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

abandon and inconsistent with the continued existence of the easement, will not operate as an abandonment of a public street. Village of Newport v Taylor, 225 M 299, 30 NW(2d) 589.

In an action by the village of Newport against the defendant to remove obstructions from a street, adverse possession may be established only by clear and positive proof based on strict construction of the evidence without resort to any inference or presumption in favor of the disseisor, or with the indulgence of every presumption against him. The burden of proving the essential facts which create title by adverse possession rests upon the disseisor; and possession of the disseisor must be shown to be hostile, open, actual, continuous, and exclusive, and the absence of any one of these essential elements is fatal to the establishment of adverse possession. Village of Newport v Taylor, 225 M 299, 30 NW(2d) 589.

In effecting a reasonable use of land for a legitimate purpose, a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed or evaporated, if (a) there is a reasonable necessity for such drainage; (b) if reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d) if, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity; or if, in the absence of a practicable natural drain, a reasonable and feasible artifical drainage system is adopted. Enderson v Kelehan, 226 M 163, 32 NW(2d) 286.

"Surface waters" consist of waters from rain, springs, or melting snow which lie or flow on the surface of the earth but which do not form a part of a well-defined body of water or natural water course. Waters do not lose their character "surface waters" because in a measure they are absorbed by or soak into the marshy or boggy ground where collected. Enderson v Kelehan, 226 M 163, 32 NW(2d) 286.

Limitation statutes are generally considered procedural and the law of the forum is applied. Knipfer v Buhler, 227 M 324, 35 NW(2d) 425.

Where city had abandoned use of property dedicated for highway purposes prior to time state attempted to take it over as part of highway system, state acquired no interest therein; where plat dedicating streets provided that, in event of vacation thereof, title thereto should revert to dedicator, upon vacation or abandonment by city of such property for highway purposes, assignee of dedicator acquired title thereto, though he was not an abutting owner. State v Marcks, 228 M 129, 36 NW (2d) 594.

When a street is dedicated by plat, city may choose its own time to occupy and open same and, until it does so, possession of abutting owner is not regarded as hostile; and if land dedicated for highway purposes is abandoned by city, city is thereafter estopped from asserting rights under the original dedication against persons or parties relying upon evidence of such abandonment. State v Marcks, 228 M 129, 36 NW(2d) 594.

Where a mistake had been made in computing interest on instalment 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.

The manner and scope of cross-examination is largely within the discretion of trial court, whose exercise thereof constitutes no ground for reversal except in case of clear abuse of discretion, and the alleged misconduct of counsel for plaintiff did not entitle defendant to a new trial, where, though exception was taken to the argument at the close of court's charge, there was no request to the court for corrective action. Flemming v Thorson et al, 231 M 343, 43 NW(2d) 225.

Where an action is governed by the statute of limitations, the doctrine of laches has no application. Aronovitch v Levy, ... M ....., 56 NW(2d) 570.

Prior to March 18, 1899, title to lands in a public alley could be acquired by adverse possession to such an extent as to be entitled to compensation upon the opening of the alley to public travel. Since March 18, 1899, the title to public property cannot be acquired by adverse possession. OAG Oct. 13, 1947 (50).

Since the enactment of Laws 1899, Chapter 65, title to public property cannot be acquired by adverse possession; consequently, the borough of Belle Plaine may open an alley without paying damages except as it interferes with the private property rights of one who acquired title in the alley by adverse possession prior to March 18, 1899. OAG Oct. 13, 1947 (50).

Where a church corporation claims adverse possession of a part of a public highway on which its building infringes, basing its right on adverse possession as against the village of Waconia, such right depends upon whether or not possession by the church ripened into title by adverse possession prior to the enactment of Laws 1899, Chapter 65. OAG April 5, 1948 (50).

A city cannot condemn property dedicated for use as a public square and thereby acquire the right to use it as a high school athletic field. OAG April 27, 1949 (59-A-14).

More than 15 years ago a village, for a consideration, consented that the owner of an 80-acre tract of land adjoining the village might connect his drainage system with the village sewer system. No written agreement was made. The law vests in the village council the right to make contracts but the courts may transfer where the action of the council is arbitrary, oppressive or unreasonable. No occupant of ground dedicated or appropriated to public use may acquire by reason of occupancy any title thereto. If the laying of tile on the 80-acre tract to connect with the village drain simply assisted waters, which in the state of nature drained upon the village, then if the owner of the 80-acre tract observed the rule laid down in Sheehan v Flynn, 59 M 436, 61 NW(2d) 462, he was within his rights. OAG Nov. 15, 1948 (387-G).

If there is deficiency in the amount paid to the town treasurer for his compensation, he cannot collect for more than a six-year deficiency. OAG Sept. 26, 1949 (455-D).

The statute of limitations, in the absence of estoppel or laches, determines the time within which a taxpayer's suit may be brought to annul the sale and cancel the deed conveying village property. OAG Sept. 30, 1947 (469-A-15).

Section 272.10 applies to the collection of drainage assessments, section 541.01 not being a bar. OAG March 18, 1948.

The legislature may validly shorten the time within which action may be brought to recover possession of the property deeded to a village for park purposes and thereafter sold by the village. OAG Sept. 14, 1949 (605-A-13).

A town has no right to invade the property of a private owner in disposing of stumps resulting from the construction of a road; and placing the stumps upon the property would constitute a trespass for which act the town is liable. OAG Aug. 18, 1948 (844-H).

541.02 RECOVERY OF REAL ESTATE, 15 YEARS

Right of servient owner to make change in location without consent of dominant owner. 35 MLR 494.

Practical location of boundaries; establishment by acquiescence. 37 MLR 382.

In a boundary line controversy the evidence supports a finding that defendant and her predecessor acquiesced in the occupancy of the disputed tract by plaintiff and its predecessors for a period in excess of 30 years prior to her assertion of a claim to it as against the plaintiff. Plaintiff and its predecessors in interest acquired title to the strip of land by adverse possession. Philips Petroleum v Selnes, 223 M 518, 27 NW(2d) 553.

Where a mortgage given to a guardian as payment for the interest to minor wards had in lands, and the guardian executed a waiver of the priority of the mortgage in favor of a mortgage to the state, and the mortgage to the state was subsequently foreclosed, and the wards thereafter instituted an action to foreclose their mortgage notwithstanding the waiver, the ward who was a minor at the date of the execution of the waiver has a right of action and as to such minor the question of laches does not arise. Vadnais v State, 224 M 439, 28 NW(2d) 694.

A municipality may use its own discretion as to when to occupy, open, and use a street dedicated by plat. Possession of the abutting owner is not hostile. Village of Newport v Taylor, 225 M 299, 30 NW(2d) 583.

Disseisor has the burden of proving facts which create title by adverse possession. Such possession may be established only a clear and positive proof based upon strict construction of the evidence. Every presumption must be unduly used against the disseisor. Village of Newport v Taylor, 225 M 299, 30 NW(2d) 583.

Adverse possession sufficient to form the basis for title to land must be hostile as to the title of the owner. Where, as in the instant case, original possession and subsequent use and occupancy by claimant's predecessor was permissive and the result of a close fraternal relationship with owner, and no evidence was presented to indicate that such original permissive use at some point became adverse or hostile, held that evidence was insufficient to sustain trial court's finding that such possession and use were hostile and adverse so as to establish adverse title in claimants or their predecessors. Norgong v Whitehead, 225 M 379, 31 NW (2d) 267.

Where the guardian of a minor assumes, without approval of the probate court, to waive the priority of a mortgage running to him as guardian for the ward, such waiver is not binding on the ward. Those who deal with guardian are bound, at their peril, to determine under what authority the guardian acts. Vadnais v State, 225 M 439, 28 NW(2d) 694.

Title to land by adverse possession must be established by competent proof that the possession is hostile to the title of the true owner under a claim or right and it must be actual, open, continuous, and exclusive; and adverse possession cannot be inferred merely from a finding of fact that defendant farmed a parcel of land for more than the statutory period when for part of the period he was a mere tenant and only had title to the property for a period less than the statutory period required. Johnson v Raddohl, 226 M 343, 32 NW(2d) 860.

The owner's acquiescence in adverse user of a driveway across his land without more does not show that the use, claimed to be adverse, was in fact permissive. The continuity of adverse possession is not broken by the adverse claimant's taking a written conveyance of the interest claimed by him from parties claiming ownership of the property or some interest therein. The execution, without more, by the owner of land of a mortgage thereon during the prescriptive period does not interrupt the user of an adverse claimant. A purchaser at a mortgage foreclosure sale held after the prescriptive period under a mortgage given during such period takes subject to an easement by prescriptive right to a driveway thereon plainly visible by a view of the premises. Dozier v Krmpotich, 227 M 503, 35 NW(2d) 696.

Where the land in question is separately assessed the payment of taxes by a disseisor or his predecessors in adverse possession for a period of five consecutive years during the period of adverse occupancy is a prerequisite to the acquisition of title by adverse possession; by the affirmative act of paying taxes the trustee did all that was necessary to protect the lot-owning beneficiaries from a loss, through mere non-user, of the right to use the lane. Bryant v Gustafson, 230 M 1, 40 NW(2d) 429.

In a dispute involving the correct location of a boundary line where by survey the line fence was found to encroach upon plaintiff's property, the finding for the plaintiff by the trial court was affirmed on the ground that evidence did not indicate that the defendant had been in adverse possession continuously for 15 years. Simpson v Sheridan, 231 M 118, 42 NW(2d) 402.

All profits made by an agent in the course of an agency belong to the principal, whether they are fruits of performance or of violation of the agent's duty, and it is immaterial that the principal has suffered no damage, or even that the transaction concerned was profitable to him. Where the agent of the buyer received a secret commission from the seller of a business, election by the buyer, upon discovery of fraud in the transaction to rescind the contract of sale and recover from the seller that with which he had parted, did not preclude a subsequent action by the buyer against his agent to recover secret commissions obtained in violation of duties of the agency. Tarnowski v Resop, 236 M 33, 51 NW(2d) 801.

Where owners of undivided shares in real estate were minors in 1933 when the adverse claimant went into possession of such real estate, but all of such minors attained their majority by 1944, the statute tolling the running of the period of limitation would be inapplicable to an action brought in 1949 to quiet title to such land in adverse possession. In the absence of fraud, ignorance of the existence of a cause of action for the recovery of real estate does not toll the statute of limitations, but the statute does not run against actions for fraud until the fraud is discovered. There was no evidence of fraud in the instant case. Voegele v Mahoney, 237 M 43, 54 NW(2d) 15.

In the absence of fraud ignorance of the existence of a cause of action for the recovery of real estate does not toll the statute of limitations, but the statute does not run against actions for fraud until the fraud is discovered. Voegele v Mahoney, 237 M 43, 54 NW(2d) 15.

When the mortgagee who bid in the property at foreclosure sale acquired possession of such property by action in ejectment, and thereafter held title under claim of ownership to the exclusion of all others, under requirements for acquisition of title by adverse possession, for more than 15 years, she thereby acquired title, regardless of whether foreclosure was invalid because mortgagee was unconscionably enriched as a result of excess of land value over the mortgage debt. Voegele v Mahoney, 237 M 43, 54 NW(2d) 15.

Whether or not a town road, established by user, may widen the right-of-way by two rods on each side of the road is a question of fact. If the road became a public road by user prior to April 11, 1899, the date of passage and approval of Laws 1899, Chapter 152, the road is limited to the area actually occupied by the road at the time it became a public road by the user; but if it became a public road after April 11, 1899, then the right-of-way is two rods on each side of the road as actually used. OAG July 7, 1949 (377-A-4).

Where the school district is dissolved and through reorganization and admittance into a larger district, where the school building was built upon land with the owner's consent, the school district did not acquire title by adverse possession because the possession was not hostile. In such case the right to remove the school building depends upon the question of fact as to the contract, oral or written, between the owner of the land and the school district at the time of the building of the schoolhouse thereon. If the school district has the right to sell or remove the building, the removal should be without damage to the owner of the fee and the district should remove any foundation for the building if the leaving of the foundation upon the removal of the building would constitute an obstruction to the use of the land. OAG Aug. 30, 1951 (622-I-14).

541.023 ACTIONS AFFECTING TITLE TO REAL ESTATE

Limitations of actions affecting title to real estate. 33 MLR 47, 54.

To take advantage of section 541.023, subdivision 1, which bars certain actions affecting the possession or title of real estate, the defending party's claim of title must be based upon a source of title which has been of record at least 40 years. Mpls. St. Louis Ry. v Ellsworth, 237 M 439, 54 NW(2d) 801.

Under the ancient claims extinguishment statute exception accorded rights of any person, partnership or corporation, in possession of real estate, "possession" must be present, actual, open and exclusive, and must be inconsistent with title of person who is protected by statute, and it cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry. Harris v City of Hastings, ... M ....., 59 NW(2d) 813.

The payment of taxes, although evidence of a claim of title, is not evidence of adverse possession. A person examining titles is not required or expected to examine books in the county auditor's office to ascertain whom they list as owner or agent, or who has paid the taxes, because the books are not kept as record of titles to real estate and do not constitute constructive notice to proposed purchaser of record title, that person listed there as owner has any interest in the land. Harris v City of Hastings, ... M ....., 59 NW(2d) 813.

The statute barring claimant of interest in real estate under a 40 year old instrument, event, or transaction, was not intended as a mere procedural device to limit the time for commencing the action but was intended to bar right itself. Harris v City of Hastings, ... M ....., 59 NW(2d) 813.

A deed effective April 5, 1902, conveyed land subject to the reservation of all coal, oil, and gas rights. The present owner wishes to plat the tract. The owner of the mineral rights does not claim to own the same rights as are granted by the owner of the surface, so section 541.023 was never intended to be used to defeat mineral rights. The owner of the mineral reservation has the same right as he had in 1902. There is nothing to prevent the owner of the surface rights from bringing an action against the owner of the mineral rights to determine adverse claims but the bringing of such an action would not answer any useful purpose. There is no reason why the owner of the surface rights cannot plat the surface but such platting or any subsequent need made by the proprietor of the surface would not defeat the right of the owner of the minerals reserved in the 1902 deed. OAG Nov. 2, 1949 (18-D).

The failure of a town to use property as a town hall may result in reversion to the original owners. Permitting a village the partial use of the town hall is not a violation of the condition subsequent. OAG April 4, 1951 (434-C-8).

541.03 FORECLOSURE OF REAL ESTATE MORTGAGE

HISTORY. RS 1851 c 70 s 12; PS 1858 c 60 s 12; GS 1866 c 66 s 11; 1870 c 60 s 1; 1878 c 53 s 1; GS 1878 c 66 s 11; GS 1878 c 81 s 1; 1879 s 21 s 1; 1887 c 69; GS 1894 s 5141, 6028; 1901 c 11; RL 1905 s 4074, 4457; 1903 c 15; 1907 c 197; 1909 c 181 s 1, 2; GS 1913 s 7698, 7699.

541.04 JUDGMENTS, TEN YEARS

HISTORY. RS 1851 c 70 s 5; PS 1858 c 60 s 5; 1865 c 20 s 1; GS 1866 c 66 s 5; GS 1878 c 66 s 5; GS 1894 s 5135; 1901 c 279; RL 1905 s 4075; GS 1913 s 7700.

Judgments; bar to other actions; consent decree in tax proceedings as collateral estoppel. 37 MLR 291.

An action to recover unpaid support money for a minor child, awarded by the decree of a Wisconsin divorce court and not in any way amended, modified, or altered when the child reaches his majority and all payments are due, is an action upon a foreign judgment, and, in conformance with MSA Section 541.04, must be commenced within ten years from that time. This statute is absolute and is not in any way tolled by defendant's absence from the state. Limitation statutes are procedural and the law of the forum applies. Knipfer v Buhler, 227 M 334, 35 NW(2d) 425.

541.05 VARIOUS CASES, SIX YEARS

HISTORY. RS 1851 c 70 s 6; PS 1858 c 60 s 6; GS 1866 c 66 s 6; 1877 c 24 s 1; GS 1878 c 66 s 6; GS 1894 s 5136; 1895 c 126; 1901 c 357; RL 1905 s 4076; GS 1913 s 7701; 1935 c 80 s 2; 1953 c 378 s 1.

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

Statute of limitations as it relates to an anticipatory breach of contract to make a will. 32 MLR 630.

The statute of limitations does not commence to run on guaranty of payment of a note until the note is due and payable. Nelson v Hacking, 225 M 125, 29 NW(2d) 888.

Plaintiff's testate upon solicitation by defendants sold corporate stock and received therefor defendants' note for $3,575 and 6 weeks later received from defendants a letter authorizing plaintiff to withdraw against the note amounts up to $500 at any time. The evidence is sufficient to support a finding that the letter constituted a guarantee of payment of the note and was delivered as a part of the original transaction in which the plaintiff's testate delivered certain stocks and received a note in exchange. The letter constituted a "guarantee" notwithstanding that no consideration was mentioned therein. The statute of limitations does not commence to run on a guarantee until the debt is due and payable. Nelson v Hacking, 225 M 125, 29 NW(2d) 889.

Where a general contractor ordered the electrical subcontractor to perform work not required to be performed by the subcontractor under the subcontract, and the subcontractor performed the work, it could not be said that the subcontractor was a mere volunteer and as such not entitled to compensation for the extra work performed. Sagl v Hirt, 236 M 281, 52 NW(2d) 721.

In an action based upon mutual mistake, an allegation in the reply that the operation of the statute of limitation, pleaded as a defense in the answer, was tolled until plaintiff's discovery in 1945 of the alleged mistake in appraisal, is insufficient to establish suspension of operation of the statute. The trial court was correct in striking such allegation from the reply. Sollar v Oliver Iron Mining Co., 237 M 170, 54 NW(2d) 114.

The Minnesota legislature is primarily judge of what constitutes a reasonable period of limitation for the commencement of actions to recover overtime compensation, liquidated damages, and attorney's fees, in the absence of a federal statute of limitation. The wisdom of that lawmaking body in so doing will not be questioned by the court unless the time allowed is so inadequate as to deny justice; and the two-year statute of limitations affecting actions commenced to recover overtime compensation, liquidated damages, and attorneys' fees under the Fair Labor Standards Act without disturbing the six-year limitations applying to actions by employees against employers for wages based on contract does no violence to the federal constitution. Smith v Cudahy, 73 F Supp 141.

It is presumed that the Minnesota Legislature in prescribing a two-year limitation for the commencement of actions for the recovery of wages, overtime and the like, accuring under laws respecting the payment of wages, overtime and the like, while at the same time they provide a six-year limitation for wage claims arising under contract, weighed all the benefits as well as the iniquities which might result from such classifications; and the classification is not unconstitutional nor does it deny the equal protection of the laws to persons having claims for wages or overtime under the fair labor standards act, nor is the classification arbitrary. Peterson v Parsons, 73 F Supp. 840.

Prior to March 18, 1899, title to lands in a public alley could be acquired by adverse possession to such an extent as to be entitled to compensation upon the opening of the alley to public travel. Since March 18, 1899, the title to public property cannot be acquired by adverse possession. OAG Oct. 13, 1947 (50).

The statute of limitations in the absence of estoppel or laches determines the time within which a taxpayer's suit may be brought to annul the sale and cancel the deed conveying village property. OAG Sept. 30, 1947 (469-A-15).

A claim of a child of an old age assistance recipient for money actually paid by the child in discharge of taxes upon the real estate owned by the recipient takes

priority over the old age assistance lien. The statute of limitations, section 541.05, necessarily operates from the time that such repayment was due. OAG Sept. 16, 1947 (521-P-4).

541.06 SHERIFFS, CORONERS, CONSTABLES; FORFEITURES, THREE YEARS

HISTORY. RS 1851 c 70 s 7; PS 1858 c 60 s 7; GS 1866 c 66 s 7; GS 1878 c 66 s 7; GS 1894 s 5137; RL 1905 s 4077; GS 1913 s 7702; 1953 c 378 s 2.

541.07 TWO-YEAR LIMITATIONS

HISTORY. RS 1851 c 68 s 15; RS 1851 c 70 s 8; 1857 c 39 s 17; 1858 c 92; PS 1858 c 55 s 15; PS 1858 c 60 s 8; PS 1858 c 129 s 17; GS 1866 c 31 s 17; GS 1866 c 60 s 12; GS 1866 c 66 s 8; 1876 c 100 s 1; GS 1878 c 31 s 17; GS 1878 c 60 s 12; GS 1878 c 66 s 8; GS 1894 s 2369, 4761, 5138; 1895 c 30; RL 1905 s 4078; GS 1913 s 7703; 1925 c 113 s 1; 1935 c 80 s 1; 1945 c 513 s 1; 1953 c 378 s 3.

Federally granted rights under the Fair Labor Standards Act; applicability of the state statute of limitations. 32 MLR 65.

Malpractice; civil liability of physicians. 35 MLR 186.

Where a complaint on its face showed that the cause of action was barred by the statute of limitations, a demurrer thereto is properly sustained. An order granting a motion to amend an answer is not appealable. An order refusing to strike an order of the court and part of its memorandum is not appealable. Allum v Federal Cartridge Corporation, 225 M 438, 30 NW(2d) 705.

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 attending physician is not relieved of the duty to call upon a patient merely because he is receiving care in an excellent hospital under the care of a qualified physician and nurses. Moeller v Hauser, 237 M 368, 54 NW(2d) 639.

The Minnesota legislature is primarily judge of what constitutes a reasonable period of limitation for the commencement of actions to recover overtime compensation, liquidated damages, and attorney's fees, in the absence of a federal statute of limitation. The wisdom of that lawmaking body in so doing will not be questioned by the court unless the time allowed is so inadequate as to deny justice; and the two-year statute of limitations affecting actions commenced to recover overtime compensation, liquidated damages, and attorney's fees under the Fair Labor Standards Act without disturbing the six-year limitations applying to actions by employees against employers for wages based on contract does no violence to the federal constitution. Smith v Cudahy, 73 F Supp 141.

The Minnesota legislature in requiring actions for the recovery of wages, overtime and the like, under any federal or state law, to be commenced within two years, exercised its legislative discretion and carefully weighed the benefits as well as the apparent inequities that might result from such classification. The Minnesota legislation is not unconstitutional, nor does it deny the equal protection of the laws to persons having claims for wages or overtime under the Federal Fair Labor Standards Act. Smith v Cudahy, 73 F Supp 141; 76 F Supp 575; Peterson v Parsons, 73 F Supp 840.

Paragraph (5) relating to wages, was designed and intended to be limited to actions for wages, damages or penalties arising out of the employer-employee relationship, and was not intended to apply to civil anti-trust action brought by a private

individual under federal statute to recover damages for alleged anti-trust valuation. Homewood Theater v Loew's Inc., 101 F Supp 76.

541.071 LAWS RETROACTIVE; LIMITATION

HISTORY. 1945 c 513 s 2; 1953 c 378 s 4.

Where a complaint on its face showed that the cause of action was barred by the statute of limitations, a demurrer thereto is properly sustained. An order granting a motion to amend an answer is not appealable. An order refusing to strike an order of the court and part of its memorandum is not appealable. Allum v Federal Cartridge Corporation, 225 M 438, 30 NW(2d) 705.

The word "passage" means approval by signature of the governor, and does not refer to the date of passage of the bill by the house and senate. Smith v Cudahy, 76 F Supp 575.

541.11 Repealed, 1953 c 378 s 5.

541.115 ACTIONS RELATING TO MAINTENANCE OF WATER LEVELS

Whether maintenance of a logging dam at the outlet of a navigable lake for a period of more than 20 years thereby raising and maintaining the water level above the high, has created prescriptive rights presents a factual question for judicial determination. OAG Feb. 19, 1951 (370-A-4).

541.12 Superseded by Rules of Civil Procedure, Rule 3.01.

Annotations relating to superseded section 541.12.

An amended pleading supersedes the original pleading and must be construed as the only pleading interposed so that an order sustaining the demurrer to the original complaint will not be considered on appeal from an order sustaining demurrers to both original and amended complaints. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

The period fixing the time within which a right of action for wrongful death under section 573.02 may be exercised is not an ordinary statute of limitations; it conditions the right. The statutory two-year period expired on April 14, 1948. The summons and complaint were delivered to the sheriff on April 8, 1948. If the sheriff served the papers on the defendant within the 60 days allowed by section 541.12 the service was good and the action properly commenced. If the service was not made as provided in section 541.12 the action was barred. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

Where a summons and a complaint in a death action were within a 2-year period after defendant's alleged wrongful act delivered to the sheriff of the county where the wrongful act occurred, and where defendant resided at the time of the accident, for service on the defendant, they were served on personally by the constable after the expiration of the statutory period, but within 60 days after such delivery the statute was complied with and the action was commenced by such delivery. Berghuis v Korthuis, 228 M 534, 37 NW(2d) 809.

To justify the issuance of a writ of prohibition, it must appear: that the court officer, or person against whom it issues is about to exercise a judicial or quasi-judicial power; that the exercise of such power of such court officer, or person is unauthorized by law; and that it will result in injury for which there is no other adequate remedy at law. Bellows v Ericson, 233 M 320, 46 NW(2d) 654.

541.13 ABSENCE FROM STATE

In a personal injury action where defendant husband and wife sold a long established home, sold their business, and the husband resigned from the office of mayor, and they moved to another state and established a new business there, the

question of whether or not there was a change of domicile so as to toll the statute of limitations that had begun to run after the infant plaintiff reached majority, was a question of fact for the jury. Nelson v Sandkamp, 227 M 177, 34 NW(2d) 640.

An action to recover unpaid support money for a minor child, awarded by the decree of a Wisconsin divorce court and not in any way amended, modified, or altered when the child reaches his majority and all payments are due, is an action upon a foreign judgment, and, in conformance with MSA, Section 541.04, must be commenced within ten years from that time. This statute is absolute and is not in any way tolled by defendant's absence from the state. Limitation statutes are procedural and the law of the forum applies. Knipfer v Buhler, 227 M 334, 35 NW(2d) 425.

Where a promissory note shows on its face that it is more than six years past due, if the holder relies upon part payment to avoid the bar of the statute of limitations, the burden is on him to prove it. The trial court's finding against the plaintiff on this issue was justified by the evidence. The departure from the state which involves merely a temporary sojourn elsewhere, as distinguished from the acquirement of a new domicile, is insufficient to toll the statute of limitations. Beckos v Hamre, 236 M 494, 53 NW(2d) 234.

541.15 PERIODS OF DISABILITY NOT COUNTED

HISTORY. Amended, 1949 c 304 s 1.

In construing section 541.15, section 645.15 is applicable. The time during which a party is within the age of 21 years old and for an additional period of one year thereafter his disability of infancy had ceased requires the exclusion of the fees and inclusion of the last day in determining the expiration of the 1-year period. Nelson v Sandkamp, 227 M 177, 34 NW(2d) 640.

When the mortgagee who bid in the property at foreclosure sale acquired possession of such property by action in ejectment, and thereafter held title under claim of ownership to the exclusion of all others, under requirements for acquisition of title by adverse possession, for more than 15 years, she thereby acquired title, regardless of whether foreclosure was invalid because mortgagee was unconscionably enriched as a result of excess of land value over the mortgage debt. Voegele v Mahoney, 237 M 43, 54 NW(2d) 15.

Where owners of undivided shares in real estate were minors in 1933 when the adverse claimant went into possession of such real estate, but all of such minors attained their majority by 1944, the statute tolling the running of the period of limitation would be inapplicable to an action brought in 1949 to quiet title to such land in adverse possession. In the absence of fraud, ignorance of the existence of a cause of action for the recovery of real estate does not toll the statute of limitations, but the statute does not run against actions for fraud until the fraud is discovered. There was no evidence of fraud in the instant case. Voegele v Mahoney, 237 M 43, 54 NW(2d) 15.

CHAPTER 542

VENUE OF ACTIONS

542.01 VENUE; GENERAL RULE; EXCEPTION

Venue provisions in section 1404 (2) of the federal code. 33 MLR 536, 34 MLR 146.

Forum non conveniens. 33 MLR 536.

State statutes as affecting jurisdiction of federal courts. 33 MLR 664.