ing, it is a proceeding by which a case is removed from a lower court to a higher court for a trial there de novo either upon the record made in the lower court, or upon evidence newly introduced; and an appeal in a civil action from the district court to the supreme court is governed by principles applicable to a writ of error and is, in substance, a writ of error. State ex rel v Civil Service Board, 226 M 240, 32 NW(2d) 574.

An "appeal" under sections 525.71 to 525.731, or under sections 532.37 to 532.50 from the probate court and from the court of a justice of the peace to the district court upon questions of law and fact, is an "appeal" in the strict and original sense and is tried de novo in the appellate court. State ex rel Spurck v Civil Service Board, 226 M 253, 32 NW(2d) 574.

532.40 RETURN, EVIDENCE, WHEN INCLUDED

HISTORY. RS 1851 c 69 art 4 s 126; 1852 amend p 8 s 18; PS 1858 c 59 s 139; GS 1866 c 65 s 106; 1872 c 66 s 1; 1873 c 66 s 1; GS 1878 c 65 s 116; GS 1894 s 5070; RL 1905 s 3984; GS 1913 s 7604.

532.41 TRIAL, JUDGMENT

An appeal properly perfected in a criminal case, from a justice of the peace to the district court, upon questions of law alone, operates to supersede the judgment of the justice, and the district court may enter such judgment on an affirmance as the law of the case requires. State v Hedstrom, 233 M 17, 45 NW(2d) 715.

FORMS IN CIVIL ACTIONS

532.51 SCHEDULE OF FORMS

Title to a motor vehicle may be transferred, based upon a certified copy of the court record relating to sale or execution. OAG Nov. 8, 1948 (632-E-27).

JUDICIAL PROCEDURE; DISTRICT COURT

CHAPTER 540

PARTIES TO ACTIONS

540.01 Superseded, Rules of Civil Procedure, Rule 1.

Annotations relating to superseded section, 540.01.

Suretyship and the statute of frauds. 31 MLR 633.

Jurisdiction of the federal district court in an application under section 23a of the Bankruptcy Act to suits against a trustee in bankruptcy. 32 MLR 627.

Tort actions against a receiver appointed under section 77 of the Bankruptcy Act. 32 MLR 829.

Action for breach of contract based upon contention that a telegram accepting an offer constituted a valid contract. 33 MLR 73.

Action for breach of contract; retention of case to award damages. 33 MLR 77.

Damages for breach of contract; sickness as an element. 33 MLR 189.

Plight of a strike-bound carrier. 33 MLR 255.

Libel and slander; mental suffering as an element of damages. 33 MLR 324.

Use of copyrighted music in cinema unsympathetic to foreign composers' political ideology. 33 MLR 327.

Recover from insured of payments by an insurer to a third party beneficiary after discovery of insured's fraud. 33 MLR 426.

Purchaser for value and discharge of unknown existent debt; restitution; negotiable instruments. 33 MLR 435.

Imputed contributory negligence; effect of statute making motor car owner liable for acts of his bailee. 34 MLR 57.

Right of child to sue enticer of parent. 34 MLR 63.

Right to recover for death resulting from pre-natal injuries. 34 MLR 65.

Right to use a personal name on non-competing goods. 34 MLR 77.

Right of contractor to recover damages to subcontractor caused by government delays. 34 MLR 143.

General and special employment; liability of operating surgeon for the acts of attending internes and nurses. 34 MLR 266.

Action for loss of consortium caused by negligent injury to spouse. 35 MLR 318.

Admission of contemporary critical evaluation of a libeled book. 35 MLR 326.

Insurer's right to recover the amount of compensation award from a third-party tortfeasor on an implied contract of indemnity. 35 MLR 684.

Intentional multi-state torts. 36 MLR 1.

Equity as a dead subject. 36 MLR 177.

Duty of an innocent party to mitigate damages upon anticipatory breach. 37 MLR 215.

Principal and agent as joint tortfeasors; liability of an agent for collusion of third-party sellers. 37 MLR 401.

Evidence authorized a finding that the city of Duluth was liable for the death of a child for negligence in creating a dangerous condition, by steaming holes through the ice on a children's playground on private property for the purpose of protecting the street during spring thaws, which action on the part of the city resulted in the death of a child. Harning v City of Duluth, 224 M 299, 28 NW(2d) 659.

Plaintiff, while engaged in the performance of a construction job for defendant, negligently caused a fire to be started within the area where he was engaged in doing his work adjacent to defendant's manufacturing plant. The fire wholly destroyed defendant's plant and contents together with the work done by plaintiff under his construction contract. In this action by the contractor for the foreclosure of his lien, and since the origin of the fire was directly traceable to the plaintiff, the plaintiff had the burden of showing that the fire had been extinguished, or that a subsequent efficient and intervening cause had broken the original chain of causation so as to isolate his original negligent act as a proximate cause. Willner v Wallinder Co., 224 M 361, 28 NW(2d) 682.

In an action for injuries sustained by a three year old boy in falling through a skylight located on the roof of a three story building, the owner was not negligent in maintaining a building with such a skylight where evidence showed proof that the building was not a place where the presence of children could reasonably have been anticipated. Ewing v Benz, 224 M 508, 28 NW (733).

The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. However, where there are inconsistent remedies and but one right and it is doubtful which remedy

may ultimately bring relief, a party may follow one remedy even to defeat and then take another remedy, or he may pursue all concurrently until it is finally decided which affords the remedy. In choosing the remedy to be employed where the question of election of remedies arises, a waiver cannot be established without actual or implied intent to waive such right. Cashen v Owens, 225 M 25, 29 NW(2d) 441.

The res ipsa loquitur rule does not apply where the instrumentality causing the injury was not under the exclusive control of the defendant; and in the instant case an injury to a woman falling into an open coal hole in the public sidewalk, abutting upon the church's property, did not of itself afford sufficient evidence to support her burden of proving that the church was guilty of negligence proximately causing or contributing to the accident. Fandel v Parish of St. John the Evangelist, 225 M 77, 29 NW(2d) 817.

Whether defendant represented to plaintiff that the house which, as agent for the owner, he sold to plaintiff was modern and had city water, sewer, and gas connections and whether the representations were relied upon by plaintiff were questions of fact for the jury. Although plaintiff might, by examining the premises or by going to the proper public office, have ascertained the fact that there were no water, sewer, or gas connections to the house which he purchased, defendant cannot impute to him negligence as a defense in this action if, relying on defendant's representations, plaintiff did not deem it necessary to make such examination, following Porter v Fletcher, 25 M 493, and Bonness v Felsing, 97 M 227, 106 NW 909, 114 Am.St.Rep. 707. Erickson v Midgarden, 225 M 153, 31 NW(2d) 919.

The record before us does not bring defendant's conduct within the rule of Hanson v Hall, 202 M 381, 385, 279 NW 227, 229, that "wilful negligence embraces conduct where the infringement of another's right is not only intended but also it is foreseen that the conduct pursued will result in such invasion." Plaintiff was driving on the wrong side of the road with lights which revealed the road for a distance of only 30 feet ahead of him. He was traveling at a rate of speed which required at least 50 feet within which to stop his car. The case comes squarely within the rule of Orrvar v Morgan, 189 M 306, 249 NW 42. Spartz v Kresbach, 226 M 46, 31 NW(2d) 917.

A judgment is entitled under the federal constitution to the same, but no more, faith and credit in the state other than the one wherein it was rendered as it is entitled to in the state of its rendition; and equitable relief may be granted against the decree of the probate court of a sister state distributing plaintiff's share of the estate of the decedent to the proponent-executor of the decedent's will and to others as residuary legatees where the decree was obtained by the proponent executive by concealing from the court a violation of his statutory duty, plaintiff's existence and his right to take under the will; and concealing from the plaintiff the pendency of the probate proceedings; and this notwithstanding the fact that the estate has been distributed. Anderson v Lyons, 226 M 330, 32 NW(2d) 849.

On defendant's appeal the reviewing court must take the view of evidence most favorable to the plaintiff; and on renewal of a denial of a motion for judgment notwithstanding a verdict of a new trial, the court takes the view of evidence most favorable to the verdict; and on review of denial of motion for judgment notwithstanding the verdict of a new trial, the court takes that view of the evidence most favorable to the verdict. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

In action for personal injuries sustained by the plaintiff while helping defendant unload a fish house from a truck, issues of negligence and contributory negligence were for the jury; and where individuals are acting in concert in unloading from a vehicle an object of great weight and of such bulk that they are concealed from each other and cannot coordinate their efforts by visual observation, whether one of them owes a duty of giving others advance warning before performing an act which suddenly deposits on them a weight of such magnitude as will constitute a potential source of serious injury if they are not prepared to receive it is for the jury. Johnson v Johnston, 226 M 388, 33 NW(2d) 53.

Where no ground is stated in a motion for new trial, no question is presented either to the trial court or to this court. An assignment of error not argued in the

brief is abandoned. A general assignment of error that the findings of fact are not sustained by the evidence presents no question for decision. The following assignments of error present only the question whether the conclusions of law are sustained by the findings of fact; that the conclusions of law are not justified by the facts found and are contrary to law; that the findings of fact and conclusions of law are not justified by the evidence and are contrary to law; that the judgment entered herein is not justified by the evidence and is contrary to law; the denial of a proposed finding of fact is equivalent to a contrary finding. The findings of fact sustain the conclusions of law. Kiebach v Kiebach, 227 M 328, 35 NW(2d) 531.

Where evidence most favorable to prevailing party was that a distance of 400 to 600 feet separated the automobile in which plaintiffs were riding as gratuitous guests, and an automobile approaching from the opposite direction which suddenly swung into its wrong lane of the pavement, it was a question for the jury whether the driver of the automobile in which plaintiffs were riding was guilty of negligence. There was no error in the submission of the emergency rule, even though it did not follow the precise language of Johnson v Townsend, 195 M 107, 261 NW 859. Kime v Koch, 227 M 372, 35 NW(2d) 534.

Evidence that the defendant's plane was in good condition and weather conditions normal; that its pilot, without authorization, explanation, or excuse, left his authorized beamed airway for a dangerous terrain; and that wreckage of his plane was found subsequently 40 miles to the west of his course is sufficient to sustain a jury finding that the pilot chose a more hazardous road and was guilty of negligence. Where the evidence is sufficient to sustain a finding of negligence based upon the specific acts of defendant's employee, it is unnecessary to determine whether the doctrine of res ipsa loquitur would render defendant liable, in the absence of proof in such specific acts. Gill v Northwest Airlines, 228 M 164, 36 NW(2d) 785.

A corporation providing services for and on behalf of the United States pursuant to the terms of a written contract does not solely by virtue of such contract become the agent of the United States so as to gain governmental immunity for its acts under the contract. As to whether or not a party is an independent contractor must be decided upon the facts. Gill v Northwest Airlines, 228 M 164, 36 NW(2d) 785.

A child has legally protected rights in the maintenance of the family relationship against interference of outsiders, and enticement by an outsider of the child's mother from the family home constitutes an invasion of the child's rights for which the child may maintain an action for damages. The novelty of the right asserted in the instant case and lack of common law precedent therefor are no reasons for denying the existence of the right of action. Miller v Monsen, 228 M 400, 37 NW(2d) 543.

In order to render an owner liable in damages to anyone bitten by a domestic animal it must be proved not only that the animal is vicious, but that the owner had knowledge of its vicious nature or propensity. The gravamen of the action is the neglect of the owner of an animal known by him to be vicious and liable to attack and injure people to restrain it, to avert the risk of damage. The notice of such propensity must be such as to put a prudent man on his guard. Hagerty v Radle, 228 M 487, 37 NW(2d) 819.

A contractor may recover in quasi-contract against a municipality for benefits received by the municipality where the contract is made in good faith and within power of the municipality, but the contract is declared void because of noncompliance with details required by statute or charter relating to competitive bidding. Where the contractor installed parking meters pursuant to contract with the city pending a taxpayer's appeal to enjoin performance of the contract and the contract was thereafter declared void, elements of good faith were lacking and the contractor was not entitled to compensation for the use of the meter. City of St. Paul v Dual Parking Meter Co., 229 M 217, 39 NW(2d) 174.

Where a mistake had been made in computing interest on installment notes secured by a mortgage and the payments made by the decedent were less than they should have been, a correction may be made. In the absence of agreement to the contrary the debtor has a right to apply payments as he sees fit. A party who seeks

to enforce a right because of a mistake is not chargeable with the laches until he discovers the mistake. He is chargeable with knowledge of the facts from which in the exercise of due diligence he ought to have discovered the error. An essential element in the doctrine of laches is prejudice to the other party; and where both parties to an action were seeking affirmative relief against the other in reference to the same transaction, neither may assert that the other was guilty of laches. Steenberg v Kaysen, 229 M 300, 39 NW(2d) 18.

Where a broker tendered to an owner an earnest money contract together with a check signed by a buyer but failed to disclose to the owner that the drawer of the check had no account in the bank upon which the check was drawn, a fact of which he was well aware, the broker did not deal fairly with his principals in failing to make a disclosure of that fact to them, and he is guilty of such fraud and bad faith as to forfeit his right to compensation. Wold v Petterson, 229 M 361, 39 NW(2d) 162.

The failure of the defendant as driver to keep a lookout during daylight while driving an automobile over 40 miles per hour over a stretch of highway under construction with the result that the vehicle struck a washout and rolled over was, as a matter of law, negligence which approximately caused his guest occupant's injuries, and the guest's failure to look out was not contributory negligence. Rutz v Iacono, 229 M 591, 40 NW(2d) 892.

In an action by lot owners to enjoin certain lot owners on an island from preventing plaintiffs and other lot owners from using the entire strip of land dedicated by the plat to the use of all lot owners, defendants could not maintain the cross-bill on restrictive covenants in deeds without bringing in other lot owners as parties plaintiff. Bryant v Gustafson, 230 M 1, 40 NW(2d) 429.

In determining whether a municipality maintaining public walks and the owners of property adjoining are liable for injuries sustained by reason of defective entryways, coal holes, or other like facilities placed therein for the convenience of the building owner, the applicable test is whether the defendants exercised reasonable care in the creation or maintenance of the facility involved having in mind the risks which might reasonably be anticipated with respect thereto. Callahan v City of Virginia, 230 M 55, 40 NW(2d) 841.

Where the lessee expressly waived any and all claims against the lessor on account of any personal injury sustained or any loss by fire, water or explosion, the clause waiving claims for personal injury was general and unrestricted; and where the lease was executed by the lessee as agent of and on behalf of her two sisters, a waiver operated to exempt the lessor from liability to the lessee's sister for injuries sustained in a fall due to darkened stairs in the leased apartment. Mackenzie v Ryan, 230 M 378, 41 NW(2d) 878.

Where several documents are executed as part of one transaction, they will be read together, and each will be construed with reference to the other. The right to proceed to construct a low-cost housing project is authorized by a letter of intent containing a termination clause and authorizations to construct 500 units are given after and dependent upon the acceptance of the letter of intent. The letter of intent and the authorizations constitute one transaction and will be construed with reference to each other, with the result that the termination clause applies to the authorizations, and a cancellation of part of the units is not a breach of contract. Fleisher v Winston, 230 M 554, 42 NW(2d) 396.

Two separate suits for declared judgment and injunctive relief were brought by two separate local unions against the national organizations. In each suit the defendants demurred to the complaint and the district court overruled both demurrers, whereupon the defendant appealed. The supreme court held that plaintiffs were entitled to judgment declaring their right to disaffiliate from the parent union and to retain their assets. A local labor union is a separate and distinct voluntary association which owes its creation and continued existence to the will of its members and upon its disaffiliation from the international union its relationship with international is severed, even though it continues to exist as an independent organization and is entitled to retain its organization's assets. In the absence of enforceable provisions in the parent union's constitution preventing disaffiliation of local union intact with its property, the local union could by majority sever its relationship with the parent

union and take its property with it. Local United Electrical Workers v United Electrical Workers, 232 M 217, 45 NW(2d) 408.

A person under duty to the public must see that the work he is about to have done is carefully performed so as to avoid injury to others and cannot avoid liability by letting the work to a contractor and where the trustees of a religious corporation engaged a contractor to connect the church building with a sewer main, knew in February that a hole in the boulevard had been filled with chunks of frozen dirt and packed in such a way that it would settle and leave a hole, the trustees are liable because they must have anticipated that an injury might be caused by the open hole created by spring rains and should have taken precaution, and plaintiff who was injured by stepping into the hole could be rightfully compensated for her injury by a verdict on the part of the jury. Lamb v So. Unit, 232 M 259, 45 NW(2d) 403.

Where it is alleged that a quit claim deed was procured by overreaching, undue influence, and misrepresentation, all amounting to constructive fraud, and the evidence is conflicting, the jury and trial court finding that the deed was not procured in the manner alleged must stand unless they are manifestly and palpably against the weight of evidence. Caskey v Lewandowski, 233 M 334, 46 NW(2d) 865.

When damage to a bridge might with equal propriety have resulted from the acts of others as well as the acts of the shipper, proof of facts other than that of the damage from which the negligence of owner of trench digger and its employee could be inferred, must be made before the question could be submitted to the jury otherwise the verdict would be founded on mere speculation. An inference of negligence based on an inferred fact, of which there is neither evidence nor predominating probability, cannot safely be made. The mere proof of the happening of an accident is not enough to establish negligence or its causal relation to the damage. State v Paskewitz, 233 M 452, 47 NW(2d) 199.

Where a person receiving board and room is not related to the person furnishing them, and such services are accepted with knowledge that the person furnishing them cannot afford to give them gratuitously, a promise to pay for them is implied in fact. Jacobson v Edman, 233 M 476, 47 NW(2d) 103.

A broker is entitled to his commission when he has performed all that he undertook to perform, and where the commission is to be everything over a specified net price to the principal. The broker is not entitled to a commission if because of his customer's fault a sale is not consummated. He is entitled to a commission where the sale is not consummated because of unjustifiable refusal or fault of the principal. Schramsky v Hollmichel, 233 M 481, 47 NW(2d) 177.

As to contracts, an acceptance which qualifies the terms of the offer amounts in legal contemplation to a rejection of the offer and is regarded as merely a counteroffer. An acceptance must be co-extensive with the offer and may not introduce additional terms and conditions. Requested or suggested modifications of an offer will not preclude formation of a contract where it clearly appears that offer is positively accepted, regardless of whether requests are granted; but where acceptance of an offer is expressly conditioned on acquiescence in requested modification of offer, or such inference is contained in the language employed, no contract is formed. Podany v Erickson, 235 M 36, 49 NW(2d) 193.

The supreme court will take judicial notice of the fact that the purchasing power of money has shrunk, and will take such shrinkage into consideration when comparing present verdicts with verdicts previously rendered, to determine whether present verdicts are excessive. Kauppi v Northern Pacific Ry., 235 M 104, 49 NW(2d) 670.

As it relates contracts acceptance need not repeat the termination of the offer. Knaus v Donaldson, 235 M 453, 51 NW(2d) 99.

A tortfeasor is answerable for all injurious consequences of his tortious act which, according to usual course of events and general experience, were likely to ensue and which, when the act was committed, might reasonably be supposed to have been foreseen and anticipated. Tarnowski v Resop, 236 M 33, 51 NW(2d) 801.

A doorknob assembly in evidence is in such a state of disrepair that the jury could only have concluded that the defect causing the injury resulted from normal deterioration over an extended period of time. This being so, it is a question of fact for the jury to determine whether "under a duty of inspection and a duty of a landlord to take cognizance of deterioration from wear and tear," ordinary care would have disclosed the dangerous condition. Graeber v Anderson, 237 M 20, 52 NW(2d) 642.

Where violation of a zoning ordinance provision was dependent solely upon motive or purpose of the actor, and it did not clearly appear from the ordinance that the village council intended thereby to establish a standard of conduct to measure civil liability for negligence, the trial court properly refused to instruct the jury that violation of the ordinance constituted negligence per se. Hutchinson v Cotton, 236 M 366, 53 NW(2d) 27.

A private hospital, although not an insurer of the safety of a patient, must exercise such reasonable care for protection and well-being of a patient as his known physical and mental condition requires or as is required by his condition as it ought to be known to the hospital in exercise of ordinary care. Ordinary care to protect a patient includes protection from danger reasonably to be anticipated from the acts of another person under the hospital's control. Intoxication of such other patient is a danger from which plaintiff should have been protected. Sylvester v Northwestern Hospital, 236 M 384, 53 NW(2d) 17.

An action by the state commission to condemn the land owned by a resident in another state is not removable to the federal court on the ground that it involves a suit between "citizens" of another state. The commission, a constitutional department of the state exercising a part of the state's sovereign power and the action was, in effect, brought by the state which is not a "citizen." Arkansas Commission v Wrape, 76 F Supp 323.

In cases brought under the Federal Employers' Liability Act, plaintiff's choice of a forum cannot be defeated by doctrine of "forum non conveniens." In the instant case the evidences established that the contract by which the injured employee, in consideration of advancement by the company, agreed not to sue the railroad except within the state where the injuries occurred, was void as obtained by fraud. Porter v Fleming, 74 F Supp 378.

A court of equity is regarded as having inherent jurisdiction independent of any suit for divorce or separation to entertain a suit by the wife for support out of the general estate of the husband, and this on the ground that the remedy at law is inadequate. Donigan v Donigan, 236 M 516, 53 NW(2d) 635.

Under a contract of appointment between a manufacturer and a sales representative for the Republic of Mexico containing a provision for cancelation by the manufacturer on certain grounds upon giving 60 days notice, but not containing provisions as to sales prices, the manufacturer when sued for breach of contract had the burden of proving that the cancelation was justified, and the manufacturer did not discharge that burden merely by showing that the representative had not adhered to United States prices. Schenstrom v Continental Machines, 85 F Supp 374.

The common law does not recognize the right of an unemancipated minor child, living in the household of the parents, to maintain an action in tort against them or either of them. Redding v Redding, 70 SE(2d) 676.

The validity of a release relied on as a defense in an action under the Federal Employers' Liability Act is a question of federal law. In order to establish mutual mistake as to the extent of plaintiff's injury in execution of a release fatal to its validity it was sufficient that plaintiff produced evidence which, read in a light most favorable to her, support a finding that at the time of the release plaintiff was suffering from a substantial and severe injury from which at best recovery was doubtful, and that the release was given in a mistaken belief on the part of the plaintiff and defendant honestly but erroneously held that plaintiff's injury was of a minor character from which his complete and early recovery was certain. Chicago & Northwestern Ry. Co. v Curl, 178 F(2d) 497.

In order for the recovery of the parent to be barred because of negligence in connection with the supervision of a trespassing child who has suffered injury from an artificial condition maintained on land entered upon, evidence must establish that parent had some knowledge that child was frequenting dangerous area and failed to warn with reference thereto or, to otherwise take adequate precautions to prevent child from going into such area. Doren v Northwestern Baptist Hospital Assn., ... M ....., 60 NW(2d) 361.

540.02 Superseded, Rules of Civil Procedure, Rules 17.01 and 23.01.

Annotations relating to superseded section 540.02.

Express warranty of goods sold as passing with the goods on resale so as to entitle a subsequent buyer to sue the original seller for a breach of warranty. 34 MLR 269.

In an action by a surety against principals and their wives to recover judgment, set aside mortgages from the principals to their wives, and for the appointment of receiver of other nonexempt assets belonging to the principals, where the mortgages to the wives were declared to be regular and valid, litigation as to the wives was at an end, and the wives were not "aggrieved parties" who could appeal from a subsequent order of the court that the receiver turn over funds in his possession to the surety; and where the wives acquiesced in the validity of the receiver's appointment for over four years, they are not in a position to attack the appointment. London and Lancashire Indemnity Co. v Nelsen, 230 M 423, 41 NW(2d) 826.

Where a taxpayer brings an action to enjoin a city official from paying a salary to a city employee, the action is a representative suit, and the trial court has inherent discretionary power to substitute a new plaintiff who is within the classification of those on whose behalf the suit was instituted, where original representative has become disqualified subsequent to trial and order for judgment. Where the court fails to exercise such power in the belief that it did not possess it, the case must be remanded for the exercise of such discretion by the court. Where the action relates to the performance of a continuing duty pertaining to a public office, irrespective of the incumbent, it does not abate upon expiration of the term of the original office holder, named as defendant therein, and his successor may be and should be substituted as such defendant so as to be bound by the judgment in his official capacity. Phillips v Brandt, 231 M 423, 43 NW(2d) 284.

Plaintiff paid certain judgments against him with his own personal check. The money which paid these judgments was furnished by plaintiff's insurer under a loan receipt agreement with plaintiff. Under the terms of the loan receipt, the loan was repayable only to the extent of any recovery plaintiff might have against any party because of the accident, plaintiff pledging as security for such repayment any amount he might recover in such suit. No interest was required. Under the agreement, plaintiff was required to prosecute such suit with due diligence at the expense and under the exclusive direction and control of the insurer. Such loan receipt was evidence of a valid loan and not of payment by the insurer, and permitted an action to be brought in the name of the insured, notwithstanding the real-party-in-interest statute. Blair v Espeland, 231 M 444, 43 NW(2d) 274.

Where creditors of assignor of account receivable levied upon the account, and debtors gave sheriff check therefor, and thereafter the assignee brought action on the account alleging that it was due and payable, debtors could question title of assignee since presented with conflicting claims of ownership of the debt. Generally a debtor has no standing to question the validity of an assignment which is accepted as valid between the creditor and his assignee, but that rule is inapplicable where the debtor is faced with conflicting claims of ownership. General Underwriters, Inc. v Kline, 233 M 345, 46 NW(2d) 794.

Section 540.02 serves the purpose of saving a defendant against whom a judgment may be obtained from further vexation at the hands of other claimants for the same demand. Anderson v Connecticut Insurance Co., 231 M 469, 43 NW(2d) 807.

In an action brought by the employee of a general contractor to recover from the crane owner for injuries sustained by plaintiff when the crane, which had been

rented together with its operator by plaintiff's employer, came into contact with an electric power line while plaintiff was holding some steel trusses fastened to the boom of the crane by means of a steel hoisting cable, the evidence establishes that plaintiff's employer had such right of control over the acts of the crane operator as would justify consideration of the operator as a loaned servant and imposed liability for the operator's negligence, not on the crane owner, but under the doctrine of respondeat superior, upon the plaintiff's employer. When one company employee negligently injures his fellow-employee, it is no defense to assert that they were both employed under one master. Nepstad v Lambert, 235 M 1, 50 NW(2d) 614.

540.04 Superseded, Rules of Civil Procedure, Rule 17.01.

Annotations relating to superseded section 540.04.

Although the guardian is the proper party to the record and has control of the prosecution of the action, the minor's name should be inserted as plaintiff as he is the real party in interest. Martineau v City of St. Paul, 172 F(2d) 777.

540.05 MARRIED WOMEN MAY SUE OR BE SUED ALONE

HISTORY. RS 1851 c 70 s 30; 1852 amend p 8 s 20; PS 1858 c 60 s 30; GS 1866 c 66 s 29; 1869 c 58 s 1; GS 1878 c 66 s 29; GS 1894 s 5159; RL 1905 s 4056; GS 1913 s 7677.

Extent to which the common law concept of the unity of husband and wife has been subrogated by the Minnesota Married Women's Act and related Acts. 32 MLR 262.

540.06 Superseded by Rules of Civil Procedure, Rule 17.02.

Annotations relating to superseded section 540.06.

Power of guardian of an incompetent person to bring divorce action for his ward. 32 MLR 827.

Where proceedings are instituted to terminate a testamentary trust, it is the duty of the guardian ad litem to inquire into the case and if a defense exists to interpose same. Blaque v Kalman, 225 M 258, 30 NW(2d) 599.

Prohibitive clauses of the constitution, such as the due process clause, are self-executing and require no legislation for their enforcement; and where in a proceeding involving rights of a minor child the court fails to appoint a guardian to protect such rights, a guardian upon whom service may be made, the action taken relating to the child is ineffective. Re Wretlind, 225 M 554, 32 NW(2d) 161.

540.08 INJURY TO CHILD OR WARD, SUIT BY PARENT OR GUARDIAN

HISTORY. Amended, 1951 c 347 s 1.

Although a compromise and settlement of damages sustained by a minor be couched in express terms releasing the defendant entirely from damages for unknown as well as known injuries and be executed without fraud or overreaching of any kind, the trial court may vacate its approval of such settlement, made pursuant to MSA Section 40.08, if, in the cautious exercise of its discretion, it appears that separate and distinct injuries were sustained by the minor which, as a matter of mutual mistake, were not contemplated or considered in the settlement. The evidence supports the trial court's finding that the minor sustained separate and distinct injuries which were not contemplated or considered when the settlement was made. Larson v Stowe, 228 M 216, 36 NW(2d) 601.

The possessor of land is liable for injuries to trespassing children where the possessor knows, or should know, that children are likely to trespass upon a place where the condition is maintained and that condition is an unreasonable risk of death or injury to children, and children do not discover the condition or realize the risk involved. Chase v Luce, ... M ....., 58 NW(2d) 565.

540.10 Superseded by Rules of Civil Procedure, Rule 20.01.

540.11 SURETY MAY BRING ACTION

HISTORY. RS 1851 c 82 s 35; 1852 amend p 14 s 59; PS 1858 c 72 s 35; GS 1866 c 66 s 110; GS 1878 c 66 s 130; GS 1894 s 5272; RL 1905 s 4063; GS 1913 s 7684.

Principal and surety; indemnity against loss and liability; express and implied contract. 33 MLR 546.

540.12 Superseded by Rules of Civil Procedure, Rules 25.01 and 25.03 to extent inconsistent.

Annotations relating to superseded section 540.12.

Applicability of state law to the doctrine of abatement to a cause of action created by federal statute and litigated in Minnesota courts. 31 MLR 371.

Right to recover damages for libel contained in a will. 33 MLR 171.

Court properly granted motion made by counsel in behalf of deceased plaintiff's son who was given authority in power of attorney to institute legal proceedings as plaintiff's attorney in fact, for substitution of party plaintiff, over objection that no identifiable person made the application for substitution. Statute providing that no action shall abate by death or disability of a party, or a transfer of his interest, if cause of action continues or survives, and that in such cases court, on motion, may substitute the representative or successor in interest, or, in cases of transfer of interest, may allow action to proceed in name of original party, though in its terms permissive, does not permit court to exercise an arbitrary discretion, and in case of death of plaintiff, where action cannot otherwise proceed, substitution should be allowed, unless good cause is shown to the contrary.

Where plaintiff, prior to bringing action for dissolution of partnership, for an accounting, and for appointment of a receiver, gave power of attorney to his son to bring an action in plaintiff's or in son's name to recover any money or property of partnership which had been illegally appropriated, and providing that any money recovered by son should become separate property of son and a brother of the son, and after institution of action partnership assets were divided by agreement, plaintiff's son, on death of plaintiff, was properly substituted for plaintiff as a successor in interest. Jacobs v Jacobs, 227 M 451, 35 NW(2d) 611.

If, by the terms of assignment of a cause of action by plaintiff, the plaintiff retains any sufficient interest in further prosecution of the action, or may become liable to the assignee if the action fails, intervention by the assignee and not substitution is the proper remedy; and where, pendente lite, the whole beneficial interest in a cause of action is assigned and transferred, the right of substitution of the assignee as plaintiff arises. Jacobs v Jacobs, 227 M 451, 35 NW(2d) 611.

A cause of action based upon a contract survives the death of the defendant therein. In such cases the court on motion may substitute the representative of the decedent as defendant, and the action may thereupon be prosecuted to final judgment as provided in sections 540.12, 525.43. Milner v First Nat'l Bank, 228 M 324, 37 NW(2d) 450.

540.14 ACTIONS AGAINST RECEIVERS; TRIAL; JUDGMENT, HOW SATISFIED

The appointment of receiver in connection with sequestration proceedings is in the nature of an equitable attachment, a quasi in rem proceeding in which creditors seek to compel satisfaction of their personal claims against the defendant corporation out of the attached assets, and the court has jurisdiction in the same proceeding to determine property claims against the assets. Schwartz v First Trust Co., 236 M 165, 52 NW(2d) 290.

540.15 ASSOCIATES SUED AS PARTNERS

NOTE: The clause "and the summons may be served on one or more of them" is deleted. See Rule 4.03(b).

The constitution and bylaws of unincorporated association, if they are not immoral, contrary to public policy or the law of the land or unreasonable, constitute an enforceable contract between the members by which their rights, duties, powers, and liabilities are measured. The majority of the members may direct the use of the funds of the association with the scope of its declared purposes but the majority cannot against the will of the minority lawfully direct association funds for uses other than those permitted by the constitution and bylaws. In the instant case the majority cannot, contrary to the wishes of the minority, transfer the funds of the local to another organization where members in excess of seven in number continue their allegiance to the parent union and continue to function under the original charter. Liggett v Koivunen, 227 M 114, 34 NW(2d) 345.

540.151 CERTAIN PERSONS AND ASSOCIATIONS; LABOR ORGANIZATIONS; EMPLOYER ORGANIZATIONS; SUABILITY

NOTE: The clause "and the summons may be served on one or more of them" is deleted. See Rule 4.03(b).

Suability of certain persons, labor organizations, and employer organizations. 33 MLR 38.

Two separate suits for declared judgment and injunctive relief were brought by two separate local unions against the national organizations. In each suit the defendants demurred to the complaint and the district court overruled both demurrers, whereupon the defendant appealed. The supreme court held that plaintiffs were entitled to judgment declaring their right to disaffiliate from the parent union and to retain their assets. A local labor union is a separate and distinct voluntary association which owes its creation and continued existence to the will of its members and upon its disaffiliation from the international union its relationship with international is severed, even though it continues to retain its organization's assets. In the absence of enforceable provisions in the parent union's constitution preventing disaffiliation of local union in tact with its property, the local union could by majority sever its relationship with the parent union and take its property with it. Local United Elec. Workers v United Elec. Workers, 232 M 217, 45 NW(2d) 408.

540.152 CERTAIN ACTIVITIES OR TRANSACTIONS SUABLE

Negotiations and solicitation by employees regarding union rights during company's time. 37 MLR 293.

540.16 Superseded by Rules of Civil Procedure, Rules 13.08, 14.01, 14.02, and 19.02.

Annotations relating to superseded section 540.16.

Right to bring in third parties no longer depends upon whether the controversy between the original parties could be determined without their presence. The right to bring in third parties is now a matter of discretion with the trial court exercised to obtain complete determination of all material claims in one action. 32 MLR 84.

Bringing in additional parties to avoid multiplicity of suits. 33 MLR 36.

Under the Federal Tort Claims Act suit for contribution may be brought against the United States and the United States may be impleaded as a third-party defendant for the purposes of contribution. 35 MLR 593

Garnishment; quasi-in-rem jurisdiction over nonresidents; nature of claim in impleader of joint tort-feasors. 36 MLR 543.

"Judicial discretion" is the sound choosing by the court, subject to guidance of the law, between doing or not doing a thing, the doing of which cannot be demanded as an absolute right of the party who asks that it be done; and on a motion to bring in additional parties, the trial court, in passing on the motion, necessarily exercises a broad discretion and may consider a variety of factors. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

Ex parte orders are not appealable, since it is ordinarily supposed that a trial court, which may have acted erroneously on a one-sided application, will perceive and correct its error if an adverse party is heard; and orders which deny or grant motions for the vacation of an order either denying or granting the joinder of additional parties to an action are not appealable. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

An order which is finally determinative of an action so as to be appealable relates to, and is decisive of, the fundamental issues on which the suit is based; and where a judgment was entered for defendant on an order sustaining the demurrer to the complaint with the notice to plaintiff and no provision for dismissal of the action or for costs and disbursement for the defendant were made therein, the judgment was final, although irregular, and an order sustaining demurrer was not appealable after entry of the judgment. Chapman v Dorsey, 230 M 279, 41 NW(2d) 438.

An order granting leave to file and serve a third-party complaint and requiring the third party defendants to answer within a time fixed by the court is not applicable. Finnegan v Meyer, 230 M 583, 41 NW(2d) 818.

Whether an additional party may be brought in as defendant is discretionary with the trial court; and where an additional party defendant is brought in on a motion by plaintiffs, the plaintiffs thereafter have the same right to dismiss as if the defendant had been originally sued, and other defendants are not in a position to object to such dismissal. Conradson v Vinkemeier, 235 M 537, 51 NW(2d) 651.

Generally, an action for contribution does not mature until one of two or more obligors or tort-feasors has paid more than his share of the debt or obligation. A party who may become liable for contribution or indemnity to the defendant sued in an action, in the discretion of the trial court, may be brought in as an additional party on motion of the defendant sued. Gustafson v Johnson, 235 M 376, 51 NW(2d) 109.

Unless they were adversaries in the original action, a judgment in favor of a plaintiff against two or more defendants is not res judicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them not involving contributions or indemnity. Bunge v Yager, 236 M 245, 52 NW(2d) 446.

CHAPTER 541

LIMITATION OF TIME, COMMENCING ACTIONS

541.01 BAR APPLIES TO STATE; EXCEPTIONS

Applicability of the state statute of limitations to federally created rights under the Fair Labor Standards Act. 32 MLR 65.

Violation of a criminal statute designed to protect against intentional harm; civil remedy where not expressly provided by statute or common law. 32 MLR 531.

Judgments of foreign courts; basis of regulation in the United States. 33 MLR 659.

An action for malicious prosecution will not lie until the prosecution has terminated in favor of the accused. Survis v McDonald, 224 M 479, 28 NW(2d) 720.

When a street is vacated by plat, a municipality may choose its own time to occupy, open and use the street. Until it does so, possession of the street by an abutting owner is not regarded as hostile, and the statute of limitations will not commence to run. Non-user for any length of time, unless accompanied by some affirmative or unequivocal acts of the municipality, indicative of an intent to