ryan, 55 Minn. 507, 509, 57 N. W. 151 (1893) (dictum).
reversed would result in a judgment for the appellant. Here, as in the case of review of intermediate orders, so to restrict the scope of review on appeal from the judgment would render superfluous the power given the court to order a new trial on appeal from the judgment.72

So too on appeal from an order denying new trial, errors of law occurring at the trial are reviewable.74 Examples of such errors of law are a ruling on evidence,75 an order on a motion to amend the pleadings made during the course of the trial,76 an order refusing a jury trial,77 and an order dismissing the action on the pleadings made after the cause has been called for trial.78 The court seems to have chosen the time that the cause is called for trial as the dividing line between the pre-trial and the trial periods.79

Extra-Record Errors

The extra-record errors such as irregularities in the proceedings on the trial resulting in a deprivation of a fair trial, misconduct of counsel or jury, accident or surprise, and although not really an error, the discovery of new evidence, are all specified as grounds for new trial.80 Their reviewability on appeal from an order denying new trial seems to have been accepted without question, and rightfully so, for they are clearly questions which come within the meaning of the phrase "involved in the order."

No case has dealt with the question whether these extra-record errors are reviewable on appeal from the judgment. The ordinary rule is that the court will review only those questions raised by the record.81 It has been held, however, that an order denying a new trial made before entry of judgment is reviewable on appeal from the judgment.82 If a motion for new trial which asserts extra-record

73. See Minn. Stat. § 605.05 (1953).
74. See notes 75-78 infra. This phrase "errors of law" is further discussed in the section relating to appeal from an order granting a new trial at p. 122 infra.
76. Hanley v. Board of County Commissioners, 87 Minn. 209, 211, 91 N. W. 756, 757 (1902) (dictum); Macauley v. Ryan, 55 Minn. 507, 509, 57 N. W. 151 (1893) (dictum).
77. Hasey v. McMullen, 109 Minn. 332, 123 N. W. 1078 (1909).
78. Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125 (1895).
79. Hasey v. McMullen, 109 Minn. 332, 336, 123 N. W. 1078, 1080 (1909); Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125 (1895).
80. See Minn. R. Civ. P. 59.01 and Minn. Stat. § 547.01 (1949). The statute specified the grounds for new trial and is now superseded by Rule 59.01.
82. See cases cited note 46 infra.
error is decided before the judgment appealed from is entered, no reason would appear to prohibit the review of such error on appeal from a judgment.

**Excessive or Insufficient Damages**

Error in awarding excessive or insufficient damages is a ground for new trial, and its reviewability on appeal from an order denying new trial does not appear ever to have been questioned. As in the case of the extra-record errors, it should be reviewable on appeal from the judgment, if it has first been raised before the trial court on a motion for new trial. In one case where a defendant admitted his liability and submitted the case to the trial court for the assessment of damages, the supreme court held that the assessment was reviewable on appeal from the judgment. Thus it would appear that the important factor in determining whether such a question is reviewable is action by the trial court on the question. Where the case is tried to a court, or where the question is raised on the motion for new trial, it should be reviewable on appeal from the judgment.

**Sufficiency of the Evidence**

The issue of whether the evidence is sufficient to justify the verdict or support the findings of fact is reviewable both on an appeal from a judgment and on an appeal from an order denying new trial. On appeal from a judgment, when the cause was tried to a court, the question is reviewable though there was no motion for a new trial. If the cause was tried to a jury, in order for such question to be reviewable there must have been either a motion for a directed verdict, for judgment notwithstanding the verdict, or for a new trial, giving the trial court an opportunity to pass upon the question. Where the appeal is from an order denying new trial, the court has applied the same reasoning. Thus in a court tried case

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83. See note 80 supra.
84. Kent v. Bown, 3 Minn. 347 (Gil. 246) (1859).
85. See cases cited notes 89-91 infra.
86. Twin City Bus Co. v. Rechtzigel, 229 Minn. 196, 38 N. W. 2d 825 (1949) (by implication); Maust v. Maust, 222 Minn. 135, 23 N. W. 2d 537 (1946) (by implication).
88. Twin City Bus Co. v. Rechtzigel, 229 Minn. 196, 38 N. W. 2d 825 (1949); Maust v. Maust, 222 Minn. 135, 23 N. W. 2d 537 (1946).
90. Ibid.
the question of the sufficiency of the evidence may be reviewed, even though it was not raised on the motion for new trial.92

Conclusions of Law

The question whether the findings of fact support the conclusions of law can be reviewed on appeal from the judgment.93 This question may also be reviewed on appeal from an order denying a new trial,94 if it was assigned as error on the motion for new trial.95 The court has recognized that the practice is not logically sound, but because it is "convenient to be able to raise the question . . . without entry of judgment . . ."96 review is allowed. The court will not grant a new trial if it finds error; it will simply make the necessary modifications in the conclusions.97 The parties are then left to initiate the next step in resolving the case. If the respondent wishes to question the sufficiency of the evidence to justify the findings by moving for a new trial after the modification has altered the conclusions so that they are no longer in his favor, he will be allowed to do so even though the specified time in which to make such a motion has run.98

Errors on Former Trial

When a new trial of all issues is granted or a mistrial order is made, the trial is wholly set aside and the case stands as if there had been no trial.99 On appeal from the judgment after the second (third, etc.) trial, the court will review neither the proceedings at the first trial nor the order granting a new trial.100 This rule should not bar the review of orders made before the first trial because the order granting new trial does not nullify their effect.101 If, however,

92. See cases cited note 87 infra.
93. Naffke v. Naffke, 240 Minn. 468, 62 N. W. 2d 63 (1953); Lee v. Delmont, 228 Minn. 101, 36 N. W. 2d 530 (1949).
97. See cases cited note 94 supra.
100. Patton v. Minneapolis Street Ry., supra note 99.
101. Such orders cannot be reviewed on a motion for new trial. See the section on the scope of review on appeal from an order granting new trial at p. 122 infra.
the new trial was granted on only one or a part of the issues, the judgment after the second trial rests upon issues determined at both trials, and the proceedings on the first trial relevant to the issues resolved on that trial as well as the order granting new trial may be reviewed on appeal from the judgment entered after the second trial.\footnote{102}

If the appeal after the second (third, etc.) trial is from an order denying new trial, there can be no review of the proceedings of the first trial or of the order granting new trial, even though the grant of a new trial was only as to a single issue or a part of the issues.\footnote{102} This holding is part of the logical rule discussed above, restricting the scope of review on appeal from an order denying a new trial to "the regularity of those things which were involved in the order." Since the motion for new trial after the second trial could reach only the question before the court in the second trial itself, only those questions are "involved in the order" and therefore reviewable.\footnote{104}

\textit{Appeal from an Order Granting a New Trial}

Only those orders granting a new trial which are grounded "exclusively upon errors of law occurring at the trial . . ." and so specified by the trial court in its order, are appealable.\footnote{105} On appeal the order "may be sustained for errors of law prejudicial to respondent other than those specified by the trial court."\footnote{106} Thus, in any event, the scope of review on appeal from an order granting new trial is limited to those questions falling within the definition of the phrase "errors of law occurring at the trial."

It seems that those questions which require the application of the discretionary power of the trial court in their decision are not included within the scope of that phrase.\footnote{107} The reason for this rule is that the trial court, with the advantage of being able to observe the proceedings, is in a much better position to decide such discretionary questions; appeals from an order granting a new trial on any of those grounds would be dilatory, costly, and useless in most instances.\footnote{108} In \textit{Spicer v. Stebbins}\footnote{109} the supreme court

\begin{itemize}
  \item \footnote{102} Lundblad v. Erickson, 180 Minn. 185, 230 N. W. 473 (1930).
  \item \footnote{103} Zywiec v. South St. Paul, 234 Minn. 18, 47 N. W. 2d 465 (1951).
  \item \footnote{104} Zywiec v. South St. Paul, supra note 103.
  \item \footnote{105} Minn. Stat. § 605.09(4) (1953). See also Cunningham, supra note 3, at 341-44.
  \item \footnote{106} Minn. Stat. § 605.09(4) (1953). Storey v. Weinberg, 226 Minn. 48, 31 N. W. 2d 912 (1948).
  \item \footnote{107} See Spicer v. Stebbins, 184 Minn. 77, 237 N. W. 844 (1931).
  \item \footnote{108} See Spicer v. Stebbins, supra note 107.
  \item \footnote{109} 184 Minn. 77, 237 N. W. 844 (1931).
\end{itemize}
suggested that this reasoning should exclude from review questions of the sufficiency of the evidence, irregularities not amounting to errors of law, misconduct of jurors or the parties, accident or surprise, excessive or inadequate damages, and newly discovered evidence. The court has actually held that questions of the sufficiency of the evidence, misconduct of the parties, and excessive or inadequate damages are not reviewable. Contrary to the suggestion in the Spicer case, the court has reviewed the question of newly discovered evidence on an appeal from an order granting new trial. These cases might be distinguishable, however, because the order for new trial came after entry of judgment and was thus appealable as an order vacating judgment.

The opinion in Roelofs v. Baber suggests that the phrase “errors of law occurring at the trial” refers to errors of the trial judge in the conduct of the trial. Prime examples of the type of question which falls within the category of “errors of law occurring at the trial” are errors in rulings and instructions made during the progress of the trial. The term rulings includes questions concerning the admissibility of evidence, orders made during the trial on a motion to amend the pleadings, an order made on a motion for jury trial, and an order granting a motion for a directed verdict.

**Appeal from an Order on a Blended Motion**

The supreme court has held that section 605.06 of the Minnesota appeals statutes authorizes an appeal from the “whole order” made on a blended motion.
on a motion in the alternative for judgment notwithstanding the verdict or for new trial.\textsuperscript{121} If the order on the alternative motion grants the motion for new trial, there is the added requirement that the motion must have been granted exclusively for errors of law occurring at the trial in order for the "whole order" to be appealable.\textsuperscript{122} It appears that only the party who received the verdict which the alternative motions attack can appeal from the whole order if either part of it is granted.\textsuperscript{123}

On appeal from an order granting judgment notwithstanding the verdict and tentatively granting or denying a new trial, the provisions of Rule 50.02 of the Minnesota Rules of Civil Procedure seem to assume that the supreme court will first review the order granting judgment notwithstanding the verdict. If that order is reversed, the provisions of Rule 50.02 requiring the trial court to rule on the motion for new trial even though it grants the motion for judgment, make it possible for the supreme court then to proceed directly to a review of the order on the motion for new trial.\textsuperscript{124}

On appeal by the moving party from an order denying both alternatives, the court may review the action of the trial court on both parts of the motion.\textsuperscript{125} Of course, the court will not review the order denying new trial if it decides to grant judgment notwithstanding.

If it becomes necessary to consider that part of a "whole order" granting a new trial, it appears that the scope of review would be limited as it is on appeal from that order made alone. Thus only errors of law occurring at the trial would be reviewable. Likewise the scope of review of that part of the order denying a motion for new trial would seem to be comparable to the scope on appeal from such an order alone. Thus in one case involving an appeal from the whole order, the court refused to review an order overruling a demurrer and denying a motion to strike.\textsuperscript{126}

\begin{itemize}
  \item \textsuperscript{121} Allison v. Chicago Great Western Ry., 240 Minn. 547, 62 N. W. 2d 374 (1954); Snyder v. Minnetonka & W. B. Nav. Co., 151 Minn. 36, 185 N. W. 959 (1921).
  \item \textsuperscript{122} Schaumburg v. Ludwig, 240 Minn. 128, 60 N. W. 2d 12 (1953).
  \item \textsuperscript{123} Greenberg v. National Council of K. & L. of S., 132 Minn. 84, 155 N. W. 1053 (1916).
  \item \textsuperscript{124} St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077 (1897); Snyder v. Minnetonka & W. B. Nav. Co., 151 Minn. 36, 40, 185 N. W. 959, 961 (1921) (dictum).
  \item \textsuperscript{125} Welsh v. Barnes-Duluth Shipbuilding Co., 221 Minn. 37, 41, 21 N. W. 2d 43, 45 (1945) (by implication).
  \item \textsuperscript{126} See Matesic v. Maras, 177 Minn. 240, 225 N. W. 84 (1929).
\end{itemize}
NOTE

Miscellaneous Rules

The Effect of a Previous Appeal

Where, in the same action, there has been an earlier appeal from an order denying a new trial, which order the supreme court affirmed on the merits, no questions which might have been raised on that appeal are available to the same party on a subsequent appeal from the judgment. Thus only pre-trial orders and post-trial orders made before entry of judgment would be reviewable on the subsequent appeal. Similarly where there has been a previous appeal from an order granting a new trial and the order has been reversed, no question which might have been raised on that appeal is reviewable on the subsequent appeal from the judgment. This rule would exclude from review any questions falling within the category of errors of law occurring at the trial. The mere dismissal of a former appeal from an intermediate order does not, however, bar the appellant from raising the same questions involved in the order on a subsequent appeal from the judgment.

An Order Appealable in Part and Non-Appealable in Part

An order appealable in part and non-appealable in part presents for review only that part which is appealable. A contrary statement in an earlier case does not seem to have been followed. The substance of this general rule seems to have been applied by the court to an order on an alternative motion to amend the findings and conclusions of for new trial. The court, however, has created an exception where an issue concerning the findings and conclusions can be settled as a matter of law. The extension of this exception to other situations might well be advisable in the interest of preventing the unnecessary expense of further litigation. Generally, where an appellant wishes to have both parts of an order reviewed, he will have to appeal from the judgment. Where the appealable part of an order is the part which grants a new trial before entry of judgment, however, appeal from the judgment is impossible, and two appeals may become necessary if justice is to be done.

130. Muggenburg v. Leighton, 240 Minn. 21, 60 N. W. 2d 9 (1953); Storey v. Weinberg, 226 Minn. 48, 31 N. W. 2d 912 (1948); Marty v. Nordby, 201 Minn. 469, 276 N. W. 739 (1937).
131. See Long v. Mutual Trust Life Ins. Co., 191 Minn. 163, 253 N. W. 762 (1934) (whole order reviewable if part is appealable).
132. See note 68 supra.
133. See note 68 supra.
134. See Muggenburg v. Leighton, 240 Minn. 21, 60 N. W. 2d 9 (1953).
Questions Which Can be Settled as a Matter of Law

It seems that the court will review a question which it ordinarily would not review, where the issue can be settled as a matter of law. Thus on an appeal from an order granting or denying a motion for new trial made on the ground of inadequate damages only, the defendant, whether he be appellant or respondent, may urge his non-liability as a matter of law. If the court finds that as a matter of law defendant is not liable, the new trial on the issue of damages will be denied and the defendant can then take the necessary steps to secure the judgment in his favor.

Questions Raised by the Respondent

On appeal, the respondent may urge and the court will consider "any sound reason for affirmance, even though it is one not assigned by the trial court." Thus where the record showed fraud as a matter of law, the supreme court affirmed an order denying a new trial, although the trial court made no findings on the question of fraud. In one earlier case, however, the respondent alleged the court's lack of jurisdiction over him as a ground for affirmance of the order denying new trial, but the court refused to consider the question because such a practice "would tend to confusion." Thus in that case because the supreme court reversed the trial court and granted the motion for new trial, the respondent was subjected to the expense of another trial before he could raise the question, which if decided in his favor would nullify the second trial also.

Conclusion

It does not appear to be completely true that the scope of review on appeal from an order denying new trial is "different from and broader than" the scope of review on appeal from a judgment, as the supreme court stated in the Crawford case. Indeed, when the order denying new trial comes before entry of judgment, the scope...
of the two appeals is duplicative to a great extent. On appeal from a judgment the scope of review includes both pre-trial orders and post-trial orders made prior to judgment. Only when the order denying new trial is made after entry of judgment does appeal from that order serve a unique function. Extra-record errors and errors not properly preserved for review during the course of the trial are reviewable on appeal from the order denying new trial, but not on appeal from the judgment. If the clerks of the district courts were to adopt the practice of entering judgment “forthwith” as recommended by Rule 58 of the Minnesota Rules of Civil Procedure, a motion for new trial would be made after entry of judgment, and the appeal from an order denying that motion would take on added importance. Under the present system, however, wherein a stay of entry of judgment is common practice, it appears that the right to appeal from an order denying new trial constitutes nothing more than a trap for the practitioner who is unaware of its limited scope of review.

Of course, there is an indirect advantage to the appeal from the order denying new trial, namely, the stay of entry of judgment, which has the effect of staying both enforcement and the attaching of the judgment lien. To eliminate the possibility of misdirected appeals made by lawyers pursuing this ephemeral advantage, the legislature should either liberalize statutory provisions allowing stay of enforcement and deposit in lieu of the judgment lien, or it should broaden the scope of review on appeal from the order denying new trial.

The right to appeal from the “whole order” on an alternative motion for judgment notwithstanding the verdict or for new trial is subject to the same criticism insofar as it permits a less broad review than does an appeal from a judgment. The right to appeal from an order granting new trial, however, should be maintained as it now exists. It serves a special purpose in that it brings up for review rulings of the trial court which, if found to be erroneous, will eliminate the need for a second trial.

142. See Minn. R. Civ. P. 58.01.
143. See note 5 supra.
144. See Minn. Stat. § 548.09 (1953).
145. See note 5 supra.
146. See Minn. Stat. § 548.12 (1953).