**543.15** Superseded by Rules of Civil Procedure, Rules 4.04, 12.01, and generally.

**543.16** Superseded by Rules of Civil Procedure, Rule 5.01.

Annotations to superseded sections 543.15 and 543.16.

In proceedings commenced under MSA, Chapter 278, the trial court lost jurisdiction of the matter where it appeared that although petitioner paid 50 percent of the tax levied for the year involved prior to the filing of the petition, other conditions of the statute were not complied with before Nov. 1 next following the filing of the petition, and where it further appeared that the proceedings thereunder were not completed within the time limit provided for by statute. Land O'Lakes Co. v County of Douglas, 225 M 535, 31 NW(2d) 474.

Defendant against whom a default judgment has been rendered cannot raise for the first time on appeal the question whether he was entitled, under section 543.16, to notice of the proceedings in which the judgment was granted. Duenow v Lindeman, 223 M 505, 22 NW(2d) 421.

**543.17** Superseded by Rules of Civil Procedure, Rule 5.02.

**543.18** Superseded by Rules of Civil Procedure, Rules 5.02 and 6.05.

## CHAPTER 544

## PLEADINGS

**544.01** Superseded by Rules of Civil Procedure, Rule 7.01.

**544.02** Superseded by Rules of Civil Procedure, Rules 8.01 and 10.01.

Annotations relating to superseded section 544.02.

In an action for malicious prosecution, malice is a fact to be pleaded as such without reciting evidence to establish it; so likewise, want of probable cause, is a fact for the purpose of pleading and may be stated directly. The gist of an action for abuse of process is the misuse or misapplication of the process, after it has been issued. Hoppe v Kopperich, 224 M 224, 28 NW(2d) 780.

A complaint which sets forth a cause of action founded on nuisance or trespass is sufficient if it sets forth allegations of plaintiff's ownership, and possession, defendant's wrongful entry or acts of trespass, and damages resulting. Allegations as to force or intentional harm is not required. Christianson v City of Duluth, 225 M 486, 31 NW(2d) 270.

A complaint must state facts, and a general allegation of wrong doing based on undisclosed facts, does not state the cause of action. Warner v Warner Co., 226 M 565, 33 NW(2d) 721.

A complaint alleging that after the performance of an abortion the woman became unconscious, that those responsible for her failed to provide proper care, and that as a result she died states a cause of action for wrongful death. True v Older, 227 M 154, 34 NW(2d) 700.

Amended pleadings are admissible against the party interposing them even though signed only by counsel and, though unverified, are admissible as an admission or for the purpose of impeachment. Carlson v Fredsall, 228 M 461, 37 NW(2d) 744.

An attorney commencing an action presumably has authority to prepare the pleadings, and to overcome that presumption when the pleadings are sought to be

introduced as an admission or for the purpose of an impeachment. The party against whom the pleadings are offered may show that he did not have knowledge of the contents of the pleadings. Carlson v Fredsall, 228 M 461, 37 NW(2d) 744.

An amended or superseded pleading is admissible against the party interposing it. While the fact that the pleading was signed only by counsel does not affect the admissibility of the pleading testimony to that effect which may be considered as to weight or evidence. Krumholz v Rusak, 230 M 178, 41 NW(2d) 177.

A complaint which alleged that plaintiffs were daughters of deceased who conveyed realty subject to the reserved life estate in himself to the defendant, a son, on condition that defendant would hold the realty after death of the deceased in trust for defendant and plaintiffs in equal shares, that the defendant had in his possession personal property of deceased for which defendant refused to account, and seeking to establish plaintiffs' rights in the property and to impress a trust thereon, states a cause of action upon which relief could be granted. Andrews v Heinzman, 8 FRD 48.

**544.03** Superseded by Rules of Civil Procedure, Rules 7.01, 12.02, and 12.08.

Annotations to superseded section 544.03.

Where an action states two or more good causes of action a demurrer will lie for misjoinder of cause of action. A demurrer will not lie where there is an unsuccessful attempt to state a second cause of action. Where the plaintiff seeks to recover on the theory that the contract was won for a third-party beneficiary, allegations must be sufficient to show that the contract was intended to benefit him directly and that he was not merely an incidental beneficiary. Gjovik v Bemidji Local Bus Line, 223 M 522, 27 NW(2d) 273.

On demurrer to the complaint, the court is not concerned with the determination of the truth of plaintiff's allegations but the problem is whether the allegations are legally sufficient in form so as to constitute good pleading or whether they would entitle plaintiff to judgment as a matter of substantive law. Hoppe v Klopperich, 224 M 224, 28 NW(2d) 780.

A judgment to be appealable, must be a final determination of the rights of parties in the action, but only in the sense of terminating the particular action. Neither the plaintiff nor the court is authorized to dismiss an action without prejudice after final submission. Where action for damages against a municipality is founded on nuisance or trespass and no allegations of negligence are set forth in the complaint, the complaint need not allege that written notice was given to the city as required by statute as prerequisite to action against municipality based on negligence. Christiansen v City of Duluth, 225 M 475, 486, 31 NW(2d) 270.

A complaint based upon Uniform Declaratory Judgments Act may be demurred to. A demurrer must be sustained if sustainable under any statutory ground. Whether stated or not in the pleadings, a demurrer admits all necessary inferences or conclusions of law based upon facts pleaded in the pleading demurred to; but does not admit bare conclusions of law or facts not well pleaded. Paron v City of Shakopee, 226 M 222, 32 NW(2d) 603.

A demurrer admits all material facts well pleaded but does not admit their conclusions. An allegation in a complaint that the conduct of defendant set in motion a series of events which resulted in plaintiff's injuries and that such conduct on the part of the defendant constituted negligence were conclusions not facts and as such were not admitted by demurrer. Robinson v Butler, 226 M 491, 33 NW(2d) 821.

A demurrer to an answer or a defense set up therein searches the record and reaches the first defective pleading; and a party demurring to his opponent's pleading stakes his own pleading on such demurrer and cannot prevail thereon if such pleading is defective although opponent's pleading is also defective. Warner v Warner Co., 226 M 565, 33 NW(2d) 721.

On appeal from an order sustaining a demurrer to a complaint, allegations of fact well pleaded must be accepted as true. Verkennes v Corniea, 229 M 365, 38 NW(2d) 838.

Where a judgment was entered for defendant on the order sustaining a demurrer to the complaint, without notice to plaintiff and no provisions for dismissal or for costs were made, the judgment, though irregular, was final and the order was not appealable after entry of the judgment. Seagram v Lang, 230 M 118, 41 NW(2d) 429.

On demurrer to a complaint the court will take the facts alleged in the complaint as true and will regard the demurrer as admitting all necessary inferences or conclusions of law which follow from the facts well pleaded as well as all inferences of fact which may reasonably be drawn from the facts expressly pleaded. Local United Electrical Workers v United Electrical Workers, 232 M 217, 45 NW(2d) 408.

A "defect of parties" means only failure to join those who should have been included and not a joinder of improper parties. State ex rel v Village of Mound, 234 M 531, 48 NW(2d) 855.

Where certain letters and notification of proposed sale of realty were incorporated as exhibits into complaint in an action and specific performance of contract alleged to have arisen from the exercise of an option for purchase of realty, the letters and notification were required to be considered in determining the facts raised by the demurrer. Minar v Skoog, 235 M 262, 50 NW(2d) 300.

A demurrer admits all material facts well pleaded, but does not admit conclusions of law. Ruvelson v St. Paul Fire & Marine Insurance Co., 235 M 243, 50 NW(2d) 629; Nyquist v Batcher, 235 M 491, 51 NW(2d) 566.

In passing upon orders sustaining demurrers the prayer for relief could not be considered as a part of plaintiff's cause of action, since the sufficiency of the complaint must be determined exclusively upon the facts pleaded. Viiliainen v American Finnish Workers, 236 M 412, 53 NW(2d) 112.

On appeal from an order sustaining defendant's general demurrer to the complaint, allegations of the complaint would be regarded as true. Gadach v Benton County Co-op Assn., 236 M 507, 53 NW(2d) 230.

Where a court orders judgment on the pleadings, the allegations of the pleading attacked must be accepted as true and stand as admitted. State ex rel v Minneapolis Street Ry. Co., ..... M ....., 56 NW(2d) 564.

A complaint, while stating a cause of action, admitted facts which constituted a defense, is vulnerable to attack on the ground that it does not state a cause of action. Wallner v Schmitz, ..... M ....., 57 NW(2d) 821.

**544.04** Superseded by Rules of Civil Procedure, Rules 8.01, 8.02, and 12.02.

Annotations relating to superseded section 544.04.

Equity; jurisdiction; retention to award damages. 33 MLR 77.

In an action to recover against defendant on the ground that he operated his automobile so negligently as to cause a collision with one in which plaintiff was riding as a passenger, a denial that defendant was negligent, an allegation that the collision was caused solely by the negligence of the driver of the car in which plaintiff was riding, and one that defendant was guilty of contributory negligence constitute meritorious defenses. Bently v Kval, 223 M 248, 26 NW(2d) 532.

The only grounds for demurrer to an answer is that it does not state facts sufficient to constitute a defense or counterclaim; and on such demurrer the only question for consideration is whether, assuming the facts alleged in the answer to be true, enough has been stated therein to constitute a defense to plaintiff's cause of action; and in the instant case a specific and general denial setforth in the defendant's answer place in issue material allegations of the complaint and constitute a valid defense to plaintiff's cause of action; hence, the court properly overruled demurrer thereto. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 181.

Res judicata is an affirmative defense to be asserted by answer, and demurrer does not raise the question whether a former judgment not set forth in the complaint is res judicata. Mitchell v City of St. Paul, 226 M 64, 36 NW(2d) 132.

When the supreme court reverses an order of judgment with directions as to the order of judgment to be entered, upon remittitur it is the duty of the trial court to execute the mandate of the supreme court precisely according to its terms without alteration, modification, or change in any respect. The court may not give one party an unfair advantage over another by seizing upon and adopting a narrow and technical admission in pleadings without regard to significance and import of pleadings as a whole. Holden v Farwell, Ozmun, Kirk, 226 M 243, 34 NW(2d) 920.

Where the plaintiff on a reasonably bright day, patronizing the defendant's place of business, instead of going out through the entrance door as he had entered, went to a large double door opened by a chain which released a catch on top and as the door opened inward, he turned and backed out without looking and fell from a loading platform, the plaintiff was contributorily negligent and could not recover damages. Guy v Western Newspaper Union, 236 M 20, 55 NW(2d) 298.

**544.043 DEFAMATION BY RADIO, DEFENSE**

HISTORY. 1951 c 532 s 1; 1953 c 680 s 1, 2.

**544.05** Superseded by Rules of Civil Procedure, Rules 8.05, 13.01, 13.02, 13.05, 20.01.

Annotations relating to superseded section 544.05.

A cause of action which defendant cannot maintain against plaintiff alone or one which cannot be pleaded without bringing in new parties cannot be pleaded as a counterclaim without bringing in such new parties. Bryant v Gustafson, 230 M 1, 40 NW(2d) 427.

In an action for breach of contract an original unverified answer of the defendant in which the defendant's former attorney admitted making the contract and asked for rescission on the ground of false representations, which was subsequently amended to make a denial of any contract between the parties, was admissible to impeach defendant's testimony. Krumholz v Rusak, 230 M 178, 41 NW(2d) 177.

Allegation in a counterclaim that the realty involved in the partition suit was purchased by defendant with her money while living with plaintiff as his wife, and that plaintiff's name was included in the contract for deed solely because of convenience, and marriage of the parties were insufficient to show that plaintiff owned no interest in the realty in the absence of allegation to that effect. Bennett v Bennett, 230 M 415, 42 NW(2d) 40.

Defendant's counterclaim alleging that plaintiff was indebted to a named person in a stated amount, which indebtedness defendant had guaranteed to pay upon plaintiff's default, and the defendant had been obliged to mortgage her home to secure payment of such indebtedness as a result of plaintiff's default, did not state a cause of action against plaintiff in the absence of an allegation that guarantor had paid such indebtedness. Bennett v Bennett, 230 M 415, 42 NW(2d) 39.

A garnishee may assert any or all setoffs which existed in his favor when the garnishment summons were served, and which he might have enforced had an action then been brought against him. Relief issued by way of setoff is allowed as a counterclaim and by statute has been extended to include all causes of action arising ex contractu, whether arising under a contract entirely distinct from that upon which the plaintiff's claim is founded and whether the damages claimed are liquidated or unliquidated. Henderson v NW Airlines, 231 M 503, 43 NW(2d) 786.

Since the abolition of the distinction between actions at law and suits in equity and the abolition of the common law forms of action, relief theretofore afforded by way of setoff is now allowed as a counterclaim and has been extended to include all causes of action arising under a contract which may be under a contract entirely distinct from that upon which plaintiff's claim is founded and whether the damages claimed are liquidated or unliquidated. Henderson v NW Airlines, 231 M 503, 43 NW(2d) 786.

**544.06** Superseded by Rules of Civil Procedure, Rules 7.01, 8.05, 10.02, 12.02.

**544.07** Superseded by Rules of Civil Procedure, Rule 55.01.

Annotations relating to superseded section 544.07.

Where a general demurrer to a complaint was sustained and the plaintiff was given 30 days within which to file an amended complaint, the order became final upon the expiration of said 30 day period, no amended complaint having been served or filed. Thereafter neither the plaintiff nor the trial court has possessed authority to dismiss the action without prejudice, and the defendant was entitled to a judgment of dismissal on the merits. Christiansen v City of Duluth, 225 M 486, 31 NW(2d) 277.

**544.08** Superseded by Rules of Civil Procedure, Rules 7.01, 12.02.

Annotations relating to superseded section 544.08.

The only grounds for demurrer to answer is that it does not state facts sufficient to constitute a defense or counterclaim; and on such demurrer the only question for consideration is whether, assuming the facts alleged in the answer to be true, enough has been stated therein to constitute a defense to plaintiff's cause of action; and in the instant case a specific and general denial set forth in the defendant's answer place in issue material allegations of the complaint and constitute a valid defense to plaintiff's cause of action; hence, the court properly overruled demurrer thereto. Alansky v NW Airlines, 224 M 138, 28 NW(2d) 181.

A demurrer interposed to an answer or to a defense setup therein searches the record and reaches the first defective pleading; and conclusory allegations unsupported by allegations of facts from which the pleader drew the conclusory allegations are illegally restrictive. Warner v Warner, 226 M 565, 33 NW(2d) 721.

A judgment of an appellate court is res judicata of questions litigated and decided, but the question, being one which must be raised by answer, cannot be raised by remurrer. Mitchell v City of St. Paul, 228 M 64, 36 NW(2d) 132.

A demurrer admits of material facts well pleaded, but does not admit conclusions of law. Construction of the language used in an insurance contract lies only in the field of ambiguity. Where there is no ambiguity, there is no room for construction. The doctrine of substantial compliance has no application where the contract of insurance expressly requires actual compliance. The parties are free to contract as they see fit. A clause in an insurance policy excepting liability in the case of loss or damage to the insured property while in or upon an automobile or other vehicle unless, at the time the loss occurs there is actually in or upon the vehicle a person in charge of the property, includes a theft which occurs when the property is left unattended. Ruvelson v St. Paul Fire & Marine Ins. Co., 235 M 243, 50 NW(2d) 629.

**544.09** Superseded by Rules of Civil Procedure, Rule 7.01.

**544.10** Superseded by Rules of Civil Procedure, Rule 12.06.

Annotations relating to superseded section 544.10.

In a motion to strike out an answer as sham the duty of the court is to determine whether or not there is an issue to try and not to try the issue. Jasperson v Jacobson, 224 M 76, 27 NW(2d) 788.

Notwithstanding that a motion to strike out has been denied, the materiality or relevancy of an allegation may be tested during the trial by objections to administration of evidence thereunder. Alansky v Northwest Airlines, 224 M 138, 28 NW(2d) 181.

A sham answer is one which is false in fact. In determining whether an answer is sham upon a motion to strike it as such, the court's function is to determine whether upon the showing of the parties there is an issue of fact to try and not to try such issue if there is one. Defendant's failure to meet a clear and unequivocal

showing by plaintiff that the answer is sham admits the truth of the facts shown. A frivolous answer is one so lacking in legal sufficiency that upon its face it does not in any view of the facts pleaded present a defense. Fidelity State Bank v Bradley, 227 M 541, 35 NW(2d) 748.

Where no motion to vacate findings of fact, conclusions of law and order for judgment had been made, appeal from an order refusing to vacate an order striking answer as sham did not present for review any question as to refusal of trial court to vacate findings of fact, conclusions of law and order for judgment, particularly where defendant was in default at the time findings were made. Bennett v Johnson, 230 M 404, 42 NW(2d) 45.

Where a party to whose pleading a demurrer has been sustained again proposes the same pleading, or one with additions which are clearly immaterial, and makes an improper and unfair use of a lease to amend his pleading, such amended pleading must be stricken as sham and frivolous. Smola v City of West St. Paul, 234 M 157, 47 NW(2d) 789.

A general denial in reply which placed in issue an allegation of the answer to the effect that judgment of dismissal entered in a prior action was on merits so as to constitute a bar to the proceedings, was improperly stricken as sham as there was nothing in the language of the prior judgment itself which would establish as an undisputed fact that it constituted a dismissal upon the merits. Sollar v Oliver Iron Mining Co., 237 M 170, 54 NW(2d) 114.

**544.11** Superseded by Rules of Civil Procedure, Rule 15.04.

Annotations relating to superseded section 544.11.

A taxpayer on behalf of himself and others sued the defendant and others to set aside a conveyance made by the City of Hastings to the defendant, the City of Hastings, filed a complaint in intervention, the trial court dismissed both complaints, and the plaintiff and intervenor appealed. The appellate court held that the intervenor's petition should not have been dismissed on the ground that no cause of action was pending, since the trial court's order sustaining a demurrer to plaintiff's complaint was not a final adjudication. An action is prosecution in court of some demand or assertion of right by one person against another and a supplemental complaint is to introduce material facts which have occurred after service of the original complaint. A supplemental complaint cannot be used to remedy a defective cause of action set up in the original complaint, but must be confined to its proper function of enlarging or changing the relief to which a party may be entitled with respect to and in aid of a good cause of action alleged in and existing at the time of the original complaint. Muirhead v Johnson, 232 M 408, 46 NW(2d) 502.

Plaintiff, a taxpayer of the City of Hastings, sued the defendant and others to set aside a conveyance by the city to the defendants. The City of Hastings filed a complaint in intervention. The trial court dismissed both complaints and the plaintiff and the intervenor appealed. The appellate court held that the intervenor's petition should not have been dismissed since the trial court's order sustaining a demurrer to plaintiff's complaint was not a final adjudication. The dismissal of plaintiff's action did not affect the rights of the intervenor or affect a dismissal of intervenor's complaint. An order sustaining a demurrer and granting plaintiff leave to amend is not a final adjudication and does not operate as a dismissal of the action and leaves the action still pending even though the period for amendment has expired. Muirhead v Johnson, 232 M 408, 45 NW(2d) 649.

**544.12** Superseded by Rules of Civil Procedure, Rule 22.

**544.13** Superseded by Rules of Civil Procedure, Rules 24.01, 24.03.

Annotations relating to superseded section 544.13.

By intervention a third party becomes a party to a suit pending between others and an intervenor is liable for costs if he fails to sustain his claim and he may recover costs if he prevails. State ex rel v Fitzsimmons, 226 M 557, 33 NW(2d) 854.

Where a party intervenes he becomes a party to the judgment whether or not the court had jurisdiction over him originally, provided that before judgment is finally rendered he appears as a party and has a chance to be heard. He is not bound upon issues decided before his intervention. State v Bentley, 231 M 531, 45 NW(2d) 185.

As condition precedent to maintenance of an action of a municipality, the taxpayer must allege and establish that he has requested the proper officers of the municipality to bring such action and that they have refused, or, in alternative, that it would be futile to make such a request and in a taxpayer's action to set aside the conveyance made by the city on the grounds that the consideration was inadequate and where the trial court sustained demurrer for failure to allege a request on the municipal officers but granted the plaintiff 20 days in which to amend his complaint, the purported amendment filed by plaintiff after the expiration of the period fixed by the court which only introduced a fact not existing at the time of service of the original complaint was, at best, nothing more than a supplemental complaint and as such was ineffective in the absence of a motion by the plaintiff to invoke discretion of the court for permission to file supplemental complaint. Muirhead v Johnson, 232 M 408, 46 NW(2d) 502.

Where a landowner agreed that a road might pass over his land and the town agreed to build and forever maintain a cattle pass over the road, the town board did not have power to agree to forever maintain a cattle pass, and if the town proposed a change of conditions which would deprive the owner of access from one side of the road to the other, the landowner should be compensated. OAG Sept. 27, 1951 (377-A-2).

**544.14** Superseded by Rules of Civil Procedure, Rule 67.02.

Annotations relating to superseded section 544.14.

Where lease of safe-deposit box contained provision that "no one shall have access to said safe except the renter * * * or, in case of death, * * * then his legal representatives," lessor of such box could not, without violating such agreement, surrender possession of the contents of the box to one not the legal representative of the deceased renter of such box, who had died testate and whose will had never been admitted to probate. A trustee under a testamentary trust created by the will of the renter's husband, who had predeceased renter, was not the legal representative of deceased renter. Under the decision of this court, the relationship which exists between the lessor and the lessee of a safe-deposit box is defined as that of landlord and tenant. It follows therefrom that the lessor of a safe-deposit box is not in possession of the contents thereof so as to render it liable in an action of replevin to recover the contents of such box brought by one not entitled thereto either under the terms of the lease agreement, by virtue of court order, or otherwise. Kohlsaat v First Nat'l Bank, 226 M 471, 33 NW(2d) 712.

Evidence considered and held sufficient to sustain trial court's finding that plaintiff and defendant entered into an oral agreement on or about November 21, 1941, whereby plaintiff purchased certain oak flooring from defendant which defendant agreed to store until plaintiff should demand delivery thereof; and that, before a reasonable time for such delivery had elapsed, executive orders promulgated by the federal government under its war powers had made such delivery illegal. Where by virtue of war, or conditions created thereby, performance of a contract becomes illegal, obligations of the parties thereunder are terminated rather than suspended, unless the parties enter into a further agreement governing ultimate performance thereof. Whether parties entered into agreement for future performance of contract rendered presently illegal of performance by virtue of war, or conditions created thereby, is a fact question to be determined from evidence submitted. Evidence disclosing that parties held numerous conversations after date of illegality of performance, and after termination of illegality, wherein defendant repeatedly reiterated promise that delivery would be made as soon as market conditions permitted; that defendant at all times retained purchase price previously paid by plaintiff; and that defendant in writing repeatedly assured plaintiff that delivery would be made as soon as merchandise became available, held to sustain trial court's finding that defendant's ultimate refusal to perform agreement when the material was

available constituted a breach thereof rendering defendant liable in damages. Monite Waterproof Glue Co. v Sawyer-Cleator Lumber Co., 234 M 89, 48 NW(2d) 333.

The trial court's memorandum which was prepared after the perfection of this appeal, and which was made nunc pro tunc a part of the order from which this appeal is taken, is a nullity and cannot be considered on review since the trial court had no jurisdiction of the cause when the memorandum was made.

The legal requisites of a gift inter vivos are (1) delivery, (2) intent on the part of the donor to make a gift, and (3) absolute disposition of control and dominion by the donor of the thing which he purports to give to another.

A presumption is merely a procedural device and dictates a decision only where there is an entire lack of competent evidence to the contrary and the very moment substantial countervailing evidence appears from any source it ceases to have any function and vanishes completely from the cause as if it had never existed.

If the evidence as a whole so overwhelmingly preponderates in favor of a party as to leave no doubt as to the factual truth, he is entitled to a directed verdict as a matter of law, even though there is some evidence which, if standing alone, would justify a verdict to the contrary.

A transfer which is voidable as to defrauded creditors (as well as to bona fide assignees in whose favor an estoppel arises) but which, aside from the element of fraud as to creditors, is valid in other respects is binding and enforceable between the transferor and the transferee, and neither of them may assert the fraud as a bar to, or as a basis for legal or equitable relief against the other.

If a transfer is defective on non-fraudulent grounds, the fraudulent transferor may, as against the transferee, obtain a rescission by alleging and proving facts (such as want of consideration for a conveyance or mortgage, or lack of intent to make an absolute gift) which, irrespective of the element of fraud, renders the purported transfer ineffective. Kath v Kath, ..... M ....., 55 NW(2d) 692.

**544.15** Superseded by Rules of Civil Procedure, Rule 11.

**544.16** Superseded by Rules of Civil Procedure, Rule 8.06.

Annotations relating to superseded section 544.16.

No prejudice resulting from speculative evidence admitted as there was ample evidence to sustain a verdict upon the issue in question. Katlaba v Pfiefer, ..... M ....., 56 NW(2d) 725.

**544.17** Superseded by Rules of Civil Procedure, Rules 12.05, 12.06.

Annotations relating to superseded section 544.17.

Disciplinary proceedings may be initiated upon a petition containing allegations of fact made on information and belief, and so verified; and a motion to make more definite and certain will not be granted for the purpose of requiring petitioner to plead evidentiary facts, nor where the information asked is not within the knowledge or reach of the pleader. Re Rerat, 224 M 124, 28 NW(2d) 168.

Notwithstanding that a motion to strike out has been denied, the materiality or relevancy of an allegation may be tested during the trial by objections to administration of evidence thereunder. Alansky v NW Airlines, 224 M 138, 28 NW(2d) 181.

**544.18** Superseded by Rules of Civil Procedure, Rules 8.04, 12.02.

Annotations relating to superseded section 544.18.

A conclusion of law raises no issue upon being denied by the adverse party and it is not admitted by a failure to deny it when pleaded. Kowalke's Guardianship, 232 M 292, 46 NW(2d) 275.

**544.19** Superseded by Rules of Civil Procedure, Rule 9.05.

**544.20** Superseded by Rules of Civil Procedure, Rule 9.04.

**544.23** Superseded by Rules of Civil Procedure, Rule 9.03.

Annotations relating to superseded section 544.23.

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

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

Rescission is an equitable remedy which may be granted for a substantial breach of contract. Equitable estoppel arises from the conduct of a party including his words, acts, silence or negative omission to do anything. From motives of equity and fair dealing it vests opposing rights in a party who obtains benefit of estoppel. Where under contract a village public well was constructed under supervision of the village engineer who failed to reject the well at the 350 foot level and instructed the drilling contractor to continue, the village was estopped from rescinding the well drilling contract because of a bulge located within the first 350 feet. Village of Wells v Layne-Minnesota Co., ..... M ....., 60 NW(2d) 621.

**544.24** Superseded by Rules of Civil Procedure, Rules 86.01, 86.02; Appendices B(1), B(2).

Annotations relating to superseded section 544.24.

In a suit to recover overcharges paid in connection with a contract for services to be performed in defendant's plant, the record does not compel a finding that the payments made pursuant to memoranda as rendered which did not disclose the rate of hours or the basis of charge, as agreed upon in the contract, constituted an account stated, especially where no prejudice resulted to defendant by plaintiff's delay in discovering such overcharges or in demanding repayment. There was evidence tending to prove a demand for repayment prior to the date interest was held by the trial court to have accrued. Hall-Vesole Co. v Durkee-Atwood Co., 227 M 379, 35 NW(2d) 601.

**544.25** Superseded by Rules of Civil Procedure, generally.

**544.26** Superseded by Rules of Civil Procedure, generally.

**544.27** Superseded by Rules of Civil Procedure, Rules 8.05, 10.02, 18.01, 20.01.

Annotations relating to superseded section 544.27.

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

Plaintiff who was injured when she tripped over the upturned edge of a cement block of a public sidewalk, brought action against the municipalities for negligently maintaining the sidewalk and the property owners for negligently backfilling a trench after installing water and gas service pipes and before putting in a cement sidewalk block over the fill. The jury properly returned a verdict against the city and in favor of the property owners. Molis v City of Duluth, 226 M 79, 32 NW(2d) 147.

There was no abuse of discretion by the trial court in denying change of intervention for the promotion of the convenience of witnesses and the ends of justices where the change was primarily sought by the defendant to enable it, subsequently, to move for a consolidation of the trials of four actions arising out of the same collision in order to avoid the alleged disadvantage of being compelled to try one of the actions in advance of the others. Chellico v Martire, 227 M 74, 34 NW(2d) 155.

**544.28** Superseded by Rules of Civil Procedure, Rule 9.08.

**544.29** Superseded by Rules of Civil Procedure, Rules 12.01, 15.01.

Annotations relating to superseded section 544.29.

The exercise of the power to permit amendments to pleadings rests in the sound discretion of the trial court and as a rule this discretion will not be controlled or disturbed by a higher court, especially where the court's intervention is sought by way of mandamus. Allum v Federal Cartridge, 226 M 363, 32 NW(2d) 589.

Amendment of pleadings is largely in the discretion of the trial court, and its action will not be reversed on appeal unless it was clearly an abuse of discretion. Aasen v Aasen, 228 M 1, 36 NW(2d) 27.

Amended pleadings are admissible against the party interposing them, even though signed only by counsel and, even though unverified, is admissible as an admission or for the purpose of impeachment. Carlson v Fredsall, 228 M 461, 37 NW(2d) 744.

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

Where plaintiff to whose pleading a demurrer was sustained again proposed the same pleading with certain immaterial objections and otherwise made unfair use of the lease to amend, the amended pleading in the interest of justice may properly be stricken. Viiliainen v American Finnish Society, 236 M 412, 53 NW(2d) 112; Smola v City of West St. Paul, 234 M 157, 47 NW(2d) 789.

**544.30** Superseded by Rules of Civil Procedure, Rules 4.07, 6.02, 15.01, 15.02.

Annotations relating to superseded section 544.30.

Under a provision permitting the court in its discretion at any time within one year after "notice" thereof to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, the quoted word means the actual and not constructive notice. Industrial Loan & Thrift Corp. v Swanson, 223 M 246, 26 NW(2d) 625.

The exercise of the power to permit amendments to pleadings rests in the sound discretion of the trial court and as a rule this discretion will not be controlled or disturbed by a higher court, especially where the court's intervention is sought by way of mandamus. Allum v Fed. Cartridge, 226 M 363, 32 NW(2d) 589.

Amendment of pleadings after the commencement of the trial is a matter largely within the discretion of the trial court, and the denial of an amendment designed to introduce a purported defense which in reality is not a defense is not an abuse of that discretion. Aasen v Aasen, 228 M 1, 36 NW(2d) 27.

Where without objection a witness testified in an action by a contractor to the effect that correction of defects pleaded by the owner as a basis of counterclaim for defects in the work would cost more than the amount claimed by the owner as damages, but no intent to litigate the issues beyond the pleading appeared, refusal to permit an amendment of the counterclaim to conform to proof as to the amount of damages, was not an abuse of discretion. Sward v Nash, 230 M 100, 40 NW(2d) 828.

**544.31** Superseded by Rules of Civil Procedure, Rule 15.02.

Annotations relating to superseded section 544.31.

Plaintiff, suing under a common count for the value of services rendered in procuring a purchaser for defendant's land, was entitled to have the jury determine whether he was entitled to recover under an express contract, and, if it found that there was no express contract, upon a quantum meruit, where plaintiff's express contract to pay a certain percentage of the selling price and defendant's evidence was to the effect that there was no contract at all, but the evidence of both parties showed that the services were rendered under such circumstances that, if there was a contract, they were in performance thereof, and, if there was no contract, defendant was liable upon a quantum meruit for the reasonable value thereof. Schimmelpfennig v Gaedke, 223 M 542, 27 NW(2d) 416.

Where facts relating to the issue on which a variance between the complaint and the proof was claimed were within the knowledge of defendants and were fully litigated, the variance is not fatal. Foster v Bock, 229 M 428, 39 NW(2d) 862.

**544.32** Superseded by Rules of Civil Procedure, Rules 4.07, 6.02, 6.03, 60.01, 60.02, and 61.

Annotations relating to superseded section 544.32.

Collateral estoppel; effect of dismissal of appeal for mootness upon subsequent suit based on a different cause of action. 35 MLR 506.

In an action to recover against the defendant upon the ground that he operated his automobile so negligently as to cause a collision with one in which plaintiff was riding as a passenger, a denial that defendant was negligent, an allegation that the collision was caused solely by the negligence of the driver of the car in which plaintiff was riding and one that plaintiff was guilty of contributory negligence, constitute meritorious defenses. Where it appears as a fact that defendant filed an affidavit of merits in support of an application to be relieved of a default in failing to answer, a contention that such an affidavit was not filed is without merit. Bentley v Kral, 223 M 248, 26 NW(2d) 532.

Defendants are entitled to relief from default in not answering, where their reason for not answering is that they relied upon advice of their attorney that an answer was not necessary, because (a) the only matter involved in the litigation was plaintiffs' right to remove an obstruction to the flow of surface water through a tile and open ditch, which plaintiffs had removed under authorization granted by a temporary injunction; (b) the trial judge had stated in open court upon the hearing of the motion for the temporary injunction that the complaint did not state cause of action for permanent relief; and (c) under the circumstances plaintiffs were not entitled to any permanent relief. Because a litigant should not be penalized for the neglect or mistakes of his lawyer, courts will relieve a party from the consequences of the neglect or mistakes of his attorney when it can be done without substantial prejudice to his adversary. Duenow v Lindeman, 223 M 505, 27 NW(2d) 421.

Granting or refusing a motion to open a default judgment on ground of excusable neglect is within the discretion of the trial court. In the instant case the court in refusing to reopen the default, did not abuse its discretionary powers. Croes v Handlos, 225 M 247, 30 NW(2d) 471.

An automobile collision is the proximate cause of death where disease intervened, when it is shown, as it was here, that injury sustained in the accident caused the disease from which death resulted. The introduction in evidence of letters of special administration establishes the plaintiff's capacity to maintain a wrongful death action. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

Independent of statutes, courts have inherent power to supply any omissions in any proceeding or record, good cause being shown; and both trial and appellate courts, for the purpose of preventing miscarriage of justice resulting from a retrial for the purpose of proving a fact existence of which can be established by an incontrovertible document, may reopen a case and receive such proof even after the verdict. Mattfeld v Nester, 226 M 106, 32 NW(2d) 291.

The exercise of the power to permit amendments to pleadings rests in the sound discretion of the trial court and as a rule this discretion will not be controlled or disturbed by a higher court, especially where the court's intervention is sought by way of mandamus. Allum v Federal Cartridge, 226 M 363, 32 NW(2d) 589.

Where the defendant asks to open a default judgment taken against him and interposes an answer, the proposed answer must contain a meritorious defense. State v Castner, 226 M 422, 33 NW(2d) 35.

A judgment on the merits operates as an estoppel in a subsequent action between the same parties upon a different claim or demand only as to those matters in issue or points controverted, upon the determination of which the finding of the verdict was rendered in the former action. A particular matter or issue which is withdrawn or withheld from consideration of the court by stipulation of the parties or otherwise is not adjudicated and a judgment entered on other issues will not act as a bar to an action on the issues so withheld. Smith v Smith, 235 M 412, 51 NW(2d) 276.

In the exercise of a sound judicial discretion, it is the duty of the trial court, in furthering justice through the adoption of a liberal policy conducive to the trial of causes on their merits, to grant a motion to open a default judgment and permit a party to answer, if the party in default shows that he (1) is possessed of a reasonable defense on the merits, (2) has a reasonable excuse for his failure to neglect to answer, (3) has acted with due diligence after notice of the entry of judgment, and (4) that no substantial prejudice will result to the other party. Defendant in the instant case is not chargeable with the neglect or negligence of the insurer or its attorney. Hinz v Northland Milk Co., 237 M 28, 53 NW(2d) 454.

**544.33** Superseded by Rules of Civil Procedure, Rule 61.

Annotations relating to superseded section 544.33.

Where several issues of fact are tried and any one of them is erroneously submitted to the jury, and a general verdict is returned for plaintiff, defendant is entitled to have the verdict set aside and to have a new trial, unless it conclusively appears as a matter of law that plaintiff was entitled to the verdict upon other grounds. Ohrmann v Chicago, Northwestern Ry., 223 M 580, 27 NW(2d) 806.

Where newspaper account of trial published during trial included picture of plaintiff with steel brace and a statement that she had sustained fractured skull and, with her father, sought recovery of $85,000; where it appeared that some of jurors may have read said article during the trial; but where said article was published without the consent of the court or counsel, and the references therein had otherwise been directed to the attention of the jury, either by the presence of plaintiff in the courtroom, by the introduction of medical testimony, or by comments made by counsel in closing argument; and where trial court had properly directed jury to disregard all such matters which were not otherwise properly submitted in evidence during the trial, the foregoing incidents did not constitute prejudice to the extent of requiring declaration of a mistrial by virtue thereof, and trial court did not abuse its discretion in denying motion to such effect. Eichten v Central Minnesota Co-op Power Assn., 224 M 182, 28 NW(2d) 862.

Error without prejudice is not ground for reversal or for granting a new trial. Henschke v Young, 224 M 339, 28 NW(2d) 766; Potter v Potter, 223 M 29, 27 NW(2d) 784; Fewell v Tappan, 223 M 483, 27 NW(2d) 648.

Plaintiff who was walking in the street about six or eight feet from the south curb line of an east-west street prior to the time she entered an intersection, and who was struck by defendant's automobile after she had entered the intersection when approximately four feet from the southeast curb line, was not contributorly negligent as a matter of law. Olson v Everet, 224 M 528, 28 NW(2d) 753.

Remarks of the trial judge for a proper purpose, and out of the hearing of the jury were not sufficiently prejudicial to warrant a new trial; nor was the court's failure to rule on an objection, error, as the objection was to the matter of phrasing and was not pressed. Ryan v City of Crookston, 225 M 129, 30 NW(2d) 351.

Where the appellate court sustains the trial court's decision in directing a verdict, the fact that the decision was based upon a ground different from that announced by the trial court does not vitiate the decision. Bemboom v National Surety Corp., 225 M 163, 31 NW(2d) 1.

In an action against a bus company by a passenger for injuries sustained when alighting from a bus, it was not prejudicial error to permit the jury to view the bus. Ball v Twin City Motor Bus Co., 225 M 274, 30 NW(2d) 523.

A shoplifter, apprehended by defendants employee, broke away while being escorted to the manager's office, and in escaping ran against and injured a customer; under the facts, no negligence was shown. Knight v Powers, 225 M 280, 30 NW(2d) 536.

A party is not prejudiced by the erroneous sustaining of an objection to a question if the witness answers the question and such answer is not stricken from the record or otherwise withdrawn from consideration of the jury. Nubbe v Hardy Continental Hotel System, 225 M 496, 31 NW(2d) 333.

In a trial by the court, there was no prejudicial error (a) in permitting testimony over objection as to conversations had by one of the defendants with the decedent, where it appeared from the court's memo that the court disregarded such testimony in making its findings; nor (b) in admitting conclusions by non-expert witnesses, since the foundation for admitting such conclusions lies largely in the discretion of the trial court. On appeal from a trial judge, it is presumed that the court considered any such evidence as was competent. Sullivan v Braun, 225 M 524, 31 NW(2d) 440.

Review on appeal must be limited to the record; and to justify reversal of a judgment, the record must show affirmatively that there was material error. Frisbie v Frisbie, 226 M 435, 33 NW(2d) 23.

Stripped of its irrelevant and ineffective allegations and assuming the truth of such facts as are well pleaded in the complaint, the court could not sustain a finding of fraud based solely on the disparity between the "book value" and the "market value" to which the stock in question was sold, nor could it sustain finding of dishonesty grounded on the determination to sell the stock at the market instead of holding it for a liquidating dividend. Warner v Warner, 226 M 565, 33 NW 721.

Where certain inadmissible evidence was erroneously received over the plaintiff's objection, but where the record disclosed that evidence to the same effect had previously been offered and received without objection, the trial court did not err in denying plaintiff's motion for a new trial. Manahan v Jacobson, 226 M 505, 33 NW(2d) 606.

Where mistake in the name of a party is amendable in trial court, and it appears that no one was misled or prejudiced by the defect, the mistake will be disregarded by the supreme court on appeal as not affecting substantial rights of the parties. Gustafson v Johnson, 235 M 376, 51 NW(2d) 108.

Unless there is error causing harm to the appealing party the supreme court will not reverse a judgment. Loth v Loth, 227 M 387, 35 NW(2d) 642.

On an appeal from a judgment against drivers of automobiles which collided at an intersection for injuries sustained by a passenger in an automobile entering an intersection from a county road, the driver of the automobile traveling on through state road could not complain of an instruction which was more favorable to him than his requested instruction as regards the duty of the driver to heed a stop sign protecting a through highway. Dose v Yager, 231 M 90, 42 NW(2d) 420.

In an action for breach of permission to marry denial by the trial court of admission into evidence of a marriage license issued to the plaintiff and to a third party eleven months after the breach of permission by the defendant, was not prejudicial error since the license constituted evidence of so remote a character as to have very little, if any, weight. Kugling v Williamson, 231 M 135, 42 NW(2d) 584.

Where there was no claim by plaintiff of permanent impairment of earning capacity, and evidence was admitted as to wages earned by plaintiff prior to the ac-

tion and such wages were substantially the same as the plaintiff earned after the accident, inclusion of evidence as to wages earned by plaintiff after the accident was not error. Blacktin v McCarthy, 231 M 303, 42 NW(2d) 818.

Where the verdict is right as a matter of law there will be no reversal on account of errors in the admission of evidence, the instructions of the court or misconduct of council which does not affect the correctness of the verdict. McGuiggan v St. Paul City Ry. Co., 229 M 534, 40 NW(2d) 435.

Where the purpose of the testimony was to show that the gross income of a summer resort was $12,000 in 1947 was false, its admission of such evidence was without prejudice, though it was a mere guess and without foundation as defendants later themselves introduced evidence that the gross income for that year was substantially less than that reported. Marion v Miller, ..... M ....., 55 NW(2d) 52.

In an action for damages for negligence in kiln drying lumber instructions were in strict harmony with cited authority on Minnesota law as to plaintiffs' burden of proof, preponderance of evidence, prima facie case and burden upon the defendant to show that he exercised a degree of care commensurate with the risks involved. Twin City Hardwood Lumber Co. v Dreger, 199 F(2d) 197.

A directed verdict on the sole ground of the contributory negligence of plaintiff is upheld even though the findings of contributory negligence of plaintiff were not sustained, because in the instant case upon an examination of the records there was nothing to sustain a finding of negligence on the part of the defendant. Donato v Minneapolis Street Ry. Co., ..... M ....., 56 NW(2d) 308.

Where the attorney in his argument stated that certain facts as to the extent of the injury of claimant were admitted, such statement did not call for a new trial as the client was not cross-examined as to her injuries and the doctors produced by her testified to the percentage facts referred to in the arguments. Bocchi v Karnstedt, ..... M ....., 56 NW(2d) 628.

Where a will contest was tried without a jury, the assignments of error pertaining to the reception of certain opinion evidence, which was subsequently stricken by the trial court, presented no grounds for reversal. Palmer's Estate, ..... M ....., 57 NW(2d) 409.

**544.34** Superseded by Rules of Civil Procedure, Rules 4.07, 6.02, 60.01, and 60.02.

Annotations to superseded section 544.34.

Although limitations upon the time for taking an appeal are to be liberally construed to avoid a forfeiture of the right of appeal, neither the supreme court nor the district court can extend the time for appeal by stay of proceedings or by an order designed to accomplish that purpose directly or indirectly. An order denying a motion to vacate a default judgment, and an order to show cause to obtain vacation of such order denying the motion to vacate could not be vacated for the purpose of extending the time of appeal as fixed by statute. Weckerling v McNiven Land Co., 231 M 167, 42 NW(2d) 701.

**544.35** Superseded by Rules of Civil Procedure, Rule 5.04.