Judicial Procedure; District Court

CHAPTER 540

PARTIES TO ACTIONS

540.01 ONE FORM OF ACTION; PARTIES HOW STYLED.

HISTORY. R.S. 1851 c. 70 ss. 1, 2; P.S. 1858 c. 60 ss. 1, 2; G.S. 1866 c. 66 ss. 1, 2; G.S. 1878 c. 66 ss. 1, 2; G.S. 1894 ss. 5131, 5132; R.L. 1905 s. 4052; G.S. 1913 s. 7673; G.S. 1923 s. 9164; M.S. 1927 s. 9164.

Though tenants in common as to the vessel, the owners are partners, as to its business, and the partnership may assign to a third person a claim held by the partnership against one of the partners, for services rendered by it to him, and such assignee may maintain an action at law in his own name and recover against the partner. Russell v Minnesota Outfit, 1 M 162 (136).

In an action on a contract, a claim for use and occupation of real estate, held adversely by plaintiff, cannot be pleaded as a counter-claim. Folsom v Carli, 6 M 420 (284).

In those cases triable by the court without a jury, the authority of the court to try the issues of fact, or send them to a jury for trial, is the same as when law and equity were administered by different courts. A direction to the jury should be by formal order, stating the issues to be tried, and made before the trial is entered on. Berkey v Judd, 14 M 394 (300).

A mortgagee cannot maintain an action to foreclose his mortgage against one who claims the premises described in the mortgage, by a title adverse and, if valid, paramount to that of the mortgagor. Banning v Bradford, 21 M 308.

When it clearly appears that the variance between the allegations of the pleading and the proof has not misled the adverse party to his prejudice, the appellate court, on appeal, will affirm and remand the cause, with directions to the trial court to permit the party to amend his pleadings so as to conform to the facts proved. Adams v Castle, 64 M 505, 67 NW 637.

The defendants failed to object in any manner in the court below to a misjoinder of parties plaintiff. If the attachment was irregular and void, and if the log-lien foreclosure was merely an action in rem, the judgment would be void on its face, but the action was not merely in rem; the defendants were parties to the action; and the court had personal jurisdiction of them, and entered a judgment foreclosing the lien on all the logs described in the complaint, and defendants cannot impeach the judgment collaterally. Breault v Merrill, 72 M 143, 75 NW 122.

The statute authorizing the bringing of an action to determine an adverse claim to land, authorizes such an action to determine one particular adverse claim, and if an equity action to remove a cloud from the title, cannot be sustained as such, it may still be sustained as an action to determine adverse claims under the statute. This overrules Walton v Perkins, 28 M 413, 10 NW 424, and Knudson v Curley, 30 M 433, 15 NW 873. Palmer v Yorks, 77 M 20, 79 NW 587.

In an action brought to enjoin the continuance of a nuisance caused by keeping a stock of fish in certain premises, judgment was entered abating it, and the defendant removed the nuisance thereafter, the continued occupancy of the premises will not be presumed to be with an intention of continuing the nuisance, and damages, if any, were embraced in the judgment. Gilbert v Back, 86 M 365, 90 NW 767.

An action to recover damages arising from the negligence of an expert employed to audit certain accounts is founded on breach of contract and not in tort. The cause of action is the breach of the contract and the different items of damage

resulting therefrom do not constitute separate causes of action. East Grand Forks v Steele, 121 M 296, 141 NW 181.

An action against a physician to recover damages due to negligent and unskilful treatment of plaintiff is based on a breach of his contract to treat the plaintiff with ordinary professional skill and care and is an action on contract. Finch v Bursheim, 122 M 152, 142 NW 143.

An action for damages for a death resulting from a negligent act committed in another state is based upon the statute of the state in which the cause of action arose, and the time within which such action may be brought is governed by the statutes of such state; but the time at which such action is deemed as commenced and all other matters pertaining to procedure are determined and governed exclusively by the law of the forum. Bond v Pennsylvania, 124 M 195, 144 NW 942.

In a garnishment proceeding the place of trial may be changed, on the application of the intervenor, for convenience of witnesses. State ex rel v District Court, 150 M 498, 185 NW 1019.

A ditch proceeding is one in rem; and the order establishing the ditch has the same final and binding force as a judgment in rem. A new status is thereby created for the lands affected. Lupkes v Town of Clifton, 157 M 493, 196 NW 666.

The complaint states a cause of action in equity to trace unto the hands of the defendants the fund derived from the sale of plaintiff's lot by the deceased, and have the same adjudged a trust fund belonging to plaintiff, and failing in said action cannot waive the tort and sue for money had and received, because the matter of claims against the estate is exclusively in probate jurisdiction. Klessig v Lea, 158 M 14, 196 NW 655.

A mortgagee may resort to both or either of his concurrent remedies. And an action to have a contract declared a mortgage and the foreclosure of same, but judgment stayed awaiting the outcome of another action for personal judgment on notes secured by the alleged mortgages is not subject to demurrer on the ground that another action is pending. The nature of the two actions is essentially different. Wade v Citizens' Bank, 158 M 231, 197 NW 277.

An action for money had and received is a remedy whereby one municipality may recover from another tax money which in equity and good conscience belongs to the former. Town of Balkan v Village of Buhl, 158 M 271, 197 NW 266.

Complaint construed as one for recovery of money only, and not one for specific performance. Paynesville v Grabow, 160 M 414, 200 NW 481.

Complaint construed as stating a cause of action in tort arising out of a wrongful interference with the contract relation of others causing a breach thereof. Bacon v St. P. Union Stockyards, 161 M 522, 201 NW 326.

The fact that the donee promised to pay interest to the donor does not defeat the claim that an advancement was intended; nor does the fact that donee gave donor his note, and to defeat a recovery on the note, it was not necessary to have the instrument reformed. Leach v Leach, 162 M 159, 202 NW 448.

In the absence of misconduct, one who advances money to another to enable him to purchase property has no lien therefor unless there is an express agreement showing an intention to charge the property with the debt; and a court of equity declines jurisdiction to grant mere compensatory damages when they are not given to or as an incident to some other specific relief. Leach v Leach, 167 M 489, 209 NW 636.

The general rule in actions of law is that the rights of the parties are determined as of the time of the commencement of the action. Equity stands on a different footing, the general rule being, equity will adopt its relief to the state of facts existing at the time of the determination of the suit. Colby v Street, 168 M 57, 209 NW 537.

Reformation rather than rescission is the proper remedy where the parties from the start agreed upon the identity of the property and its boundaries but by mutual mistake supposed it had a frontage of 30 feet whereas the actual frontage was only 28.87 feet. Chilstrom v Enwall, 168 M 293, 210 NW 42.

Plaintiffs had a right to select the purchaser, and where, through the double agency instigated by the appellant for the purpose of deceiving plaintiffs as to the identity of the purchaser, they were induced to enter into the contract, they

had a right to rescind on learning the truth. Olson v Pettibone, 168 M 414, 210 NW 149.

In an action to recover damages for the failure of a bank to perform an agreement with a customer to pay, out of funds placed in its hands, an existing mortgage upon the customer's real property, general damage for injury to the customer's credit standing and for mental suffering is not recoverable. Swanson v First Nat'l, 185 M 89, 239 NW 900.

Forms of action are under our system of code pleading abolished, and the nature of a cause of action is to be determined by the facts alleged and not by the formal character of the complaint. Recovery may be had either for tort or breach of contract if the facts proved within the allegations of the pleading justify it, though the pleader was mistaken as to the nature of his cause of action. Walsh v Mankato Oil Co. 201 M 58, 275 NW 377.

In equity causes of action may be joined if they might have been included in a bill in equity under the old practice. A bill is not multifarious where one general right is claimed by it, though the defendants have only separate interests in distinct questions which arise out of or are connected with such right. But the parties must each be affected in some respect by the suit. Lind v Johnson, 204 M 30, 282 NW 661.

Where the injured party accepts a note from one of two joint tortfeasors for the amount of the debt and procures judgment thereon, under which there is a futile receivership, there has been no election of remedies so as to bar a cause of action against the other tortfeasor. Penn v Clarkson, 205 M 517, 287 NW 15.

False representation as to credit standing made in a customer's report to a mercantile agency and by the latter reported to another, who relies thereon in making a contract, constitutes actionable fraud. Penn v Clarkson, 205 M 517, 287 NW 15.

540.02 REAL PARTY IN INTEREST TO SUE; WHEN ONE MAY SUE OR DEFEND FOR ALL.

HISTORY. R.S. 1851 c. 70 s. 27; P.S. 1858 c. 60 s. 27; G.S. 1866 c. 66 s. 26; G.S. 1878 c. 66 s. 26; G.S. 1894 s. 5156; 1899 c. 4; R.L. 1905 s. 4053; G.S. 1913 s. 7674; G.S. 1923 s. 9165; M.S. 1927 s. 9165.

1. Held to be real party in interest
2. Not real party in interest
3. Pleading
4. Assignments
5. One suing for the benefit of self and others
6. Generally

1. Held to be real party in interest

Tenants in common as to the vessel are partners as to the operation of its business, and the partnership having an account against one of the partners may assign it and the purchaser may sue thereon. Russell v Minn. Outfit, 1 M 162 (136).

An assignee, legal or equitable, of a chose in action may bring action. Castner v Austin, 2 M 44 (32); McDonald v Knelland, 5 M 352 (283); Tuttle v Howe, 14 M 145 (113); Bennett v McGrade, 15 M 132 (99); Lakmers v Schmidt, 35 M 434, 29 NW 169; Schlilman v Bowlin, 36 M 198, 30 NW 879; Anderson v Reardon, 46 M 185, 48 NW 777; Maxcy v New Hampshire, 54 M 272, 55 NW 1130; Bates v Richards, 56 M 14, 57 NW 218; Anchor v Kirkpatrick, 59 M 378, 61 NW 29; Struckmeyer v Lamb, 64 M 56, 65 NW 930; Hurley v Bendel, 67 M 41, 69 NW 477; Laramee v Tanner, 69 M 156, 71 NW 1028; Wood v Bragg, 75 M 527, 78 NW 93; Jackson v Severtson, 79 M 275, 82 NW 634.

A pledgee of a note payable to order in his hands as security, even if not endorsed, may sue. Castner v Austin, 2 M 44 (32); White v Phelps, 14 M 27 (21).

A promissory note, payable to order, may be transferred without endorsement, so that the transferee may maintain suit in his own name. Pease v Rush, 2 M 107 (89); Conger v Nesbitt, 30 M 436, 15 NW 875; Peterson v Swanson, 176 M 246, 223 NW 287.

Suit to recover on a course of action in favor of a minor should be brought in the name of the infant by his guardian; but, if brought in the name of the guardian, the court may amend the record by inserting the name of the ward as plaintiff. Price v Phoenix Mutual, 17 M 497 (473); Perine v Grand Lodge, 48 M 82, 50 NW 1022.

The party holding the legal title to property although others may have an equitable title. Winona & St. P. v St. P. & Sioux City, 23 M 359; Triggs v Jones, 46 M 277, 48 NW 1118; St. P. Title v Thomas, 60 M 140, 61 NW 1134.

The trustee having deceased, and no successor appointed, the cestui que trust as the real party in interest, is the proper party plaintiff. Judd v Dike, 30 M 380, 15 NW 672.

Even though a bill of exchange be really, but not in terms, given to the payee for the purpose of collection, the payee may maintain an action in his own name against the drawee, upon acceptance of the latter. Vanstrum v Liljengren, 37 M 191, 33 NW 555; Minn. Thresher v Heipler, 49 M 395, 52 NW 33; Farmers' Nat'l v Brown, 198 M 195, 269 NW 409.

The holder of a promissory note under the unconditional and unrestricted endorsement of the payee has legal title, and may sue in his own name, although, as between themselves, the assignor possesses the beneficial interest in the proceeds. Elmquist v Markoe, 45 M 305, 47 NW 970; Rosemond v Graham, 54 M 323, 56 NW 38; Northwestern v Hawkins, 205 M 490, 286 NW 717.

A general guardian refusing to act, an action for recovery may be prosecuted by the minors, through a guardian ad litem. Peterson v Baillif, 52 M 386, 54 NW 185.

Suits instituted by an executor or administrator upon a cause of action belonging to him in his representative capacity must be brought by him in that capacity. Hamilton v McIndoo, 81 M 324, 84 NW 118.

The right to sue for breach of covenants which runs with the land rests exclusively in the last covenantee, and an intervening covenantor has no right of action thereon until he has indemnified such subsequent covenantee. Allis v Foley, 126 M 14, 147 NW 670.

An owner of property abutting upon a public alley may maintain an action to restrain and enjoin an unlawful attempt permanently to obstruct the alley and prevent free use thereof by such abutting owner. Anderson v Landers, 127 M 440, 149 NW 669.

An action having been brought in the federal court, the action in the state court was properly dismissed. The United States was the proper party to maintain an action for the benefit of an Indian ward whose property was destroyed by fire, negligence being claimed. Laveirge v Davis, 166 M 14, 206 NW 939.

The substituting of the agent of the president as a party defendant was, in effect, the commencement of a new and independent action to enforce the liability which was barred. Johnson v Davis, 166 M 126, 207 NW 23.

An action for rescission may be maintained against one who has made a contract for an undisclosed principal. Kerr v Simons, 166 M 195, 207 NW 305.

Plaintiff, grantee in a trust deed, whose tenants were ousted by defendants, was entitled to maintain the action. Wolfe v Mayer, 171 M 98, 213 NW 549.

In the absence of special circumstances, the representative of the estate of a deceased person is the only one who may maintain an action to recover personal property belonging to the state. Weis v Kundert, 172 M 274, 215 NW 176.

A third party for whose benefit a contract is made has a right of action on it if there be a duty or obligation to him on the part of a promissee, or is entitled to a benefit under the promise. Peterson v Parviaineu, 174 M 297, 219 NW 180.

A stockholder may maintain an action in the name of a corporation for rescission without first making a demand upon the corporation to do so when it appears that such demand would be futile. Anderson v Campbell, 176 M 411, 223 NW 624.

A bailee may maintain an action on a replevin bond. Kelly v Kremer, 177 M 515, 225 NW 425.

A car in storage having been stolen, through negligence of defendant, the plaintiff can maintain an action in his own name though the insurance company had paid the amount remaining due on the sales contract to the holder of the

conditional vendor's right, there still remaining an amount due. Solberg v Minneapolis, 177 M 10, 224 NW 271.

The city was a proper party to restrain the officers of the city from revoking a taxicab license, but not a necessary party. Nat'l Cab v Kunze, 182 M 152, 233 NW 838.

The lessee is the real party in interest as against one in possession of property holding over after cancelation of a contract for a deed. Gruenberg v Saumweber, 188 M 568, 248 NW 724.

The surety on the bond of the owner of an elevator, purchased for plaintiff assignments of the outstanding storage tickets which covered converted grain, and plaintitff agreed to pay the surety the proceeds of his recovery upon such assignments. Held, that plaintiff might bring suit as the real party in interest. Christensen v St. James, 190 M 299, 251 NW 686.

Widow as beneficiary of life policy was the proper party to bring suit thereon, though the policy was not scheduled or administered on in any way in husband's bankruptcy proceedings. Kassmir v Prudential, 191 M 340, 254 NW 446.

A contract resulting from collective bargaining between employers and employees stands on the same rules of interpretation and enforcement as in other contracts, and an employee may sue on the contract as a party thereto. Mueller v C. & N. W. Ry. 194 M 83, 259 NW 798.

Where suit is brought on a note by the assignee thereof, the defendant has the same right of set-off as he might have against the assignor. Campbell v State Bank, 194 M 502, 261 NW 1.

Plaintiff and husband lived apart for five years, and he did not contribute to her support. As the result of an accident, she incurred medical and hospital bills; and is entitled to recover in her own name the amount incurred. Paulos v Koelsch, 195 M 603, 263 NW 913.

A son of the owner of the car was driving the motor car when the accident occurred, and paid the repair bill, and instituted this action in the name of the father, the owner of the car. The owner was the real party in interest, although the action was instituted by his son without his knowledge, the father later ratifying the act. Lavelle v Anderson, 197 M 195, 269 NW 409.

Lessees, who under the terms of their lease are obligated to pay taxes and assessments, may claim invalidity of a tax levied for tourist purposes, and the owners of the property need not be made parties. International v State, 200 M 242, 274 NW 217.

An action on a bill or note payable to bearer or endorsed in blank, may be maintained in the name of the nominal holder; and possession is prima facie evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything but proof of mala fides. Northwestern v Hawkinson, 205 M 490, 286 NW 717.

Where, at request of mayor, the governor sent national guard to take charge of a district, and the troops took possession of plaintiff's property, the governor, mayor, and adjutant general of the state are the necessary and proper parties to a suit to enjoin interference with plaintiff's use of the property. Strutwear v Olson, 13 F. Supp. 384.

2. Not real party in interest

As of 1858, an instrument under seal, though in all other particulars a promissory note, is not a negotiable instrument. Helfer v Alden, 3 M 332 (232).

Actions upon contracts made in behalf of the government by a public agent, acting as such and within the scope of his authority, must be brought in the name of the government and not of the agent. Balcombe v Northrup, 9 M 172 (159).

An endorsement on a note, "pay to A. B., or order, for collection", and signed by the payee or owner of the note, does not vest in him such title as to make him a proper party plaintiff in a suit on the note. Rock County v Hollister, 21 M 385; Third Nat'l v Clark, 23 M 263.

But the payee of a draft is "the real party in interest" notwithstanding an agreement between him and the drawer that it is taken for collection. Vanstrum

v Liljengren, 37 M 191, 33 NW 555; Minnesota Thresher v Heipler, 49 M 395, 52 NW 33.

A salaried officer, whose duty it is to collect fees pertaining to his office, and pay them into the state treasury, is not the proper party plaintiff in an action to collect oil inspection fees. Willis v Standard Oil, 50 M 290, 52 NW 652.

Where property is consigned to a commission merchant for sale without any previous contract or any advances made to the shipper, the consignee acquires no ownership in the property before its delivery to him, and cannot maintain an action to recover for damages to the property in transit. Grinnell v Illinois Central, 109 M 513, 124 NW 377.

Where a covenant in a deed runs with the land, and the covenantee without having suffered any loss and, without bringing action on the covenant, conveys the lands to another, the covenant passes with the conveyance, and the original covenantee cannot thereafter sue unless required to do so by his grantee to make good on account of a breach of the covenantee. Anderson v Larson, 177 M 606, 225 NW 903.

One not a party to a pledge, but who at best is merely an incidental beneficiary, cannot base a cause of action thereon. Lincoln Finance v Doe, 183 M 19, 235 NW 392.

The plaintiff accepted compensation under the workmen's compensation act for the death of her husband, the payment being made by his employer, Burrows, and insurer. Afterward, she sued the village of Hibbing in a common law action. The defendant was granted judgment on the pleadings because plaintiff was not the real party in interest. Prebeck v Village of Hibbing, 185 M 303, 240 NW 890.

In an action by a minority stockholder against officers in control of the corporation business to recover funds of the corporation wrongfully expended, such recovery to be for the use and benefit of the corporation, the corporation joined in the action is only a nominal party, and cannot, by answer, interpose affirmative defenses. Meyers v Smith, 190 M 157, 251 NW 20.

Neither wife nor minor child may recover damages for personal injuries inflicted upon the husband and father by the negligent act of another. Eschenbach v Benjamin, 195 M 195, 263 NW 154.

Where an insurer issued an insurance liability policy to a county containing an omnibus clause by the terms of which the insurance covered an employee while driving the county's car with its consent, the insurer, for lack of interest in that question, will not be heard to question the rights of the county to permit its employee to use the car. Schultz v Krosch, 204 M 585, 284 NW 782.

3. Pleading

The allegation in the amended answer that plaintiff was not the real party in interest is a conclusion of law, and insufficient. Esch v White, 82 M 462, 85 NW 238, 718.

The defendant in an action on a promissory note, who wishes to take advantage of the fact that the plaintiff is not the real party in interest, or has commenced the action prematurely, must plead the facts as a matter in abatement. A general denial does not raise the issue. Independent Silo v Hanson, 156 M 335, 194 NW 879.

A general demurrer does not raise the question of defect of parties plaintiff or defendant. Zimmerman v Benz, 162 M 47, 202 NW 272.

The county attorney is assumed to be a proper party to institute an action to have a loan company declared a nuisance; but if he is not, and there is a defect of parties in that respect, the objection must be taken by demurrer. State ex rel v District Court, 204 M 415, 283 NW 738.

4. Assignments

At common law an injury to the person of plaintiff died with his death, and a right of action for a personal tort is not assignable. The statute has not changed the rule. Green v Thompson, 26 M 500, 5 NW 376; Hunt v Conrad, 47 M 557, 50 NW 614.

A lien cannot be created upon a mere right of action for a personal tort. Hammons v Great Northern, 53 M 249, 54 NW 1108.

After a verdict in any action for a wrong, such action shall not abate by the death of any party, and a verdict in an action in tort is assignable. This overrules Hunt v Conrad, 47 M 557, 50 NW 64, and is based upon statute, section 540.12. Kent v Chapel, 67 M 420, 70 NW 2.

Plaintiff, to which the stock was also assigned, being authorized by the the assignment to enforce the agreement, and to deliver it and the stock to the defendant upon payment of the specified price, had the right to continue the prosecution of this action, though the debt was paid after the action was brought. First Nat'l v Corporation Securities, 128 M 341, 150 NW 1084.

A cause of action for damages sustained by fraud or deceit is one for injury to property, not for injury to the person, survives the death of either party, and is assignable. Guggisberg v Boettger, 139 M 226, 166 NW 177.

That an assignment of a cause of action is without consideration, and for the purpose of having a citizen of the state act as plaintiff is not a matter of defense, the assignee, being under controlling authority, the real party in interest. Hayday v Hammermill, 176 M 315, 223 NW 614.

Where a mortgagee, who has been induced to make a loan by false representations, thereafter sells and assigns the mortgage to a third party, the assignment does not transfer the cause of action for the fraud to such third party. Nilsen v Farmers' Bank, 178 M 574, 228 NW 152.

Where suit on a mechanics' lien is brought in the name of two partners and it develops that one has assigned all his interest in the claim to his copartner, the court may properly decree foreclosure in behalf of the assignee. Blatherman v Cities Service, 188 M 95, 246 NW 532.

A mortgagor being indebted to mortgagee for past due interest made an assignment of rents to an agent of the mortgagee. Said agent was the real party in interest and could maintain an action for collection of rents. Prudential v Enkema, 196 M 154, 264 NW 576.

An assignment in furtherance of an attorney's lien, and to secure other indebtedness, does not impose liability for costs and disbursements upon the assignee. Dreger v Otter Tail Power, 205 M 286, 285 NW 707, 287 NW 13.

Where an insured has not been paid in full by an insurance company, but only in part, leaving a residue to be made good by the wrongdoer, the action should be brought by the insured to recover the full loss, making an accounting in case of recovery to the insurer; but it was error in the instant case to reject an offer to prove that plaintiff had transferred the cause of action to another party and was no longer the real party in interest. Flor v Buck, 189 M 131, 248 NW 743.

After plaintiff had brought suit against defendant for negligence causing loss of a valuable ring, her insurer made good the loss, and the claim was assigned to the insurer. On trial defendant insisted that plaintiff could not recover because not real party in interest. The objection was held without merit. Defendant's remedy was by motion for substitution of assignee. Peet v Roth Hotel, 191 M 151, 253 NW 546.

5. One suing for the benefit of self and others

The rule that a corporation, by its officers, is the proper party to maintain an action to protect its property, and that, until the corporation refuses, individual members have no right to litigate for it, has no application where it appears from the complaint that the officers are engaged in perpetrating a fraud, and grossly mismanaging corporate affairs. Pencille v State Farmers' Mutual, 74 M 67, 76 NW 1026.

In the matter of removal of a county-seat, mandamus, brought by a legal voter, on behalf of himself and all other legal voters in county, was authorized. Kaufer v Ford, 100 M 49, 110 NW 364.

Court of equity's power to determine the validity of a penal statute and to restrain criminal prosecutions thereunder when unconstitutional, where such would directly result in irreparable injury to property rights, is undoubted, the

question being the propriety of its exercise in a given case, and the rule being subject to the qualification that it does not authorize actions the gravamen of which is to enjoin criminal proceedings. In this case, plaintiff's injury being merely consequential and incidental, the petition should have been denied. Milton v Gt. Northern, 124 M 239, 144 NW 764.

For practical reasons, courts ought not to entertain suits at the instance of individual consumers to enjoin a public service corporation from placing in effect a schedule of rates which does not exceed the maximum fixed by the legislative body. The remedy of consumers for discrimination in rates by a public service corporation is ordinarily an action at law for damages, and not by injunction. St. Paul Book v St. Paul Gas Light, 130 M 71, 153 NW 262.

Plaintiffs, members of the Chippewa tribe, cannot maintain this action unless the federal government becomes a party thereto; and the allowance or refusal to grant a temporary injunction lies in the discretion of the trial court, and unless there is an abuse of that discretion, the trial court will be sustained. Potter v Engler, 130 M 510, 153 NW 1088.

Courts refuse to entertain actions which attempt to regulate the management of the internal affairs of a foreign corporation; and hence the complaint in the instant case is demurrable. Olsen v Danish Brotherhood, 150 M 8, 184 NW 178.

Where an ordinance of a city imposes an unauthorized and illegal tax which affects in the same way a large number of its residents, who have a community of interest in the controlling principle of law involved, and the decision of which will affect their respective property rights, and the expense of testing the law being a burden on the individual, a representative action may be maintained, and appropriate relief granted by injunction. Fairley v City of Duluth, 150 M 374, 185 NW 390.

A taxpayer may maintain an action in behalf of a city, against the officers to compel restitution of the money illegally withdrawn from the city treasury as the result of the unauthorized acts of the officers. Burns v Essling, 163 M 57, 203 NW 605; Burns v Van Buskirk, 163 M 48, 203 NW 608.

Plaintiffs had legal capacity to bring an action to determine the fitness of an applicant for a position under St. Paul civil service ordinance. Oehler v City of St. Paul, 174 M 410, 219 NW 760.

One or more taxpayers may enjoin the unauthorized acts of the city officials seeking to impose liability upon the city or to pay out its funds. Williams v Klemmer, 177 M 44, 224 NW 261.

Payment of automobile license fees and of the state gasoline tax gives the taxpayer a special interest in the honest expenditure of highway funds entitling him to maintain an action to restrain the payment of such funds upon void contracts. Regan v Babcock, 188 M 192, 247 NW 12.

A taxpayer may question, by a bill of injunction, a proposed new issue of state bonds. Subject to the exception that if the question be political rather than legal, the courts will refuse jurisdiction. When litigation presents a question whether proposed administrative action of an official is within the law, both the subject of the inquiry and the function of decision are grounds for judicial action and duty. Rockne v Olson, 191 M 310, 254 NW 5.

Injunction is a proper remedy to prevent unauthorized practice of law by a layman when asked by attorneys acting for themselves and other affected members of their profession. Fitchette v Taylor, 191 M 582, 254 NW 910.

A class suit cannot be maintained under section 540.02, where the sole relief sought is the recovery of money or damages arising out of distinct and separate transactions of each of several plaintiffs with defendant. Thorn v Hormel, 206 M 589, 289 NW 516.

When a question of common or general interest is presented for decision and those who might be made parties are so numerous as to make it impracticable to bring them all before the court, one or more taxpayers may sue for the benefit of all. The plaintiffs in the instant case, as taxpayers and employees of the city of Minneapolis within the classified service, have such a special interest in the subject matter of this action and may sue in their representative capacity. Cranok v Link, 219 M 112, 17 NW(2d) 359.

Federal rules regarding class suits. 22 MLR 34.

Class suits under the codes; applicability to actions at law. 24 MLR 703.

6. Generally

The judgment in a mandamus action conclusively determined that the contract had not been performed and is a bar to an action on the contract. Murphy v Co. of Scott, 125 M 466, 147 NW 447.

The objection that the widow brings action in her administrative capacity is waived by failure to demur. Lombard v Northern Pacific, 160 M 1, 199 NW 887.

No competent evidence showed plaintiff not to be a real party in interest, nor did the court err in refusing defendant, in the third trial of the case, leave to amend the answer so as to allege that she was not such a party. Aaberg v Minn. Commercial, 161 M 384, 201 NW 626.

A stranger to an action can take no part therein, except to intervene or make an application to become a party. Greenwood v Burt, 162 M 247, 202 NW 489.

Where the award to an injured employee is paid by an insurance company, and the city has paid nothing, the city is not the real party in interest and cannot maintain an action against the negligent third party who caused the injury. City of Red Wing v Eichinger, 163 M 54, 203 NW 622.

Where a bond, for the benefit of a bank, runs to the superintendent of banks, the bank and the superintendent may properly join in an action on the bond. Harriet St. Bank v Samels, 164 M 265, 204 NW 938.

It is optional with the employer, when subrogated to the rights of the employee or his dependents, to bring action against the third party whose negligence caused the injury, to bring such an action or continue one already commenced; but in case of a recovery greater than the amount paid the employee, the excess goes to the employee. McGilligan v Allan, 165 M 390, 206 NW 714.

In equity proceedings, such as a dispute regarding the transfer of stock, all persons whose rights may be injuriously affected by the proposed decree should be made parties to the action. Mortgage Land Investment v McManus, 172 M 110, 215 NW 192.

Defendants promised to pay certain debts of plaintiff in consideration of property conveyed by him to them. Heins v Byers, 174 M 350, 219 NW 287.

The objection that a plaintiff claiming to sue on behalf of himself and his associates in a joint adventure has no capacity to sue, must be taken by demurrer or answer, or it is waived. Crawford v Lugoff, 175 M 226, 220 NW 822.

The demurrer to a complaint in an action for the purpose of having the provisions of a trust carried out was properly sustained, because the right of action should be for the benefit of the estate as such and not for the benefit of the plaintiff personally. Whitcomb v Wright, 176 M 280, 223 NW 296.

Reformation of the bond, where the ward sues on a depository bond, so as to make plaintiff's guardian the obligee, was not necessary. Snicker v Byers, 176 M 541, 224 NW 152.

In an action to permanently enjoin a sheriff from selling on execution certain real estate of which plaintiff claims to be the owner, the execution creditor is a necessary party defendant. Cheney v Bengston, 193 M 586, 259 NW 59.

Both parties are riparian owners of land bordering on Lake Minnetonka, a navigable lake. No rights of the state or public are involved. Meyers v Lafayette Club, 197 M 241, 266 NW 861.

On appeal from a judgment in an action tried without a jury, where there is neither a bill of exceptions, nor a settled case, the only question that can be raised is that the findings of fact by the trial judge do not support the evidence. The sufficiency of the pleadings to support the judgment cannot be raised. Schaefer v Thoeny, 199 M 610, 273 NW 190.

Where the complaint contained averments that individual defendant was the president and general manager of the defendant corporation, and that he by misrepresentation had stock issued to him giving him the majority and control, absence of allegation that plaintiffs before suit had requested the corporation to sue and that it refused, did not render the complaint subject to attack since demand would have been futile. Weiland v N. W. Distilleries, 203 M 600, 281 NW 364.

While the representative of a decedent's estate may sue to set aside a conveyance as fraudulent to his decedent's creditors, he is not bound to do so unless furnished security. But this is not exclusive of the right of decedent's creditors to proceed independently. Lind v Johnson, 204 M 30, 282 NW 661.

As to whether another, not a party to the suit, is the real party in interest, held, upon the facts in the instant case, to raise an issue of fact to be determined as such. Peterson v Johnson, 204 M 300, 283 NW 561.

Equity, having assumed jurisdiction and granted an injunction, will, as an incident, give full relief and compel an accounting of profits wrongfully obtained. Peterson v Johnson, 209 M 470, 297 NW 178.

Where a third party beneficiary institutes an action under a third party beneficiary contract, he does not sue on an independent contract but rather rests his action on a contract made for his benefit. Where vendee had obtained a fire policy providing that in case of loss proceeds should be payable to vendee and vendor as their interests should appear, the vendor as third party beneficiary could maintain the action on the policy without joining the vendee, where loss exceeded the amount due vendor and vendee's right had been barred by the statute of limitations. Langhorne v Capital Ins. Co. 54 F. Supp. 771, 146 F(2d) 238.

540.03 ACTION BY ASSIGNEE; SET-OFF SAVED; EXCEPTION.

HISTORY. R.S. 1851 c. 70 s. 28; P.S. 1858 c. 60 s. 28; G.S. 1866 c. 66 s. 27; G.S. 1878 c. 66 s. 27; G.S. 1894 s. 5157; R.L. 1905 s. 4054; G.S. 1913 s. 7675; G.S. 1923 s. 9166; M.S. 1927 s. 9166.

1. Generally
2. Latent and third party equities
3. Counter-claim
4. Mortgages
5. Negotiable paper
6. Notice
7. Estoppel

1. Generally

The assignee of a non-negotiable chose in action takes it subject to all defenses, legal or equitable, existing against it in the hands of the assignor, at the time of the assignment. State ex rel v City of Lake City, 25 M 404.

Defendant made his promissory note to Johnson, by whom it was endorsed to Wilcox who in turn endorsed to plaintiff. Upon the theory that the note fell due while in the hands of Wilcox, and before endorsement to plaintiff, defendant undertakes to defeat the action by setting up a claim against Wilcox growing out of a joint enterprise. Held, the defendant cannot be allowed to set up such claim without an accounting between defendant and Wilcox, and cannot have such accounting unless Wilcox is made a party to the action. Wilcox v Comstock, 37 M 65, 33 NW 42.

Barwise recovered a judgment against Wyvell, and at once assigned it to Katsky who now owns it. Later, Wyvell recovered a judgment against Barwise. The court cannot set the judgments off against each other. Wyvell v Barwise, 43 M 171, 45 NW 11.

In a deed of conveyance, a covenant against encumbrances is personal as between the grantor and grantee; but when such deed contains stated consideration, and the covenantee conveys the premises to one having no notice of the real consideration, such grantee may upon paying off the encumbrance, maintain an action for the damages sustained against the covenantor, and such action is not subject to set-off or defense by the covenantor. Randall v Macbeth, 81 M 376, 84 NW 119.

A person who takes assignment of notes secured by real estate mortgages after default had been made in the payment of an instalment of principal and interest, stands in the shoes of the assignor and takes the assignments subject to any set-off or defense existing when they were made. Swenson v Greysolm, 170 M 259, 212 NW 457.

Notations on a check, intended to indicate the purpose of the payment, have no effect against the bank in which the check is deposited by the payee. It is a breach of a plain legal duty for a school district treasurer to make a payment or a warrant not presented to him for payment, and an assignee of the warrant may recover notwithstanding the unauthorized payment. First Nat'l v School District, 173 M 383, 217 NW 366.

An assignee of a chose in action, not a negotiable instrument, takes it subject to all defenses and equities which the obligor has against the assignor or a prior holder before such obligor has any notice or knowledge of any assignment thereof. First Nat'l v Consolidated, 184 M 635, 238 NW 634, 240 NW 662.

When rights arising out of a contract are coupled with obligation to be performed by the contractor and involve such a relation of personal confidence that it must be intended that the rights should be exercised and the obligations performed by him alone, the contract cannot be assigned without the consent of the other party to the contract. Smith v Zuchman, 203 M 535, 282 NW 269.

No particular form of words or instrument is required to render an assignment valid, but an intent to transfer must be manifested, and assignor must not retain control over the fund or any power of revocation. A lien is distinquished from an assignment, the first is a charge on the property, while the latter conveys and creates an interest in the property in the assignee. Springer v Clark, 46 F. Supp. 54.

Effect of holder's failure to present for payment at maturity on liability of persons primarily liable. 18 MLR 734.

Assignment of deposit; sufficiency of notice of assignment. 22 MLR 1044.

2. Latent and third party equities

Where bonds in the possession of a third person are assigned by the owner, and a creditor of each owner institutes garnishment proceedings against the person holding the bonds, and, before notice to such person of the assignment, obtains judgment against him for the bonds or their value, an action will lie on the part of the assignee to clear the cloud created by the judgment upon his title to the bonds. McDonald v Kneeland, 5 M 352 (283).

An assignee does not take subject to equities of third parties of which he had no notice. Newton v Newton, 46 M 33, 48 NW 450; Moffett v Parker, 71 M 139, 73 NW 850.

Corporations A. and B. each a creditor of D. agreed that if B. would extend the time of payment, he under all circumstances would be preferred, and his claim paid in full ahead of the claim of A. The contract was made at the solicitation of D. and for his benefit. A receiver was appointed for D. and both A. and B. filed their claims. Held, B. is entitled to his own and also the dividends of A. until his claim is paid in full, but B. is not entitled to proceed of collateral held by A. B's equitable rights are superior to any claim of the trustees and receivers. Plymouth v Seymour, 67 M 311, 69 NW 1079.

The doctrine of latent equities does not prevail in this state. If A. assigns to B. a right of action against C. and B. assigns the same to D. the latter takes it subject to any equities existing in A. and B. in the absence of an estoppel. Brown v Equitable, 75 M 412, 78 NW 103.

3. Counter-claims

A claim accruing to H. Davis was transferred to David Davis. The fact that defendants have a claim against H. Davis in an amount greater than plaintiff's cause of action, which they set up by way of counter-claim and which accrued to defendant before the assignment to David Davis, the plaintiff furnishes no reason why H. Davis be made a party to the action. Davis v Sutton, 23 M 307.

In an action by an assignee of a chose in action to which the defendant is entitled to a set-off under the statute, the latter is not entitled to an affirmative judgment for a balance due him thereon as a counter-claim against the plaintiff. Webb v Michener, 32 M 48, 19 NW 82.

In an action on a judgment, by an assignee thereof, the defendant may set off an indebtedness of the assignor, the original judgment creditor, to him, existing at the time of the assignment. Way v Colyer, 54 M 14, 55 NW 744.

In an action by the endorsee after maturity of a promissory note, an indebtedness of the payee to the maker, existing at the date of the transfer of the note, is not a counter-claim but a defense; and the fact that the indebtedness set up exceeds $500.00 does not oust the municipal court of Duluth of jurisdiction. Lynch v Free, 64 M 277, 66 NW 973.

The equitable doctrine of set-off may be applied by a court of equity in garnishment proceedings in all cases where the plaintiff presents no superior right. Wunderlich v Merchants, 109 M 468, 124 NW 223.

Where the payee of a promissory note transfers it overdue, the maker may offset against the transferee a claim against the payee, existing at the time of the transfer, and later reduced to judgment. Gould v Svendsgaard, 141 M 437, 170 NW 595.

A chose in action assigned before maturity is, in the hands of an assignee suing thereon, subject to offsets on account of claims or obligations against the assignor acquired by the defendant before notice of the assignment. Nordsell v Neilsen, 150 M 224, 184 NW 1023.

The intervention of a trustee in place of the bankrupt does not affect the right of set-off. Meighan v Cohen, 161 M 302, 201 NW 431.

When a bank goes into liquidation, a debtor of the bank, who has a then due claim against the bank, has a legal right of set-off; and the right is not affected by section 49.04 or 49.24. Chippewa v Moyer, 170 M 502, 212 NW 895.

4. Mortgages

An assignment of a mortgage, although it secures a negotiable promissory note, passes as to the mortgage as an ordinary chose in action, subject to all equities in favor of the mortgagor, prior to notice of assignment. Johnson v Carpenter, 7 M 176 (120); Hostetter v Alexander, 22 M 559; Blumenthal v Jassay, 29 M 177, 12 NW 517; Oster v Mickley, 35 M 245, 28 NW 710; Watkins v Goessler, 65 M 118, 67 NW 796; Olson v Northwestern, 65 M 475, 68 NW 100.

The fact that a mortgage, void for usury, has been foreclosed by a sale under a power, the purchaser having notice of the usury, does not prevent the mortgagor from avoiding the sale and the mortgage by an action for that purpose. Scott v Austin, 36 M 460, 32 NW 89, 864.

The assignee of a paid mortgage of real estate takes it subject to the defense that it has been paid, although it is not satisfied of record. Redin v Branham, 43 M 283, 45 NW 445.

A negotiable promissory note, due in the future, according to its terms, cannot be brought to immediate maturity though a clause in a mortgage given to secure the same, authorizing the mortgagee to declare the debt a note due upon default in any of the provisions found in the mortgage. White v Miller, 52 M 367, 54 NW 736.

The test as to whether a contract is usurious is, will it, if performed, result in securing to the lender a greater rate of interest than is permitted by law. A "bonus" may when computed, tend to create usury. The exception of bona fide purchasers of negotiable paper in Laws 1879, Chapter 46, Section 3, from the operation of the usury law does not extend to a mortgage securing such paper. Smith v Parsons, 55 M 520, 57 NW 311.

There was a mutual mistake of the parties in reducing to writing an agreement for the sale of real estate. The contract was recorded and the vendee assigned same to an innocent assignee for value, without notice of the mistake. In an action brought by the vendor to reform the contract, such assignee is not protected, either by the recording act, or the principles of equity, from the claim of the plaintiff to have the contract reformed. Klatt v Dummert, 70 M 467, 73 NW 404.

In an action of ejectment where the complaint is in the usual form, merely averring ownership in fee in the plaintiff, and that he is entitled to possession, evidence of usury in the consideration of the mortgage by virtue of which plaintiff

claimed title is admissible as a defense under the general issue. Commonwealth v Dakko, 72 M 229, 75 NW 106.

Plaintiff may allege and prove, as a defense to proceedings instituted by the assignee to foreclose the mortgage, the damages it had sustained by the breach of the contract on which the mortgage was based, and if the damages equaled the amount of the mortgage, to wholly defeat the foreclosure. Ironton v Butchart, 73 M 39, 75 NW 749.

5. Negotiable paper

Although a promissory note, payable to order, may be transferred by endorsement, mere possession of the note unendorsed is not prima facie evidence of a transfer, and he takes it as a mere chose in action, subject to all defenses. Van Eman v Stanchfield, 10 M 255 (197); Fredin v Richards, 61 M 490, 63 NW 1031; Slater v Roster, 62 M 150, 64 NW 160.

A promise to one person, upon consideration coming from another, the latter assenting to the promise, is valid, and an action may be maintained by the promisee for a breach of it. Van Eman v Stanchfield, 10 M 255 (197).

The assignee of overdue negotiable paper takes it subject to equities as in the case of an ordinary thing in action. Martin v Pillsbury, 23 M 175; LaDue v First Nat'l, 31 M 33, 16 NW 426; Tuttle v Wilson, 33 M 422, 23 NW 864.

When it was shown that the note was obtained by fraud, the burden was on the plaintiff to show that it acquired the note in good faith, and for a valuable consideration. Dekalb v Thompson, 79 M 151, 81 NW 765.

Where the Merchants Bank had a deposit with the First National, and the First National had sent collection items to Merchants, who collected same and sent draft to First National on the day the Merchants became insolvent, the First National could set off amount due it on collection items against the amount of deposit. Storing v First National, 28 F(2d) 587.

6. Notice

An attorney has no lien on a judgment for the costs without notice to the debtor; where an attorney takes an assignment of a judgment on which he has a lien, his lien is merged; and where a judgment was assigned by the creditor, and the debtor, before notice of the assignment paid the judgment in good faith, the court will set aside an execution issued on it, and satisfy the judgment of record. Dodd v Bratt, 1 M 270 (205).

As between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, though neither the debtor nor the subsequent creditor has notice. McDonald v Kneeland, 5 M 352 (283); Lewis v Bush, 30 M 244, 15 NW 113.

Payment of a mortgage by the mortgagor to the mortgagee before maturity, with accrued interest, is no evidence of bad faith, nor is a want of good faith to be inferred because the mortgage was not produced at the time of the payment. Olson v Northwestern, 65 M 475, 68 NW 100.

One whose duties and authority as cashier are restricted to the payment of money under the direction of his employer is not the agent of his principal for the purpose of receiving notice of the assignment of the wages of an employee. Strauch v May, 80 M 343, 83 NW 156.

An assignee without notice is charged with the equities existing in favor of the mortgagor in respect to the mortgage assigned. Paulsen v Koon, 85 M 240, 88 NW 760.

An assignment of a chose in action becomes effective, as between the parties, at the time it is made, and operates to transfer the title to the thing assigned, without notice to or acceptance by the debtor. Quigley v Welter, 95 M 383, 104 NW 236.

The fact that the subject matter of the contract was land owned by the promisor's wife did not prevent him from taking advantage of the statutory provision for notice. Lydiard v Coffee, 167 M 389, 209 NW 263.

7. Estoppel

The plaintiff having executed written assignments of two promissory notes and of a mortgage given to secure them, which assignments stated that they were for value received, and delivered the notes with the assignments, a purchaser from the assignee was not called upon to inquire of plaintiff as to the facts attending the assignment. Cochran v Stewart, 21 M 435.

Rule that where one of two innocent persons must suffer by the fraudulent act of a third, he by whose act the third person was enabled to perpetrate the fraud must bear the loss, applied to an accommodation note. Burgess v Brogaw, 49 M 462, 52 NW 45.

An estoppel may be recognized even where the doctrine of latent equities is non-existing. Brown v Equitable, 75 M 412, 78 NW 103.

As plaintiff did not take title to the land subject to the second mortgage, or assume and agree to pay same, she is not estopped from asserting its invalidity, and may effect its cancelation in this action. Welbon v Webster, 89 M 177, 94 NW 550.

A party who executes and delivers a contract for the payment of money, containing a representation to the effect that it is free from all equities not disclosed therein, is estopped from asserting undisclosed equities against a good faith purchaser. Guaranty v Exchange, 148 M 60, 180 NW 919.

540.04 REPRESENTATIVE MAY SUE WITHOUT JOINING THE CESTUI QUE TRUST.

HISTORY. R.S. 1851 c. 70 s. 29; P.S. 1858 c. 60 s. 29; G.S. 1866 c. 66 s. 28; G.S. 1878 c. 66 s. 28; G.S. 1894 s. 5158; R.L. 1905 s. 4055; G.S. 1913 s. 7676; G.S. 1923 s. 9167; M.S. 1927 s. 9167.

1. Generally
2. Personal representative
3. Trustee of express trust
4. Parties

1. Generally

A guardian of minors may properly maintain an action to recover money collected for her as guardian, by an attorney, notwithstanding the fact that, after the collection and before the commencement of the action, two of the four minors became of age. Huntsman v Fish, 36 M 148, 30 NW 455.

A salaried officer, whose duty it is to collect fees pertaining to his office, and pay them into the state treasury, is not the proper party plaintiff in an action to collect fees. Willis v Standard Oil, 50 M 290, 52 NW 652.

An agent depositing money of his principal in his own name as agent, as "A. J. Miller, Agent", cannot maintain an action in his own name after his agency ceases. Miller v State Bank, 57 M 319, 59 NW 309.

Where a bond, given for the benefit of a bank, runs to the superintendent of banks, the bank and the superintendent may properly join in an action on the bond. Distinguishing Jefferson v Asch, 53 M 446, 55 NW 604. Harriet State Bank v Samels, 164 M 265, 204 NW 938.

Where an administrator forecloses a mortgage and bids in the property in his own name as administrator, an action to set aside the foreclosure on the ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. Scott v Nordin, 171 M 469, 214 NW 472.

One adjudged to be the beneficial owner of vendee's rights under a contract for deed has sufficient interest in the subject matter of a suit seeking to cancel the interest of the vendee that he may intervene in such suit. Veranth v Moravitz, 205 M 24, 284 NW 849.

2. Personal representative

A suit to recover on a cause of action in favor of a minor should be brought in the name of the infant by his guardian; but, if brought in the name of the

guardian, the court may amend the record by inserting the name of the ward as plaintiff. Perine v Grand Lodge, 48 M 82, 50 NW 1022.

A mortgage of real property to trustees named therein in trust to pay debts due from or assumed by the mortgagor, upon sufficient consideration, is a valid trust, and may be enforced by the trustees in their own names without joining the cestui que trust. Moulton v Haskell, 50 M 367, 52 NW 960.

A mortgagee who is trustee, holding title to the security for all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but in case of unreasonable neglect, or a refusal to discharge his duty, any bondholder may bring an action to enforce the security for the common benefit. Siebert v M. & St. L. Ry. 52 M 148, 57 NW 1134.

Where a promissory note is taken in the name of one person for the benefit of another, the administrator of the payee maintains an action on it. Cooper v Hayward, 71 M 374, 74 NW 152.

When a plaintiff sues as an executor or administrator, he must allege that he is such in a direct and issuable form. He should allege that he is such by virtue of letters issued out of a probate court, giving the name thereof, and the term at which such letters were granted. Hamilton v McIndoo, 81 M 324, 84 NW 118.

While the representative of decedent's estate may sue to set aside a conveyance as fraudulent to decedent's creditors, he is not bound to do so unless furnished security; but this is not exclusive of the right of decedent's creditors to proceed independently. Lind v Johnson, 204 M 30, 282 NW 661.

An action to set aside a deed on ground of incompetency of the grantor, or in any proceeding where a ward is a party in sole interest, should be brought in the name of incompetent by his legal guardian, rather than in the name of the guardian as such for the incompetent. Hoverson v Hoverson, 216 M 239, 12 NW(2d) 497; Rebne v Rebne, 216 M 379, 13 NW(2d) 18.

3. Trustee of express trust

In case of an assignment, to entitle the action to proceed for the benefit of the assignee, it must appear that the assignment was made after action brought. St. Anthony v Vandall, 1 M 246 (195).

An action on a life insurance policy for the benefit of minor children, both parents being deceased, is well brought by the guardian ad litem of the children. It is not necessary to bring action in the name of a general guardian. Price v Dunbar, 17 M 497 (473).

A voluntary assignee for the benefit of creditors may maintain an action in his own name, and need not join the creditors, nor disclose the representative character in which he sues. Langdon v Thompson, 25 M 509; Donohue v Ladd, 31 M 244, 17 NW 381; Williamson v Selden, 53 M 73, 54 NW 1035.

The interest which an assignor, in case of an assignment for benefit of creditors, has in the fund, founded upon a prospect of a surplus, does not constitute such interest in the property which he can assert in an action to determine adverse claims. Donohue v Ladd, 31 M 244, 17 NW 381.

A duly appointed receiver of partnership property maintains an action in his own name. Henning v Raymond, 35 M 303, 29 NW 132.

Where a contract has been taken by an agent in his own name, although for the benefit of his principal, he is a "trustee of an express trust" within the meaning of the statute, and may sue in his own name. Cremer v Wimmer, 40 M 511, 42 NW 467.

Where a creditor assigns a chose in action in absolute terms to another for the express purpose of bringing suit thereon for the benefit of the creditor, the assignee is the trustee of an express trust, and might maintain an action in his own name. Struckmeyer v Lamb, 64 M 57, 65 NW 930.

All actions brought or proceedings instituted by a receiver of an insolvent banking corporation should be brought or instituted by the receiver as such and in his own name. Ueland v Haugan, 70 M 349, 73 NW 169.

One who takes an assignment of a note and mortgage for a corporation in which he is interested becomes trustee of an express trust within the meaning

of section 540.04 and has the right to bring action to foreclose in his own name. County v Backenstedt, 170 M 383, 212 NW 905.

4. Parties

A sheriff selling real estate on execution may maintain an action in his individual name for the sum bid at the sale. Armstrong v Vroman, 11 M 220 (142).

A county is a body politic and corporate with capacity to sue and be sued, and by express statute action is to be instituted by the county board. Board v Smith, 22 M 97.

One with whom or in whose name a contract is made for the benefit of another may prosecute an action thereon in his own name. Lake v Albert, 37 M 453, 35 NW 177; State Bank v Henney, 40 M 145, 41 NW 411; Close v Hodges, 44 M 204, 46 NW 335; Murphin v Scovell, 44 M 530, 47 NW 256.

One to whom a note and mortgage are given may enforce the same in his own name, though a third person has an interest in the debt. Lundberg v Northwestern, 42 M 37, 43 NW 685; In re Stack, 164 M 57, 204 NW 546.

A guardian may sue in his own name on a note payable to himself, although the consideration paid for it was funds of his ward. McLean v Dean, 66 M 369, 69 NW 140.

The word "owner" includes any person who has usufruct, control, or occupation of real estate, whether his interest in it is an absolute fee, or an estate for years under a lease; and a tenant may allege ownership in bringing ejectment proceedings. Parker v M. & St. Louis, 79 M 372, 82 NW 674.

To save a bank, the officer induced plaintiffs to accept a majority of the capital stock and accept the management of the bank. As a part of the transaction, the stockholders guaranteed payment to plaintiffs of a specified amount of doubtful paper in the bank. This guaranty, although made to plaintiffs, was for the benefit of the bank, and a person in whose name the contract is made for the benefit of another may sue thereon. Feldman v Arnold, 158 M 243, 197 NW 219.

A judgment is conclusive, as between the parties, of the facts upon which it is based and all the legal consequences resulting from its rendition, and it may be enforced by the parties thereto, though the judgment may be also for the benefit of a third party. Ingelson v Olson, 199 M 422, 272 NW 270.

540.05 MARRIED WOMEN MAY SUE OR BE SUED ALONE.

HISTORY. R.S. 1851 c. 70 s. 30; P.S. 1858 c. 60 s. 30; G.S. 1866 c. 66 s. 29; 1869 c. 58 s. 1; G.S. 1878 c. 66 s. 29; G.S. 1894 s. 5159; R.L. 1905 s. 4056; G.S. 1913 s. 7677; G.S. 1923 s. 9168; M.S. 1927 s. 9168.

Prior to Laws 1869, Chapter 58, the laws relating to the rights of married women were less liberal than accorded them under the 1869 statute; and where a married woman is sued with her husband, in an action to foreclose a mortgage executed by both or her separate estate, she and her husband should answer jointly; and it is irregular for her to answer separately without leave of court; and a separate answer without leave, will, on motion, be stricken. Wolf v Banning, 3 M 202 (133).

When a married woman sues for her separate property, she need not make her husband a party. Mininger v Board, 10 M 133 (106).

Real estate devised to a married woman before the repeal of Public Statutes 1858, Chapter 106, is her separate property within the provisions of General Statutes 1866, Chapter 66, Section 29, which provides "that when the action concerns her separate property she may sue alone". Spencer v Sheehan, 19 M 338 (292).

Residence of husband and wife on the real estate of the wife does not make the husband a necessary party when the wife sues in an action for trespass. Spencer v St. P. & S. C. 22 M 29; Waupach v St. P. & S. C. 22 M 34.

In an action for personal tort upon the wife, the joinder of the husband as plaintiff with her is only an irregularity, which may be disregarded or corrected at any time by striking out the name of the husband. Colvill v Langdon, 22 M 565.

In an action against husband and wife by a judgment creditor of the husband to enforce a resulting trust against land of the wife for payment of the judgment, on the ground that the consideration of the grant to the wife was paid by the husband, neither husband nor wife can be examined as a witness for the plaintiff without the consent of the other spouse; but if the wife, with the consent of the husband, testifies in her own behalf, the cross-examination is not limited to matters inquired of in direct examination. Leonard v Green, 34 M 137, 24 NW 915; National v Lawrence, 77 M 282, 79 NW 1016.

The insolvent is not a necessary party defendant to an action instituted by an assignee or receiver under the provisions of Laws 1881, Chapter 148, Section 4, to annul and avoid a conveyance of real property alleged to have been a fraudulent and forbidden preference of a creditor. Williamson v Selden, 53 M 73, 54 NW 1055.

A wife's interest in her husband's homestead is not affected by an action to foreclose a mortgage thereon to which she is not a party. Spalti v Blumer, 56 M 523, 58 NW 156.

While the wife of the grantor in an alleged fraudulent conveyance is not a proper party defendant, the wife of the grantee is. Tatum v Roberts, 59 M 52, 60 NW 848.

Plaintiff, a married woman, injured in an accident, was entitled to maintain this action in her own name, including damages for loss of earnings as a singer. Libaire v M. & St. L. Ry. 113 M 517, 130 NW 8.

In an action for forcible entry and unlawful detainer, brought by a married woman to recover possession of her own property, the husband is not a necessary party. Twitchell v Cummings, 123 M 270, 143 NW 785.

In case where the wife is injured, the husband and wife may maintain separate actions for damages. Adams v City of Duluth, 175 M 247, 221 NW 8.

An action by the administrator of the estate of a decedent for damages for wrongful death, under our statute, against husband of the sole beneficiary entitled to the proceeds of such action, if recovery is had, it is not an action by the wife against her husband for a tort by the husband against the wife, and does not come within the common law rule that the wife cannot bring an action against her husband for a tort against her personally. Albrecht v Potthoff, 192 M 557, 357 NW 377.

540.06 INFANTS AND INSANE PERSONS.

HISTORY. R.S. 1851 c. 70 ss. 31, 32; P.S. 1858 c. 60 ss. 31, 32; G.S. 1866 c. 66 ss. 30, 31; 1871 c. 58 ss. 1, 2; 1877 c. 80 s. 1; G.S. 1878 c. 66 ss. 30 to 32; 1885 c. 117; G.S. 1894 ss. 5160 to 5162; R.L. 1905 ss. 4057, 4058; G.S. 1913 ss. 7678, 7679; G.S. 1923 ss. 9169, 9170; M.S. 1927 ss. 9169, 9170; 1945 c. 20 s. 1.

1. Appointment; necessity for
2. Effect of not appointing
3. Guardians; rules relating to
4. Effect of appointment before service of summons
5. Justice court practice

1. Appointment; necessity for

Infants must sue and be sued in their own name, appearing by a general guardian or a guardian ad litem. Price v Phoenix Mutual, 17 M 497 (473); Germain v Sheehan, 25 M 338; Eisenmenger v Murphy, 42 M 84, 43 NW 784; Perine v Grand Lodge, 48 M 82, 50 NW 1022; Peterson v Baillif, 52 M 386, 54 NW 185.

As respects proceedings to probate a will, no appointment of a guardian for any minor interested in the testator's estate is necessary. In re Mousseau, 30 M 202, 14 NW 887; Ladd v Weiskopf, 62 M 29, 64 NW 99.

It is not necessary, before the administrative account of an executor or administrator is allowed, to appoint guardians ad litem for minor heirs and legatees interested in the estate. Balch v Hooper, 32 M 158, 20 NW 124; Ladd v Weiskopf, 62 M 29, 64 NW 99.

The statute provides that the general guardian appear for the ward, so if there is a guardian, and unless he neglects to appear, there is no necessity to appoint a guardian ad litem. Perine v Grand Lodge, 48 M 82, 50 NW 1022; Peterson c Baillif, 52 M 386, 54 NW 185; Becket v Northwestern, 67 M 298, 69 NW 923.

A guardian ad litem may be appointed and may act although there is a general guardian competent to act. Peterson v Baillif, 52 M 386, 54 NW 185.

The power of the district courts to appoint a guardian ad litem is not impaired by the statute relating to the appointment of general guardians by the probate court. Plymton v Hall, 55 M 22, 50 NW 351.

The complaint in the instant case states a cause of action, and it is sufficiently alleged that the guardian was duly appointed by the proper court. Patterson v Melchoir, 102 M 363, 113 NW 902.

2. Effect of not appointing

The plaintiff infant should have appeared by his guardian, and his appearance by attorney was erroneous; but if, during the pendency of the action he becomes of age, he may ratify and adopt the action and the case may regularly proceed. Germain v Sheehan, 25 M 338.

A judgment rendered upon default against an infant over 14 years of age, after service of summons upon him, but without the appointment of a guardian ad litem, is erroneous and voidable, but not void. Eisenmenger v Murphy, 42 M 84, 43 NW 784.

An infant defendant is incompetent to waive or admit service of summons upon him, or to confer jurisdiction upon the court by a voluntary appearance; and a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof. Phelps v Heaton, 79 M 476, 82 NW 990.

While under our statute it is the duty of the general guardian of an incompetent person to represent his ward, nevertheless the power of the district court to appoint a guardian ad litem is not taken away by the statutes authorizing the appointment of a general guardian by the probate court. Schultz v Oldenburg, 202 M 237, 277 NW 918.

3. Guardians; rules relating to

A guardian is not the real party in interest. Price v Phoenix Mutual, 17 M 497 (473); Bryant v Livermore, 20 M 313 (271) (295); Perine v Grand Lodge, 48 M 82, 50 NW 1022; Peterson v Baillif, 52 M 386, 54 NW 85.

A stipulation by an attorney that the action shall abide the event of another action pending does not bind an infant unless ratified by the court on a proper showing. Bryant v Livermore, 20 M 313 (271) (295); Eidam v Finnegan, 48 M 53, 50 NW 933.

A guardian ad litem is a party to the record, and appointed by the court wherein the action is pending, and a general denial does not put in issue his right to act. If the issue of his appointment is raised, it should be by motion. Schuek v Hagar, 24 M 339; Perine v Grand Lodge, 48 M 82, 50 NW 1022.

When persons are incapable of acting for themselves, as in the case of lunatics, they are entitled to the protection of the court, and proceedings will be instituted under its direction. Suit may be brought in their name, and the court will authorize some suitable person to act as guardian ad litem; and the district exercises such authority notwithstanding the power of the probate court to appoint a general guardian. Plympton v Hall, 55 M 22, 56 NW 351; Lundberg v Davidson, 72 M 49, 74 NW 1018; Wilson v Wilson, 95 M 464, 104 NW 300; Dalsgaard v Meierding, 140 M 388, 168 NW 584.

NOTE: The supreme court rules prescribe that the guardian continues on appeal.

4. Effect of appointment before service of summons

The court cannot acquire jurisdiction of minors except service be made upon them. The fact that a guardian ad litem has been appointed for them, and that

he through attorneys contested the case, is not sufficient, and in the instant case the judgment is void for want of jurisdiction. Phelps v Heaton, 79 M 476, 82 NW 990.

5. Justice court practice

The authority of a next friend, appointed to prosecute an action in the justice court in behalf of an infant, is not suspended by an appeal to the district court. His authority continues and the district court need not appoint a guardian. Meyer v Porter, 81 M 302, 84 NW 1115.

540.07 PARENT OR GUARDIAN MAY SUE FOR SEDUCTION.

HISTORY. R.S. 1851 c. 70 s. 33; P.S. 1858 c. 60 s. 33; G.S. 1866 c. 66 s. 32; G.S. 1878 c. 66 s. 33; G.S. 1894 s 5163; R.L. 1905 s. 4059; G.S. 1913 s. 7680; G.S. 1923 s. 9171; M.S. 1927 s. 9171.

A father may maintain in his own right, and for his own benefit, an action for damages for the seduction of his adult daughter if he can maintain that she resides in his home, even though employed elsewhere, is only home occasionally, and is seduced elsewhere. Schmidt v Mitchell, 59 M 251, 61 NW 140.

The trial court rightfully refused to instruct the jury that, "to entitle the plaintiff to recover any damages beyond his actual money loss," it must appear that the debauchment of his daughter was accomplished by seductive acts. Hein v Holdridge, 78 M 468, 81 NW 522.

Except where there are confidential relations or peculiar circumstances, no right of action exists in this state by a woman for seduction against the offender. Welsund v Schueller, 98 M 475, 108 NW 483.

540.08 PARENT OR GUARDIAN MAY SUE FOR INJURY TO CHILD OR WARD; BOND; SETTLEMENT.

HISTORY. R.S. 1851 c. 70 s. 34; P.S. 1858 c. 60 s. 34; G.S. 1866 c. 66 s. 33; G.S. 1878 c. 66 s. 34; G.S. 1894 s. 5164; 1895 c. 45; R.L. 1905 s. 4060; 1907 c. 58; G.S. 1913 s. 7681; G.S. 1923 s. 9172; M.S. 1927 s. 9172; 1929 c. 113; 1943 c. 416 s. 1.

The statute authorizes an action by the parent in all cases where an action might be maintained by the child; and the damages recoverable are only those sustained by the minor, and not by the parent for loss of services. The action is for the benefit of the child solely, and the amount of the recovery is held in trust for the child. Such action is a bar to a subsequent independent action by the child. Gardner v Kellogg, 23 M 463; Buechner v Columbia Shoe Co. 60 M 477, 62 NW 817; Lathrop v Schulte, 61 M 196, 63 NW 493; Hess v Adamant, 66 M 79, 68 NW 774; Nyman v Lynde, 93 M 257, 101 NW 163; Brunette v M. St. P. & S. 118 M 444, 137 NW 172.

The statute applies only to minor children. Gardner v Kellogg, 23 M 463; Schmidt v Mitchell, 59 M 251, 61 NW 140.

It is not necessary to allege that the action is brought for the benefit of the child, when the only damages alleged are such as were sustained by the child. Buechner v Columbia Shoe Co. 60 M 477, 62 NW 817.

The statute as the basis for the following actions: Bank v Brainerd School, 49 M 106, 51 NW 814; Olivier v Cunningham, 53 M 521, 55 NW 540; Mason v Minneapolis St. Ry. 54 M 216, 55 NW 1122; Haluptzok v Gt. N. Ry. 55 M 446, 57 NW 144; Pettil v Gt. Northern, 58 M 120, 59 NW 1082; Lathrop v Dearing, 59 M 234, 61 NW 24; Kayser v Lindell, 73 M 123, 75 NW 1038; Vashbeck v Kellogg, 78 M 176, 80 NW 957; Rauma v Lamont, 82 M 477, 85 NW 236; Marengo v Gt. Northern, 84 M 397, 87 NW 1117; Patterson v Melchoir, 102 M 363, 113 NW 902.

An action under this statute is not a bar to a subsequent indepedent action by the parent for losses he personally sustained. Bamka v C. St. P. & O. 61 M 549, 63 NW 1116.

The statute does not violate the fourteenth amendment to the constitution of the United States. Lathrop v Schulte, 61 M 196, 63 NW 493; Hess v Adamant, 66 M 79, 68 NW 774.

The trial court properly submitted to the jury the question whether the plaintiff was entitled to punitive damages. Rauma v Lamont, 82 M 477, 85 NW 236.

The negligence of the parent will bar an action for loss of services; but in an action brought for the benefit of a child non sui juris for injuries to his person caused by the negligence of the defendant, the contributory negligence of his parent or guardian will not be imputed to the child. Overruling Fitzgerald v St. P. M. & M. Ry. 29 M 336, 12 NW 168. Mattson v M. & N. Wisconsin, 95 M 477, 104 NW 443.

Prior to Laws 1907, Chapter 58, a father could settle an injury to his child without suit brought. Johnson v M. & St. L. 101 M 396, 112 NW 534; Picciano v D. M. & N. 102 M 21, 112 NW 885; Hannuld v D. & I. R. 130 M 3, 153 NW 250.

Who shall represent a minor in an action in this state is a matter of procedure; and the laws of this state govern and not the laws of Michigan where the accident occurred and where both parent and child reside. Brunette v M. St. P. & S. 118 M 444, 137 NW 172.

The defendant is not chargeable with interest in the amount of the judgment until the father shall have furnished the bond as required by statute. Jensen v C. M. & St. P. Ry. 160 M 122, 199 NW 579.

The title should be in the name of the minor as plaintiff by his guardian ad litem, and not in the name of his guardian as plaintiff. Lund v Springsteel, 187 M 577, 246 NW 116; Gunnerstad v Rose, 194 M 531, 261 NW 194; Johnson v Colp, 211 M 245, 300 NW 791.

A parent is a statutory trustee and the district court has jurisdiction to a settlement of a tort claim although no suit has actually been begun. Ernst v Daily, 202 M 358, 278 NW 516.

An order vacating and setting aside unconditionally an order approving the settlement of a minor's action and dismissal of the action is an appealable order. Elsen v State Mutual, 217 M 564, 14 NW(2d) 859.

A settlement without the approval of the court is invalid. A father may, with court approval, settle a minor's cause of action without suit. Such settlement cannot be attacked collaterally. The court's discretion as to vacation of its approval must not be exercised without cause shown. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

On motion to vacate an order approving a settlement of a minor's cause of action, facts including supporting affidavit of the same physicians who made affidavits used to support the approval of the settlement, that they were mistaken in their original diagnosis of extent and nature of minor's injuries, created a sufficient basis for exercise of court's discretion in vacating the order. Wilson v Davidson, 219 M 42, 17 NW(2d) 31.

A private attorney should be retained to protect the rights of a minor who receives an injury and who is under the control of the director of social welfare. OAG Jan. 16, 1945 (844g).

A judge of probate has jurisdiction under section 525.26 to authorize a guardian to compromise a claim for injuries to a minor as a result of an accident though suit has not been brought. 1938 OAG 179, March 3, 1938 (346d).

Investment of fiduciary funds. 25 MLR 309.

540.09 DESERTED WIFE MAY SUE AND DEFEND IN HUSBAND'S NAME.

HISTORY. R.S. 1851 c. 70 s. 35; P.S. 1858 c. 60 s. 35; G.S. 1866 c. 66 s. 34; G.S. 1878 c. 66 s. 35; G.S 1894 s. 5165; R.L. 1905 s. 4061; G.S. 1913 s. 7682; G.S. 1923 s. 9173; M.S. 1927 s. 9173.

A deserted wife may in her husband's place prosecute or defend an action. Davis v Woodward, 19 M 174 (137); Allen v Minn. L. & T. Co. 68 M 8, 70 NW 800.

Substitution of wife for husband in pending action. Lund v Springsteel, 187 M 577, 246 NW 116.

540.10 JOINDER OF PARTIES TO INSTRUMENT.

HISTORY. R.S. 1851 c. 70 s. 36; P.S. 1858 c. 60 s. 36; G.S. 1866 c. 66 s. 35; G.S. 1878 c. 66 s. 36; G.S. 1894 s. 5166; R.L. 1905 s. 4062; G.S. 1913 s. 7683; G.S. 1923 s. 9174; M.S. 1927 s. 9174.

Pending an action upon a joint and several contract, if one of the defendants dies, the action may be continued against the survivors, without joining the representatives of the deceased defendant. Lanier v Irvine, 24 M 116.

The absolute guarantor, upon the same instrument, of the payment of a promissory note, may be joined as defendant in the same action with the maker. Hammel v Beardsley, 31 M 314, 17 NW 858; Lucy v Wilkins, 33 M 21, 21 NW 849.

In an action upon a joint and several obligation, all or any one or more of the parties liable may be made defendant. Steffes v Lemke, 40 M 27, 41 NW 302.

In an action against the maker, and the guarantors of payment, of a promissory note, the plaintiff may enter a several judgment on a verdict against the maker without waiting until the trial of the issues with the other defendants. Bank v Smith, 57 M 374, 59 NW 311; First Nat'l v Burkhardt, 71 M 185, 73 NW 858; Cushing v Cable, 48 M 3, 50 NW 891.

Signers on a subscription contract are not joint promissors, but can be sued separately. Laromee v Tanner, 69 M 156, 71 NW 1028.

Joint action against a master and his servant may be maintained, when based upon the negligent or other act of the servant for which the master is liable. Mayberry v Northern Pacific, 100 M 79, 110 NW 356.

A complaint against two defendants, alleging that their concurrent negligence caused an injury to the plaintiff, is good against a demurrer for misjoinder of causes, though the liability of one rests upon the federal employers' liability act, and that of the other upon the common law. Doyle v St. P. Union Depot, 134 M 461, 159 NW 1081.

On issuance of a permit to a purchaser of state timber, the state takes a bond from the purchaser to secure the price; and if the permit is assigned another bond from the assignee, keeping the original bond in force. The state may maintain separate actions on the bonds; and is not obliged to exhaust its remedies on the second bond before resorting to the first. State v Aetna, 140 M 70, 167 NW 294.

The defendant Tople, a party to the sales contract, was a guarantor of payment and not merely of indemnity against damage, and could be sued jointly with the purchaser. Peoples v Blegen, 159 M 158, 198 NW 425.

A complaint against two defendants, alleging that their negligence caused an injury to plaintiff, is bad as against a demurrer for misjoinder of causes, where it appears upon the face of the pleading that the acts of negligence were separate torts, not concurrent in point of time or effect. McGannon v C. & N. W. Ry. 160 M 143, 199 NW 894.

The makers and guarantors of promissory notes may be sued in the same action, although the guaranty is by a separate contract, to which the maker is not a party. Midland v Sec. Elevator, 161 M 30, 200 NW 851.

The surety on a contractor's surety bond may be sued alone without joining his principal. Bartles v Western Surety, 161 M 169, 200 NW 937.

When a third party, for whose benefit a contract is made, is a daughter of the promisee, such relationship is sufficient to supply the legal right in her to maintain an action upon the contract against the promissor. Clark v Clark, 164 M 201, 204 NW 936.

Where a bond, given for the benefit of a bank, runs to the superintendent of banks, the bank and the superintendent may properly join in an action on the bond. The doctrine of Jefferson v Asch, 53 M 446, 55 NW 604, to the effect that a stranger to a contract cannot recover thereon although the contract contains a provision for his benefit, is not applicable to the contract in this case. Harriet State Bank v Samels, 164 M 265, 204 NW 938.

The distinction between actions at law and suits in equity is abolished and parties liable upon the same obligation may all or any of them be included in the same action. Central State Bank v Royal Indemnity, 167 M 494, 210 NW 66.

The assignor of an account owing him upon a claim for goods sold and delivered, who guarantees payment of the same to his assignee, may be joined as defendant in an action with the principal debtor. Singer v Singer, 173 M 57, 214 NW 778, 216 NW 789.

Section 540.10 is remedial, and should be liberally construed so as to carry out the purpose sought. Singer v Singer, 173 M 57, 216 NW 789.

Whether a bank is entitled to subrogation as against a successor to the mortgagor's interest as a vendor in a contract for deed, the vendee's interest in which it holds as security and to protect which it assumed the mortgage, cannot be decided in an action to which such successor is not a party. Nippolt v F. & M. 186 M 325, 243 NW 136.

Under the statute (superseding the common law rule), when there is an allegation of joint contract with two or more defendants and the proof is of a several contract with one, there may be a recovery against the one liable; and in such case there is not a failure of consideration within section 544.31. Schmidt v Agric. Insurance, 190 M 585, 252 NW 671.

An absolute guarantor may be joined as defendant in the same action with the principal obligor. Townsend v Milaca, 194 M 423, 260 NW 525.

The trial court did not err in consolidating action for cancelation of contract brought by appellant and actions to enjoin cancelation proceedings and for specific performance brought by respondents, and in granting specific performance. Union Central v Schultz, 199 M 131, 271 NW 249.

In equity causes of action may be joined if they might have been included in a bill in equity under the old practice; and a person acting in several capacities may bring a joint action against a judgment debtor and grantees or transferees who rendered assistance to debtor in attempting to fence his property beyond the reach of plaintiff and others. Lind v Johnson, 204 M 30, 282 NW 661.

Respondent executrix, as such, represents the entire estate; hence it was not necessary that she be joined as a party defendant in her personal capacity as widow, there being no homestead right involved. Marquette v Mullin, 205 M 562, 287 NW 233.

540.11 SURETY MAY BRING ACTION.

HISTORY. R.S. 1851 c. 82 s. 33; P.S. 1858 c. 72 s. 33; G.S. 1866 c. 66 s. 109; G.S. 1878 c. 66 s. 130; G.S. 1894 s. 5272; R.L. 1905 s. 4063; G.S. 1913 s. 7684; G.S. 1923 s. 9175; M.S. 1927 s. 9175.

In an action on a promissory note against two makers, one of whom signed as surety for the other, an answer by the surety which alleged that after the maturity of the note, the holder, at the request of the principal debtor, and without the consent of the surety, extended the time of payment thereon, presents a defense on the part of the surety. Huey v Pinney, 5 M 310 (246).

The maker of a promissory note which he has paid, may sue the holder to determine a claim made by him, that there is a sum still due on it. Miller v Rause, 8 M 124 (97).

Baldwin and Sly formed a business copartnership, borrowing $2,000 from DeWolf. Sly gave his note and bond for the loan, and it was understood by all parties that Baldwin was to pay half of the loan. After the death of Sly, suit was brought by his personal representatives to force Baldwin to pay his part. Held, the loan was not a partnership transaction. Baldwin was liable to DeWolf for one-half of the loan and as to that half Sly was his surety; and although the bond does not show the relationship, it may be proved by parol. Metzner v Baldwin, 11 M 150 (92).

Parties who contract a debt as partners may, by reason of subsequent arrangements, become, as between themselves, principal and surety. Wendlandt v Sahre, 37 M 162, 33 NW 700.

Where one of several signers on a joint note is surety for the others, but such fact does not appear upon the face of the paper, the payee is not, in the absence of any notice, bound to inquire into the relations of the makers as between themselves, nor, until informed thereof, is he bound to regard the equitable rights of such surety. Benedict v Olson, 37 M 431, 35 NW 10.

A note given in renewal of a valid note is good in the hands of an assignee of the payee, without proof of his good faith, though when the payee took the renewal he promised the maker that he would place it as collateral to a contemplated loan, and would not otherwise negotiate it; and, failing to procure such loan, negotiate it in violation of his promise. Farmers Bank v Skellet, 149 M 266, 183 NW 831.

The failure of the holder of a promissory note to present it to the probate court for allowance and payment out of the estate of a deceased maker, does not release a surety on the note. Overruling Siebert v Quesnel, 65 M 107, 67 NW 803. Manchester v Lynch, 151 M 349, 186 NW 794.

A receiver of the property of a surety for the debt of another, appointed in proceedings supplementary to execution, may bring an action to compel the principal debtor to satisfy the debt. Merrill v Zimmerman, 152 M 333, 188 NW 1019.

Sureties on a bond given by a bank to secure state deposits are subject to the provisions of section 9.10; and they cannot compel the commissioner of banks, in charge of the insolvent bank, to pay the state's deposit claim as a preferred claim, where the state seeks recovery from the sureties and not from the funds of the bank except as to any deficiency not recovered from the sureties on the bond. In re Liquidation of Farmers State Bank, 174 M 583, 219 NW 916; State v American Surety Co. 179 M 143, 228 NW 613.

The First State Bank of Carrel owned land on which there was a $1,400 mortgage due plaintiff. When the note came due, defendant Cashman, entirely for the accommodation of the bank, signed a new note and mortgage to the plaintiff and deeded the land back to the bank. The plaintiff knew in general these facts and the purpose. Held, Cashman is not entitled to have the bank made a party under section 540.16; nor compel the plaintiff to sue the bank under section 540.11. The obligation of Cashman is primary, and they cannot compel plaintiff first to exhaust the mortgage security. Aetna v Cashman, 181 M 82, 231 NW 403.

Circumstances under which a surety may compel a creditor to resort to security. 15 MLR 95.

540.12 ACTION NOT TO ABATE BY DEATH; TORTS.

HISTORY. R.S. 1851 c. 70 s. 37; P.S. 1858 c. 60 s. 37; G.S. 1866 c. 66 s. 36; 1876 c. 46 s. 1; G.S. 1878 c. 66 s. 41; G.S. 1894 s. 5171; R.L. 1905 s. 4064; G.S. 1913 s. 7685; G.S. 1923 s. 9176; M.S. 1927 s. 9176.

1. Jurisdiction
2. Substitution of parties
3. Assignment
4. Representative defined
5. Generally

1. Jurisdiction

A judgment in favor of plaintiff, deceased at the time when the same is rendered, is not void, when it is rendered by a court of general jurisdiction, having jurisdiction of the subject matter of the action in which the same was rendered, and having acquired jurisdiction of the parties to such action before the decease of such plaintiff. Hayes v Shaw, 20 M 405 (355); Stocking v Hanson, 22 M 542; Berkey v Judd, 27 M 475, 8 NW 383; Poupore v Stone-Ordean, 132 M 409, 157 NW 648; Supornick v Nat'l Council, 147 M 469, 180 NW 773.

The publication of the summons was begun on November 7th, and defendant died November 18th. It is held that the service not being complete, the court had no jurisdiction and properly denied plaintiff's motion for a substitution of the executrix for the deceased defendant. Auerbach v Maynard, 26 M 421, 4 NW 816.

The fact that the named defendant was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of "other persons or parties unknown," claiming an interest in the real estate described in the complaint. Inglee v Welles, 53 M 197, 55 NW 117.

An agreement by a plaintiff to transfer to another all his interest in the land subject of litigation, upon being paid a certain sum, which has not been paid, does not constitute an executed transfer of such interest, so as to justify a dismissal of the action. Maloney v Finnegan, 40 M 281, 41 NW 979.

Where the personal representative appeared and made no objection to being substituted for the defendant, but answers and the case is tried, it is too late to vacate the judgment rendered after trial. O'Keefe v Scott, 201 M 51, 275 NW 370.

Summary probate proceedings. 20 MLR 104.

2. Substitution of parties

Where a cause is pending in the supreme court, so that the court below has lost control of it, the supreme court may make a substitution of an assignee of the cause of action, as plaintiff; but in the instant case, the appeal came up because of a demurrer so the trial court did not lose jurisdiction of the subject matter, and the supreme court has no jurisdiction and cannot grant the substitution. Keough v McNitt, 7 M 29 (15); Taney v Hodson, 170 M 230, 212 NW 196.

A motion to substitute, in an action, the successor in interest of a party deceased, takes the place of the former bill of revivor and original bill, in the nature of a bill of revivor, and is the proper mode for obtaining such substitution in all cases. The motion may be contested, and if the motion asks for general as well as specific relief, the court, the other party not being taken by surprise, may grant such relief as may be compatible with the facts. Landis v Olds, 9 M 90 (79); Lee v O'Shaughnessy, 20 M 173 (157); Willoughby v St. Paul, 80 M 432, 83 NW 377.

When an application for substitution is made within one year, the statute regards the application as prima facie in time, and the granting of the substitution is almost a matter of course; but when made after the lapse of a year, the application is prima facie too late, and the applicant must excuse his delay. Stocking v Hanson, 22 M 542.

Pending an action on a joint and several contract, if one of the defendants dies, it may be continued against the survivors, without joining the representatives of the deceased defendant. Lanier v Irvine, 24 M 116.

A foreign administrator may be admitted to defend an action pending against his intestate at the time of his decease. Brown v Brown, 35 M 191, 28 NW 238.

Suit pending against a defendant on account of a fire loss caused by defendant's negligence, may proceed to its conclusion without a substitution of parties, and without making the insurance company, which under its policy paid the loss, a party. Nichols v C. St. P. & O. 36 M 452, 32 NW 176.

A railway company succeeding to the interest of another company may continue the condemnation proceedings instituted by the assignor. Bradley v Northern Pacific, 38 M 234, 36 NW 345.

In an action against "unknown heirs," a person to whom the heirs have transferred and conveyed their interest in the property, after the entry of judgment is the proper party to make an application to reopen, and upon the petition being granted may be substituted as defendant in place of the "unknown heirs." Boeing v McKinley, 44 M 392, 46 NW 766.

In an action to quiet title to real estate the summons being served by publication, and a judgment rendered by default, the right of the defendant to apply to the court to set aside the judgment passes to an heir of the defendant. Waite v Coaracy, 45 M 159, 47 NW 537.

Where one of the parties dies after the rendition of a verdict in an action for a tort, the action does not abate, but may be continued on application and substitution by a personal representative. Cooper v St. Paul, 55 M 134, 56 NW 588; Clay v C. M. & St. P. 104 M 1, 115 NW 949.

A stranger to an action can take no part therein, except to intervene or make an application to become a party. In an action in ejectment the plaintiff made a motion that the heirs of deceased defendant be substituted as parties and that H, who claimed an interest in the land, be made a defendant. Granted as to the heirs, but denied as to H. Hunt v O'Leary, 78 M 281, 80 NW 1120.

If plaintiff retains any substantial interest, the party claiming an assignment may intervene, and should not be substituted. Walker v Sanders, 103 M 124, 114 NW 649.

An order substituting or refusing to substitute a party for an original party is an appealable order. Nat'l Council v Weisler, 131 M 365, 155 NW 396; Kanevsky v Nat'l Council, 132 M 422, 157 NW 646.

An action to restrain defendant from obstructing a roadway, and to abate a nuisance, does not abate on the death of a party. Town of Warsaw v Bakken, 133 M 129, 156 NW 7, 157 NW 1089.

The insurance company brought action against defendant to cancel a policy. After service of process and joinder of issue, defendant died. The action survived

and on proper motion a successor could be substituted. Nat'l Council v Scheiber, 137 M 423, 163 NW 781.

3. Assignment

Where it appears in an action that the claim upon which it has been brought has been assigned by the plaintiff, whether before or after the commencement of the action, the plaintiff cannot recover. St. Anthony v Vandall, 1 M 246 (195).

An action may be continued in the name of the plaintiff, although he may have assigned the cause of action, pending the action. Whitacre v Culver, 9 M 295 (279); Chisholm v Clitherall, 12 M 375 (251); Rogers v Holyoke, 14 M 220 (158); Bennett v McGrade, 15 M 132 (99); Lee v O'Shaughnessy, 20 M 173 (157); Peet v Roth Hotel, 191 M 151, 253 NW 546.

Defendant furnished a bond to release an attachment. Thereafter the plaintiff made an assignment for benefit of his creditors. The assignee was substituted for plaintiff and recovered a judgment; and it is held that the obligors on the bond became liable to assignee. Slosson v Ferguson, 31 M 448, 18 NW 281.

Where a plaintiff, pendente lite, assigns the proceeds of the litigation, but not the cause of action, he still retains sufficient interest therein to entitle him to continue the action as plaintiff. McKay v Minn. Commercial, 139 M 192, 165 NW 1061.

An assignment in furtherance of an attorney's lien and to secure other indebtedness does not impose liability for costs and disbursements upon the assignee. Dreyer v Otter Tail Power, 205 M 286, 285 NW 707, 287 NW 13.

4. Representative defined

The term "representative" includes not only executors and administrators but also all who occupy the position held by the deceased person, succeeding to his rights and liabilities. Willoughby v St. Paul, 80 M 432, 83 NW 377.

The matter of permitting an assignee of a cause of action to continue the prosecution thereof in the name of the original party, rests in the discretion of the trial court. Richey v Northern Pacific, 154 M 154, 191 NW 395.

5. Generally

Persons out of the state may bring an action for the recovery of property sold by a guardian within five years after return to the state. In case of the grantee or heir of a ward, the time limit commences to run as to him immediately on the transfer of the estate; but if the ward continued to be entitled thereto, such grantee or heir succeeds to his right therein, unaffected by previous lapse of time. The right of the ward to recover his estate in such case survives and is assignable. Jordan v Secombe, 33 M 220, 32 NW 383.

Where an interest in the subject matter (adverse possession) of an action is transferred pending action, it is a matter of discretion on the part of the court whether the assignee shall be substituted, or the action proceed in the name of the original party. Brown v Kohout, 61 M 113, 63 NW 248.

The doctrine of laches, when applied to refusals of the courts to enforce stale demands, is governed by the circumstances surrounding each case, by the nature of the claim, and whether delay has been unnecessary and unreasonable. In this case, the application for substitution held stale. St. Paul v Eckel, 82 M 278, 84 NW 1008.

A motion to dismiss on the ground that the right to maintain the action had passed to a receiver, was properly denied. The remedy is a motion to substitute. Amer. Engine v Crowley, 105 M 233, 117 NW 428.

A suit for divorce abates at the death of either party; but where, in the lifetime of both parties, the court determined all the issues and made an order directing that a judgment for divorce be entered, and nothing remained to be done except to enter judgment in the judgment book, such judgment may be entered nunc pro tunc after death at the instance of those interested in his estate. Tikalsky v Tikalsky, 166 M 468, 208 NW 180.

Where compensation is computed under section 176.21, and the respondent beneficiary dies before receiving the whole sum placed in trust for his benefit, un-

der section 176.22, the depositing insurer may not recover the balance unexpended at the time of the beneficiary's death. Employers Mutual v Empire, 192 M 398, 256 NW 663.

Compensation was awarded an employee's widow against a partnership. The fact that the widow was one of the partners does not abate the award, or relieve the insurer from liability. Keegan v Keegan, 194 M 261, 26 NW 318.

540.13 EXEMPTIONS OF LEGISLATIVE MEMBERS AND EMPLOYEES.

HISTORY. 1893 c. 53 ss. 1, 2; G.S. 1894 ss. 5172, 5173; R.L. 1905 s. 4065; G.S. 1913 s. 7686; G.S. 1923 s. 9177; M.S. 1927 s. 9177.

540.14 ACTIONS AGAINST RECEIVERS; TRIAL; JUDGMENT, HOW SATISFIED.

HISTORY. 1893 c. 54 ss. 1 to 3; G.S. 1894 ss. 5174 to 5176; R.L. 1905 ss. 4066, 4067; G.S. 1913 ss. 7687, 7688; G.S. 1923 ss. 9178, 9179; M.S. 1927 ss. 9178, 9179.

While federal receivers may be garnished, no executory process can be issued against the receivers on the judgment rendered thereon. It can only be satisfied, as other demands are satisfied, by an application to the court in which the receivership proceedings are pending for an order of payment. Irwin v McKechnie, 58 M 145, 59 NW 987.

An action to recover a debt incurred by an assignee under the insolvency laws of the state may be brought in any court having jurisdiction of the amount involved. Church v St. Paul Title, 58 M 472, 59 NW 1103.

A receiver incurs no personal liability for acts done under and in conformity to the order of the court. For such acts an action will lie against him only in his official capacity, and judgment must be rendered against him as receiver, payable and enforceable only out of property held by him in his official capacity. Schmidt v Gayner, 59 M 308, 61 NW 333, 62 NW 265.

Where certain city warrants were in the hands of a receiver and were replevined by a third party under a claimed assignment, and the warrants seized by the sheriff, held, that an order of the trial court ordering the sheriff to return the warrants to the receiver was appealable, and the trial court erred in making the order. Elwell v Goodnow, 71 M 390, 73 NW 1095.

The foreclosure sale under a paramount mortgage of real estate, which at the time is being subject to a receivership for the benefit of general creditors of the owner, is not void simply because the foreclosure was instituted and the sale had without first obtaining leave of the court appointing the receiver. McKnight v Brozich, 164 M 90, 204 NW 917.

One holding a claim upon which a tort action has been commenced against a receiver of a railway company is not entitled to share ahead of the mortgage lienholders in the residue remaining from a sale of the railway company. N. W. Trust v St. P. Southern, 177 M 584, 225 NW 919.

In a corporate receivership the court may fix time within which claims may be presented, order notice of the time limit, and provide that claims not filed be barred from participation. Any application after the date has expired is addressed to the discretion of the court. The courts refusal in the instant case is not an abuse of sound discretion. Chicago Joint Stock v Minn. L. & T. 57 F(2d) 70.

Common law tort liability of the various levels of government in Minnesota. 26 MLR 315.

540.15 ASSOCIATES SUED AS PARTNERS.

HISTORY. 1868 c. 79 s. 1; G.S. 1878 c. 66 s. 43; G.S. 1894 s. 5178; R.L. 1905 s. 4068; G.S. 1913 s. 7689; G.S. 1923 s. 9180; M.S. 1927 s. 9180.

Service of a garnishee summons upon one member of a firm is sufficient to justify a judgment against the firm which will bind the firm property. Hinkley v St. Anthony, 9 M 55 (44).

Where the object is not to make out a claim of title to real estate, but to show that party was associated with others in establishing a town, parol evidence is

admissible; but the mere fact that one is an agent for certain persons in a particular enterprise, does not authorize him to transact business for them by a common name so as to make them severally liable. Cooper v Breckenridge, 11 M 341 (241).

In an action against associates under a common name, an individual judgment against those served is not void for want of jurisdiction; and the affidavit of the person who served the summons that the persons he served are members of the firm is sufficient to confer jurisdiction over such persons. The action is against the associates and not against the association. Gale v Townsend, 45 M 357, 47 NW 1064; Dimond v Minnesota, 70 M 298, 73 NW 182.

Where the defendant made a contract on which the action is brought by the name by which it is sued, it is immaterial, so far as the plaintiff's right to recover is concerned, whether it is a corporation or a voluntary association. Perine v Grand Lodge, 48 M 82, 50 NW 1022.

Any association of persons, such as a fraternal or benevolent association, transacting business by a common name, may be sued in such name. Cornfield v Order Brother Abraham, 64 M 261, 66 NW 970.

Under the facts in this case, the administratrix of the decedent's estate cannot maintain an action in tort. Martin v Northern Pacific, 68 M 521, 71 NW 701.

Where a fraternal association has for one of its purposes the insurance of members in this state, but has no president, officer, or agent therein, the provisions of law relating to service of summons upon corporations are not exclusive, but service in such case may also be made upon any one of the associates within the state. Taylor v Order Railway Conductors, 89 M 222, 94 NW 684.

In the constitution of a funeral benefit association was a provision that "no member who engages in the sale of intoxicating drinks can be admitted as a member." The provision was not self-executing, and a member's right under his certificate did not terminate ipso facto when he engaged in the liquor business. Stewart v United Brotherhood, 91 M 189, 97 NW 668.

Voluntary unincorporated associations, not engaged in some business enterprise, can neither sue nor be sued in their association name. Actions in which such associations are involved must be brought in the names of the members. St. P. Typothetae v St. P. Bookbinders, 94 M 351, 102 NW 725.

The trustees of the Lake Superior Company, Ltd., were carrying on business under a common name and service on one of them was sufficient. Venner v Gt. Northern, 108 M 62, 121 NW 212.

The international typographical union was an unincorporated voluntary association of two or more associates doing business under a common name. Fitzpatrick v International, 149 M 401, 184 NW 17.

A person who executes a promissory note in a representative capacity without authority is personally liable thereon to the payee if the payee took the paper without knowledge of the facts. Eliason v Montevideo, 160 M 341, 200 NW 300.

An unincorporated voluntary association, a labor union, held to be transacting business in Minnesota, and service of a summons on a resident member sufficient to give jurisdiction. Bamers v Grand International, 187 M 626, 246 NW 362.

Ulen Farmers Co-operative Association is under this section, and the members are liable. Ford Motor Co. v Wylte, 188 M 578, 248 NW 55.

The employer was a member of a partnership, decedent an employee thereof, and the widow entitled to compensation, although a member of the copartnership. Keegan v Keegan, 194 M 261, 260 NW 318.

Policy of compensation insurance issued to Peavey, who later took in a partner retaining the old trade name. All employees came under the policy. Moreault v Northwestern, 199 M 96, 271 NW 246.

The complaint should allege the defendant to be a "group of associates doing busines as" and specifying the trade name. State ex rel v District Court, 200 M 207, 273 NW 701.

Proper service of summons upon one of several individuals doing business under a firm name was sufficient to give validity to a judgment against the firm binding only firm property; and defenses of infancy and non-residence are per-

sonal and of no avail against creditors of a firm entitled to have firm obligations satisfied out of firm assets. Peterson v Davis, 216 M 60, 11 NW(2d) 801.

Shifting basis of jurisdiction. 17 MLR 156.

Suit against under common name. 21 MLR 203.

Labor injunctions. 24 MLR 796.

540.16 BRINGING IN ADDITIONAL PARTIES.

HISTORY. 1868 c. 79 ss. 1 to 4; G.S. 1878 c. 66 ss. 43 to 46; G.S. 1894 ss. 5178 to 5181; 1895 c. 29; R.L. 1905 ss. 4069, 4070; G.S. 1913 ss. 7690, 7691; G.S. 1923 ss. 9181, 9182; M.S. 1927 ss. 9181, 9182.

Where there is clearly a defect of necessary parties, it is allowable for the court to suggest such defect and continue the cause until the necessary parties are added, and failure to bring the parties is ground for dismissal. Cover v Town of Baytown, 12 M 124 (71); Johnson v Robinson, 20 M 170 (153); N.W. v Norwegian-Danish Evangelical, 43 M 449, 45 NW 868.

Motion to bring in additional parties, for various reasons denied. Davis v Sutton, 23 M 307; Boen v Evans, 72 M 169, 75 NW 116; Sundberg v Goar, 92 M 143, 99 NW 638.

Judgment having been taken by default against non-residents, the trial court erred in not reopening the case and permitting the interposition of answers. Welch v Marks, 39 M 481, 40 NW 611.

Where a complaint stating no cause of action or ground of relief against a particular person is not so amended as to do so, an order making such person a party defendant, is erroneous. Penfield v Wheeler, 27 M 358, 7 NW 364.

A party may be brought in as a party defendant although he be engaged in another suit as yet undetermined and growing out of the same subject matter. Chadbourn v Rahilly, 34 M 346, 25 NW 633.

Mandamus proceedings pending against Minneapolis & St. Louis railway and like proceedings against the Manitoba, to compel them to bridge their tracks. The fact that a joint bridge might be advisable, the trial court rightfully consolidated the two actions. State ex rel v M. St. L. 39 M 219, 39 NW 153.

The appellant, originally not a party, voluntarily appeared and opposed a motion on its merits, and submitted and complied with an order making him a party, and was a party, although throughout he claimed to appear specially. Farmers Bank v Backus, 64 M 43, 66 NW 5; Bishop v Hyde, 66 M 24, 68 NW 95.

Where an action is brought to recover the award of damages for taking property for public use, a third party, who claims to be the owner of the property taken, or a part of it, may become a party and assert his claim. Smith v City of St. Paul, 65 M 295, 68 NW 32; Harper v Carroll, 66 M 487, 69 NW 610, 1069.

A minor child may be made a party defendant. Markel v Roy, 75 M 138, 77 NW 788.

The court is only authorized to make its order bringing in parties when it is necessary to do so in order to secure a full determination of the controversy between the original parties tendered by the complaint, answer, or counter-claim. Clay County v Alcox, 88 M 4, 92 NW 464.

An ex parte order adding new parties defendant is not appealable, but an order denying a motion to vacate such order is appealable. Sundberg v Goar, 92 M 143, 99 NW 638; Lincoln Securities v Poppe, Inc. 169 M 392, 211 NW 470; Sheehan v Hall, 187 M 582, 246 NW 353.

A motion not made promptly, will be denied if the granting of the motion would prejudice the rights of third parties. Sundberg v Goar, 92 M 143, 99 NW 638.

On the death of the defendant, plaintiff on motion secured an order substituting appellants as parties defendant. The order was appealable. National Council v Weisler, 131 M 365, 155 NW 396.

Action by one holding a recorded deed to land to clear the record of a mortgage given before but recorded after plaintiff's deed. Defendant alleges that plaintiff's deed and a contemporaneous contract of sale to the grantor in the deed constitutes a mortgage. For the determination of that issue, the holder of said contract should be joined as a party. Lewis v Babcock, 150 M 394, 185 NW 384.

A defendant who alleges no counter-claim or ground of affirmative relief against a plaintiff is not entitled to have the assignor of plaintiff made a party solely for the purpose of asserting a cause of action against such assignor. Eimon v Cassidy, 151 M 470, 187 NW 520.

Section 540.16 does not curtail the power of the district court to bring before it persons who are not parties to an action whenever, for the complete administration of justice, it is necessary to bring them in as parties. Since the court might so direct, there is no reason why such additional parties should not be allowed to come in voluntarily. Webster v Beckman, 162 M 132, 202 NW 482.

The pleadings raised two issues: Were the notes sued on usurious? Was the plaintiff, the endorsee of the notes, a holder in due course? The ex parte order made the payee of the notes a party defendant. He had no interest and was not concerned with the second issue. Lincoln Securities v Poppe, Inc. 169 M 392, 211 NW 470.

The bank deeded land to Cashman, who mortgaged it to plaintiff and deeded the land back to the bank for the accommodation of the bank. Cashman was not entitled to have the bank brought in as a party. Aetna v Cashman, 181 M 82, 231 NW 403.

In an attorney's lien proceeding it was proper for the trial court, in order to render a judgment determinative of the whole controversy, to order in as an additional party an attorney admittedly entitled to share in the fund subject to the lien. Meacham v Ballard, 184 M 607, 240 NW 540.

In the exercise of its inherent power, the court may bring in a party when necessary to the complete administration of justice. It may bring in an attorney the amount of whose fees concern the controversy between the contractor and the surety company. Johnson v Hartford, 187 M 186, 245 NW 27; Sheehan v Hall, 187 M 582, 246 NW 353; Lambertson v Westerman, 200 M 204, 273 NW 634.
An order bringing in an additional defendant, ordinarily requires the complaint to be amended so that the new party may plead thereto. Sheehan v Hall, 187 M 582, 246 NW 353.

An order having been regularly carried through establishing a judicial road, and eight years having elapsed since the final award and order was made, progress having been dormant, the county applied to the court for disposition of funds on hand. The appellant county, having invoked the jurisdiction of the court, could not defeat the claim of an intervenor to have the entire award for damages considered and determined. County of Blue Earth v Williams, 196 M 501, 265 NW 329.

In a suit upon a life insurance policy, the trial court's refusal to exercise its inherent power to order in as additional defendants four cerditors of the insured's estate, who claimed that premiums upon the policy were paid in fraud of them, was an abuse of judicial discretion. Minn. Nat'l v Equit. Life, 197 M 340, 267 NW 202.

While a will cannot be modified by agreement, and the probate court must award the property as prescribed by the will, the beneficiaries may contract as to the will regarding their respective property rights as evidenced by the ward, but if it becomes necessary to enforce such contract, resort must be had to a court of general jurisdiction. Schaeffer v Thoeny, 199 M 610, 273 NW 190.

Who shall be made parties in a given cause is a question of convenience and discretion rather than absolute right, to be determined according to the exigencies of the particular case. Necessary parties are those without whom no decree at all can be effectively made determining the principal issues. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy. Serr v Biwabik, 202 M 165, 278 NW 355.

A defendant who has not by answer alleged a counter-claim or ground for affirmative relief against the plaintiff is not entitled to an order bringing in additional parties under the statute. Levslek v Nat'l Surety, 203 M 324, 281 NW 260.

Since a beneficial owner's rights under a contract depend upon the continued existence of the contract, where the named vendee defaults and fails to defend against cancelation, denial of the beneficial owner's petition to intervene is an abuse of discretion. Veranth v Moravitz, 205 M 24, 284 NW 849.

In an action brought by the assignee of the vendor's interest in a conditional sales contract, the trial court's statutory power to order parties brought in when necessary for a full determination was not exceeded by an order bringing in vendors upon a showing by affidavit that the assignment was made in order to avoid a counter-claim by the defendant. Kaoli v Liefman, 207 M 549, 292 NW 210.

Whether the source of power for the exercise by the trial court in adding additional parties is statutory or inherent, the problem of joinder should be resolved by a consideration of the public and judicial interest in the administration of justice. Schan v Buss, 209 M 99, 295 NW 910.

Where in replevin it appears that a third party is probably entitled to possession, he should be brought in as a party by intervention or impleader. The latter may be, and in proper case should be, ordered by the court on its own motion. Braman v Wall, 210 M 548, 299 NW 243.

A person whose lands are actually taken, although not described in the condemnation petition, has such an interest in the proceedings that he will either gain or lose by the direct legal effect of the judgment therein so as to permit him under section 544.13 to intervene in the proceedings. State v Bently, 216 M 146, 12 NW(2d) 347.

In a suit to annul a contract whereby an individual outside the city classified civil service was engaged to perform duties of position in the classified civil service and to restrain individual defendants from expending or receiving municipal funds under the contract and requiring them to comply with the provisions of the city charter, if the city was a necessary party defendant, the trial court by order could direct that it be so designated and brought in as such. Cranok v Link, 219 M 112, 17 NW(2d) 359.

Bringing in third parties by defendant. 19 MLR 163.

Interpleader; requirement of privity. 19 MLR 812.

540.17 JOINDER OF CONNECTING CARRIERS.

HISTORY. 1907 c. 466 ss. 1, 2; G.S. 1913 ss. 7692, 7693; G.S. 1923 ss. 9183, 9184; M.S. 1927 ss. 9183, 9184.

Where property is consigned to a commission merchant for sale without any previous contract, or any advances made to the shipper, the consignee acquires no general or special ownership in the property before its delivery to him, and cannot maintain an action to recover damages to property in transit. Laws 1907, Chapter 466, does not change the rule that an action may be prosecuted only by the real party in interest. Grinnell v Ill. Central, 109 M 513, 124 NW 377.