son of the death of the witness during the intervening period, the exercise of the reserved right of cross-examination by the parties entitled thereto was prevented, without any fault on their part, the testimony in question was inadmissible. Estate of Sweeney, 248 W 607, 22 NW (2d) 657, 24 NW (2d) 406.

Testimony given by the testator, while under guardianship, in proceedings involving a controversy between the same parties over certain deeds executed by the testator, should have been received in evidence as having a definite bearing on the issues involved in the instant proceedings. Estate of Brzowsky, 267 W 510, 66 NW (2d) 145, 67 NW (2d) 384.

See note to sec. 7, art. I, on rights of accused (meet the witnesses), citing State v. La Fernier, 44 W (2d) 440, 171 NW (2d) 408.

To invoke 885.31, Stats. 1967, on a retrial, the state must show that the witness is absent from the state, that a good-faith attempt to secure his attendance has been made, and that the good-faith effort is in effect an affirmative showing that due diligence has been used to obtain the presence of the absent witness. State v. La Fernier, 44 W (2d) 440, 171 NW (2d) 408.

885.365 History: 1965 c. 506; Stats. 1965 s. 885.365; 1969 c. 427.

CHAPTER 887.

Depositions, Oaths and Affidavits.

Editor's Note: The sections comprising this chapter were not assigned decimal numbers by ch. 4, Laws 1925, but were renumbered by the Revisor in 1925 under his general authority.

887.01 History: R. S. 1849 c. 99 s. 1; R. S. 1858 c. 137 s. 108; 1860 c. 125 s. 1; 1864 c. 79 s. 1; R. S. 1878 s. 4080, 4203; 1880 c. 9; 1883 c. 119; Ann. Stats. 1889 s. 2216a, 4080, 4203; 1893 c. 312 s. 20; Stats. 1898 s. 4080, 4203; 1901 c. 145 s. 1; Supl. 1906 s. 4080; 1921 c. 200; Stats. 1925 s. 326.01; 1927 c. 523 s. 39; 1933 c. 253; 1933 c. 454 s. 11; 1943 c. 289; Stats. 1943 s. 326.01, 329.13; 1951 c. 703 s. 14; Stats. 1951 s. 326.01; 1953 c. 61 s. 136; 1961 c. 495; 1965 c. 66 s. 2; 1965 c. 617; Stats. 1965 s. 887.01; 1967 c. 276 s. 39.

Revisor's Note, 1927: (1) Verbal changes in subsection (1) are made for the purpose of making plain that the power to administer the oath is as broad as the power to subpoena and hear witnesses. That is probably the law now.

(2) The language "or other proper certifying officer" is indefinite and no way is provided for arriving at certainty. Then there is a lack of precision as to both thought and expression in the language—"he believes the signature of such officer to be genuine." If a writing is the signature of an officer, it is necessarily genuine and nobody's belief about it is important. It is the written name that needs authentication. Our courts take judicial notice of the public acts of other states and of the United States. Section 328.01. As a rule clerks of courts administer oaths. That makes obvious the reason for exempting his oaths, as are the notaries, from a further certification. [Bill 10-S, s. 39]

Affidavits made before an officer of another state must be authenticated as provided by sec. 4203, R. S. 1878. Sloane v. Anderson, 57 W 123, 13 NW 684.

If the verification to a complaint be made in another state and before an officer of such state a copy of the certificate required by sec. 4203, R. S. 1878, must be attached. Knowles v. Fritz, 58 W 216, 16 NW 621.

Witnesses on the trial of a charge against a city officer before the common council thereof may be sworn by the chairman of the committee of the whole appointed by the council to take evidence upon such charges. State ex rel. Starkweather v. Common Council, 90 W 612, 64 NW 304.

A certificate by a notary public of the verification before him of an accusation against a municipal officer created a presumption that the accusation was in fact sworn to, which could not be overcome by uncertain, unreliable and conflicting testimony to the contrary. State ex rel. Cleveland v. Common Council, 177 W 537, 188 NW 601.

887.02 History: R. S. 1849 c. 131 s. 39, 53; R. S. 1858 c. 133 s. 74; R. S. 1878 s. 2964; Stats. 1898 s. 2964; 1911 c. 537; Stats. 1911 s. 2964, 4080m; 1925 c. 4; Stats. 1925 s. 271.50, 326.02; 1927 c. 523 s. 40; Stats. 1927 s. 326.02; 1965 c. 66 ss. 2, 8; Stats. 1965 s. 887.02.

326.02 (2) does not prohibit charging of a fee for administering an oath under 5.05 (5) (b), Stats. 1937. 27 Atty. Gen. 187.

887.025 History: Sup. Ct. Order, 221 W vi; Stats. 1937 s. 326.025; Sup. Ct. Order, 236 W vi; Stats. 1941 s. 326.03; Sup. Ct. Order, 241 W vi; Stats. 1943 s. 326.025; 1965 c. 66 s. 2; Stats. 1965 s. 887.025.

887.03 History: R. S. 1849 c. 99 s. 6; R. S. 1858 c. 137 s. 113; R. S. 1878 s. 4081; Stats. 1898 s. 4081; Stats. 1925 s. 326.03; 1927 c. 523 s. 41; Sup. Ct. Order, 236 W vi; Sup. Ct. Order, 241 W vi; 1965 c. 66 s. 2; Stats. 1965 s. 887.03.

The record of a 7-year-old child's examination and her answers to the questions put to her both by the magistrate to determine her competency and by counsel to ascertain the facts connected with the collision, in which her companion was struck and killed by the defendant's car, sufficiently showed that she was capable of understanding the obligation to make truthful answers to questions asked, and in the circumstances the receiving of her testimony in the preliminary examination, without administering an oath, was not error. State ex rel. Shields v. Portman, 242 W 5, 6 NW (2d) 713.

Although the first sentence in affidavits ordinarily recites that the affiant is swearing under oath, the absence of such recital does not necessarily render an affidavit fatally defective; likewise as to the jurat's failure to specify the notary's venue; and the statement in the jurat, "sworn to before me," in the absence of proof to the contrary, necessarily presumes that the notary duly administered the proper oath to the affiant. Dunlavy v. Dairyland Mut. Ins. Co. 21 W (2d) 105, 124 NW (2d) 73.

887.04 History: R. S. 1849 c. 99 s. 2; R. S. 1858 c. 137 s. 109; R. S. 1878 s. 4084; Stats. 1898 s. 4084; 1903 c. 151 s. 2; Supl. 1906 s. 4084; Stats. 1925 s. 326.04; Sup. Ct. Order, 221 W vii; 1965 c. 66 s. 2; Stats. 1965 s. 887.04.

887.05 History: 1851 c. 381 s. 2; R. S. 1858 c. 137 s. 7; 1867 c. 94 s. 1; 1876 c. 40; R. S. 1878 s. 4086; 1881 c. 165; Ann. Stats. 1889 s. 4086; Stats. 1898 s. 4086; 1913 c. 336; 1917 c. 163; Stats. 1925 s. 326.05; 1927 c. 523 s. 42, 43, 44, 47; Stats. 1927 s. 326.05, 326.09 (5); Sup. Ct. Order, 229 W viii; Stats. 1939 s. 326.05; 1965 c. 66 s. 2; Stats. 1965 s. 887.05.

A deposition cannot be used on the trial against one who was not a party to the action when it was taken. Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

887.08 History: R. S. 1849 c. 98 s. 24; R. S. 1858 c. 137 s. 24; R. S. 1878 s. 4100; Stats. 1898 s. 4100; Stats. 1925 s. 326.08; 1927 c. 523 s. 46; 1965 c. 66 s. 2; Stats. 1965 s. 887.08.

887.09 History: R. S. 1849 c. 98 s. 9 to 13; R. S. 1858 c. 137 s. 9 to 13; 1861 c. 39 s. 1; 1862 c. 240 s. 1; 1876 c. 193; R. S. 1878 s. 4102; Stats. 1898 s. 4102; 1905 c. 237; Supl. 1906 s. 4102; 1907 c. 455; Stats. 1925 s. 326.09; 1927 c. 523 s. 47; Sup. Ct. Order, 229 W viii; 1961 c. 113; 1963 c. 459; 1965 c. 66 s. 2; Stats. 1965 s. 887.09; 1967 c. 276 s. 39.

A clerical error in a notice, when the other papers served were correct, is not a ground for excluding a deposition. Eastman v. Bennett, 6 W 332.

Cross-examination of a witness or objections to questions is a waiver of defect or want of notice. Benham v. Purdy, 48 W 99, 4 NW 133.

Notice of taking a deposition may be given before an issue of fact is joined. Sleep v. Heymann, 57 W 495, 16 NW 17.

887.095 History: Sup. Ct. Order, 251 W vi; Stats. 1947 s. 326.095; 1965 c. 66 s. 2; Stats. 1965 s. 887.095.

887.10 History: R. S. 1849 c. 98 s. 14, 18; R. S. 1858 c. 137 s. 14, 18; 1872 c. 68 s. 2; R. S. 1878 s. 4087; Stats. 1898 s. 4087; 1899 c. 29; 1901 c. 244; Supl. 1906 s. 4096; Stats. 1925 s. 326.10, 326.12 (9), (10); 1927 c. 523 s. 48; Stats. 1927 s. 326.10; 1961 c. 113; 1965 c. 66 s. 2; Stats. 1965 s. 887.10.

The certificate must show that all the requirements of the statute have been substantially complied with; no presumption will be indulged to supply defects. Goodhue v. Grant, 1 Pin. 556.

It is not essential that a deposition be taken at the precise street and number mentioned in the notice and commission. Parties or attorneys have no right to put questions on examination upon written interrogatories. Sayles v. Stewart, 5 W 8.

As a general rule depositions reduced to writing by the witness or other person in advance of the examination or copied from such previously-written statement are inadmissible. Such paper or writing may be used as an admission. Fisk v. Tank, 12 W 276.

A deposition should not be suppressed for want of venue or statement of the place where taken. Where a copy of a contract or other instrument is attached to the deposition it is inadmissible unless the nonproduction of the original is sufficiently accounted for. Fisk v. Tank, 12 W 276.

If, during the time depositions are being taken, the venue of the action is changed and thereafter they are transmitted to the clerk of the court in which it was originally brought, he may, on discovering the nature of the papers, forward them to the clerk of the court in which the action was then pending. Waterman v. Chicago & A. R. Co. 82 W 613, 52 NW 247.

Where a deposition for use in justice court was addressed to the "Clerk of Justice Court, Rock County, care of Whitehead & Mathison, Attorneys" instead of to the "Magistrate," and was delivered intact to the magistrate this was not ground for suppression. C. E. Erickson Co. v. Farnum, 175 W 279, 185 NW 177.

See note to 270.635, on scope and application, citing Kanios v. Frederick, 10 W (2d) 358, 103 NW (2d) 114.

887.11 History: R. S. 1849 c. 98 s. 23, 27, 41; R. S. 1858 c. 137 s. 23, 27, 41; R. S. 1878 s. 4088; Stats. 1898 s. 4088; Stats. 1925 s. 326.11; 1965 c. 66 s. 2; Stats. 1965 s. 887.11.

887.12 History: R. S. 1858 c. 137 s. 54, 55; 1863 c. 24; 1866 c. 138; R. S. 1878 s. 4096; 1882 c. 194; 1885 c. 321; 1889 c. 348; Ann. Stats. 1889 s. 4096; 1893 c. 141; Stats. 1898 s. 4096; 1899 c. 29 s. 1; 1901 c. 244 s. 1; Supl. 1906 s. 4096; 1907 c. 369; 1909 c. 84; 1911 c. 231; 1913 c. 246; 1917 c. 101; 1919 c. 239; Stats. 1925 s. 326.12; 1927 c. 523 s. 49; Sup. Ct. Order, 204 W ix; Sup. Ct. Order, 212 W xix; 1947 c. 30; 1949 c. 301; 1953 c. 371; 1955 c. 197; 1961 c. 113; 1963 c. 33; 1965 c. 66 s. 2; Stats. 1965 s. 887.12; 1969 c. 304.

Revisor's Note, 1927: Subsection (1): Provision as to municipalities is omitted because they are included in the general language preceding those provisions. The revisers of 1898 inserted "private" before the word "corporation" in section 4096, and subsequently this section was amended by inserting the provision as to municipal corporations. Still later, the words "private corporation" were eliminated, but the provision as to municipalities was retained, but it would seem, without any remaining force. It is unnecessary to say the examination may be had "after the commencement" of the action because that is necessarily implied. The wording makes it plain that the examination may be by oral or written questions.

Subsection (2): The substance of subsection (8) is omitted because the general provisions for coercing witnesses are made applicable to this examination.

Subsection (3): The word "person" is substituted for the word "party" for the obvious reason that this examination statute which was originally confined strictly to the parties has been extended to officers, agents and employes. Subsection (7) is omitted or struck out because it is a duplication of other provisions, and because it was declared to be in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Kentucky F. Corp. v. Paramount A. E. Corp. 262 US 544. In that action

subsection (2) of section 4097 was also held invalid in part.

Subsection (4): The phraseology only is changed.

Subsection (5): The language is modified to clearly express the purpose of limiting the introduction of an adverse deposition upon the trial to the party who took the examination. That has been the practice, but the decisions of the supreme court seem to raise a doubt as to whether that practice is necessarily universal. Lamberson v. Lamberson, 175 W 398, 411; Lang v. Heckel, 171 W 59, 68, 69; Thomas v. Lockwood O. Co. 174 W 486, 496, 497. [Bill 10-S, s. 49]

Comment of Advisory Committee, 1949: The purpose of the amendment of 326.12 (3) is to cure the invalidity found therein by the Supreme Court in State ex rel. McKee v. Breidenbach, 246 W 513 (decided Feb. 13, 1945). Mrs. McKee sued Mr. McKee in the Milwaukee county circuit court. Neither was a resident of Wisconsin. The summons was served personally in this state. Mr. appeared by attorneys and answered. Mrs. obtained an order to show cause and thereon the court ordered Mr. to appear before a court commissioner in Milwaukee and submit to adverse examination under 326.12. These orders were served on his attorneys but not on him. Mr. then instituted an original action in the supreme court to prohibit the circuit court from proceeding further in the matter. It was held that sec. 326.12 is "unconstitutional and void" and constitutes "a denial of the equal protection of the laws and of due process of law" insofar as it discriminates "between a resident of Wisconsin and a nonresident party." "The decision in State ex rel. Walling v. Sullivan [245 W 180], supra, is not in point in that the order then held valid did not require the nonresident party to come * * * into Wisconsin and submit here to an adverse examination." 246 W 513, 520-21. The last sentence of 326.12 (3) was added by ch. 30, laws of 1947. [Bill 30-S]

Editor's Note: Secs. 326.13-326.16, Stats. 1959, relating to the use of depositions, were repealed by ch. 113, Laws 1961. For notes of decisions construing these sections see Wis. Annotations, 1960.

On inspection of documents and property see notes to 269.57; on appealable orders see notes to 274.33; and on appeals from county court see notes to 324.01.

A court commissioner conducting an examination under sec. 55, ch. 137, R. S. 1858, has no power to punish for contempt for failure to answer. It seems that, where the relevancy of the examination and the interrogatories to be put are settled beforehand by the court, the court may punish for failure to answer; and that, upon the whole matter being reported to the court, the court would in any case punish by fine or imprisonment, or by striking out the pleadings of the party failing to answer. Stuart v. Allen, 45 W 158.

The examination of a party is not limited to cases in which a discovery might have been had in equity; nor, after the issues are settled by the pleadings, can the scope of such examination be narrowed by an order of court so as to prevent the disclosure of anything relevant to the controversy. It seems that after issue joined, the court cannot limit the scope of the examination except where the issues are so indefinite as to make it necessary to define more definitely what they are and the general scope of the inquiry. Kelly v. Chicago & Northwestern R. Co. 60 W 480, 19 NW 445, 521.

In an action involving the right to the possession of property, if the defendant alleges that plaintiff's possession is wrongful and that he himself was acting by the authority of the owner of the property, who was entitled to its possession, an inquiry as to plaintiff's right of possession is material. Pride v. Weyenberg, 83 W 59, 53 NW 29.

The presentation of a claim against the estate of a decedent to the proper county court is the commencement of a proceeding within sec. 4096, R. S. 1878. Frawley v. Cosgrove, 83 W 441, 53 NW 689.

In an action by the state against one of its ex-treasurers and his sureties to recover interest received by him on state funds, an examination for the purpose of enabling plaintiff to frame its complaint was properly allowed upon an affidavit showing that plaintiff did not know the banks where the deposits were made, the rates of interest received, the dates of the deposits, the amount received on account thereof by the treasurer, or the proportion of such deposits which properly belonged to the various funds of the state. The sureties were subject to an examination. State v. Baetz, 86 W 29, 56 NW 329.

The clause "the party examining shall, in all cases, be allowed to examine upon oral interrogatories" applies to every examination. Neeves v. Gregory, 86 W 319, 56 NW 909.

An administrator de bonis non may have a discovery in an action brought to recover a fund, the amount, form and condition of which he is ignorant. Meyer v. Garthwaite, 92 W 571, 66 NW 704.

Examination of a party under sec. 4096, R. S. 1878, may be used by him to show that the nature of his claim was made known to the opposite party so that such party was not misled by failure of proof to conform to the pleadings. McNally v. McAndrew, 98 W 62, 73 NW 315.

After defendant had introduced extracts from plaintiff's deposition, it was not reversible error to permit the plaintiff to introduce, over a general objection, the whole of the deposition, where parts of it qualified and explained the extracts introduced, although other parts were inadmissible. Gutzman v. Clancy, 114 W 589, 90 NW 1081.

The examination of one of the principal officers of the corporation is to be regarded as the examination of a party and the deposition may be used notwithstanding his presence in court. Johnson v. St. Paul & W. C. Co. 126 W 492, 105 NW 1048; Clark County v. Rice, 127 W 451, 106 NW 231.

Sec. 4096, Stats. 1898, contemplates but one examination of a party. The right of further examination in a proper case on account of inadvertence, surprise or excusable neglect should be allowed upon application to the trial court, upon proper showing. Phipps v. Wisconsin C. R. Co. 133 W 153, 113 NW 456.

Where the affidavit for examination before

issue joined affirmatively shows that no cause of action exists, an examination cannot be had. State v. Milwaukee E. R. & L. Co. 136 W 179, 116 NW 900.

Where an examination is had on motion of defendant before issue joined, it must appear that the facts upon which discovery is desired are necessary to enable the party to answer, and when that appears the examination must be limited to the discovery of facts relevant to such points, but the court or presiding judge may still further limit the examination and an order so limiting it will not be reversed unless there is a clear abuse of discretion. Badger B. Co. v. Daly, 137 W 601, 119 NW 328.

When an examination is had in a foreign country under sec. 4096, it is proper to issue letters rogatory in aid of such examination. Hite v. Keene, 137 W 625, 119 NW 303.

Where the affidavit for an examination to enable plaintiff to frame his complaint shows that he is in possession of sufficient facts to frame the complaint, the examination should not be allowed. Ellinger v. Equitable L. Society, 138 W 390, 120 NW 235.

The examination is under the control of the court, and its discretion will not be interfered with except in case of clear abuse. American F. P. Co. v. American M. Co. 151 W 385, 138 NW 1123.

In an affidavit made before issue joined it is not necessary that it state that the facts upon which discovery is sought are not within the knowledge of the plaintiff; it is not necessary that the affidavit set forth facts sufficient to show a cause of action. It is sufficient where it states the nature and object of the action and does not negative the existence of a cause of action. Sullivan v. Ashland L. P. & S. R. Co. 152 W 574, 140 NW 316.

A corporate officer who verified a complaint charging on information and belief that the defendant was fraudulently pretending to sell goods of plaintiff's manufacture may be compelled to disclose reports made to him by employes and agents respecting such sales and forming the basis of the allegations. Physical articles, as well as writings, if competent evidence, may be required to be produced. Horlick's M. M. Co. v. A. Spiegel Co. 155 W 201, 144 NW 272.

The examination provided for is a substitute for a bill of discovery under the old practice and should be liberally construed. The examination is in the nature of a cross-examination and the character of the questions are, to some extent, discretionary. Cleveland v. Burnham, 60 W 16, 17 NW 126; Whereatt v. Ellis, 65 W 639, 27 NW 630 and 829; Frawley v. Cosgrove, 83 W 441, 53 NW 689; State v. Baetz, 86 W 29, 56 NW 329; Schmidt v. Menasha W. W. Co. 92 W 529, 66 NW 695; Horlick's M. M. Co. v. Spiegel, 155 W 201, 144 NW 272.

A proceeding to examine a defendant in an action brought to oust him from office for corrupt practices should be dismissed, the defendant being privileged not to testify against himself. State ex rel. Schumacher v. Markham, 162 W 55, 155 NW 917.

A guardian ad litem is not subject to examination under sec. 4096, Stats. 1915; he is not "the party" nor is he an "agent" of the infant. Rohleder v. Wright, 162 W 580, 156 NW 955.

A communication to the attorney general of complaints of official misconduct on the part of a sheriff was within the rule of qualified privilege, and in an action of libel for such communication a discovery was allowable. Hathaway v. Bruggink, 168 W 390, 170 NW 244.

Where an employe of an adverse party was examined before trial as to statements made by him in an affidavit, without offering the affidavit at the time of the examination, the affidavit was not admissible at the trial as independent evidence. And testimony of defendant's employe, taken by plaintiff before trial, was not available to defendant at the trial in the absence of any showing that such employe could not attend at the trial as a witness. Thomas v. Lockwood O. Co. 174 W 486, 182 NW 841.

The party at whose instance the adverse examination was had may introduce portions of it relating to a particular subject, and the other party then has the right to read additional portions as explanatory. Lamberson v. Lamberson, 175 W 398, 184 NW 708.

See note to 256.27, citing Zeitlow v. Sweger, 179 W 462, 192 NW 47.

An officer of a Louisiana corporation, present and subpoenaed within this state, may be examined here, notwithstanding the fact that the corporation has been ordered to produce books and papers and be examined at a place in Louisiana. Gallun v. Hibernia B. & T. Co. 182 W 40, 195 NW 703.

Sec. 4096 is to be liberally construed. If the affidavit for examination states facts which show that he may be entitled to some relief and that discovery is necessary to enable him to plead, it is sufficient. A counter affidavit will not defeat the plaintiff's right; neither will it be defeated by knowledge that would enable him to draw some kind of a complaint in general terms. He is entitled to information enabling him to draw the particular complaint required by the facts and to determine who are and who are not liable, and the nature of his cause of action. Singer S. M. Co. v. Lang, 186 W 530, 203 NW 399.

Neither sec. 4096 nor sec. 4183 authorizes an indiscriminate exploration into matters extrinsic to the merits of the action or of the defense therein, and an application for an order of inspection under sec. 4096 should specify with particularity the books and documents desired for inspection and their relevancy. Northern Wisconsin Co-op. T. Pool v. Oleson, 191 W 586, 211 NW 923.

An order committing the defendant for refusal to answer, if the defendant should persist in his refusal, is not a final order and not appealable. Landman v. Rashman, 195 W 33, 217 NW 649.

The adverse examination of the doctor under 326.12 was admissible on behalf of his administratrix in the trial of the action after his death. Nelson v. Ziegler, 196 W 426, 220 NW 194.

The adverse examination of a party, so far as competent, constitutes evidence against him, and may be offered at the trial notwithstanding his presence in court. Counsel for a party may reexamine him at the close of

the adverse examination, where the reexamination is confined to matters tending to explain or qualify testimony already given. Leslie v. Knudson, 205 W 517, 238 NW 397.

In a corporation's action for goods sold, where defendant died during the action, and the president of the corporation was dead, admitting a deposition of defendant, relating to defendant's transactions with the president, taken otherwise than as a witness at the trial, was error. F. H. Bresler Co. v. Bauer, 212 W 386, 248 NW 788.

While adverse examinations could have been put in evidence by the contestant as being an admission against interest, 326.12 (5) prohibits their introduction by claimant; and not having been offered by contestant, they are not a part of the record. Estate of Shinoe, 212 W 481, 250 NW 505.

A court could not entirely suppress the taking of an adverse examination under 326.12 (4) where the plaintiff had filed an affidavit stating the general nature and object of the action, that discovery was sought to enable the plaintiff to plead, and the subjects upon which examination was desired, which complied with every condition imposed by the statute, but did not state facts showing a cause of action, although the court might have limited the scope of the adverse examination upon a showing sufficient to warrant the exercise of its discretion. Stott v. Markle, 215 W 528, 255 NW 540.

The adverse examination of a defendant cannot be used by a codefendant where the presence of the witness might have been procured. Drexler v. Zohlen, 216 W 483, 257 NW 675.

An order to show cause which enjoined a statutory adverse examination of defendant corporation's president, and supporting affidavit which alleged insufficiency of service of summons, did not waive defendant's special appearance based on the same defects in service, where defendant sought no relief upon the merits. Bitter v. Gold Creek Min. Co. 225 W 55, 273 NW 509.

An injured employe who has recovered workmen's compensation, being entitled in any event to part of recovery from a third party causing injury, is a person for whose "immediate benefit" action by the employer or insurance carrier is prosecuted, and hence is subject to adverse examination in a suit by the employer or insurance carrier against the third party allegedly causing the injury. Employers Mut. L. Ins. Co. v. Icke, 225 W 304, 274 NW 283.

See note to sec. 3, art. VII, on general superintending control over inferior courts (prohibition), citing Petition of Phelan, 225 W 314, 274 NW 411.

The requirements that a defendant answer the complaint in 20 days and that he shall testify on an adverse examination if given 5 days' notice are imposed by separate statutes, and the rights thereby vested in a plaintiff exist independently of each other, and if compliance with the former requirement be interfered with by the latter requirement, the defendant's remedy is an extension of the time to answer, and not the suppression of the adverse examination. Plankinton Bldg. Co. v. Laikin's, Inc. 226 W 72, 276 NW 129.

An attorney for a party is not subject to adverse examination under 326.12 as an "agent" of such party, at least not an attorney whose alleged agency is predicated on his retainer for the very litigation in which discovery is sought. Estate of Briese, 238 W 516, 300 NW 235.

A court commissioner may compel the production of documents and other instruments of evidence for use on an adverse examination held before him. McGeoch Bldg. Co. v. Dick & Reuteman Co. 241 W 267, 5 NW (2d) 804.

While a deposition taken on adverse examination is not a part of the record of the trial until offered, it or any portion offered and received at the trial becomes a part of the record and subject to use by both plaintiff and defendant. Spellbrink v. Bramberg, 245 W 103, 13 NW (2d) 600.

Where the circuit court had acquired jurisdiction of the defendant by the service of a summons and the appearance of the defendant by attorney, the subsequent removal of the defendant from the state did not operate to impair the jurisdiction of the court in respect to a proceeding for adverse examination of the defendant. State ex rel. Walling v. Sullivan, 245 W 180, 13 NW (2d) 550.

An affidavit for discovery against a corporation and its president and secretary, stating that the object of the action is to recover damages sustained as the result of defendants' fraud in connection with defendants' sale of shares of stock owned by the plaintiffs in the defendant corporation, and that discovery is necessary as to certain facts within defendants' knowledge and not within plaintiffs' knowledge, is sufficient, as stating sufficiently the object of the action, and as disclosing no facts indicating as a matter of law that the plaintiffs do not have a cause of action against the defendants, although not stating a cause of action and not disclosing the name of the vendee of the stock. State ex rel. Wisconsin B. & I. Co. v. Sullivan, 245 W 544, 15 NW (2d) 847.

326.12 (4) should be administered with the consideration in mind that the adverse party should not be subjected without adequate reason or on inadequate showing to an inquest into his private affairs, and also, on the other hand, that the party who seeks to plead should be able on a proper showing to get such information as will enable him to plead a cause of action if he has one. State ex rel. Wisconsin B. & I. Co. v. Sullivan, 245 W 544, 15 NW (2d) 847.

As a state court has no extraterritorial jurisdiction, there is no process available out of a court of this state to compel a nonresident to come within this state to testify. State ex rel. McKee v. Breidenbach, 246 W 513, 17 NW (2d) 554.

The summary nature of actions for unlawful detainer and the statutory provisions governing such actions, particularly 291.08, impel the conclusion that there is no absolute right of adverse examination in such causes. March v. Voorsanger, 248 W 225, 21 NW (2d) 275.

See note to sec. 3, art. VII, on general superintending control over inferior courts (general), citing Application of Sherper's, Inc. 253 W 224, 32 NW (2d) 178.

When parties are examined adversely un-

der 326.12, they can only answer the questions submitted to them by opposing counsel, and they are not permitted to offer any positive proof; and it is not anticipated that a plaintiff must affirmatively establish a cause of action in adverse proceedings or be subject to a nonsuit by application of the summary-judgment statutes. Pelon v. Becco, 253 W 278, 34 NW (2d) 236.

Where the defendants had the full benefit of the adverse examination of the plaintiff, in that they were permitted on cross-examination to examine into its contents for impeachment purposes and discovering of admissions against interest, the exclusion of the adverse examination itself, on objection made by an insurance company which was not a party to the action when the adverse examination was taken and did not have notice thereof, was not prejudicial to the defendants. Knowles v. Stargel, 261 W 106, 52 NW (2d) 387.

Where a party has given testimony at the trial which conflicts with the testimony given by such party at an adverse examination, such conflicting testimony, in the absence of established perjury, presents a jury issue as to its weight, with the members of the jury free to accept whichever of the 2 versions of such testimony they believe to be true. Maxwell v. Fink, 264 W 106, 58 NW (2d) 415.

An affidavit for a discovery examination to enable the plaintiffs to plead, stating that the action was one for damages arising out of the defendants' fraudulent representations in regard to the sale of a photography business, and that the matters on which discovery was sought were, among others, the defendants' interest in the photography business and premises prior to the date of possession taken by the plaintiffs, and the defendants' interest therein from such date, was sufficient under 326.12 (4), so that the trial court, although it might have limited the scope of the examination in some respects, erred in suppressing the examination entirely on the ground that the plaintiffs knew as well as the defendants what the representations were. Hiller v. Perssion, 264 W 143, 58 NW (2d) 676.

In a proceeding on objections made by sons of a testator to the probate of his will on the grounds that he lacked mental capacity to make a will and that the execution of the will was procured by undue influence exercised on him by another son and the latter's wife, the testator was not a "party" or a "person for whose benefit" the proceeding was had, and the objectors were not parties "adverse" to the testator, and an attorney who had drafted the will and was a subscribing witness thereto was not subject to adverse examination by the objectors before trial under 326.12 as an "agent" of the testator, or otherwise. (Estate of Landauer, 261 W 314, and Estate of Smith, 263 W 441, distinguished.) Will of Block, 264 W 471, 59 NW (2d) 440.

Where defendants were afforded the opportunity to examine plaintiffs adversely by oral interrogatories, by an order imposing conditions within the discretion of the court to impose, but defendants chose not to comply with such order and did not appeal therefrom, an order enjoining defendants' attorneys from proceeding with a subsequently proposed adverse examination of a nonresident plaintiff by written interrogatories, without prejudice to the right of defendants to examine such plaintiff adversely on the trial, was not an improper suppression of an examination to which defendants were entitled and was within the discretion of the court. Mackey v. Trombetta, 264 W 621, 60 NW (2d) 389.

In a condemnation proceeding by a city, the property owners can examine adversely a city employe who participated in and supervised the annexation proceeding. Milwaukee v. Schomberg, 266 W 174, 63 NW (2d) 50.

326.12 (1) is sufficiently broad to permit the adverse examination of former officers of a town consolidated with a city, as well as an officer of the defendant city in charge of community development and annexation, for the purpose of discovering information to enable the plaintiffs to prepare their complaint, even though their action to contest the validity of the consolidation proceedings was properly dismissed as against the town. Toman v. Lake, 268 W 239, 67 NW (2d) 356.

On the adverse examination of an attorney, information within the knowledge of the client, and to which his adversary is not entitled, is not made available to the latter by the mere fact that it is also within the knowledge of the attorney and has come to the attorney by means of a communication made to him by a third person. Tomek v. Farmers Mut. Auto. Ins. Co. 268 W 566, 68 NW (2d) 573.

Under 326.12 (3), the trial court properly denied the defendant's motion for an adverse examination in Wisconsin of nonresident officers of the plaintiff Wisconsin corporation. Any order directing such nonresidents to attend adverse examinations in Wisconsin would be void and unenforceable. Midwest Broadcasting Co. v. Dolero Hotel Co. 273 W 508, 78 NW (2d) 898.

An order of the circuit court denying a motion to suppress a discovery examination, which was to be conducted pursuant to subpoena duces tecum issued by court commissioner and commanding defendant to appear for examination under 326.12 and to bring with him certain records, is not appealable under 274.33 as being in effect an order to produce records pursuant to 269.57. Zawerschnik v. Bell, 6 W (2d) 185, 94 NW (2d) 641.

The proponent of a will was an adverse party to an objector to the will before trial, under 326.12 (1), and hence the proponent was subject to adverse examination by the objector before trial. Estate of Schmidt, 13 W (2d) 538, 109 NW (2d) 87.

The party whose adverse examination has been taken has the right to read in excerpts of such examination to explain questions and answers read to the jury by the opposing side, but such explanatory questions and answers should be offered immediately after the reading of the questions and answers sought to be explained. Where this was not so done, the trial court did not abuse its discretion in refusing to allow it to be done at a stage of the trial some 4 witnesses later. Walker v. Baker, 13 W (2d) 637, 109 NW (2d) 499.

An expert witness can be compelled to disclose an opinion already formed. The court can order a witness fee of up to $25 per day. State ex rel. Reynolds v. Circuit Court, 15 W (2d) 311, 112 NW (2d) 686, 113 NW (2d) 537.

A court will wholly deny a discovery examination, when from the statement of the nature and object of the action, it affirmatively appears that the plaintiff has no cause of action. Weeden v. Beloit, 22 W (2d) 414, 126 NW (2d) 54.

Under 326.12 (7) (b) portions of a deposition of an adverse party, if relevant to the issues, may be offered in evidence even though the deponent is in court. Fisher v. Gibb, 25 W (2d) 600, 131 NW (2d) 382.

326.12 does not encompass adverse discovery examination in proceedings before administrative agencies. State ex rel. Thompson v. Nash, 27 W (2d) 183, 133 NW (2d) 769.

City police officers can be examined adversely under 326.12 in an ordinance violation case. Knowledge of the facts by the moving party is not sufficient ground to suppress the examination. Neenah v. Alsteen, 30 W (2d) 596, 142 NW (2d) 232.

Under 887.12 (3), Stats. 1965, when an attorney for a party is subpoenaed he may raise the objection that examination calls for a revelation of attorney's work product and as such is privileged, and the party seeking discovery must then assume the burden of proof to establish sufficient good cause to warrant an exception to the qualified privilege; likewise, when an objection is made during an examination of an attorney upon the ground that the question calls for a revelation of the attorney's work product and the question is certified to the trial court, the party seeking the discovery has the burden to show good cause. State ex rel. Dudek v. Circuit Court, 34 W (2d) 559, 150 NW (2d) 387. See also Halldin v. Peterson, 39 W (2d) 668, 159 NW (2d) 738.

The fact that an attorney has verified a pleading under conditions permitted by 263.25, Stats. 1965, does not change the character of his work product and does not give the opposing party or his counsel any greater right to inspect it. State ex rel. Dudek v. Circuit Court, 34 W (2d) 559, 150 NW (2d) 387.

A transcript should not be offered in evidence without reading. The proper procedure is to offer the deposition by question and answer to give the opposing party a chance to object and the court an opportunity to rule on objections. Rath v. Doerfler, 35 W (2d) 494, 151 NW (2d) 151.

See note to sec. 1, art. I, on limitations imposed by the Fourteenth Amendment, citing Kentucky F. Corp. v. Paramount A. E. Corp. 262 US 544.

Judgments in reorganization proceedings, which were intended to prevent maintenance by one of the parties of a contemplated state court action which appeared to be of the same kind as had long hindered reorganization proceedings and rendered those proceedings unnecessarily difficult and expensive, did not constitute an unlawful restraint of such party's rights under the Wisconsin statute pertaining to discovery examination before trial. Harvey v. Breed, 158 F (2d) 786.

Discovery proceedings under 4096, Stats. 1917. Nohl, 2 MLR 137.

Use, abuse and value of an adverse examination. Werner, 8 MLR 11.

Use of discovery examination before trial. McDermott, 21 MLR 1.

Allowable scope of adverse examination of attorney as agent of party. 39 MLR 71.

Wisconsin's new discovery statute. Shellow, 45 MLR 600.

Adverse examinations. Plier, 40 WBB, No. 4.

Procedural considerations in taking and using depositions. Schoone, 42 WBB, No. 5.

Discovery practice in Wisconsin. Lay, 1954 WLR 428.

887.17 History: R. S. 1849 c. 98 s. 21; R. S. 1858 c. 137 s. 21; 1864 c. 267 s. 8; R. S. 1878 s. 4093; Stats. 1898 s. 4093; Stats. 1925 s. 326.17; 1965 c. 66 s. 2; Stats. 1965 s. 887.17.

A deposition of a defendant taken and used in an action other than the one on trial, which was brought by another plaintiff, was inadmissible; and an objection thereto that "the deposition was not taken in this action" was sufficient. Maxey v. Peavy P. Co. 178 W 401, 190 NW 84.

326.17, Stats. 1957, is not exhaustive of the conditions under which a deposition taken in one action may be used in another action in a situation in which 325.31 is inapplicable; and if there is an identity of issue, it is deemed not necessary also to have identity of parties in order to admit a deposition taken in a former action. The unavailability of the persons who gave the depositions must be established as a condition to admitting the same or any part thereof in the subsequent action. Feldstein v. Harrington, 4 W (2d) 380, 90 NW (2d) 566.

887.18 History: R. S. 1849 c. 88 s. 74; R. S. 1849 c. 98 s. 22; R. S. 1858 c. 120 s. 73; R. S. 1858 c. 137 s. 22; R. S. 1878 s. 4094; Stats. 1898 s. 4094; Stats. 1925 s. 326.18; 1965 c. 66 s. 2; Stats. 1965 s. 887.18.

887.20 History: R. S. 1849 c. 88 s. 76; R. S. 1858 c. 120 s. 75; R. S. 1878 s. 4103; Stats. 1898 s. 4103; Stats. 1925 s. 326.20; 1965 c. 66 s. 2; Stats. 1965 s. 887.20; 1967 c. 276 s. 39.

The use of a deposition taken by a justice without objection before him is a waiver of the objection that it is not certified. Hobby v. Wisconsin Bank of Madison, 17 W 167.

887.21 History: R. S. 1849 c. 98 s. 15; R. S. 1858 c. 137 s. 15; R. S. 1878 s. 4104; Stats. 1898 s. 4104; Stats. 1925 s. 326.21; 1965 c. 66 s. 2; Stats. 1965 s. 887.21.

887.22 History: R. S. 1849 c. 98 s. 17; R. S. 1858 c. 137 s. 17; R. S. 1878 s. 4106; Stats. 1898 s. 4106; Stats. 1925 s. 326.22; 1927 c. 523 s. 53; 1965 c. 66 s. 2; Stats. 1965 s. 887.22.

Editor's Note: The following are citations of early cases concerned with questions of form: Miller v. McDonald, 13 W 673; Horton v. Arnold, 18 W 212; Bowman v. Van Kuren, 29 W 209; Sydnor v. Palmer, 29 W 226; University of Notre Dame du Lac v. Shanks, 40 W 352; and Cross v. Bennett, 61 W 650, 21 NW 832.

887.23 History: 1868 c. 25 s. 1 to 5; 1874 c. 188 s. 2, 3; R. S. 1878 s. 4107, 4108; Stats. 1898 s. 4107, 4108; Stats. 1925 s. 326.23; 1927 c. 523 s. 54; 1943 c. 89; 1953 c. 61 s. 1; 1965 c. 66 s. 2; Stats. 1965 s. 887.23; 1967 c. 276 s. 39; 1969 c. 276 ss. 602 (1), 603 (2); 1969 c. 366 s. 117 (2) (d).

Revisor's Note, 1927: The change of "and" to "or" and "their" to "its" makes it clearer that the power is granted to each board, severally, not to all of them jointly. The matter of subpoenas is fully covered by section 325.01. The reference to section 326.09 is ambiguous and is unnecessary. The conduct of the proceeding is sufficiently covered by section 326.21. The law is unchanged. [Bill 10-S, s. 54]

887.24 History: R. S. 1849 c. 98 s. 48; R. S. 1858 c. 137 s. 48; R. S. 1878 s. 4109; Stats. 1898 s. 4109; 1917 c. 163; 1917 c. 677 s. 16; Stats. 1925 s. 326.24; 1927 c. 523 s. 55; 1965 c. 66 s. 2; Stats. 1965 s. 887.24.

887.25 History: 1917 c. 176; Stats. 1917 s. 4109a; Stats. 1925 s. 326.25; 1927 c. 523 s. 56; 1933 c. 48 s. 1; 1965 c. 66 s. 2; Stats. 1965 s. 887.25.

887.26 History: R. S. 1849 c. 88 s. 73; R. S. 1849 c. 98 s. 25, 26, 94; R. S. 1858 c. 120 s. 72; R. S. 1858 c. 133 s. 10; R. S. 1858 c. 137 s. 25, 26, 102; 1867 c. 73 s. 1; 1867 c. 94 s. 1; 1872 c. 68; 1874 c. 196; 1876 c. 40; 1877 c. 72 s. 2; R. S. 1878 s. 4110, 4111, 4112, 4113, 4114, 4115, 4116; Stats. 1898 s. 4110, 4111, 4112, 4113, 4114, 4115, 4116; 1899 c. 351 s. 46; 1905 c. 237 s. 2; Supl. 1906 s. 4112; Stats. 1925 s. 326.26; 1927 c. 523 s. 57; Court Rule XVII s. 5, 6, 7; Sup. Ct. Order, 212 W xx; Sup. Ct. Order, 229 W ix; 1965 c. 66 s. 2; Stats. 1965 s. 887.26; 1967 c. 276 s. 39; 1969 c. 87.

Legislative Council Note, 1969: Section 887.26 refers to depositions taken outside the state. This amendment makes no change in the law since fees allowed municipal justices presently refer to s. 252.17. [Bill 9-A]

A commission to take testimony in a foreign state may issue, by consent, without naming the commissioner. Carlyle v. Plumer, 11 W 96.

The form of certificate prescribed by sec. 4106 must be used under sec. 4112, R. S. 1878. Hayes v. Frey, 54 W 503, 11 NW 695.

It is a substantial compliance with the statute if the residences of the witnesses are given in the notice accompanying the interrogatories. Semmens v. Walters, 55 W 675, 13 NW 889.

A deposition taken by a notary without the state need not be authenticated by a certificate of his official character. Sleep v. Heymann, 57 W 495, 16 NW 17.

If a party elects to take the deposition of his witness out of the state on commission and written interrogatories the adverse party cannot cross-examine the witness orally. Neeves v. Gregory, 86 W 319, 56 NW 909.

887.27 History: R. S. 1849 c. 98 s. 29 to 33; R. S. 1858 c. 137 s. 29 to 33; R. S. 1878 s. 4117, 4118, 4119, 4120, 4121; Stats. 1898 s. 4117, 4118, 4119, 4120, 4121; 1901 c. 14 s. 1; Supl. 1906 s. 4119a; 1911 c. 663 s. 452; Stats. 1925 s. 326.27; 1927 c. 523 s. 58; 1961 c. 622; 1965 c. 66 s. 2; Stats. 1965 s. 887.27.

Revisor's Note, 1927: Subsection (6) was enacted under a misapprehension of the law. The provisions as to a court commissioner added nothing to the law, section 269.29; all mention of such officer may be omitted. The only reason for its inclusion is that it may save misconstruction of the section. Section 326.29 expressly applies to proceedings as well as to actions. Such is believed to be the intent of section 326.27; hence the insertion of the words "or proceedings" in subsection (5). This harmonizes the two sections.

The provision for subpoenaing the witness is derived from section 325.22, which is repealed, section 47 of this bill. [Bill 10-S, s. 58]

See note to 274.33, on orders not appealable under 274.33 (2), citing Sioux L. Co. v. Ewing, 148 W 600, 135 NW 130.

326.27 cannot be used as a means of conducting an adverse examination of one not a party nor the agent or servant of a party to a prospective action. Application of Duveneck, 13 W (2d) 88, 108 NW (2d) 113.

887.28 History: R. S. 1849 c. 98 s. 35 to 41; R. S. 1858 c. 137 s. 35 to 41; R. S. 1878 s. 4123, 4124, 4125, 4126, 4127, 4128, 4129; Stats. 1898 s. 4123, 4124, 4125, 4126, 4127, 4128, 4129; Stats. 1925 s. 326.28; 1927 c. 523 s. 59; 1965 c. 66 s. 2; Stats. 1965 s. 887.28.

A proceeding to perpetuate the testimony of a witness living without the state is not precluded by the fact that the applicant might immediately begin an action to quiet title and take his deposition in the action. Sioux L. Co. v. Ewing, 165 W 40, 160 NW 1059.

887.29 History: R. S. 1849 c. 98 s. 43 to 47; R. S. 1858 c. 137 s. 43 to 47; R. S. 1878 s. 4130, 4131, 4132, 4133, 4134; Stats. 1898 s. 4130, 4131, 4132, 4133, 4134; Stats. 1925 s. 326.29; 1927 c. 523 s. 60; 1965 c. 66 s. 2; Stats. 1965 s. 887.29.

Revisor's Note, 1927: It was decided in Sioux L. Co. v. Ewing, 148 W 600, 135 NW 130, that the order for recording the deposition must be made upon notice of motion. The law is not changed. [Bill 10-S, s. 60]

A proceeding for the perpetuation of testimony as against all persons is not an action, and a mere prospective witness whose testimony is sought cannot be made or considered a party thereto who, as such, can be subjected to an adverse examination under 326.12. Sova v. Ries, 226 W 53, 276 NW 111.

CHAPTER 889.

Documentary and Record Evidence.

Editor's Note: The sections comprising this chapter were not assigned decimal numbers by ch. 4, Laws 1925, but were renumbered by the Revisor in 1925 under his general authority.

889.01 History: R. S. 1849 c. 98 s. 53; R. S. 1858 c. 137 s. 62; 1878 c. 4; R.S. 1878 s. 4135; Ann. Stats. 1889 s. 4135; Stats. 1898 s. 4135; Stats. 1925 s. 327.01; 1927 c. 523 s. 62; 1953 c. 445; 1965 c. 66 s. 2; Stats. 1965 s. 889.01.

Revisor's Note, 1927: The real purpose of this section was to provide a handy and inexpensive mode of proving what are or have been our statutes, legislative acts, and proceedings of our senate and assembly. But the section, as it now reads, refers to "the printed copies of all statutes," etc. Therefore when a judge or lawyer wishes to make use of this