and had to be determined. The husband and wife were competent to testify relative thereto. Vorvilas v. Vorvilas, 252 W 333, 31 NW (2d) 586.

Under 328.39 (1), where a child was born to the plaintiff while she was the lawful wife of the defendant, the burden was on him, as the party asserting the illegitimacy of the child in the wife's action for divorce, of proving that he was not the father of the child. Mader v. Mader, 258 W 117, 44 NW (2d) 924.

The provisions in 328.39 (1) relating to the guardian's fee do not limit the court to applying the schedule of fees set out in 357.26. The evidence in this case was insufficient to sustain burden of proof required under 328.39 (1). Shewalter v. Shewalter, 259 W 636, 49 NW (2d) 727.

At common law there is a rebuttable presumption of the legitimacy of a child born during wedlock. Under 328.39 (1), there must be proof that the husband is not the father of a child born to a woman during wedlock, in order to establish the illegitimacy of such a child but, when the evidence in such a case does establish that the husband is not the father, it is the duty of the court so to find. Evidence disclosing that the mother of the child in the instant case was cohabiting with a man other than her husband during the inception of and throughout the normal gestation period, coupled with the known nonaccess of the husband for at least 321 days, established that the husband was not the father of the child, and such evidence, together with the testimony of both the mother and the other man that the latter was the father, established that he was the father. In re Aronson, 263 W 604, 58 NW (2d) 553.

328.39 (1) applies only in cases where the child has been born and where proper assertion of illegitimacy has been advanced. Limberg v. Limberg, 5 W (2d) 327, 92 NW (2d) 767.

See note to 52.25, citing 48 Atty. Gen. 248.

Admissibility of testimony of married woman as to illegitimacy of child. 29 MLR 125.

The doubtful status of the child produced through artificial insemination. Radler, 39 MLR 146.

891.395 History: 1957 c. 296; Stats. 1957 s. 328.395; 1965 c. 66 s. 2; Stats. 1965 s. 891.395.

891.43 History: 1878 c. 252; R. S. 1878 s. 661a; 1879 c. 177; 1879 c. 194 s. 2 sub. 6; Ann. Stats. 1889 s. 661a, 661b; Stats. 1898 s. 661a, 661o; 1919 c. 679 s. 40; 1919 c. 695 s. 10; Stats. 1923 s. 4151c to 4151q; Stats. 1925 s. 328.43; 1927 c. 523 s. 115; 1965 c. 66 s. 2; Stats. 1965 s. 891.43.

891.44 History: 1959 c. 291; Stats. 1959 s. 328.44; 1965 c. 66 s. 2; Stats. 1965 s. 891.44.

328.44 does not apply retroactively. Bair v. Staats, 10 W (2d) 70, 102 NW (2d) 267.

328.44 does not warrant the conclusion that a driver of an automobile must necessarily be negligent as a matter of law if he strikes and injures such a child. Binsfeld v. Curran, 22 W (2d) 610, 126 NW (2d) 509.

328.44 should not be read to the jury where the plaintiff is a child over 7 years of age. Gremban v. Burke, 33 W (2d) 1, 146 NW (2d) 453.

891.45 History: 1961 c. 341; Stats. 1961 s. 328.45; 1965 c. 66 s. 2; Stats. 1965 s. 891.45.

CHAPTER 893.

Limitations of Commencement of Actions and Proceedings.

893.01 History: R. S. 1849 c. 127 s. 4; R. S. 1858 c. 138 s. 1; R. S. 1878 s. 4206; Stats. 1898 s. 4206; 1925 c. 4; Stats. 1925 s. 330.01; 1965 c. 66 s. 2; Stats. 1965 s. 893.01.

On remedy for wrongs see notes to sec. 9, art. I.

The state may plead the statute of limitations to an action against it, and is entitled to this defense the same as any other defendant. Baxter v. State, 10 W 454. See also Baxter v. State, 17 W 588.

Where the county board rejected a claim against the county, which was barred by the statute it was not an abuse of discretion to permit the supervisors to file an answer pleading the statute on appeal from their decision. Baker v. Columbia County, 39 W 444.

Nine months is a reasonable time in which to bring action for money paid on illegal tax certificates. Eaton v. Manitowoc County, 40 W 668.

Nine months was reasonable time for writ of error after enactment of law shortening period for suing. Hyde v. Kenosha County, 43 W 129.

It is not error to open a default against a county and allow it to plead the statute. Wisconsin C. R. Co. v. Lincoln County, 57 W 137, 15 NW 121.

In the case of nonpresentation of claims against the estate of a deceased person they are absolutely extinguished and no relief can be had by way of affirmative judgment, setoff or otherwise whether or not the statute be insisted on. Carpenter v. Murphey, 57 W 541, 15 NW 798.

It is discretionary with the trial court to permit the statute to be pleaded by amendment. If such court decides that it has no such power its order denying the amendment will be reversed. Smith v. Dragert, 61 W 222, 21 NW 46.

In the absence of any denial or repudiation of the trust created by a will charging a legacy upon land, the statute of limitations does not apply nor does any presumption of payment arise from the lapse of time. Williams v. Williams, 82 W 393, 52 NW 429.

The heirs have no equities superior to those of the trustee when he was living; and the time within which an action must be commenced does not begin to run until there has been a repudiation of the trust. Fawcett v. Fawcett, 85 W 332, 55 NW 405.

Acquiescence by defendant's counsel in a statement made by the court to the jury at the close of the charge that "there is a question raised here by the pleadings as to whether this cause of action accrued within 6 years, but, inasmuch as it has not been insisted on on the trial, I don't think it is necessary to say anything to this jury about it, and I will let what I have said stand as my charge to the jury," waives the defense of the statute. Hall v. Stevens, 89 W 447, 62 NW 81.

It is an abuse of discretion to allow the filing of an amended complaint setting up as an independent and separate cause of action matter which is barred. O'Connor v. Chicago & N. W. R. Co. 92 W 612, 66 NW 795.

An answer pleading a section of this chapter entitles the defendant to the benefit of any subdivision of the section so pleaded. Kuhl v. Chicago & Northwestern R. Co. 101 W 42, 77 NW 155.

The statute cuts off the right as well as the remedy. The running of the statute constitutes a vested property right within the constitution, but which he may waive by not pleading it. Claims between citizens of other states there barred cannot be here enforced. Eingartner v. Illinois S. Co. 103 W 373, 79 NW 433.

Sec. 4206, Stats. 1898, makes no exception as against trustees. Boyd v. Mutual Fire Asso. 116 W 155, 90 NW 1086, 94 NW 171.

The right of action for substantial damages for breach of covenant against incumbrances which runs with the land is distinct from the technical breach occurring at the time of the delivery of the deed. The cause of action in the former case does not accrue until an eviction. Estate of Hanlin, 133 W 140, 113 NW 411.

Statutes of limitation do not run against the state unless expressly so provided. State ex rel. Globe S. T. Co. v. Lyons, 183 W 107, 197 NW 578.

See note to 246.03, citing Estate of Brundage, 185 W 558, 201 NW 820.

Statutes of limitations do not run upon the claim of a wife against her husband. Campbell v. Mickelson, 227 W 429, 279 NW 73.

Statutes of limitation absolutely extinguish the cause of action. Maryland Cas. Co. v. Beleznay, 245 W 390, 14 NW (2d) 177.

The divorced wife, up to the time her youngest child was 21 years of age, could not have commenced a separate action for arrearages in support money for the children, and hence whatever statute of limitations was applicable to such arrearages could not commence to run until that time. Halmu v. Halmu, 247 W 124, 19 NW (2d) 317.

The doctrine, that where a cause of action was wholly created by a statute which is repealed it is necessary that the statute contain a saving clause expressly reserving rights of action accruing prior to the repeal, has no application to statutes of limitation, and does not affect the presumption that the legislature did not intend a statute of limitations to operate retrospectively. Estate of Cameron, 249 W 531, 25 NW (2d) 504.

The defense of the statute of limitations must be pleaded specially in the answer, and the failure to plead the statute is a waiver of the defense. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

When the limitation for any action is reduced the bar does not act retrospectively in the absence of provision therefor. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

Effect of statutes of limitation on claims between husband and wife. 23 MLR 94.

893.02 History: R. S. 1849 c. 127 s. 2; R. S. 1858 c. 138 s. 2; R. S. 1878 s. 4207; Stats. 1898 s. 4207; 1925 c. 4; Stats. 1925 s. 330.02; 1965 c. 66 s. 2; Stats. 1965 s. 893.02.

One who shows himself possessed of the legal title under sec. 4210, R. S. 1878, is presumed to have been possessed thereof within the time prescribed by sec. 4207, and the occupancy of the premises by any other person is deemed to be in subordination to the legal title unless this presumption is overcome by proof of an adverse possession under sec. 4213. Allen v. Allen, 58 W 202, 16 NW 610.

Where a person has occupied the land for agricultural purposes and the possession has been open, notorious and exclusive for more than 20 years and taxes have been paid thereon, the title is such that a purchaser under a land contract may be compelled to accept it. Nelson v. Jacobs, 99 W 547, 75 NW 406.

Actual occupancy of the land to the exclusion of the true owner for the statutory period is sufficient to dispossess him, and such occupancy may be that of distinct persons. It is not necessary that the privity between such persons be created by written instrument. Illinois Steel Co. v. Budzisz, 106 W 499, 82 NW 534.

Possession of a strip of land used for a highway was adverse and was gained by 20 years' occupancy. State v. Lloyd, 133 W 468, 113 NW 964.

Where a person entered into possession of a tract of land and continued to hold it adversely, the fact that thereafter he formed a partnership and conveyed a part interest in the business to a partner who was ignorant of the adverse claim, did not enable the previous owner to maintain an action for the possession of the premises. Hamachek v. Duvall, 135 W 108, 115 NW 634.

"The question is one of physical possession, except for the case of actual subordination to the true owner. If there has been that physical possession, it matters not what or how varied the claims of title set up meanwhile, nor indeed the absence of any. The privity between successive occupants required for the statute of limitations is privity merely of that physical possession, and is not dependent on any claim, or attempted transfer, of any other interest or title in the land. * * * If the possessions join by delivery from predecessor to predecessor, there is no opportunity for the true owner to become seised, and, after twenty years' submission to such inability, he becomes barred by sec. 4207, Stats. (1898), irrespective of the terms of sec. 4215, Stats. (1898)." Illinois Steel Co. v. Paczocha, 139 W 23, 28, 119 NW 550, 552.

"Upon unexplained exclusive, continuous occupancy of land under a chain of title, by one not the true owner, for the statutory period to make title by adverse possession, being shown, the presumption of seisin during any part of such period in the true owner, disappears and there arises in place thereof the presumption that, during all such period, the possession had all the requisites of an adverse holding, subject to be rebutted by proof that it was in fact subordinate to the right of the true owner, but conclusive in the absence of such rebuttal." Ovig v. Morrison, 142 W 243, 249-250, 125 NW 449, 452.

Continuous disseisin of the true owner for 20 years bars his right of action to recover

real property or the possession thereof. Zellmer v. Martin, 157 W 341, 147 NW 371.

There can be no adverse possession prior to the issuing of a patent, for such would be asserting a claim of right against a sovereign. Lemieux v. Agate L. Co. 193 W 462, 214 NW 454.

The construction of a building across a strip of land occupied adversely to the owner and the payment of rent to the owner for one and one-half years interrupted the running of the statute. Frank C. Schilling Co. v. Detry, 203 W 109, 233 NW 635.

Limitation statutes cannot run against Indians who, with respect to land, are under disability. United States v. Raiche, 31 F (2d) 624.

893.03 History: R. S. 1849 c. 127 s. 3; R. S. 1858 c. 138 s. 3; R. S. 1878 s. 4208; Stats. 1898 s. 4208; 1925 c. 4; Stats. 1925 s. 330.03; 1965 c. 66 s. 2; Stats. 1965 s. 893.03.

Revisers' Note, 1878: Section 3, chapter 138, R. S. 1858. This section was enacted in the code of procedure, in place of section 3, chapter 127, R. S. 1849, which related to avowries and cognizances which were always interposed by the defendant; and as the facts which entitle a party to interpose the same must now be set up in the answer, the section is made to conform to that practice. The revisers acknowledge their obligations to the late revisers of New York for this suggestion.

Under sec. 3, ch. 138, R. S. 1858, an action for equitable relief against a railroad company which succeeded to the franchise of another company, without paying a judgment against it for the value of land taken, could be maintained by a landowner as involving title to real property. Gilman v. Sheboygan & F. du L. R. Co. 40 W 653.

893.04 History: R. S. 1849 c. 127 s. 4; R. S. 1858 c. 138 s. 4; R. S. 1878 s. 4209; Stats. 1898 s. 4209; 1925 c. 4; Stats. 1925 s. 330.04; 1965 c. 66 s. 2; Stats. 1965 s. 893.04.

Adverse possession. Haag v. Delorme, 30 W 591.

893.05 History: R. S. 1849 c. 127 s. 5; R. S. 1858 c. 138 s. 5; R. S. 1878 s. 4210; Stats. 1898 s. 4210; 1925 c. 4; Stats. 1925 s. 330.05; 1965 c. 66 s. 2; Stats. 1965 s. 893.05.

The party pleading adverse possession is not bound to set out the nature and character of such possession. Bartlett v. Secor, 56 W 520, 14 NW 714.

Possession of land for a time shorter than that required to create a title under the statute of limitations is presumed to be "under and in subordination to the legal title". Toomey v. Kay, 62 W 104, 22 NW 286.

Land was sold and conveyed absolutely, but by the terms of a deed and a bond given by the purchaser the grantor reserved the right of possession for one year. At end of the year, no provision being made to the contrary, right of possession was in the grantee although part of the purchase money was unpaid. Evans v. Enloe, 64 W 671, 26 NW 170.

Where possession was by permission and sufferance, and not adverse, it must "be deemed to have been under and in subordination to the legal title". Nau v. Brunette, 79 W 664, 48 NW 649.

A defendant in an action of trespass, having shown his legal title to the premises, is presumed "to have been possessed thereof within the time required by law," and the occupancy of other persons is "deemed to have been under and in subordination to the legal title", unless shown to have been adverse. Riha v. Pelnar, 86 W 408, 57 NW 51.

Evidence of adverse possession must be clear and positive; if it only shows that the possession continued for "about" 20 years it is not sufficient. Allis v. Field, 89 W 327, 62 NW 85; Kurz v. Miller, 89 W 426, 62 NW 182.

One who claims that possession of land beyond that called for by his deed was adverse has the burden of proof. Fuller v. Worth, 91 W 406, 64 NW 995.

The continued occupation of land by one who has conveyed it is in subordination to the title of his grantee and his deed estops him from claiming that it is adverse. Schwallback v. Chicago, M. & St. P. R. Co. 69 W 292, 34 NW 128; Hacker v. Horlemus, 74 W 21, 41 NW 965; Nau v. Brunette, 79 W 664, 48 NW 649; Gross v. Gross, 94 W 14, 68 NW 469.

A presumption that the requisites of adverse possession have been complied with by the occupant arises under sec. 4210, Stats. 1898, and explains occupancy for the requisite length of time it has been clearly established. Illinois Steel Co. v. Bilot, 109 W 418, 84 NW 855, 85 NW 402.

Use of a way across another's lot for users' convenience, openly, notoriously, and without permission, constituted "adverse user." Shepard v. Gilbert, 212 W 1, 249 NW 54.

See note to 275.01, citing Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

893.06 History: R. S. 1849 c. 127 s. 6; R. S. 1858 c. 138 s. 6; R. S. 1878 s. 4211; Stats. 1898 s. 4211; 1925 c. 4; Stats. 1925 s. 330.06; 1965 c. 66 s. 2; Stats. 1965 s. 893.06.

1. Scope of section.
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3. Occupation and possession.
4. Possession of one lot.
5. Mortgagor and mortgagee.
6. Questions for jury.
7. Ouster by cotenant.
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9. Easement.
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11. When running begins.

1. Scope of Section.

Statutes which operate in restraint of the true title or make a certain kind of possession effectual for that purpose ought not to be construed so liberally as to include any case not fairly within the words used. Sydnor v. Palmer, 29 W 226. See also Wilson v. Henry, 35 W 241.

A sheriff's deed void for defects in the proceedings previous to judgment is within sec. 6, ch. 138, R. S. 1858. North v. Hammer, 34 W 425.

Secs. 6 and 7, ch. 138, R. S. 1858, must be considered as one entire provision, the first stating the general rule and the second defining its particular conditions. Pepper v. O'Dowd, 39 W 538.

Sec. 6, ch. 138, R. S. 1858, determines the ef-

fect of actual adverse possession under paper title and limits extent of constructive adverse possession arising from actual adverse possession of part of the land. Tax title is defeated by one claiming possession under paper title, and in actual adverse possession, to the extent of such possession and the constructive possession following. Wilson v. Henry, 40 W 594.

Sec. 6, ch. 138, R. S. 1858, has no application to a case governed by sec. 3 of that chapter. Gilman v. Sheboygan & Fond du Lac R. Co. 40 W 653.

Easements of light and air over adjacent premises are not created or acquired by prescription, and such easements are not favored. Depner v. United States Nat. Bank, 202 W 405, 232 NW 851.

2. Claim of Title.

Possession under a sheriff's deed, purporting to convey the interest the judgment debtor had on a certain day, is not adverse to the dower right of wife of debtor before that day. In such case the statute does not run against her. Cowan v. Lindsay, 30 W 586.

Where the deed purported to convey the whole land, possession under it was a possession under color of title. Wiesner v. Zaun, 39 W 188.

It must affirmatively appear that possession was entered into under claim of title exclusive of any other right. Possession and ordinary use of land, such as cultivation, improvement and residence thereon, do not raise the presumption that the entry was adverse until such occupation has continued 20 years. Furlong v. Garrett, 44 W 111.

The character of the possession of one who claims to have held adversely under color of title is to be determined by the instrument under which he entered. One who sets up title to the entire estate based wholly upon adverse possession cannot shield his possession by claiming to hold as tenant in common with plaintiff. Watts v. Owens, 62 W 512, 22 NW 720.

A tax deed, though void upon its face, is such a written instrument as is contemplated by the statute. McMillan v. Wehle, 55 W 685, 13 NW 694; Meade v. Gilfoyle, 64 W 18, 24 NW 413; Whittlesey v. Hoppenyan, 72 W 140, 39 NW 355.

A deed which had been adjudged void was not such a written instrument as could be the foundation of a claim of title under sec. 4211, R. S. 1878. Stewart v. Stewart, 83 W 364, 53 NW 686.

Possession of land under a deed which by mistake does not describe it is not with color of title. Elofrson v. Lindsay, 90 W 203, 63 NW 89.

Where a deed conveying land contained inconsistencies, but it was possible by application of a rule of construction to determine what property it was intended to convey, the deed as construed was sufficient to sustain a claim of adverse possession under sec. 4211, R. S. 1878. Heinsel v. Hunsicker, 103 W 12, 79 NW 23.

An assignment of a certificate of entry of land made as a mortgage is a sufficient written instrument under secs. 4211 and 4212, Stats. 1898. Pitman v. Hill, 117 W 318, 94 NW 40.

A judgment under secs. 4211, 4212 and 4215, Stats. 1898, vests in the plaintiffs complete legal title although in form only a bar in a suit to question such title. Hatch v. Lusignan, 117 W 428, 94 NW 332.

Where a tenant conveys the leased premises and the grantee having no notice of the existence of the tenancy takes possession claiming title under such conveyance and remains in such possession for a period of 10 years, he acquires a title good as against the original owner. Illinois Steel Co. v. Budzisz, 139 W 281, 119 NW 935.

Sec. 4211 shortens the period of limitation only as to the premises included in the instrument under which title is claimed. As to land lying outside and clearly beyond the call of a deed, the grantee can acquire title by adverse possession only where such possesson is continued for 20 years. Zuleger v. Zeh, 160 W 600, 150 NW 406.

Where land conveyed to a wife had previously been conveyed in part to her husband and was thereafter used as a whole, she dealing with it as the agent of her husband on account of his insanity and failing health, and was at no time in the exclusive adverse possession of the wife; and where after the husband's death the wife continued in possession of the land, having homestead and dower rights therein, her possession was not adverse to the heirs of the deceased. Graf v. Newman, 172 W 643, 179 NW 768.

Land occupied adversely to a person who holds the life estate does not become the property of the one so occupying as against the remainderman during the life of the owner of the life estate, since, as the remainderman has no possession or right thereto, no adverse possession as against him can exist so long as he is merely a remainderman. Blodgett v. Davenport, 219 W 596, 263 NW 629.

Although an outstanding title be acquired with intent to defraud the owner of the land of his title, this does not defeat the acquisition of title by the perpetrator of the fraud by adverse possession. Although a tax deed conveyed only a one-tenth interest in the premises, a quitclaim deed by the tax-deed grantee, describing the premises as a whole, constituted color of title to the entire interest so that the grantee under such quitclaim deed could acquire title to the entire interest by adverse possession, even though his deed was void to his own knowledge. Marshall & Ilsley Bank v. Baker, 236 W 467, 295 NW 725.

A claim to adverse possession of the disputed area made on the theory that an ambiguity in the deeds created color of title could not be validly asserted where the deeds contained no ambiguity. Grosshans v. Rueping, 36 W (2d) 519, 153 NW (2d) 619.

An instrument is color of title, however defective its execution or acknowledgment and however insufficient upon its face to convey title. La Crosse v. Cameron, 80 F 264.

3. Occupation and Possession.

Where a purchaser of land took title to all except one tract in his own name, went into possession, improved the land and exercised

acts of ownership for 20 years, without communicating to the party in whose name the deed to the tract ran, a court is not justified in holding, as a matter of law, that possession was adverse. McPherson v. Featherstone, 37 W 632.

The possession must be visibly and notoriously distinct and continuous. Furlong v. Garrett, 44 W 111.

If the owner of a city lot fences in a part of a street bounding his premises, with notice of the true line and without claim or color of title, his occupation thereof cannot be adverse to the public. Childs v. Nelson, 69 W 125, 33 NW 587.

Possession was taken of lots in the spring of 1874 and a fence built around them, and the underbrush thereon trimmed out. The fence remained in 1876 and 1877, but had disappeared in 1880. No other possession was shown until 1884. This was not a continual occupation so as to confer title. Whittlesey v. Hoppenyan, 72 W 140, 39 NW 355.

If land is not divided into lots, possession and occupancy will be deemed adverse as to the whole notwithstanding a small strip along a fence built by the occupant has never been actually occupied or possessed by him or his grantors. Hacker v. Horlemus, 74 W 21, 41 NW 965.

Possession by a married woman who has acquired a tax title by her own separate estate and had it put on record is none the less adverse because it was through tenants, and her husband acted as her agent in the management of the property. Wood v. Armour, 88 W 488, 60 NW 791.

"In order to constitute adverse possession against the title of the true owner the adverse claim must be sufficiently open and obvious, both as to the fact of possession and its really adverse character, to apprise the true owner, if in charge of the property and in the exercise of reasonable diligence, of the fact and of an intention to usurp possession of that which in law is his own. Secret or disconnected acts of an equivocal character, occurring at long intervals, will not suffice." Kurz v. Miller, 89 W 426, 433, 62 NW 182, 185.

The occupation of land by the grantee up to a fence beyond his boundary line is not adverse as to the strip between such line and the fence because the presumption is that he entered under his deed and claimed only what that gave him; to enlarge his claim after entry he must perform acts equivalent to a new entry and make a new claim of possession. Fuller v. Worth, 91 W 406, 64 NW 995.

Possession may be hostile notwithstanding the person claiming it has acquiesced in the use of the lands for flowage purposes believing that the dam owner had the right to use it. Lampman v. Van Alstyne, 94 W 417, 69 NW 171.

The elements of actual possession under sec. 4211, Stats. 1898, are the same as actual occupancy under sec. 4213 as construed by sec. 4214, though the evidence deemed sufficient to establish occupancy under the latter section may not be so deemed under the former. Circumstances of color of title being all that is significant as to the nature of the possession. Illinois Steel Co. v. Bilot, 109 W 418, 84 NW 855, 85 NW 402.

Where adverse possession is established under secs. 4211, 4212 or 4215 title is vested in the person so holding and he may maintain an action to quiet such title. Hatch v. Luisignan, 117 W 428, 94 NW 332.

A plea in an answer of 20 years' adverse possession instead of 10 in no way vitiates the plea if it is otherwise good. Roberts v. Decker, 120 W 102, 97 NW 519.

Where a partnership was in the possession of land, one of the partners holding either for himself personally or for the firm a lease in his own name from the owner, while the other partner was making oral declarations that the land was his, such declarations not being communicated to the owner, the possession of the latter partner was not open and exclusive nor adverse as against the owner; his possession, though it need not have been open and exclusive as against the world, must have been so as to the owner in order to ripen into a title. Illinois Steel Co. v. Tamms, 154 W 340, 141 NW 1011.

As to one claiming title by adverse possession his possession must be shown to be not only adverse but exclusive and hostile; and it requires declarations or acts of the most unequivocal character to change a use permissive in the beginning to one of an adverse character. McNeill v. Chicago & N. W. R. Co. 206 W 574, 240 NW 377.

Where the holder of the legal title in fee to lands executed and duly recorded a 99-year lease of the same which reserved the right to flood or overflow the lands and exacted as rental only the payment of taxes by the lessee, and the lessee conveyed the lands by warranty deed to a third person, who in turn conveyed by warranty deed to the plaintiff, and the plaintiff, although having actual notice of the lease and reservation of flowage rights within 4 or 5 years of the time she entered possession, never notified the holder of the legal title that she claimed any rights in opposition to the lease, and plaintiff's possession and use of the lands for farming purposes was not inconsistent with a tenancy and did not constitute any notice of hostile invasion to the holder of the legal title, and during the years of plaintiff's occupancy there had been no efforts by the holder of the legal title (until shortly prior to the present action) to exercise its flowage rights so as to call on the plaintiff to resist and thereby bring home to the holder notice of the adverse claim—there was no adverse possession by the plaintiff effective to establish her title as against the reserved flowage rights. (Illinois Steel Co. v. Budzisz, 139 W 281, distinguished.) McFaul v. Eau Claire County, 234 W 542, 292 NW 6.

Where a person enters under a deed of title, his possession is construed to be coextensive with his deed. Where one occupies a part of the premises conveyed, his occupancy extends to the boundaries of the land described in the instrument under which he claims. Hunter v. Neuville, 255 W 423, 39 NW (2d) 468.

Occupation of property pursuant to a deed is presumptively and in fact adverse to the former owner's title. Recording is the best evidence of a claim of title. Adverse possession

is gained even if the conveyance is defective. It cannot be claimed that possession is not adverse until reconveyance is demanded. Polanski v. Eagle Point, 30 W (2d) 507, 141 NW (2d) 281.

4. Possession of One Lot.

An execution defendant remaining in possession after sale holds under the purchaser, not adversely to him. The character of occupancy cannot be changed by attornment of defendant to other than a purchaser without notice. Swift v. Agnes, 33 W 228.

Sec. 6, ch. 138, R. S. 1858, applies to all actual adverse possession under paper title. Wilson v. Henry, 40 W 594.

Actual adverse possession of some 40-acre tracts in a section does not create constructive adverse possession of other tracts in the same section. Coleman v. Eldred, 44 W 210.

If one enters upon the possession of a city lot under a deed which bounds it by the line of a street it is presumed that he entered under such deed and his claim of title is restricted to the premises it describes. If his grantors adversely occupied part of the street he is not entitled to any benefit therefrom. Childs v. Nelson, 69 W 125, 33 NW 587.

Where one enters on land under a recorded deed, which purports to give complete title, his possession becomes adverse to all the world, and it does not first become adverse to the rights of a judgment creditor of the grantor when the creditor acquires a right of entry or action. Spellbrink v. Bramberg, 245 W 322, 14 NW (2d) 38.

5. Mortgagor and Mortgagee.

The statute does not begin to run against the owner of the equity of redemption until the mortgagee takes actual possession. If the mortgagor permits him to remain for 10 years his right of action is barred. Knowlton v. Walker, 13 W 264.

The statute does not begin to run so long as mortgagee, being in possession, admits that he holds as mortgagee and recognizes the mortgagor's right of redemption. Waldo v. Rice, 14 W 286.

The right of an heir to bring action to recover possession of land sold by an administrator accrues when a purchaser obtains possession and is barred 10 years thereafter. Jones v. Billstein, 28 W 221; Jones v. Lathrop, 28 W 339.

Evidence of adverse possession must be clear and positive. Where facts do not negative the idea of interruptions of a continuous occupancy the finding should be against the party claiming. Wilson v. Henry, 35 W 241.

Title claimed under such an instrument by one in possession under a parol contract for the sale of the land may be established by the possession and title deeds of his vendor. Meade v. Gilfoyle, 64 W 18, 24 NW 413.

6. Questions for Jury.

The question of adverse possession is for the jury. McPherson v. Featherstone, 37 W 632.

If adverse possession is relied upon as a defense in ejectment and the only evidence in support of the defense is to the effect that defendant and those under whom he claims had been in actual possession and use of the land, had cultivated and improved it, paid taxes on it, and used it as owners do for more than 20 years before the action was begun, the defendant is ordinarily entitled to have the question of adverse possession passed upon by the jury. Allen v. Allen, 58 W 202, 16 NW 610.

"What constitutes adverse possession is a question of law for the court, and whether the necessary facts exist to establish it is a question of fact for the jury." Kurz v. Miller, 89 W 426, 433, 62 NW 182, 185.

7. Ouster by Cotenant.

If the deed under which land is claimed is adjudged void and the grantee therein is found by the judgment to be a tenant in common with others, the judgment ends the adverse character of the possession and puts the seisin in all the cotenants. If the claimant continues in possession his possession after such judgment does not become adverse to his cotenants until knowledge is brought home to them that he claimed to hold adversely. Stewart v. Stewart, 83 W 364, 53 NW 686.

Where one of several tenants in common, in possession and having acknowledged his cotenants' title, seeks to turn his occupancy into adverse possession under merely colorable claims of title, his possession will be regarded adverse only from time cotenants had knowledge of his intentions. The only exception to this rule is where his possession had been sole and uninterrupted for so long a period as to justify the jury in finding knowledge and acquiescence by the other tenants. Saladin v. Kraayvanyer, 96 W 180, 70 NW 1113.

8. Grantor and Grantee.

Possession of a vendee under an executory contract is possession of the vendor, and if he has acquired legal title by his and the vendee's possession he may maintain ejectment unless, after payment of purchase money, the vendee has acquired prescriptive title as against the grantor. Furlong v. Garrett, 44 W 111.

Possession of the grantee in a deed, executed after a mortgage given by a grantor is recorded, is subordinate to the mortgage. Maxwell v. Hartmann, 50 W 660, 7 NW 103.

If one who has conveyed land continues to occupy it his occupation is not deemed adverse, but is presumed to be in subordination to the title of his grantee. In order to overcome such presumption and make such possession adverse as against the first grantee a person claiming under a subsequent deed executed by the same grantor while he was occupying the land must disseize the rightful owner, either by ousting him from an actual possession or by taking such open and notorious possession, when the land is unoccupied, that the owner may be presumed to know that he holds adversely; and he must show by clear and positive proof a continuance of such adverse possession for the time prescribed. Such second grantee is bound by a covenant in the original deed for a quiet and peaceable possession, and his possession must be held in subordination to the title in the first grantee. Schwallback v. Chicago, M. & St. P. R. Co. 69 W 292, 34 NW 128 and 73 W 137, 40 NW 579.

While one who enters into possession of land under a conveyance from the holder of a life estate only cannot hold adversely to the remainderman during the continuation of such estate, yet if the conveyance from the life tenant purports to convey an estate in fee and the grantor intended to convey such estate, and the grantee supposed he was getting it, the latter's possession becomes adverse to the remainderman on the life tenant's death. The presumption is that one who has been shown to be in possession adverse to him who seeks to establish title continued in such possession. Barrett v. Stradl, 73 W 385, 41 NW 439.

The purchaser under a land contract, while the contract is executory, cannot set up an adverse possession against his vendor. But if he pays part of the purchase money and so secures the balance as to make the security equivalent to payment and obtains a conveyance from his vendor, he may from that time set up an adverse possession; and if he continues in possession, claiming exclusive title to the premises for 10 years after receiving and recording a deed thereof, he obtains title notwithstanding his original entry was under the executory contract. Simpson v. Sneclode, 83 W 201, 53 NW 499.

One who holds land under a tax deed issued before the expiration of the period of redemption which was given to widows by ch. 89, Laws 1868, acquires no title or constructive possession against a widow as owner of a life estate in the land; and a warranty deed from her to the holder of the tax deed extinguishes his lien. The tenancy terminates on the death of the widow, and a purchaser from her grantee prior to her death does not thereafter hold possession with any color of right. Little v. Edwards, 84 W 649, 55 NW 43.

A grantor cannot claim that his possession subsequent to his conveyance was adverse to his grantee. Riha v. Pelnar, 86 W 408, 57 NW 51.

A grantor continues in possession as tenant for his grantee, and that relation will continue until he expressly disclaims it. McCormick v. Herndon, 86 W 449, 56 NW 1097.

Where a deed fails, through mistake, to describe the land, adverse possession by the grantee is not aided by the prior possession of his grantor. Elofrson v. Lindsay, 90 W 203, 63 NW 89.

9. Easement.

Possession necessary to the full enjoyment of an easement is not adverse to the owner of the land. The character of the possession is determined by the character of the claim under which possession is taken and held. Pinkum v. Eau Claire, 81 W 301, 51 NW 550.

An easement for a specified purpose, founded on a judgment, may be enlarged by subsequent adverse user, and the owner of the servient estate is not required to wait until his property has been unreasonably burdened and thereby permit additional rights to be gained by prescription, but he may proceed by appropriate action to prevent such a result. S. S. Kresge Co. v. Winkelman Realty Co. 260 W 372, 50 NW (2d) 920.

10. Good Faith.

Good faith in the entry and occupancy is not essential to render the possession adverse. Lampman v. Van Alstyne, 94 W 417, 69 NW 171; McCann v. Welch, 106 W 142, 81 NW 996; Steinberg v. Salzman, 139 W 118, 120 NW 1005. Compare Woodward v. McReynolds, 2 Pin. 268.

11. When Running Begins.

One who advances money, bids in property on a foreclosure sale and takes title to it with the understanding that he should reconvey to the person at whose request he does these things, upon repayment of the money, such person having an interest in the mortgaged premises and a right to redeem them, holds as equitable mortgagee, and his possession was not adverse to that of the mortgagor. Hence an action to foreclose such mortgage is not barred after 10 years under sec. 4221 (4), R. S. 1878, nor after 20 years under sec. 4220 (2). Phelan v. Fitzpatrick, 84 W 240, 54 NW 614.

Where land was held by a husband and wife as tenants in common and the husband conveyed the whole premises by deed, the 10-year statute began to run against the heirs of the wife from the death of the husband, except so far as they were under disability. Brown v. Baraboo, 98 W 273, 74 NW 223.

The statute begins to run from the entry even though fraudulent and is not saved by sec. 4218, Stats. 1898. Steinberg v. Salzman, 139 W 118, 120 NW 1005.

The true owner of land brought ejectment against the occupant thereof who was in possession as tenant of a third party whose claim of title arose less than 10 years before. But after the expiration of 10 years next following the origin of the landlord's title he was made a defendant to the action. The commencement of the action against the tenant prevented the statute from running in favor of the landlord. Illinois Steel Co. v. Kohnke, 151 W 410, 138 NW 995.

It is doubted whether a certificate of heirship issued ex parte under sec. 2276a, Stats. 1913, is "a judgment of a competent court." But where the 9 persons named in such a certificate quitclaimed to the widow, the deed, construed with the certificate, purported to convey the whole title and was a written instrument upon which adverse possession might be based. And such possession set the statute running against other heirs of whose existence the widow had no knowledge. Bourne v. Wiele, 159 W 340, 150 NW 420.

893.07 History: R. S. 1849 c. 127 s. 7; R. S. 1858 c. 138 s. 7; R. S. 1878 s. 4212; Stats. 1898 s. 4212; 1925 c. 4; Stats. 1925 s. 330.07; 1965 c. 66 s. 2; Stats. 1965 s. 893.07.

Making preparations to build, clearing away brush and making rails on land do not constitute adverse possession. Ladd v. Hildebrant, 27 W 135.

A possession which is merely incidental and subsidiary to the commission of trespass upon land, as by cutting and removing the timber, and which is abandoned when that object is accomplished, is not such adverse possession as prevents him who owns the land from recovering the timber so taken. Austin v. Holt, 32 W 478.

The words "for the purpose of husbandry

or for the ordinary use of the occupant" relate back to and limit the words "the supply of fuel or of fencing timber." Du Pont v. Davis, 35 W 631.

The extent of a farm must be known in the sense of being notorious. Pepper v. O'Dowd, 39 W 538.

Constructive adverse possession of uninclosed land under sec. 7, ch. 138, R. S. 1858, can be established only by actual proof of a local course or custom sanctioning the manner of occupation. Pepper v. O'Dowd, 39 W 538; Wilson v. Henry, 40 W 594.

Subdivisions (3) and (4) of sec. 7 are independent of each other and, under the former, actual possession of part of uninclosed lot by its use for fuel or fencing will probably operate as constructive adverse possession of the whole; but under sec. 6 it cannot operate beyond limits of the same lot. Both subdivisions cannot support the same possession of the same premises, and possession claimed in part under each and not supported by either alone is not within the statute. Wilson v. Henry, 40 W 594.

The object of sec. 7 is to establish certain rules of actual adverse possession. But it does not undertake to state all conditions and qualities of such possession. The conditions given are probably all conditions which would fail to uphold an adverse possession at common law. Whatever would constitute actual adverse possession under paper title outside of the statute still constitutes it notwithstanding the statutory definitions of other conditions of such possession. Wilson v. Henry, 40 W 594, 604.

Mining operations upon land as constantly prosecuted as the nature of the business and customs of the country allow, accompanied by the exercise of acts of ownership on the land, constitute adverse possession. Stephenson v. Wilson, 50 W 95, 6 NW 240.

The occupation of land for logging, by cutting timber and roads, hauling timber, etc., is sufficiently adverse to interrupt the running of the statute in favor of a tax deed. Haseltine v. Mosher, 51 W 443, 8 NW 260.

It is not necessary, under sec. 1190, R. S. 1878, in order to prevent the running of the 3 years' limitation, to show an actual possession of the character specified in sec. 4212. Finn v. Wisconsin R. L. Co. 72 W 546, 40 NW 209.

There can be no prescription either for public or private nuisance. Taylor v. Chicago, M. & St. P. R. Co. 83 W 636, 53 NW 853.

If there is any error in restricting a person claiming title to the conditions of secs. 4211 and 4212, R. S. 1878, the person affected by the alleged hostile title is not prejudiced thereby. Lampman v. Van Alstyne, 94 W 417, 69 NW 171.

Error does not follow from the omission to explain the nature of adverse possession, no request to that effect having been made nor any exception taken. Lampman v. Van Alstyne, 94 W 417, 69 NW 171.

Where an adjoining owner began to use a private way as a means of access to the back of his lot, such use would be presumed to be permissive. Frye v. Highland, 109 W 292, 85 NW 351.

Occupancy under a tax deed was adverse through inclosure, use and occupation in the ordinary way. Reitler v. Lindstrom, 126 W 562, 106 NW 388.

Twenty years' inclosure and physical occupation as a pasture, and delivery of possession by successive grantors of adjoining property, constitute a sufficient privity of possession. Closuit v. John Arpin L. Co., 130 W 258, 110 NW 222.

A right barred by a statute of limitations ceases to exist and the running of the statute creates a new right of equal dignity as regards constitutional protection. The title of the original owner or of a tax title claimant, in actual possession of lands affected by the tax deed during the 3 years next following the recording of the same, is ripened into a perfect title by such possession. The possession must be adverse, such as will require the opposing claimant to resort to legal proceedings to obtain possession. It need not have all the characteristics mentioned in sec. 4212, Stats. 1898, but there must be complete dominion and an assertion of adverse right by acts sufficiently significant and continuous to reasonably inform his adversary of the character of such possession and claim. Laffitte v. Superior, 142 W 73, 125 NW 105.

Neither sec. 4212 nor sec. 4214, Stats. 1913, purports to enumerate all the conditions which constitute adverse possession. Zellmer v. Martin, 157 W 341, 147 NW 371.

In a proceeding on a claim against the estate of a decedent for the reasonable value of the alleged use and occupation of a tract of land owned by the claimant, the fact that the decedent had used and occupied half of the tract did not require that he be deemed to have been in possession of the entire tract, nor was the fact that the decedent had paid taxes on the entire tract evidence that he had been in possession of the entire tract, no phase of adverse possession being involved. Estate of Sheldon, 247 W 457, 20 NW (2d) 115.

Requisites and proof of adverse possession of real property. Helm, 8 MLR 104; Kannenberg, 15 MLR 127.

893.08 History: R. S. 1849 c. 127 s. 8; R. S. 1858 c. 138 s. 8; R. S. 1878 s. 4213; Stats. 1898 s. 4213; 1925 c. 4; Stats. 1925 s. 330.08; 1965 c. 66 s. 2; Stats. 1965 s. 893.08.

K purchased land 25 feet in width and erected a building on it which covered a few inches of the land adjoining. He conveyed to G the description in the deed being 25 feet of land. K's occupation of the strip did not inure to G's benefit. Graeven v. Dieves, 68 W 317, 31 NW 914.

The grantee of a specifically described tract of land cannot claim any advantage of the possession of his grantors for 20 years of a strip adjacent to that granted, but which is not included in any of the conveyances antecedent to his own, and concerning which there is no privity between him and his grantors. Dhein v. Beuscher, 83 W 316, 53 NW 551.

If the adverse possession originally extends to the waters of a lake the disseisin necessarily includes all riparian rights pertaining to the ownership of the shore, and these carry with them the accretion to the shore land,

whether or not such accretion is actually inclosed regardless of the length of time since they were made. Chicago & Northwestern R. Co. v. Groh, 85 W 641, 646, 55 NW 714.

The inclosure, cultivation and improvement mentioned in sec. 4213, Stats. 1898, are only evidences of possession and occupancy. There can be actual occupancy and possession without such inclosure, cultivation or improvement and open, notorious and continuous use for 20 years without objection is prima facie evidence of adverse possession. Batz v. Woerpel, 113 W 442, 89 NW 516.

Where defendant has acquired an easement by prescription across a narrow strip of plaintiff's land by maintaining a cinder driveway thereon, the construction of a concrete driveway does not increase the burden on the servient estate. Knuth v. Vogels, 265 W 341, 61 NW (2d) 301.

Long acquiescence by the parties in considering a fence as the true boundary line between their properties, with undisputed possession up to the fence for more than 20 years, raises a strong presumption that the line so recognized is the true line; and such presumption is not overcome by the mere fact that a survey, made long after government monuments have been obliterated or lost, reveals another line. Rosen v. Ihler, 267 W 220, 64 NW (2d) 845.

The fact that the plantiff's continuous and exclusive possession by use of a narrow sloping strip of lawn may have occurred as a result of the mistaken belief that the west surface of a retaining wall constituted the true boundary line between the plaintiff's and the defendant's property, did not prevent such acts of continuous and exclusive possession extending for more than 20 years from ripening into a good title by adverse possession. Schiro v. Oriental Realty Co. 272 W 537, 76 NW (2d) 355.

To establish a road as a public highway by virtue of user for 20 years, the user must be adverse or under such circumstances as will give rise to a presumption of an intention on the part of the owner to dedicate the road as a public highway, and 20 or more years of adverse user by the public would create a presumption of such intention to dedicate. The use of a way of necessity is permissive and not adverse. Bino v. Hurley, 14 W (2d) 101, 109 NW (2d) 544.

893.09 History: R. S. 1849 c. 127 s. 9; R. S. 1858 c. 138 s. 9; R. S. 1878 s. 4214; Stats. 1898 s. 4214; 1925 c. 4; Stats. 1925 s. 330.09; 1965 c. 66 s. 2; Stats. 1965 s. 893.09.

If 2 owners agree upon and establish a dividing line between their lands and actually claim and occupy the land to that line on each side continuously for 20 years, their possession is adverse and creates title by prescription. Tobey v. Secor, 60 W 310, 19 NW 99; Donahue v. Thompson, 60 W 500, 19 NW 520.

While occupation and improvements for several years, with the knowledge of the true owner, may be prima facie evidence of adverse possession, yet they are not conclusive, and may be explained and rebutted by proof showing that the possession was not in fact adverse; that it was permissive or provisional, and without the intention in fact of claiming or acquiring title. Ayers v. Reidel, 84 W 276, 54 NW 588.

If land is conveyed to a de facto corporation which claims it in that capacity and conveys it as such, the title passes to its grantee as against one who asserts title upon adverse possession not founded on any written instrument. Ricketson v. Galligan, 89 W 394, 62 NW 87.

The use of land under a parol license is not adverse until the license is revoked. Thoemke v. Fiedler, 91 W 386, 64 NW 1030.

"The law has been settled in this state, by repeated decisions, that evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. The defense of adverse possession is not to be made out by inference, but by clear and positive proof; and one in possession of land to which he has no claim of title is presumed to be in possession in amity with and in subservience to the legal title of the real owner. A party making the defense of adverse possession must overcome the presumption that the occupation by one of the premises to which another holds the legal title is deemed to have been under and in subordination to such title, unless it appears that such premises have been held and possessed adversely to such legal title for the statutory period of limitation, and must show, not only the adverse character of the possession upon which he relies, but that it has been continuously adverse for the requisite period." Ryan v. Schwartz, 94 W 403, 410-411, 69 NW 178, 181. See also Bank of Eagle v. Pentland, 197 W 40, 41-42, 221 NW 383, 384.

Possession under an executory contract of sale is not adverse. Morgan v. Meedler, 107 W 241, 83 NW 313.

Twenty years of open, notorious, continuous, adverse use and enjoyment of an artificial ditch to drain water from the land of one person across that of an adjoining owner creates a permanent right to such use and enjoyment. Wilkins v. Nicolai, 99 W 178, 74 NW 103; Roberts v. Von Briesen, 107 W 486, 83 NW 755.

The use of an already existing private right of way upon the land of another is presumed to be permissive and not adverse. Frye v. Highland, 109 W 292, 85 NW 351.

Declarations of one in possession of land characterizing or defining his possession and claim thereto are admissible in evidence against those claiming under or in privity with him. Kreckeberg v. Leslie, 111 W 462, 87 NW 450.

"No particular kind of inclosure is requisite. It may be artificial in part and natural in part. Nor is any particular kind of improvement required, so long as it satisfies what is usual under the circumstances, and indicates clearly the boundaries of the adverse occupancy. * * * The term 'improvement in the usual way,' as used in the statute, means put to the exclusive use of the occupant, as the true owner might in the usual course of events. * * * The governing questions of law, regardless of the character of the premises, are the same in every case; but the question of fact may be presented by evidence in such

a great variety of ways, according to the circumstances of each particular case, that usually there is room for conflicting inferences, requiring the verdict of a jury as to where the truth lies." Illinois Steel Co. v. Bilot, 109 W 418, 440, 84 NW 855, 85 NW 402. See also Batz v. Woerpel, 113 W 442, 89 NW 516.

Actual occupation, inclosure and cultivation up to a fence for 20 years under claim of full ownership is adverse. Gilman v. Brown, 115 W 1, 91 NW 227.

Where there is continuous occupancy for 20 years the presumption is raised that such occupancy is under claim of right and adverse. Illinois Steel Co. v. Jeka, 119 W 122, 95 NW 97.

Use of a strip of land for pasturage and cutting timber and hay for more than 20 years is adverse. Clithero v. Fenner, 122 W 356, 99 NW 1027.

A hostile entry and commencement of improvement plainly indicating a purpose to lay out a lot in a district suitable for residence lots might be sufficient to disseise the true owner not only of the particular spot where the first improvement occurred, but of surrounding land, the hostile appropriation of which is plainly suggested. Illinois Steel Co. v. Jeka, 123 W 419, 101 NW 399.

Occupation up to a fence was adverse, each party having built a division fence on the same line during the period of limitation. Off v. Heinrichs, 124 W 440, 102 NW 904.

The evidence in the case was not sufficient to show adverse possession for 20 years. Hemmy v. Dunn, 125 W 275, 103 NW 1095.

The taking of possession by the father of his son's land under an agreement to occupy and cultivate for the benefit of the father, and that the title should be in the son, was not adverse. Allen v. Ellis, 125 W 565, 104 NW 739.

Possession by occupancy, inclosure and use in the manner usual to like premises was adverse. Reitler v. Lindstrom, 126 W 562, 106 NW 388.

User of a private road for 7 years, followed by a notice from the landowner to procure another road, is not adverse. Kolpack v. Kolpack, 128 W 169, 107 NW 457.

Where a person entered into possession of land and began to hold it adversely, such possession was not interrupted by formation of a partnership, and the conveyance of a part interest in the business to the partner. Nonpayment of taxes by the claimant is to be considered in judging the character of his possession, but is by no means conclusive. Samacheck v. Duvall, 135 W 108, 115 NW 634.

Residing on the land claimed, cultivating part of it, and exercising dominion over the whole as was reasonably consistent with the character of the land, shows adverse possession. Brown v. Dunn, 135 W 374, 115 NW 1097.

The fact that land was not included in any deed is not sufficient to break the chain under which adverse possession is claimed. Meilke v. Dodge, 135 W 388, 115 NW 1099.

The possession of a husband was presumed to be under the will of his wife as a life tenant and not to be adverse to the children who held the remainder. Perkinson v. Clarke, 135 W 584, 116 NW 229.

Possession by the life tenant is not adverse to the remaindermen unless some notice of the adverse claim is brought home to them. Van Matre v. Swank, 147 W 93, 132 NW 904.

The facts supported a claim of adverse user within the meaning of sec. 4214, Stats. 1898. Progress Farms v. Harter, 147 W 133, 132 NW 895.

An absconding debtor left unoccupied premises held by him under a lease upon which he had built a house. Thereupon creditors took possession and afterwards claimed the premises as their own, inclosed them with a fence, made other improvements and finally sold the property or part of it. These facts after a possession of 20 years by the creditors and their successors might sustain a finding that the possession was adverse and not by permission as tenants. Illinois Steel Co. v. Budzisz, 157 W 16, 145 NW 212.

Neither sec. 4212 nor sec. 4214 purports to enumerate all the conditions which constitute adverse possession. Zellmer v. Martin, 157 W 341, 147 NW 371.

Where one of several heirs of the record owner of land claimed the equitable ownership thereof because she had furnished the money to purchase it, and after the owner's death took possession, paid the taxes and collected the rents without accounting to the other heirs, all but one of whom deeded their interests to her, the interest of that one heir was barred by the lapse of more than 50 years since possession was so taken and held. Giblin v. Giblin, 173 W 632, 182 NW 357.

An oral license to drain surface water across the land of another, even though for a valuable consideration, does not create an easement, and so long as such license continues to be exercised by permission of the landowner it cannot ripen into an adverse use. Schmoldt v. Loper, 174 W 152, 182 NW 728.

The mere fact that a foot path has been used by pedestrians for more than 20 years as a short cut to a neighboring store, hotel and amusement ground does not raise a presumption of adverse user. Permissive user never ripens into an easement. Wiesner v. Jaeger, 175 W 281, 184 NW 1038. But see Wegner v. Erffmeyer, 193 W 212, 213 NW 472.

Successive entries upon land for the purpose of erecting a fence do not constitute interruption of the adverse possession of an adjoining landowner, where the person making the entries did not commence an action thereupon within one year. Brockman v. Brandenburg, 197 W 51, 221 NW 397.

Where plaintiff's predecessor purchased a right-of-way easement for purpose of transporting milk to a cheese factory but the predecessor and plaintiff used the right of way for all purposes necessary and convenient in connection with operation of the farm, such use was permissive and the predecessor and plaintiff did not acquire rights by user hostile and adverse to those of servient estate. Lindokken v. Paulson, 224 W 470, 272 NW 453.

Where the plaintiff, occupying a lot under a deed accurately describing it, did not claim a strip, located on the adjacent lot under color of title but relied solely on adverse possession by his grantor and himself, and the plaintiff (also his grantor) and the neighbor both con-

temporaneously used the unfenced strip, and there was no exclusive possession by the plaintiff until he erected a garage on a part of the disputed strip 10 years prior to the commencement of the action, and prior thereto there was merely a dispute as to the location of the boundary with both parties in possession, there was no exclusive adverse possession for 20 years by the plaintiff and his grantor. Bettack v. Conachen, 235 W 559, 294 NW 57.

An oral arrangement by which one became the purchaser and occupant of a lot was sufficient to create continuity of the vendor's original adverse possession of an adjacent disputed strip of land. The possession of a person who enters into land under a deed is construed to be co-extensive with his deed. 330.09 is affirmative and does not purport to enumerate all the conditions which constitute adverse possession. Actual possession taken with an intention to possess the land occupied as the possessor's own constitutes its adverse character, and not the remote view or belief of the possessor. Bettack v. Conachen, 235 W 559, 294 NW 57.

When it is shown that there has been the use of an easement for 20 years unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription and to authorize the presumption of a grant, unless contradicted or explained; and such rule applies to property which is either improved or in the process of being improved, whether for use as agricultural land or city property, even if unenclosed; but such rule does not apply to unenclosed unimproved property largely in a state of nature. Carlson v. Craig, 264 W 632, 60 NW (2d) 395.

One in possession of land up to a supposed line, with an absolute claim of title thereto, is deemed to hold adversely, although his claim of title may have originated in a mistaken belief that the supposed line was the true line. Wiese v. Swersinske, 265 W 258, 61 NW (2d) 312.

The use of an easement for 20 years, unexplained, will be presumed to have been under a claim of right and adverse, and will in many circumstances be sufficient to establish a right by prescription; but the evidence in the instant case warranted the trial court's finding that the defendant, claiming a prescriptive right to drive over an area on a corner of the plaintiff's land, had failed to to establish the necessary user. Carlson v. Dorsch, 274 W 22, 79 NW (2d) 99.

The possession of one claiming adversely must be of such a character as to apprise the true owner that the possessor claims adversely and to the exclusion of the true owner. Cuskey v. McShane, 2 W (2d) 607, 87 NW (2d) 497.

When it is shown that there has been the use of an easement for 20 years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. Shellow v. Hagen, 9 W (2d) 506, 101 NW (2d) 694.

If the elements of open, notorious, continuous, and exclusive possession are satisfied, the law presumes the element of hostile intent on the part of the adverse possessor regardless of whether he acts in good or bad faith, by mistake as to boundaries, or with intent to claim the land with full knowledge the claim is wrongful. Burkhardt v. Smith, 17 W (2d) 132, 115 NW (2d) 540.

Putting in lawn, flower bed and erecting building on disputed strip is sufficient notice of adverse occupation of land. If a claimant, after the statute has run, admits the line is not correct, this will not change the title to the strip. Laurin v. Wyroski, 20 W (2d) 254, 121 NW (2d) 764.

Pasturing cattle up to a fence line for more than 20 years is adverse possession under 330.09 (1) if coupled with a claim of title. Even if it was obvious that the fence was not on the line a claim can be made and it would not be proper to ask on cross-examination whether defendant only intended to claim to the true line. Northwoods Dev. Corp. v. Klement, 24 W (2d) 387, 129 NW (2d) 121.

Requisites and proof of adverse possession of real property. Helm, 8 MLR 104.

893.10 History: R. S. 1858 c. 138 s. 10; R. S. 1878 s. 4215; Stats. 1898 s. 4215; 1925 c. 4; Stats. 1925 s. 330.10; 1931 c. 79 s. 34; 1957 c. 192; 1965 c. 66 s. 2; Stats. 1965 s. 893.10.

The right of a party to property adversely held is cut off by neglect to bring suit within the period prescribed. Such neglect transfers it to adverse claimant, and it is beyond the power of the legislature to restore the right. Lindsay v. Fay, 28 W 177; Brown v. Parker, 28 W 21.

A presumption that a use was adverse arises from mere proof that an easement was used for the statutory period, and the owner has the burden of showing it was permissive. (Language in Wiesner v. Jaeger, 175 W 281, 184 NW 1038, withdrawn.) Wegner v. Erffmeyer, 193 W 212, 213 NW 472.

A purchaser's adverse possession and occupancy of a lot, with acquiescence of adjoining lot owners for over 20 years, up to the line he regarded as the correct boundary line, settled the location thereof and ownership of the disputed strip. Lot owners' building of sidewalk beyond the line claimed as boundary by adjoining lot owner did not invade or interrupt the latter's adverse holding of the disputed strip. Krembs v. Pagel, 210 W 261, 246 NW 324.

In view of 281.02 (1), 330.06 and 330.10, a person who enters on land and holds uninterrupted possession thereof for 10 years under claim of title founded on a recorded conveyance, held adversely and acquired complete legal title by adverse possession, regardless of the claimant's knowledge of its invalidity, cutting off the rights of a creditor of the grantor under 242.09, although the creditor first discovered the alleged fraud within such 10-year period. Spellbrink v. Bramberg, 245 W 322, 14 NW (2d) 38.

Possession up to a line recognized and acquiesced in as a boundary line is adverse as against the adjoining landowner. In respect to tacking successive adverse possessions, a tenant's actual possession of a strip of land on an adjoining property was con-

structively the possession of his respective landlords. Menzner v. Tracy, 247 W 245, 19 NW (2d) 257.

Where a fence built in reliance on a survey is acquiesced in by adjoining landowners for 13 years, this is conclusive as to the line, in the absence of evidence showing a different line to be the true line. Nagel v. Philipsen, 4 W (2d) 104, 90 NW (2d) 151.

Use of a shack for hunting for years may constitute adverse possession if such use was exclusive. Kraus v. Mueller, 12 W (2d) 430, 107 NW (2d) 467.

Assuming that the existence of a fence erected by the plaintiff, and the significance of a monument near the lake, were known to the defendant, acquiescence in such boundary would make out a prima facie case that the plaintiff's fence was on the correct boundary, but such prima facie showing would be overcome by proof that the boundary referred to in the deeds of conveyance was a different line. Seybold v. Burke, 14 W (2d) 397, 111 NW (2d) 143.

The limitation periods imposed by 330.10 are applicable even though the cause of action is one for declaratory relief rather than one strictly for the recovery of real estate, since adverse possession of the subject real estate for the limitation period extinguishes the title of the original owner and vests title in the adverse possessor. Marky Investment v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

Even if a deed is void because it runs to a fictitious person or is obtained by fraud, it still will afford color of title to support a claim of adverse possession under color of title. If adverse possession by another runs for the full statutory period of limitation after the death of a husband or after accrual of the dower right, a widow 's dower right is barred. Marky Investment v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

893.11 History: R. S. 1849 c. 127 s. 10; R. S. 1858 c. 138 s. 11; R. S. 1878 s. 4216; Stats. 1898 s. 4216; 1925 c. 4; Stats. 1925 s. 330.11; 1965 c. 66 s. 2; Stats. 1965 s. 893.11.

The character of possession is determined by entry unless the party holding title has been notified that it is the intention of the other party not to hold under that title, or there has been a legal eviction, and possession under paramount title. Quinn v. Quinn, 27 W 168.

A person who has entered into possession as tenant of the owner may, without surrendering such possession, by holding under an adverse claim for 20 years after the expiration of 10 years from the expiration of his term, defeat the landlord's right to recover possession. Bartlett v. Secor, 56 W 520, 14 NW 714.

When once the relation of landlord and tenant is established by act of the parties it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely. Pulford v. Whicher, 76 W 555, 45 NW 418.

If a tax-title claimant obtains possession in his own right, and not by fraud or collusion with a tenant of the former owner, the statute runs in his favor and against such owner. Pulford v. Whicher, 87 W 576, 58 NW 1104.

An agreement by which defendant was to hold the premises under the plaintiff as owner and as his tenant, and to vacate upon 6 months' notice, estops him from denying plaintiff's ownership. Ricketson v. Galligan, 89 W 394, 62 NW 87.

Where a tenant conveys the leased premises and the grantee having no notice of the existence of the tenancy takes possession claiming title under such conveyance and remains in such possession for a period of 10 years, he acquires a title good as against the original owner. Illinois Steel Co. v. Budzisz, 139 W 281, 119 NW 935.

See note to 330.06, citing McFaul v. Eau Claire County, 234 W 542, 292 NW 6.

893.12 History: 1885 c. 57; Ann. Stats. 1889 s. 4216a; Stats. 1898 s. 4216a; 1925 c. 4; Stats. 1925 s. 330.12; 1941 c. 94; 1965 c. 66 s. 2; Stats. 1965 s. 893.12.

See note to 182.017, citing Peterson v. Lake Superior Dist. P. Co. 255 W 584, 39 NW (2d) 706.

Regardless of the subject matter to which it may apply, 330.12, providing that the mere use of a way over unenclosed land shall be presumed to be permissive and not adverse, cannot in any event affect prescriptive rights acquired by an adverse user prior to its enactment. Carlson v. Craig, 264 W 632, 60 NW (2d) 395.

An owner of part of an "island" could not obtain an easement by prescription over an uninclosed "causeway" since his use was presumed permissive under 330.12, nor could he establish a way of necessity where the "causeway" was unowned. Law v. De Normandie, 5 W (2d) 546, 93 NW (2d) 332.

Picnic tables erected on the shore of a lake, and a boat livery operated on the lake, with access to the lake only over a private roadway, did not change the character of the land through which the roadway passed as wild and unimproved land. Bino v. Hurley, 14 W (2d) 101, 109 NW (2d) 544.

893.13 History: R. S. 1849 c. 127 s. 11; R. S. 1858 c. 138 s. 12; R. S. 1878 s. 4217; Stats. 1898 s. 4217; 1925 c. 4; Stats. 1925 s. 330.13; 1965 c. 66 s. 2; Stats. 1965 s. 893.13.

893.135 History: 1945 c. 261; Stats. 1945 s. 330.135; 1965 c. 66 s. 2; Stats. 1965 s. 893.135.

893.14 History: R. S. 1858 c. 138 s. 14; R. S. 1878 s. 4219; Stats. 1898 s. 4219; 1925 c. 4; Stats. 1925 s. 330.15; 1941 c. 293; Stats. 1941 s. 330.14; 1957 c. 242; 1965 c. 66 s. 2; Stats. 1965 s. 893.14.

On remedy for wrongs see notes to sec. 9, art. I.

The statute of limitations does not run against the right of a mortgagor to bring an action to redeem until the mortgagee has taken possession nor so long as the mortgagee, being in possession, admits that he holds as such and expressly recognizes the mortgagor's right. Waldo v. Rice, 14 W 286.

The statute of limitations does not apply to the case of an express trust where it has not been denied or repudiated. Taylor v. Hill, 86 W 99, 56 NW 738.

The statute does not run upon an attorney's claim for services until the termination of

the proceedings in which they were rendered, where his employment was to conduct such proceeding to its termination or until his employment is otherwise terminated. Lowe v. Ring, 106 W 647, 82 NW 571.

A right of action to compel the delivery of a certificate of shares of stock does not arise until the right thereto is denied by the corporation. Morey v. Fish Brothers W. Co. 108 W 520, 84 NW 862.

An action to enforce the statutory liability of a stockholder of an insolvent corporation begins to run when the corporation is adjudged insolvent and a receiver appointed. Boyd v. Mutual F. Asso. 116 W 155, 90 NW 1086, 94 NW 171.

Where a residuary legatee gives bond to pay debts, a claim against the testator on which suit is brought on such bond is not barred until 6 years after the giving of the bond. Pym v. Pym, 118 W 662, 96 NW 429.

The statute of limitations on an ordinary banking account subject to check begins to run upon demand for payment and not from the time of the deposit. (Curran v. Witter, 68 W 16, 31 NW 705, held to apply only to certificates of deposit.) Koelzer v. First Nat. Bank, 125 W 595, 104 NW 838.

The statute of limitations does not affect or run between husband and wife as to contracts or obligations made or arising during coverture. Estate of Brundage, 185 W 558, 201 NW 820.

A cause of action accrued when a foreign corporation was required to pay an excess license fee in Wisconsin, and the fact that the amount was based on erroneous rulings of taxing officials in its home state which were not corrected by the final opinion of the courts of that state until after 6 years from the date of payment does not prevent the statute from running. New York Life Ins. Co. v. State, 192 W 404, 211 NW 288, 212 NW 801.

In an action for a partnership accounting brought by the surviving partner against the administrator of the deceased managing partner a few months after the death, where the trial court properly found that the managing partner was guilty of fraud and that the plaintiff did not discover such fraud until after the death, neither the statute of limitations nor laches applied to bar extension of the accounting back to the creation of the partnership. Caveney v. Caveney, 234 W 637, 291 NW 818.

See note to 102.17, citing Metropolitan Cas. Ins. Co. v. Industrial Comm. 260 W 298, 50 NW (2d) 399.

The statutes of limitations embraced in ch. 330 do not apply to special proceedings, such as certiorari and mandamus. Unexplained delay of approximately 8 years in instituting certiorari proceedings to review acts of state bar commissioners in correcting bar examination papers, constituted such laches as to bar maintenance of proceeding. Wurth v. Affeldt, 265 W 119, 60 NW (2d) 708.

As against a cause of action to recover compensation for services rendered under an entire, indivisible contract, the statute of limitations begins to run only when the services are terminated or the work is completed, although the work may consist of numerous parts or items and although the contract provides that the compensation shall be made at stated intervals or in instalments. Davies v. J. D. Wilson Co. 1 W (2d) 443, 85 NW (2d) 459.

The parties can contract for a shorter period of limitation than that provided for by statute. Olson v. Harnack, 10 W (2d) 256, 102 NW (2d) 761.

Although the term "cause of action" is not statutorily defined, in legal terminology it is said to accrue where there exists a claim capable of present enforcement; a suable party against whom it may be enforced, and a party who has a present right to enforce it. (Barry v. Minahan, 127 W 570, cited.) Holifield v. Setco Industries, Inc. 42 W (2d) 750, 168 NW (2d) 177.

893.15 History: 1941 c. 293; Stats. 1941 s. 330.15; 1943 c. 109; 1945 c. 29, 261; 1953 c. 496; 1965 c. 66 s. 2; Stats. 1965 s. 893.15.

The 30-year statute of limitations on actions concerning real estate was inapplicable to inheritance tax liens prior to amendment by ch. 29, Laws 1945, and the amendment does not affect the determination of the tax made in the instant case in proceedings prior to the amendment. Estate of Frederick, 247 W 268, 19 NW (2d) 249.

330.15 (1), Stats. 1963, applies to actions founded on adverse possession but where the claimant of title by adverse possession can prove the adverse possession, he falls within the exception in 330.15 (4) as one "in possession of the real estate involved as owner" even though the acts of adverse possession occurred more than 30 years before trial. Herzog v. Bujniewicz, 32 W (2d) 26, 145 NW (2d) 124.

The words "inheritance, gift and income tax liens," were inserted in 330.15 (4), in 1945, solely because of the position taken in the supreme court in Estate of Frederick, 247 W 268, 19 NW (2d) 248, that statutes of limitation do not apply to the state unless specifically so provided. 42 Atty. Gen. 115.

Conveyances — the 30-year statute. 1947 WLR 681.

893.155 History: 1961 c. 412; Stats. 1961 s. 330.155; 1965 c. 66 ss. 2, 5; Stats. 1965 s. 893.155.

330.155 cannot be applied retroactively. Shaurette v. Capitol Erecting Co. 23 W (2d) 538, 128 NW (2d) 34.

893.16 History: R. S. 1858 c. 138 s. 15; R. S. 1878 s. 4220; Stats. 1898 s. 4220; 1919 c. 679 s. 105; 1925 c. 4; Stats. 1925 s. 330.16; 1965 c. 66 s. 2; Stats. 1965 s. 893.16; 1969 c. 339 s. 27.

An action to enforce an equitable lien for the unpaid balance of purchase moneys for land is not barred by secs. 4220 and 4221, R. S. 1878. Spear v. Evans, 51 W 42, 8 NW 20.

Sec. 4220, R. S. 1878, applies to actions to confirm and enforce judgments, not actions to set aside and avoid them. Coon v. Seymour, 71 W 340, 37 NW 243.

If there has been no denial of the relation of equitable mortgagor and mortgagee an action to foreclose the mortgage is not barred after 20 years from the time of the mortgagee's possession. Phelan v. Fitzpatrick, 84 W 240, 54 NW 614.

An execution duly issued and partly executed within 20 years from the entry of a judg-

ment does not expire at the end of the 20-year period. The property so levied upon may be thereafter sold to satisfy the writ. Brown v. Hopkins, 101 W 498, 77 NW 899, 1118.

An action on an official bond of a public officer is covered by sec. 4220, R. S. 1878. Johnson v. Brice, 102 W 575, 78 NW 1086.

Where a contract of guaranty is indorsed upon a sealed contract but is not itself under seal, sec. 4222, Stats. 1878, and not sec. 4220, applies. Spencer v. Holman, 113 W 340, 89 NW 132.

Where a power of attorney was given authorizing the collection and enforcement of claims with power to commence, prosecute or compromise any action necessary, but there was no provision for payment of services of the attorney or for money expended in the execution of the power, a claim for money so expended was not upon a sealed instrument. Pierce v. Stitt, 126 W 62, 105 NW 479.

Where a mortgage under seal was given to secure a note, the right to enforce such mortgage continued for 20 years from the time of the last payment of interest on the note. Hughes v. Thomas, 131 W 315, 111 NW 474.

A lease executed under seal is within sec. 4220, even though it is executed by an agent and no authority under seal is shown. Mariner v. Wiens, 137 W 637, 119 NW 340.

An instrument in the form of a bond executed as a compliance with a statute requiring a bond and reciting that it was "signed, sealed and delivered" by the obligors is a sealed instrument although no scroll or other device for a seal follows the signatures. Oconto County v. McAllister, 155 W 286, 143 NW 702.

Sec. 4220 does not limit to 20 years after the rendition of a foreclosure judgment the time within which a sale under it may be had. There being no provision of law barring the right to sell land under such a judgment, existing statutes cannot be extended so as to have that effect on the ground of a supposed legislative policy to provide limitations as to all claims. Fish v. Collins, 164 W 457, 160 NW 163.

The limitation prescribed by 4220 (1) does not apply to a judgment for alimony during the life of the parties, such judgment remaining subject to modification during that period. Ashby v. Ashby, 174 W 549, 183 NW 965.

Liability on a broker's bond was dependent on existence of a cause of action against the broker created by exercise of election on part of the purchaser to tender back securities purchased and ask for his purchase money, and until that time no statute of limitations was applicable, and thereafter, the bond being a sealed instrument, the 20-year statute of limitations was applicable. Chas. A. Krause M. Co. v. Chris Schroeder & Son Co. 219 W 639, 263 NW 193.

Where a real estate mortgage under seal contains a covenant to pay the debt secured thereby, neither the right to foreclose nor the right to a personal judgment for deficiency is barred until the expiration of 20 years from the time of default, even though personal liability on the note itself is barred by the 6-year statute of limitations. But a provision, in a real estate mortgage under seal, that "in case of the nonpayment of any sum of money * * * at the time or times when the same shall become due * * * the whole amount of said principal sum shall, at the option of (the mortgagees) be deemed to have become due and payable without any notice whatever, and the same * * * shall thereupon be collectible in a suit at law," was a mere statement of condition and did not amount to a covenant to pay the debt secured by the mortgage and evidenced by a note, and hence the 20-year statute of limitations did not apply, but the 6-year statute, which governed as to the note, governed also as to the mortgage. (Ogden v. Bradshaw, 161 W 49, distinguished.) Bolter v. Wilson, 238 W 525, 300 NW 9.

A note on which the signatures of the makers was immediately followed by the printed letters "L. S." inclosed in brackets was under seal and constituted a sealed instrument, to which the 20-year statute of limitations applied. Fond du Lac C. L. & I. Co. v. Webb, 240 W 42, 1 NW (2d) 772, 2 NW (2d) 722.

An action by a village to recover from a utility company money paid to the company under an allegedly void contract under seal was not governed by the 20-year statute of limitations, relating to an action "upon" a sealed instrument, since to be "upon" such instrument the action must be brought to recover upon the terms thereof. Gilman v. Northern States P. Co. 242 W 130, 7 NW (2d) 606.

A renewal note, executed under seal, was governed as to limitations by the 20-year statute. Banking Comm. v. Townsend, 243 W 329, 10 NW (2d) 110.

Where the payee of a demand note, after removing from Wisconsin, prepared and mailed a new note for the makers in Wisconsin to sign, under seal, and they signed and returned it by mail to the payee in Maryland, the transaction was completed as to the makers when they mailed the new note, and the new note was a Wisconsin contract, under seal. Estate of Schultz, 252 W 126, 30 NW (2d) 714.

A provision "'Witnesseth our hands and seals" was not sufficient to constitute a contract an instrument under seal. Skelly Oil Co. v. Peterson, 257 W 300, 43 NW (2d) 449.

Where a stipulation in a divorce action was incorporated in the judgment and required the husband to continue to pay premiums on an insurance policy which had already lapsed, the beneficiary's claim against his estate for the face amount of the policy was subject to the 20-year statute of limitations. Estate of Zellmer, 1 W (2d) 46, 82 NW (2d) 891.

In view of the fact that no discrimination was made in the revision of 1849 or that of 1878 between the judgments of state courts and those of the federal courts within the state, an action upon a judgment rendered by such a federal court was not barred if begun within 20 years. Metcalf v. Watertown, 153 US 671.

893.17 History: 1913 c. 280; Stats. 1913 s. 4220a; 1925 c. 4; Stats. 1925 s. 330.17; 1965 c. 66 s. 2; Stats. 1965 s. 893.17.

Editor's Note: Sec. 330.17 is not mentioned in Price v. Marinette & Menominee P. Co. 197 W 25, 221 NW 381, and Benka v. Consolidated W. P. Co. 198 W 472, 224 NW 718, which hold

that condemnation is the landowner's exclusive remedy.

A condemnation proceeding, brought by a remainderman 38 years after his expectant estate accrued, 10 years after the particular estate expired and 29 years after the railroad was built, was barred by adverse possession. Hooe v. Chicago, M. & St. P. R. Co. 98 W 302, 73 NW 787.

"Assigns" does not include grantees. Peterson v. Lake Superior Dist. P. Co. 255 W 584, 39 NW (2d) 706.

A landowner, who has been injured by reason of flowing his land by a power company, may sue for damages under 330.17 or condemn under ch. 32. (Peterson v. Wisconsin River P. Co. 264 W 84, 58 NW (2d) 287, overruled.) Zombkowski v. Wisconsin River P. Co. 267 W 77, 64 NW (2d) 236.

893.18 History: R. S. 1858 c. 138 s. 16, 22; 1862 c. 184 s. 1; R. S. 1878 s. 4221; Stats. 1898 s. 4221; 1899 c. 285 s. 1; Supl. 1906 s. 4221; 1925 c. 4; Stats. 1925 s. 330.18; 1931 c. 79 s. 35; 1951 c. 321; 1953 c. 61; 1965 c. 66 s. 2; Stats. 1965 s. 893.18.

A bill to correct a mistake in a deed must be filed within 10 years after its delivery. Parker v. Kane, 4 W 1.

Maintenance of a dam for 20 years does not confer prescriptive right to flow lands which have not in fact been flowed so long. Smith v. Russ, 17 W 227.

Only milldams are within ch. 184, Laws 1862. Arimond v. Green Bay & M. C. Co. 31 W 316.

Flowage for 10 years, without claim for damages, bars action even for those accruing immediately prior to action. Sabine v. Johnson, 35 W 185.

Sec. 22, ch. 138, R. S. 1858, only includes actions for relief not before provided for. Gilman v. Sheboygan & Fond du Lac R. Co. 40 W 653.

Secs. 4220 and 4221, R. S. 1878, do not apply to an action to enforce an equitable lien for unpaid purchase money. Spear v. Evans, 51 W 42, 8 NW 20.

One who maintains a milldam which causes the waters of a nonnavigable stream to set back and overflow the lands of another to a certain height uninterruptedly for 10 years acquires a prescriptive right to flow them to that extent. (Cobb v. Smith, 38 W 21, distinguished.) Johnson v. Boorman, 63 W 268, 22 NW 514.

An answer in an action for damages for the flowage of land which alleges that neither the dam, the water therein nor the pond thereof has been changed in height or level within the last 10 years preceding the commencement of the suit and that they have been kept and maintained at the same height continuously during that time does not plead this section of the statute because it does not allege an easement or use on the land of another. But where evidence is admitted and instructions are given the jury the answer will be treated by the appellate court as amended. Murray v. Scribner, 74 W 602, 43 NW 549.

Sec. 4221 does not apply to legal action brought to enforce contribution between sureties. Bushnell v. Bushnell, 77 W 435, 46 NW 442.

A right of action against the grantee of an easement who was given 5 years in which to perform the condition on which the grant was made does not arise until the expiration of that period. Pinkum v. Eau Claire, 81 W 301, 51 NW 550.

An action to set aside administrator's sale on account of fraud is within sec. 4221, Stats. 1898. Gibson v. Gibson, 108 W 102, 84 NW 22.

An action foreclosing a mortgage on land located within this state does not accrue outside the state, even though both parties are nonresidents. Wells v. Scanlan, 124 W 229, 102 NW 571.

An action against a surviving partner for an accounting did not accrue until an administrator was appointed for the estate. Stehn v. Hayssen, 124 W 583, 102 NW 1074.

A remedy at law and also in equity existing concurrently, the statute bars the equitable at the same time the legal one is barred. Nolan v. First Nat. Bank, 161 W 22, 152 NW 468.

An action or proceeding to enforce against the estate of a deceased divorced husband the weekly payments required of him by the divorce judgment rendered in another state is not barred by sec. 4221 (1) except as to the payments which fell due 10 years or more prior to his death. Will of Burghardt, 165 W 312, 162 NW 317.

An action to quiet title brought against the sheriff by the original owner of land sold on execution, the purchaser and claimants under such purchaser, or alternatively to recover in the same action a money judgment for damages against the sheriff in case it shall be adjudged that his misconduct has lost the title, where such owner claims a valid redemption, is not barred before the expiration of 10 years, under sec. 4221 (4). Williams v. Thrall, 167 W 410, 167 NW 825.

The exclusive jurisdiction of courts of equity over controversies between a trustee and the beneficiary is confined to the establishment and protection of the trust; other controversies between them are cognizable in courts of law. The latter are barred by the 6-year statute of limitations and the former by the 10-year statute. Woodmansee v. Schmitz, 202 W 242, 232 NW 774.

Lapse of time before acceptance of a charitable bequest is not significant, so long as the parties are in the same condition; and the statute of limitations does not apply to a continuing express trust not repudiated by the trustees. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

An action by a village to have the bonds issued and sold by it canceled and declared void, commenced more than 10 years after the issuance of the bonds, would be barred by 330.18 (4) or (6). Gilman v. Northern States P. Co. 242 W 130, 7 NW (2d) 606.

330.18 does not apply to income tax liens under 72.05. Estate of Frederick, 247 W 268, 19 NW (2d) 249.

The doctrine, that where a cause of action was wholly created by a statute which has been repealed it is necessary that the statute contain a saving clause expressly reserving rights of action accruing prior to the repeal, has no application to statutes of limitation, and does not affect the presumption that the legis-

lature did not intend a statute of limitations to operate retrospectively. Estate of Cameron, 249 W 531, 25 NW (2d) 504.

When the Illinois payee of a note due on March 31, 1930, payment of which was guaranteed by an instrument under seal, filed a claim against the estate of the deceased maker in Illinois on May 21, 1931, the statute of limitations was then set running on the contract of guaranty, so that under 330.18 (2), the applicable 10-year statute of limitations, a claim on the note, filed against the estate of a deceased guarantor by a purchaser of the claim on May 2, 1946, was barred. Estate of Bitker, 251 W 538, 30 NW (2d) 449.

330.18 (4) applies to divorce actions, and operates to bar a divorce action grounded on cruel and inhuman treatment occurring more than 10 years before the commencement of the divorce action. Zlindra v. Zlindra, 252 W 606, 32 NW (2d) 656.

330.18 (4) does not apply in all cases where equitable relief is sought, but only in controversies between trustee and beneficiary as to the establishment, enforcement, protection and preservation of trusts of which controversies the court of chancery had sole and exclusive jurisdiction. 330.18 (4) does not apply to an ordinary action by a corporation against its former general manager for an accounting of corporate funds. Haueter v. Budlow, 256 W 561, 42 NW (2d) 261.

An action to reform a correction deed by eliminating therefrom a certain provision, also contained in the original deed, was properly dismissed on the ground that the alleged cause of action accrued under the original deed, more than 10 years before the commencement of the action to reform, and hence was barred by 330.18 (4). Milwaukee County v. City of Milwaukee, 259 W 560, 49 NW (2d) 902.

An action to reform the description in a lease is under 330.18 (4), so that the 10-year statute of limitations applies rather than the 6-year. Langer v. Stegerwald Lumber Co. 262 W 383, 55 NW (2d) 389, 56 NW (2d) 512.

330.18 (4) applies to an action for annulment of marriage based on the alleged insanity of one of the parties at the time of the marriage. A cause of action for annulment on the ground of insanity of the wife at the time of the marriage arose on the date of the marriage, so that the statute started to run from that date. Witt v. Witt, 271 W 93, 72 NW (2d) 748.

Neither 330.18 (6) nor 330.19 (7) bar an action by the state to revoke a physician's license procured through fraud. State v. Josefsberg, 275 W 142, 81 NW (2d) 735.

See note to 247.03, citing Ginkowski v. Ginkowski, 28 W (2d) 530, 137 NW (2d) 403.

The state's claim under 46.10, Stats. 1967, for maintenance cost of a child during its minority against a parent who, on advice that it was retarded, caused the child to be committed to a curative institution of the state, is covered by 893.18 (6). Estate of Allen, 43 W (2d) 260, 168 NW (2d) 869.

An action to establish plaintiff's right as heir to an estate escheated to the county orphans' board under an unconstitutional statute was not barred by any statute of limitations. Gorny v. Trustees of Milwaukee County Orphans' Board, 14 F Supp. 450.

893.19 History: R. S. 1858 c. 138 s. 17; 1872 c. 53; R. S. 1878 s. 4222; 1895 c. 149; 1897 c. 304; Stats. 1898 s. 4222; 1899 c. 307; Supl. 1906 s. 4222; 1909 c. 151; 1925 c. 4; Stats. 1925 s. 330.19; 1929 c. 24; 1929 c. 504 s. 126; 1931 c. 79 s. 36; 1941 c. 70; 1953 c. 61 s. 139; 1953 c. 444; 1953 c. 631 s. 75; 1955 c. 10; 1957 c. 84; 1957 c. 260 s. 43; 1957 c. 435, 674; 1965 c. 66 ss. 2, 5; Stats. 1965 s. 893.15.

Editor's Note: The 7th subdivision, governing actions for relief on the ground of fraud, was given its existing form by ch. 24, Laws 1929; and some of the prior decisions relating to such actions are no longer relevant. The 9th subdivision, governing actions on claims against decedents or against their estates, was given its existing form by sec. 163, ch. 10, Laws 1955. The 5th subdivision, governing actions to recover damages for an injury to property, or for an injury to the character or rights of another, not arising on contract, was given its existing form by ch. 435, Laws 1957, and ch. 66, Laws 1965. The 1957 statute also created sec. 330.205, governing actions to recover damages for injuries to the person for such injuries sustained on or after July 1, 1957; prior to its amendment by the 1957 statute the 5th subdivision had governed such actions.

1. Judgment.
2. Bond, coupon, warrant, contract.
3. Any other contract.
4. Liability created by statute.
5. Injury to property or character.
6. Recovery of personal property.
7. Relief for fraud.
8. Notice to railroad corporation.
9. Absence of probate.

1. Judgment.

A judgment for plaintiff rendered in another state on a judgment note made in this state, the maker and holder residing here, and which was barred by law of this state, will be relieved against. Brown v. Parker, 28 W 21.

Action to recover money paid on a judgment rendered in this state and afterwards vacated because of reversal of a judgment in other state does not accrue until such reversal. Mann v. Aetna Ins. Co. 38 W 114.

Where a transcript of a judgment of a justice has been filed in the circuit court it becomes in effect a judgment of a court of record and sec. 2900, Stats. 1898, and not sec. 4222, applies. Sullivan v. Miles, 117 W 576, 94 NW 298.

2. Bond, Coupon, Warrant, Contract.

230.19 applies against a village, so as to bar an action by a village to recover from a utility company a sum of money paid to the company under an allegedly void contract relating to an electric distribution system. Gilman v. Northern States P. Co. 242 W 130, 7 NW (2d) 606.

Sec. 4222, R. S. 1878, applies to coupons of municipal bonds whether detached or not, and begins to run from maturity. Koshkonong v. Burton, 104 US 668.

The fact that plaintiff is prevented by the

action of the officers of the municipality which issued the bond from making service on its mayor does not affect the question. Amy v. Watertown, 130 US 320.

3. Any Other Contract.

The statute runs against a check from its date whether the drawer had funds in the bank or not. Brust v. Barrett, 16 Hun. (New York) 409.

On a chattel duebill the statute does not commence to run until demand is made. Noonan v. Ilsley, 21 W 138.

Acceptance of a deed, stating that the grantee is to pay a mortgage debt, though not signed or sealed by him, is a simple contract. Bishop v. Douglass, 25 W 696.

The period of limitation is not extended on promissory note by giving with it warrant of attorney under seal. Brown v. Parker, 28 W 21.

Where a surety has paid more than his share of the debt a right of action for contribution arises at the time the payment is made and statute runs from that date. Bushnell v. Bushnell, 77 W 435, 46 NW 442.

The liability to repay advances made, if there is no agreement as to the time of payment, terminates at the end of 6 years, so that upon the foreclosure of an equitable mortgage thereafter a personal judgment for a deficiency cannot be rendered. Phelan v. Fitzpatrick, 84 W 240, 54 NW 614.

A guarantee not under seal of a contract which is under seal is barred in 6 years. Spencer v. Holman, 113 W 340, 89 NW 132.

Where power of attorney authorizing collection and enforcement of claim with power to commence, prosecute or compromise necessary actions was given, but contained no provision to pay the services of the attorney or money expended in the execution of the power, a claim for money so expended was upon an implied contract and not upon a sealed instrument. Pierce v. Stitt, 126 W 62, 105 NW 479.

A certificate of a bank is a negotiable note. The statute begins to run against it from the date of its issuance although no demand of payment is made. Lusk v. Stoughton S. Bank, 135 W 311, 115 NW 813.

W, who held a certificate issued by a benefit society, died in 1901, but his death was not ascertained until 1914. By agreement with the society his heirs continued paying the assessments to keep the certificate alive until it could be demonstrated whether W was dead or still living. The payments of assessments continued the certificate in force beyond the 7 years next following the disappearance; while so kept alive no right of action by the heirs accrued thereon and the statute did not begin running against a recovery of the assessments until the association in 1914 rejected a demand for payment on the certificate. White v. Brotherhood Locomotive Firemen and Enginemen, 167 W 323, 167 NW 457.

Where an action on a note due October 1, 1919, was begun on May 2, 1927, and the indorser and a guarantor were made parties defendant, and there was no allegation of payment by defendants secondarily liable, the complaint showed on its face that a claim against them was barred. Payments made by the makers of a note do not toll the statute as to those secondarily liable. Bergmann v. Roll, 195 W 120, 217 NW 746.

In order to renew a debt once barred, there must be express acknowledgment of the debt with intention to renew it as a legal obligation. Partial payment, to operate as a new promise, must be made under circumstances warranting a clear inference that the debtor recognized the debt as an existing liability. Shea v. Shea, 198 W 613, 225 NW 326.

A purchaser, whose action for original misrepresentation in sale of mortgage was barred, was entitled to recover on proof that within the statutory period sellers induced her to waive contract rights on further misrepresentations. Danielson v. Bank of Scandinavia, 201 W 392, 230 NW 83.

A contract to bid enough on a foreclosure sale to protect the owner of a mortgage is not breached prior to the foreclosure sale. Starbird v. Davison, 202 W 302, 232 NW 535.

An interest payment by the maker of a note, following the accommodation maker's statement that the plaintiff would get interest soon, suspended limitations as to the accommodation maker. Gillitzer v. Kremer, 203 W 269, 234 NW 503.

The 6-year statute of limitations ran on a cause of action, for breach of contract to build a silo in a workmanlike manner, from the date the silo was completed, even though plaintiff did not know of the breach. But an action on a warranty to repair defects in the silo for 10 years, brought within the 10-year period was not barred. Krueger v. V. P. Christianson S. Co. 206 W 460, 240 NW 145.

A clause in a note executed by two joint makers, waiving demand, notice and protest, and agreeing to "all extensions and partial payments" before and after maturity, without prejudice to the holder, is construed to include extensions by operation of law due to payment as well as those made by contract. Such clause was not a waiver of the statute of limitations, but only an agreement which operated to extend the time when the statute began to run. Kline v. Fritsch, 213 W 51, 250 NW 837.

Where M was trustee for J of a fund remaining at the death of M originally represented by a certificate of deposit, but M had had a certificate made payable to herself and son C or survivor, a trust company receiving the fund by virtue of the latter certificate after the death of M was a trustee, as to J, of a constructive trust created by operation of law, which constructive trust was subject to the statute of limitations and the statute began to run against J's claim at the death of M at which time J's right to the fund accrued. Glebke v. Wisconsin Valley T. Co. 216 W 530, 257 NW 620.

In an action by a legatee to enforce payment of legacy charged upon devised land, a complaint, alleging that payments upon legacy had been made by devisees within 6 years of commencement of action, did not show on its face that limitations had run against the action, as respects the right to enforce a lien against devised land, which was in possession of purchaser at foreclosure sale, since the lien

was enforcable against a purchaser so long as the personal obligation of any devisee to pay the legacy was kept alive by payment thereon. Trickle v. Snyder, 217 W 447, 259 NW 264.

Where the question was whether a debtor had tolled the statute of limitations by delivering lime to a creditor as payment on a note, the issue of fact for the jury was whether the creditor became indebted to debtor for the lime. Earl v. Napp, 218 W 433, 261 NW 400.

Where a brewing company owned saloon fixtures in the possession of F as bailee in a saloon operated by him, but K purchased the premises and continued in open and notorious possession for nearly 9 years before any demand for possession was made or action commenced against him, a buyer of the fixtures through the brewing company was barred from recovering them from K by the 6-year statute of limitations. Ketler v. Klingbeil, 219 W 213, 262 NW 612.

The city's causes of action against the deceased city treasurer's administratrix, and a broker, for profits made through the illegal use of city funds, were subject to the 6-year statute of limitations, since the action was one upon implied contract. The action was not one that was ever solely cognizable by a court of chancery, but one in which a court of equity exercised a merely concurrent jurisdiction, so that the 10-year statute of limitations was not applicable. Milwaukee v. Drew, 220 W 511, 265 NW 683.

With respect to the question of whether a claim filed against the estate of a decedent was barred by limitations, the evidence warranted the conclusion of the court that the decedent, who had acted as the claimant's agent for the investment of her funds, did not convert the claimant's funds or note when, using funds of his own and of a relative in addition to funds of the claimant, he acquired a mortgage in his own name, but took 3 bearer notes in the exact amounts contributed by each. Estate of Pratt, 221 W 114, 266 NW 230.

A creditor was entitled to recover on account of a note executed more than 18 years prior to institution of action where the item was carried on open account and included in subsequent accounts stated, and payments on open account served to keep item enforceable through the time which elapsed. Meyer v. Selover, 225 W 389, 273 NW 544.

Where the decedent had contracted to contribute to the claimant's expense for the care of their incompetent brother by monthly payments, all promised payments which had accrued under the contract prior to 6 years before the death of the decedent were barred by 330.19, but not those payments which accrued within six years of his death. Will of Bate, 225 W 564, 275 NW 450.

The personal liability for payment of a legacy is barred by the 6-year statute of limitations. Mitchell v. Mitchell, 230 W 461, 283 NW 448.

Under 220.08, Stats. 1933, the running of the statute of limitations, so far as the banking commission is concerned, is stayed as to obligations of the bank on the date when the commission takes charge to liquidate, so that after such date the statute of limitations is not applicable to bar a claim filed during the pendency of the liquidation proceedings. In re Bank of Viroqua, 232 W 644, 288 NW 266.

Where the defendants gave their joint and several promissory note to the plaintiff for property, purchased by them as partners, and then formed a corporation to which all of the partnership assets were transferred, and the defendants, owning all of the corporate stock and serving as directors and officers, made arrangements with their corporation to pay their indebtedness to the plaintiff, and participated in this arrangement and acquiesced in the payments, the situation was the same as if each defendant obligor had contributed to each payment so made, and the payments so made tolled the statute of limitations as to the obligation of each on the note. Goerlinger v. Juetten, 237 W 543, 297 NW 361.

Where the makers of a note given for a loan subsequently executed a chattel mortgage reciting that it secured an amount of interest in default on the loan, and also executed a note in the amount of the defaulted interest, the new note and mortgage did not constitute an unconditional payment of the interest on the original note in the absence of evidence of any understanding between the parties to this effect, but payments on the new note were payments of interest on the original note and had the effect of tolling the running of the statute of limitations thereon. Penterman v. Penterman, 239 W 17, 300 NW 765.

Where a claim against an incompetent, based on a debt, was not filed in the guardianship proceedings until after the 6-year statute of limitations had run thereon, but the order made pursuant to 319.41 and fixing the time within which claims might be filed was entered before the 6-year statute had run, and the claim was filed within the time limited by the order, the claim was not barred and was properly allowed. Guardianship of Thornton, 243 W 397, 10 NW (2d) 193.

Where a transaction contemplated a conveyance of land to the city and a covenant in that conveyance binding the city to reroute certain creeks, acceptance of the grantor's offer by resolution of the common council did not close the contract and disable the city officers from signing and sealing the deed, but was a sufficient authorization to the city officers to do so, and the city's obligation, under the deed so signed and sealed, fell in the category of covenants or sealed obligations rather than that of simple contract, so that a cause of action against the city for breach was not governed by 330.19 (3). Mitchell Properties, Inc. v. Milwaukee, 245 W 96, 13 NW (2d) 508.

As between an assistant city treasurer and her surety on the one hand and third parties on the other, the official bond of the assistant city treasurer was a contract of indemnity against liability or a contract to pay, and not an agreement to save harmless or on the part of the surety to pay if the principal did not, so that the city treasurer's cause of action on the bond for special damages resulting from the assistant treasurer's breach of the contract in failing to report shortages arose when the assistant treasurer breached the contract and not later when the city treasurer made good the shortages to the city; hence, the bond not being under seal, and the action not having

been commenced within 6 years after the cause of action arose, the action was barred by 330.19 (3). Maxwell v. Stack, 246 W 487, 17 NW (2d) 603.

The execution and delivery of a codicil, wherein the testatrix directed her executor to pay a certain note of which she was a maker, tolled the statute of limitations and revived the debt. Estate of Schultz, 252 W 126, 30 NW (2d) 714.

A motion to amend a complaint based on express contract, by setting forth an alternative cause of action in quantum meruit, should have been denied as too late for the commencement of an action on such alternative cause of action, the statute of limitations, (3), having run thereon. Halvorson v. Tarnow, 258 W 11, 44 NW (2d) 577.

Where the first item in the plaintiff's account for fees earned in reporting hearings was $11.60 earned in 1940, and his action for such fees was not brought until 1948, the statute of limitations had run as to such item. O'Leary v. Hannaford, 258 W 146, 44 NW (2d) 908.

If the plaintiff Red Cross chapter was without authority to transfer its fund in trust, its remedy to recover the same was an action for money had and received, but in such case the plaintiff's claim was barred by 330.19 (3), covering implied contracts. American Nat. Red Cross v. Banks, 265 W 66, 60 NW (2d) 738.

When no time is specified for work done, payment is not due until completion of the work, and the limitation period then begins to run. Estate of Dobrecovich, 17 W (2d) 1, 115 NW (2d) 597.

Since there is no limitation specifically made applicable to sec. 301 (a) by any provision of the Labor Management Relations Act, nor any that can be supplied by reasonable construction, the 6-year limitation set forth in 330.19 is applicable to actions for breach of collective bargaining agreements affecting interstate commerce. Tully v. Fred Olson Motor Service Co. 27 W (2d) 476, 134 NW (2d) 393.

The general rule is that the right of action of the insured under a policy of insurance accrues against the insurer on the date of loss, and the applicable statute of limitations is 893.19 (3), Stats. 1967. Gamma Tau Ed. Found. v. Ohio Cas. Ins. Co. 41 W (2d) 675, 165 NW (2d) 135.

The county's contention that it properly pleaded a cause of action in contract not barred by the statute of limitations because the action did not accrue until the architects completed their contract by issuance of the final certificate of payment within the 6-year statutory period was without merit, for issuance of that certificate did not amount to an act of supervision or inspection, and, as the evidence disclosed, any defect in design of the building or failure to properly supervise or inspect the work as it progressed could only have occurred prior to the crucial date, which was more than 6 years before commencement of the action. Milwaukee County v. Schmidt, Garden & Erikson, 43 W (2d) 445, 168 NW (2d) 559.

The statute of limitations was no bar to an action brought by an insured against his insurer on an uninsured motorist's coverage endorsement for injuries sustained in an automobile accident attributed to the negligence of an uninsured motorist whose vehicle collided with that of the insured, where suit was commenced less than 6 years but more than 3 years after the cause of action accrued, for the cause of action was grounded in contract and not in tort, and hence 893.19 (3) applied. Sahloff v. Western Cas. & Surety Co. 45 W (2d) 60, 171 NW (2d) 914.

4. Liability Created by Statute.

Sec. 4222 (4), R. S. 1878, applies to an action for liability created by statute authorizing damages for loss (ch. 255, Laws 1889). Kuhl v. Chicago & Northwestern R. Co. 101 W 42, 77 NW 155.

Remedies against a person as executor are barred by a lapse of 6 years immediately following his discharge as such. Nolan v. First Nat. Bank, 161 W 22, 152 NW 468.

Printing of an allegedly infringing book by an independent printing contractor in Wisconsin would give rise to a cause of action there against defendant, who procured such contractor to do the printing, for infringement, if any exists, and an action brought in federal district court in New York would be governed by the Wisconsin 6-year statute of limitations. Greenbie v. Noble, 151 F Supp. 45.

5. Injury to Property or Character.

Sec. 4222, R. S. 1878, runs against a right of action in the state. Coleman v. Peshtigo Co. 47 W 180, 2 NW 111.

An action to recover damages for a continuing nuisance is not barred because it had existed for more than 6 years prior to the commencement of the action. Ramsdale v. Foote, 55 W 557, 13 NW 557.

There is no statute which bars an action for a continuing injury to property. Cedar Lake H. Co. v. Cedar Creek H. Co. 79 W 297, 48 NW 371.

A proceeding by a remainderman to recover compensation for taking of land by a railroad company is within sec. 4222 (5) and must be begun within 6 years. The running of the statute is not prevented by an intervening life estate. Hooe v. Chicago, M. & St. P. R. Co. 98 W 302, 73 NW 787.

Action for damages for a recurring nuisance occasioned by the faulty construction of a railroad bridge and the consequent flooding of land never occupied or used by a railroad company for right-of-way purposes is not barred at the expiration of 6 years from the date of such faulty construction. Verbeck v. Minneapolis, St. P. & S. S. M. R. Co. 159 W 51, 149 NW 764.

Although sec. 4222 (5) provides for no exceptions it has been held on grounds of public policy to be inapplicable to transactions between husband and wife (Flanagan's Estate v. Flanagan's Estate, 169 W 537, 173 NW 297); and in the present case it is inapplicable to the time within which a claim must be filed in liquidation proceedings conducted by the commissioner of banking, after he has taken possession. This is because the state has stepped in and barred the claimant's right to proceed against the bankrupt and for that reason the running of the statute must be stayed. The liability of a trust company to a customer

for a negligent loaning of his funds accrues when the loan is made, and the statute begins to run then against the remedies of the customer, not when the loan is from time to time renewed and new security taken. Wisconsin T. Co. v. Cousins, 172 W 486, 179 NW 801.

A cause of action for malpractice sounding in tort accrues when the injury caused by professional malpractice occurs, as distinguished from when the injury is discovered at a later date. Milwaukee County v. Schmidt, Garden & Erikson, 43 W (2d) 445, 168 NW (2d) 559.

A cause of action for criminal conversation is barred by the 6-year period of limitation under 330.19 (5), and hence, although the complaint also stated a cause of action for alienation of affections, it was not subject to demurrer on the ground that the action was not commenced within one year. Woodman v. Goodrich, 234 W 565, 291 NW 768.

Where a tenant removed certain partitions in a garage building during 1928 and 1929, and the landlord knew of such removal before the expiration of the original lease in 1931, but did not commence an action for damages therefor until 1939, the landlord's cause of action was barred by the 6-year statute of limitations. Voelz v. Spengler, 237 W 621, 296 NW 593.

A surety's cause of action to recover from the defendant amounts paid by the surety to persons protected by a bond covering the defendant as agent for the sale of steamship tickets was barred by the 6-year statute of limitations at the time the defendant went into bankruptcy although the defendant's indemnity contract with the surety was under seal; but such cause of action, under the pleadings, was one on the indemnity contract, and the defendant's liability thereon was contractual, so that the liability was discharged by the defendant's discharge in bankruptcy. Maryland Cas. Co. v. Beleznay, 245 W 390, 14 NW (2d) 177.

A complaint against a city for damages for the desecration of tombs and removal of bodies from crypts in a mausoleum, in a public cemetery operated by the city, set forth no more than a claim for damages for injury to property, barred by the 6-year statute of limitations, and the bare allegation that the city's conduct amounted to fraud did not make the action one based on fraud so as to postpone the running of the statute, by virtue of 330.19 (7). Speth v. Madison, 248 W 492, 22 NW (2d) 501.

The statute of limitations did not begin to run against a cause of action for damages for removal of lateral support to the plaintiff's land until the plaintiff suffered an injury. School Dist. v. Kunz, 249 W 272, 24 NW (2d) 598.

An action for malicious communication of false, defamatory and slanderous information to the U.S. immigration service was a claim for defamation barred in 2 years by 330.21 (2) and was not covered by 330.19 (5). Cordova v. Gutierrez, 23 W (2d) 598, 128 NW (2d) 62.

6. Recovery of Personal Property.

The evidence was insufficient to establish an interruption of the running of the adverse possession. Closuit v. Arpin L. Co. 130 W 258, 110 NW 222.

An action for conversion of money belonging to a decedent within a year before decedent's death is barred in 6 years. Palmer v. O'Rourke, 130 W 507, 110 NW 389.

Money deposited by an employe with his employer for safekeeping constitutes a bailment, and the statute of limitations does not begin to run until a demand has been made for a return of the money. Smith v. Poor Hand Maids of Jesus Christ, 193 W 63, 213 NW 667.

A cause of action of a special administratrix of the estate of a decedent whose son had wrongfully taken possession of the decedent's farm personal property, to recover such property or its value from the son, was a cause of action for conversion, to which the applicable statute of limitations was 330.19 (6). Peters v. Kell, 12 W (2d) 32, 106 NW (2d) 407.

7. Relief for Fraud.

The statute does not run against an action for relief on the ground of fraud until discovery of the facts constituting the fraud or information such as leads a reasonable man to the belief that a fraud has been committed and would, upon diligent inquiry, lead to the discovery of the facts. O'Dell v. Burnham, 61 W 562, 21 NW 635.

If the fraud was discovered more than 6 years before the action was brought the action is barred. O'Dell v. Rogers, 67 W 168, 30 NW 229.

Mere constructive notice is not sufficient to put the statute in motion. Fox v. Zimmerman, 77 W 414, 46 NW 533.

In an action for the conversion of a chattel, the plaintiff having alleged that defendant fraudulently concealed the facts from him, the former may be allowed to show when and from whom he obtained knowledge, although defendant was not present at the time. Hall v. Stevens, 89 W 447, 62 NW 81.

Where relief from a judgment is sought upon newly-discovered evidence, application must be made within the time limited by sec. 2879, Stats. 1898, but when it is based upon fraud sec. 4222 (7) applies. Crowns v. Forest L. Co. 102 W 97, 78 NW 433.

Where executors misinformed a widow as to the value of the estate, the statutes began to run against her from the time she knew of the fraud, or might have known it by the exercise of ordinary care. Ludington v. Patton, 111 W 208, 86 NW 571.

Where, in an action brought under the provisions of secs. 3237-3239, Stats. 1898, based on the alleged fraud of the managing officers of a corporation, it was established that the directors and a majority of the stockholders (including the plaintiff) knew of the alleged fraud 7 years before the action was commenced, the action was barred by sec. 4222 (7). Figge v. Bergenthal, 130 W 594, 109 NW 581, 110 NW 798.

The mere fact that a railroad company fraudulently made incorrect returns of its gross earnings for purposes of taxation did not amount to a fraudulent concealment of the cause of action so as to prevent the statute of limitations from running. State v. Chicago & Northwestern R. Co. 132 W 345, 112 NW 515.

Sec. 4222 (7), Stats. 1898, applies to an action to set aside a tax sale deed alleged to have

been procured by the fraud of the defendant. Boon v. Root, 137 W 451, 119 NW 121.

Sec. 4222 (7) does not save the right of action for the recovery of real property where a fraudulent entry was made under a written instrument. Steinberg v. Salzman, 139 W 118, 120 NW 1005.

The clearing up of a record in a county court, of proceedings by which residuary legatees had settled their respective claims with a child fraudulently represented to be a son of the deceased, could be effected only by an action; and such an action did not accrue until the discovery of the fraud and was not barred until the expiration of 6 years thereafter. Although the legatees suspected the fraud, they were not barred by laches while the evidence was insufficient to support a reasonable expectation of success in attacking the fraud. Guardianship of Reeve, 176 W 579, 186 NW 736.

Continued and renewed material false representations, which merely prevent the discovery of the original fraud, do not toll the statute of limitations as to a cause of action arising from the original fraud. Seideman v. Sheboygan L. & T. Co. 198 W 97, 223 NW 430.

A purchaser whose action for original misrepresentation in the sale of a mortgage was barred was held entitled to recover on proof that within the statutory period sellers induced her to waive contract rights on further misrepresentations. Danielson v. Bank of Scandinavia, 201 W 392, 230 NW 83.

The 6-year limitation runs against an action for relief on the ground of fraud from the time when by the use of reasonable diligence the fraud could have been discovered. The statute bars assertion of rights against the trustee of an express trust by the cestui que trust where more than 6 years elapse after repudiation of the trust is brought home to him. Gottschalk v. Ziegler, 208 W 55, 241 NW 713.

An action commenced October 24, 1932, for deceit is barred by the 6-year statute of limitations where the complaint on its face shows that the misrepresentations relied upon were made on January 20, 1923; and subsequent misrepresentations amounting merely to a fraudulent concealment of a cause of action would not toll the statute. (Blake v. Miller, 178 W 228, 189 NW 472, and Seideman v. Sheboygan L. & T. Co. 198 W 97, 223 NW 430, approved.) Larson v. Ela, 212 W 525, 250 NW 379.

As respects the liability of legatees for claims against their testator, the statute of limitations does not run until a cause of action accrues against the legatees; and a cause of action against the legatees of a surety upon the bond of a discharged administratrix did not accrue until a judgment was rendered setting aside, for fraud, a decree allowing the final account of the administratrix. Clark v. Sloan, 215 W 423, 254 NW 653.

If a grantor had a right of action in 1917 to recover damages for fraud then perpetrated on him by grantees' agents, then all rights of action based on that fraud became barred upon expiration of 6 years, and the statutory amendment (in 1929) providing that a cause of action for fraud should not be barred until 6 years after discovery of fraud did not apply. Gollon v. Jackson Milling Co. 224 W 618, 273 NW 59.

With respect to what constitutes discovery of the facts constituting the fraud, within the statute of limitations, when information brought home to a defrauded party is such as to indicate where the facts constituting the fraud can be discovered on diligent inquiry, it is his duty to make the inquiry, and if he fails to do so he is charged with notice of all facts to which such inquiry might have led. Ihlenfeld v. Seyler, 236 W 255, 295 NW 26.

When a physician, in the course of his professional treatment, continued to disregard the presence of surgical needles in the patient's abdomen as a factor in her condition in the face of his own knowledge that they were there, he was guilty of malpractice; but when informed by the patient that she proposed to seek other medical advice, he, for the purpose of forestalling this course of action and not in connection with any medical treatment, repeated his misrepresentations, thereby causing the patient to abandon her announced purpose, he committed a new breach of the patient's rights constituting fraud and redressable by an action for deceit, governed as to limitations by 330.19 (7). Krestich v. Stefanez, 243 W 1, 9 NW (2d) 130.

The recording acts are not intended as a protection to those who make fraudulent representations. Schoedel v. State Bank of Newburg, 245 W 74, 13 NW (2d) 534.

Where the city, pursuant to 30.02 (8), Stats. 1935, had a dock wall reconstructed and assessed benefits prior to the reconstruction, the property owner's complaint against the city for redress on the ground that the dock wall had failed and was useless because the city had negligently permitted the contractor to use improper and defective materials, failed to require performance in a workmanlike manner, failed to inspect the work, and accepted it in a defective condition, stated a cause of action based on fraud, hence was not subject to the contract 6-year statute of limitations. Marine Ex. Bank v. Milwaukee, 246 W 1, 16 NW (2d) 381.

Under 330.19 (7), as amended by ch. 24, Laws 1929, causes of action at law, as well as in equity, for relief on the ground of fraud, have not accrued until the discovery of the facts constituting the fraud. Marine Ex. Bank v. Milwaukee, 246 W 1, 16 NW (2d) 381.

The general rule is that a cause of action for damages for breach of a contract arises when the breach occurs, and that the statute of limitations begins to run from that time even though a party may remain in ignorance of the facts which gave rise to his cause of action, the running of the statute on such a cause of action not being postponed by reason of 330.19 (7), relating to the discovery of a fraud. Maxwell v. Stack, 246 W 487, 17 NW (2d) 603.

Where nothing had occurred to warn the plaintiff that the defendant was making any claim to the property in his name inconsistent with his obligations of a joint adventurer or as a fiduciary until the time when he asserted that the plaintiff's rights had been terminated, the statute of limitations on the plaintiff's

right to bring an action for relief on the ground of fraud did not begin to run until such time. Berlin v. Ruehle, 255 W 589, 39 NW (2d) 708.

See note to 102.17, citing Fossman v. Industrial Comm. 257 W 540, 44 NW (2d) 266.

A complaint alleging that, because of fraudulent representations made by the defendants, the plaintiff signed a release of his cause of action for personal injuries, not knowing it to be a release, but failing to allege that thereby he was delayed in bringing action on account of his injuries until the time had run when he could no longer do so, and hence failing to plead a causal connection between his fraudulently induced act or failure to act and the damage sustained in the loss of his right to sue for his personal injuries, did not state a cause of action in deceit. (Krestich v. Stefanez, 243 W 1, distinguished.) Gerke v. Johnson, 258 W 583, 46 NW (2d) 829.

Under 330.19 (7) a cause of action for fraud is barred if the aggrieved person was placed in possession of facts which, if followed by diligent inquiry, would have disclosed the fraud. Hinkson v. Sauthoff, 272 W 33, 74 NW (2d) 620.

The statute of limitations starts to run against the depositor's cause of action, to recover from the bank the amount of a check bearing a forged indorsement, as of the date the bank renders its statement to the depositor showing the charging of the check to the depositor's account, and not as of some later date on which the depositor first discovers the facts. The 6-year statute of limitations, having expressly made the accrual of the cause of action dependent on the recovery of facts by the aggrieved party only in an action for fraud, it will be assumed that the legislature did not intend this stated exception to apply to the other causes of action embraced within 330.19. Peppas v. Marshall & Ilsley Bank, 2 W (2d) 144, 86 NW (2d) 27.

A party may be estopped by fraud, or other wrongful conduct, from asserting the statute of limitations as a defense. [Pietsch v. Milbrath, 123 W 647, overruled.] There can be no estoppel unless the aggrieved party relied to his injury on such fraudulent conduct. Peters v. Kell, 12 W (2d) 32, 106 NW (2d) 407.

In 330.19 (7), providing a 6-year statute of limitations for actions for relief on the ground of fraud, the language that "the cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud," has no application to 893.10 [330.10], since that section contains no exception to meet cases of fraud. Marky Investment v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

The legislature, having expressly provided in 330.19 (7) that a cause of action sounding in fraud is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud, must be assumed to have rejected making such exception applicable to simple negligence or malpractice actions. McCluskey v. Thranow, 31 W (2d) 245, 142 NW (2d) 787.

See note to 247.03, citing Walber v. Walber, 40 W (2d) 313, 161 NW (2d) 898.

A complaint seeking damages for alleged malpractice and false representations made thereafter in an action commenced after the statute of limitations had run but within 6 years after discovery of the tort could not withstand demurrer unless it stated a cause of action for fraud alleging the 3 essential elements thereof. Volk v. McCormick, 41 W (2d) 654, 165 NW (2d) 185.

For 893.19 (7), Stats. 1967, to be applicable, fraud must be the gravamen of the action brought, and the date of discovery of the fraud (when the cause of action accrues as provided in the statute) is relevant only when the action is commenced against the perpetrator of the fraud. Gamma Tau Ed. Found. v. Ohio Cas. Ins. Co. 41 W (2d) 675, 165 NW (2d) 135.

8. Notice to Railroad Corporation.

A notice to a railway company of a claim for killing stock through its negligence in failing to keep the gate closed in the fence separating the right of way of said company from a portion of a farm of W in a certain town, locates the place of accident on the right of way through W's farm and is sufficiently definite. May v. Chicago & Northwestern R. Co. 102 W 673, 79 NW 31.

The notice prescribed in sec. 4222 (5), Stats. 1898, is a statute of limitations, which must be taken in the answer or it will be waived. Gatzow v. Buening, 106 W 1, 81 NW 1033; Meisenheimer v. Kellogg, 106 W 30, 81 NW 1033; Malloy v. Chicago & Northwestern R. Co. 109 W 29, 85 NW 130.

Failure to give the required notice cannot be taken advantage of by demurrer but must be by answer. Troschansky v. Milwaukee E. R. & L. Co. 110 W 570, 86 NW 156.

The service of the notice is mandatory. Smith v. Chicago, M. & St. P. R. Co. 124 W 120, 102 NW 336.

9. Absence of Probate.

Where a husband and wife executed a joint note in 1923, the husband made payments of interest in 1926 and 1927 in the wife's presence and with her approval, the husband died in 1931, the payments were indorsed on the note by authorization of the wife, the holder made demand on the wife immediately after her husband's death, the wife admitted the obligation and promised payment, but at her request the claim was presented against her husband's estate, and the holder commenced an action against the wife one month after receiving an insufficient dividend from the husband's estate, the action was not barred by the 6-year statute of limitations. Schneider v. Anderson, 227 W 212, 278 NW 460.

893.195 History: 1957 c. 296; Stats. 1957 s. 330.195; 1965 c. 66 s. 2; Stats. 1965 s. 893.195.

893.20 History: R. S. 1858 c. 15 s. 70, 97; R. S. 1858 c. 138 s. 18; R. S. 1878 s. 4223; 1881 c. 139; Ann. Stats. 1889 s. 655a, 4223; 1893 c. 268; Stats. 1898 s. 655a, 984 part, 4223; 1917 c. 152 s. 3; Stats. 1917 s. 655a, 4223; 1919 c. 695 s. 6; Stats. 1919 s. 4223; 1925 c. 4; Stats. 1925 s. 330.20; 1943 c. 351; 1965 c. 66 s. 2; Stats. 1965 s. 893.20.

The limitation is absolute and unconditional. George v. Chicago, M. & St. P. R. Co. 51 W

603, 8 NW 374. See also Parish v. Eden, 62 W 272, 22 NW 399.

A sheriff who seizes, under process in his hands, the property of one who is not named therein does so in virtue of his office, and the party injured must seek redress against him within 3 years. Bishop v. McGillis, 80 W 575, 50 NW 779.

A deputy sheriff who acts under the sheriff's authority may rely upon the statutory bar in favor of the sheriff. But it is otherwise as to the plaintiff in the attachment suit in which the seizure was made and as to the sureties of the latter on a bond of indemnity given to the sheriff. Bishop v. McGillis, 82 W 120, 51 NW 1075.

The limitation of 3 years after discovery of defalcation is the only limitation applicable to actions upon official bonds. Milwaukee v. Drew, 220 W 511, 265 NW 683.

The 3-year limitation in 330.20 (1) does not apply to a taxpayer's action to recover from a town chairman for the illegal disbursement of town funds caused by him to be made; and likewise, 330.20 (2), so far as relating to an action by a town to recover money by reason of breach of official bond, does not apply to such taxpayer's action. Pugnier v. Ramharter, 275 W 70, 81 NW (2d) 38.

330.20 (1) was not intended to apply to causes of action for injury to the person. Zahn v. Taylor, 7 W (2d) 60, 95 NW (2d) 771.

The time within which a surety on an official bond may be held liable in an action by the banking commission against it growing out of acts or omissions of an examiner covered thereby, occuring during the time said bond is in force, is determined by 330.20 (2). 34 Atty. Gen. 135.

893.205 History: 1957 c. 435; Stats. 1957 s. 330.205; 1959 c. 295; 1961 c. 650; 1965 c. 66 s. 2; Stats. 1965 s. 893.205.

Editor's Note: Prior to the enactment of ch. 435, Laws 1957, which created sec. 330.205 in its original form, actions to recover damages for injuries to the person were limited by sec. 330.19 (5) and predecessor statutes. For notes of decisions having to do with the applicability of 330.19 (5) and predecessor statutes to such actions see Wis. Annotations, 1950. Prior to the enactment of ch. 650, Laws 1961, which amended secs. 330.205 and 330.21, actions to recover damages for death caused by the wrongful act, neglect or default of another were limited by sec. 330.21 (3) and predecessor statutes. For notes of decisions having to do with the applicability of 330.21 (3) and predecessor statutes to such actions see Wis. Annotations, 1960. See also Staeffler v. Menasha Woodenware Co. 111 W 483, 87 NW 480.

See notes to 893.19, on relief for fraud, citing Krestich v. Stefanez, 243 W 1, 9 NW (2d) 130, and Gerke v. Johnson, 258 W 583, 46 NW (2d) 829.

See notes to sec. 1, art. I, on inherent rights, citing Schultz v. Vick, 10 W (2d) 171, 102 NW (2d) 272, and Haase v. Sawicki, 20 W (2d) 308, 121 NW (2d) 876.

See notes to 269.44, citing Johnson v. Bar-Mour, Inc. 27 W (2d) 271, 133 NW (2d) 748, and Shurpit v. Brah, 30 W (2d) 388, 141 NW (2d) 266.

A cause of action for malpractice accrues when the injury caused by the professional misconduct is sustained, i. e., as of the date a malpractice is committed and not as of the date when the patient discovers that he was in fact negligently injured. McCluskey v. Thranow, 31 W (2d) 245, 142 NW (2d) 787.

Since it is the fact and date of injury that set in force and operation the factors that create and establish the basis for a claim of damages, both the act of negligence and the fact of resultant injury must take place before a cause of action founded on negligence can be said to have accrued. Holifield v. Setco Industries, Inc. 42 W (2d) 750, 168 NW (2d) 177.

Under the wrongful death statute the representative of the estate occupied the same position with respect to time of accrual of the cause of action as did the decedent, who, if he had lived, could have brought a personal injury action within 3 years from the date of injury as did the personal representative. Holifield v. Setco Industries, Inc. 42 W (2d) 750, 168 NW (2d) 177.

Plaintiff Michigan administrator's intestate died after an explosion in Michigan of an oil stove manufactured by defendant. Whether an action in a federal court is for personal injuries or for wrongful death must be determined by Michigan law; and under Michigan law the action is for wrongful death. The Wisconsin law on limitation of actions applies. Drinan v. A. J. Lindemann & Hoverson Co. 202 F (2d) 271, 238 F (2d) 72.

893.21 History: R. S. 1849 c. 104 s. 1; R. S. 1849 c. 127 s. 15; R. S. 1858 c. 138 s. 19; R. S. 1878 s. 4224; Stats. 1898 s. 4224; 1925 c. 4; Stats. 1925 s. 330.21; 1931 c. 79 s. 37; 1945 c. 574; 1947 c. 583; 1947 c. 614 s. 30h; 1951 c. 727; 1953 c. 61; 1961 c. 650; 1965 c. 66 s. 2; Stats. 1965 s. 893.21.

Editor's Note: Prior to the enactment of ch. 650, Laws 1961, which amended secs. 330.205 and 330.21, actions to recover damages for death caused by the wrongful act, neglect or default of another were limited by sec. 330.21 (3) and predecessor statutes.

Where a complaint alleged that between September 1 and December 1, 1873, plaintiff rendered services to defendant which were reasonably worth $4,000, "which sum became due some time in 1884," the cause of action accrued as early as December 1, 1873. Tucker v. Lovejoy, 73 W 66, 40 NW 627.

Where a person is received into a family under a void oral contract whereby in consideration of services he is to receive certain property, the right of action accrues at the time of his majority and is not extended by the void oral contract. Martin v. Martin's Estate, 108 W 284, 84 NW 439.

An action brought to revoke a medical license is not one for the enforcement of a penalty or forfeiture. State v. Shaeffer, 129 W 459, 109 NW 522.

Where the first item of plaintiff's claim against her mother's estate was dated August, 1893, and exhibited items for each succeeding year up to March, 1899, when there was a break until January, 1907, with a detailed claim to 1914, recovery was limited to items accruing within period limited immediately preceding the mother's death in November, 1914, where the services were not continuous

to the mother's death and where the disbursements did not constitute a mutual running account. Nelson v. Christensen, 169 W 373, 172 NW 741.

If no promise is made by a person for whom services are rendered to pay for the same, the statute begins to run from the time they were rendered, but if an agreement exists to pay for the services at the death of the person served, the statute does not run. Estate of Edwinson, 192 W 555, 213 NW 282.

The claim of a daughter for services rendered her father was barred after time limited. His indorsement thereafter of 2 certificates of deposit was not a payment on account for such services so as to constitute the claim a mutual running account. Estate of Teynor, 203 W 369, 234 NW 344.

Where a decedent had orally promised to devise real estate as consideration for services rendered to the decedent and the board and room furnished by the decedent did not constitute an open and mutual "account" so as to take a claim for the services rendered out of the statute of limitations where there were no cash transactions and, in view of the character of the agreement, no occasion for an accounting. The decedent's sojourn in a hospital in another state for 2 years prior to her death did not toll the statute of limitations as to the claim for services. The claimant was entitled to recover from the estate only for services rendered within the limited period preceding decedent's death. Murphy v. Burns, 216 W 248, 257 NW 136.

A claimant for the reasonable value of services rendered to a decedent under a void oral agreement to convey real estate to the claimant could be allowed nothing, in the absence of evidence of the rendering of any services of value within the period limited preceding the death of the decedent, since the statute of limitations began running immediately after the rendering of the services. Estate of Goyk, 216 W 462, 257 NW 448.

Where an ex-husband had promised to pay at death for services rendered by his ex-wife in caring for him at her home and assisting him at his farm, the ex-wife was entitled to recover from the estate of the ex-husband for the reasonable value of the services rendered for the time limited prior to his death, but the claim as to services rendered prior thereto was barred by the statute of limitations. Estate of Anderson, 242 W 272, 7 NW (2d) 823.

An assumed cause of action for false imprisonment, for causing the arrest of the plaintiff without a warrant and causing him to be imprisoned for 3 days before a complaint was filed or a warrant issued, was barred by the 2-year statute of limitations. Oosterwyk v. Bucholtz, 250 W 521, 27 NW (2d) 361.

The requirement of notice of injury, contained in 330.19 (5), Stats. 1947, relating generally to actions for personal injuries, does not apply to an action for assault and battery, which latter action is governed by the limitation of 330.21 (2). Asplund v. Palmer, 258 W 34, 44 NW (2d) 624.

330.21 (5) limited the compensation which a claimant against the estate of a decedent might recover on quantum meruit, for personal services rendered to the decedent, to the last 2 years before the death of the decedent. Estate of Tulloch, 260 W 378, 50 NW (2d) 671.

Where the agreement established was that after the decedent's death the claimants should be paid for their services, their causes of action did not accrue until the death, and hence, their claims having been filed with the county court within 2 years thereafter, 330.21 (5) did not apply to reduce the period for which compensation was allowable to these claimants. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

Where personal services were rendered without agreement as to amount and time of payment, and the implication was that payment was not due until the employment ended, the statute did not begin to run until the employment ended. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

Where the contract of employment is for no definite period and the salary is due monthly, there is an accrual of salary at the end of each month, and the claim therefor constitutes a distinct and separate cause of action on which the statute of limitation begins to run from the date thereof. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

A claim against the estate of a decedent for board, room, and laundry furnished to the decedent during a period of years, at the home of the claimants, was not subject to the 2-year statute of limitations, but under an implied contract, the claim was subject to the 6-year statute of limitations. Estate of Fredericksen, 273 W 479, 78 NW (2d) 878.

As to salesman's commissions on an entire contract, see Davies v. J. D. Wilson Co. 1 W (2d) 443, 85 NW (2d) 459.

A surgical operation performed without the consent of the patient and without justification by reason of emergency constitutes an assault, and an action to recover damages therefor is barred by the 2-year statute. Suskey v. Davidoff, 2 W (2d) 503, 87 NW (2d) 306.

See note to sec. 1, art. I, on equality, citing Estate of Bloomer, 2 W (2d) 623, 87 NW (2d) 531.

In the absence of an express contract, recovery for services rendered a deceased person would be based on quantum meruit and 330.21 (5) would apply. Estate of Rienow, 16 W (2d) 403, 114 NW (2d) 840.

330.21 (5) does not apply to a claim for work and material when the contract is entire. Estate of Dobrecevich, 17 W (2d) 1, 115 NW (2d) 597.

The limitation of 330.21 (5) applies to actions for quantum meruit recovery for personal services. Estate of Voss, 20 W (2d) 238, 121 NW (2d) 744.

A claim for payment for housework is barred by 330.21 (5) even though performed by an independent contractor. Cordova v. Gutierrez, 23 W (2d) 598, 128 NW (2d) 62.

See note to 893.19, on injury to property or character, citing Cordova v. Gutierrez, 23 W (2d) 598, 128 NW (2d) 62.

See note to 893.205, citing Johnson v. Bar-Mour, Inc. 27 W (2d) 271, 133 NW (2d) 748.

330.21 (5) does not apply to an action against an employer and a union for damages for wrongful discharge. Cheese v. Afram Brothers Co. 32 W (2d) 320, 145 NW (2d) 716.

Where personal services are intertwined with other claims so as to be inseparable, the 6-year statute will apply, but they must be inseparable in fact. Estate of Javornik, 35 W (2d) 741, 151 NW (2d) 721.

An action brought under the provisions of the federal antitrust law allowing recovery of treble damages for anyone injured is not for a penalty or forfeiture but one for the recovery of damages to property. Atlanta v. Chattanooga F. Co. 127 F 23.

330.21 (1) is to be read as though there was a comma after "penalty," since the comma was apparently omitted by mistake in the 1878 revision, and therefore the 2-year limit applies to all statutory penalties. Grengs v. Twentieth Century Fox Film Corp. 232 F (2d) 325.

See note to 893.205, citing Drinan v. A. J. Lindemann & Hoverson Co. 202 F (2d) 271, 238 F (2d) 72.

893.215 History: 1969 c. 183; Stats. 1969 s. 893.215.

893.22 History: R. S. 1849 c. 127 s. 16; R. S. 1858 c. 138 s. 20; R. S. 1878 s. 4225; Stats. 1898 s. 4225; 1915 c. 588; 1919 c. 102; 1925 c. 4; Stats. 1925 s. 330.22; 1931 c. 223 s. 2; 1953 c. 61; 1965 c. 53 s. 60; 1965 c. 66 s. 2; Stats. 1965 s. 893.22.

A cause of action for alienation of affections accrues when the alienation is finally accomplished, and it is accomplished when a judgment of divorce is entered, if not before. An action by a husband for alienation of the affections of his wife is barred by the one-year limitation of 330.22 notwithstanding the provision of 247.37 that a judgment of divorce so far as affecting the status of the parties shall not become effective until the expiration of one year from the date thereof. Harris v. Kunkel, 227 W 435, 278 NW 868.

The basis of a right of action for damages for alienation of affections is loss of consortium. The one-year statute of limitations began to run on the date when the loss of consortium occurred, when the wife was induced to leave the home, and not on a later date when judgment of divorce was entered, and it was immaterial whether a possibility of reconciliation existed after the loss of consortium or whether the defendant committed further acts of wrongdoing by inducing the wife to stay away from her husband. Kasper v. Enich, 265 W 318, 61 NW (2d) 315.

When the loss of consortium occurs, the cause of action accrues and the one-year statute of limitations begins to run. Alienation of affections is a gradual process, usually a series of wrongful acts or persuasions taking place over a period of time and culminating in the loss of consortium of the spouse. Chenow v. Aliota, 14 W (2d) 352, 111 NW (2d) 141.

The period of limitation is deemed to commence when the plaintiff loses the affection of the spouse, rather than the time of any particular acts of the defendant causing the loss. The basis of a cause of action for alienation of a wife's affections is a loss of consortium—the wife's companionship and society and her duties such as conjugal affection and assistance toward her husband—and when the loss of consortium occurs, a cause of action accrues and the one-year statutory limitation begins to run. Fischer v. Mahlke, 18 W (2d) 429, 118 NW (2d) 935.

893.23 History: 1917 c. 264; Stats. 1917 s. 4225a; 1921 c. 576 s. 16, 17; 1925 c. 4; Stats. 1925 s. 330.23; 1965 c. 66 s. 2; Stats. 1965 s. 893.23; 1969 c. 259; 1969 c. 276 s. 608; 1969 c. 382.

Revisor's Note, 1921: All of section 4225a that really constitutes a statute of limitations is retained here. The remainder, consisting of executive or administrative provisions, has been removed to more appropriate locations as stated above. The section seems defective at present because it provides no way of giving actual or constructive notice to possible contestants, particularly taxpayers, of the fact of certification. Neither is it clear how state bonds are to be presented to the attorney general, whether piecemeal by the several purchasers, after purchase, or by the state before any bonds of a particular issue are sold. As to state bonds these difficulties, if they in fact exist, have been left untouched; but as to municipal bonds, the subject now under revision, they have been cleared up. See subsection (3) of new section 67.02. [Bill 23-S, s. 17]

Bonds issued and sold by a village for a proper public purpose, to procure electrical service for the village and its inhabitants and rural customers, were not subject to constitutional objections, and their validity could be attacked only for irregularities in the proceedings for their issuance, and hence an action attacking their validity, commenced more than 30 days after the recording of the attorney general's certificate of validity of the bonds in the office of the village clerk, was barred under 330.23, 14.53 (5a) and 67.02 (3). Gilman v. Northern States P. Co. 242 W 130, 7 NW (2d) 606.

893.24 History: 1889 c. 326 s. 197; Ann. Stats. 1889 s. 925t sub. 197; Stats. 1898 s. 925—197; 1921 c. 242 s. 133a; Stats. 1921 s. 4225b; 1925 c. 4; Stats. 1925 s. 330.24; 1953 c. 245; 1965 c. 66 s. 2; Stats. 1965 s. 893.24.

See note to sec. 9, art. I, citing Hayes v. Superior, 92 W 429, 65 NW 482.

An action to set aside special assessments of street improvements and to restrain their enforcement and collection and for the surrender and cancellation of the paving bonds issued pursuant to an assessment of benefits because the work was not done in accordance with the contract and because no opportunity was given the plaintiff to do the work himself, is subject to the limitation in sec. 925-197, Stats. 1898. Gaastra v. Kenosha, 146 W 93, 130 NW 870.

An action to avoid a special assessment made under an invalid statute, though not brought within the time prescribed by sec. 925-197, was nevertheless, maintainable. Milwaukee E. R. & L. Co. v. Shorewood, 181 W 312, 193 NW 94.

330.24, Stats. 1957, applies to an action to set aside a special assessment for cleaning out a drainage ditch originally constructed in 1904. Essock v. Cold Spring, 10 W (2d) 98, 102 NW (2d) 110.

See note to 66.12, citing Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 328.

893.245 History: 1965 c. 53 s. 61; 1965 c. 66 s. 2; Stats. 1965 s. 893.245.

893.25 History: R. S. 1849 c. 127 s. 19; R. S. 1858 c. 138 s. 21; R. S. 1878 s. 4226; Stats. 1898 s. 4226; 1925 c. 4; Stats. 1925 s. 330.25; 1965 c. 66 s. 2; Stats. 1965 s. 893.25.

If payments made are not applied by either party at the time the court will apply them as equity may require. If the account is an open running one the payment will be applied to the earlier items if it is necessary to do so to prevent the running of the statute. Hannan v. Engelmann, 49 W 278, 5 NW 791.

An account including items for services and materials furnished defendants and items furnished by defendant to plaintiff constitutes an open mutual account. Hannan v. Engelmann, 49 W 278, 5 NW 791.

A claim which is not mutual does not come within the rule that items charged within 6 years draw after them other items beyond that period; that rule is strictly confined to mutual accounts. Fitzpatrick v. Estate of Phelan, 58 W 250, 16 NW 606.

An account is made up of credits as well as debits. Plaintiff has the burden of showing that the account on which he claims is within the statute. Dunn v. Estate of Fleming, 73 W 545, 41 NW 707.

Sec. 4226, Stats. 1898, has no application to a deposit in a bank subject to check, as the statute begins to run in such cases from the time demand for payment is made. Koelzer v. First Nat. Bank, 125 W 595, 104 NW 838.

Sec. 4226, Stats. 1898, "manifestly has reference to an action contractual in its nature, based upon an obligation to pay the balance due upon an open account." Figge v. Bergenthal, 130 W 594, 624, 109 NW 581, 592, 110 NW 798.

Where the items of a claim presented against an estate did not constitute a mutual running account, and where there was a break in the items from 1899 to 1907 and the subsequent items were for services that were not continuous, the right of recovery was limited to the items accruing within the 6 years immediately before the decedent's death. Nelson v. Christensen, 169 W 373, 172 NW 741.

Unless an account is of a "mutual" character within 330.25 the statute of limitations runs against the several items as they accrue. Estate of Reinke, 249 W 19, 23 NW (2d) 470.

Where each of successive contracts provided that it canceled all prior contracts between the parties, any cause of action which a distributor had for the return of his deposits under any particular contract commenced with the termination of that contract, and the 6-year statute of limitations applied as to each such separate contract. Skelly Oil Co. v. Pederson, 257 W 300, 43 NW (2d) 449.

A "mutual and open account current" is one that is made up of a series of reciprocal charges and allowances by both parties. Mere money payment on an account does not make it a mutual and open current account. Estate of Vicen, 1 W (2d) 193, 83 NW (2d) 664.

893.26 History: R. S. 1849 c. 127 s. 20; R. S. 1858 c. 138 s. 24; R. S. 1878 s. 4227; Stats. 1898 s. 4227; 1925 c. 4; Stats. 1925 s. 330.26; 1965 c. 66 s. 2; Stats. 1965 s. 893.26.

893.27 History: R. S. 1849 c. 127 s. 21; R. S. 1858 c. 138 s. 25; R. S. 1878 s. 4228; Stats. 1898 s. 4228; 1925 c. 4; Stats. 1925 s. 330.27; 1965 c. 66 s. 2; Stats. 1965 s. 893.27.

330.27 does not include "recoupment" and does not abolish a defrauded party's right to ask reduction of the plaintiff's claim to the extent of fraud. Peterson v. Feyereisen, 203 W 294, 334 NW 496.

Where a legatee sought payment of a contingent legacy which had become absolute, and the executor claimed the right to deduct a note due the estate from the legatee, the rights of the parties must be determined as of the time the legacy became absolute. A finding that the note had become extinguished by the running of limitations prior to the time the legacy became absolute precluded deduction thereof from such legacy, there being nothing in the will to indicate that the amount of the note should be deducted. Will of Weidig, 207 W 107, 240 NW 832.

893.29 History: R. S. 1858 c. 138 s. 23; R. S. 1878 s. 4230; Stats. 1898 s. 4230; 1925 c. 4; Stats. 1925 s. 330.29; 1965 c. 66 s. 2; Stats. 1965 s. 893.29.

Sec. 4230, Stats. 1898, applies only to evidences of debt intended for circulation as money, and does not include certificates of deposit. Lusk v. Stoughton S. Bank, 135 W 311, 115 NW 813.

893.30 History: R. S. 1858 c. 138 s. 28; 1859 c. 91 s. 3; R. S. 1878 s. 4231; 1897 c. 304; Stats. 1898 s. 4231; 1925 c. 4; Stats. 1925 s. 330.30; 1951 c. 731 s. 9; 1959 c. 226; 1965 c. 66 s. 2; Stats. 1965 s. 893.30.

Revision Committee Note, 1951: 330.30 (1949) requires amendment to make its reference to the instrument appointing an agent for service, conform to the form of the appointments under such sections as 180.813 (1) (d), 180.823, 180.837, 180.845 (2), 180.801 (2) and 180.68, and the effect given under section 180.825 to the appointment of a registered agent. In addition, this revision eliminates the present provision that a qualified foreign corporation does not have the benefit of the statutes of limitation unless it has a manufacturing plant in the state. There appears no defensible reason why the benefit of the statutes of limitation should not be extended to a foreign corporation with a retail store, sales office, warehouse, or truck fleet, for example, or in fact to any foreign corporation (including an insurance company), which has fully complied with all statutory requirements to do business in this state and by statutory requirement has expressly appointed a resident or state official to accept service of process. If the effect of the present provision were generally understood, it is believed that it would be a serious deterrent to the conduct by foreign corporations of business in this state. [Bill 763-S]

Absence of one of several joint debtors suspends the running of the statute as against him. Caswell v. Engelmann, 31 W 93.

A nonresident defendant who had been in the state frequently, but temporarily only, and less in all than the statutory period, after the accruing of the cause of action, could not set up the statute (sec. 28, ch. 138, R. S. 1858) as a defense. Whitcomb v. Keator, 59 W 609, 18 NW 469.

Mere absence does not create an exception to sec. 4231, R. S. 1878, but residence out of the state is essential; a settled, fixed abode and intention to remain elsewhere permanently, at least for a time, for business or other purposes, is essential in order to create a residing without the state. The word "and" cannot be construed to mean "or." Farr v. Durant, 90 W 341, 63 NW 274.

Where the plaintiff was a resident of the state at the time the cause of action accrued and remained so up to the time of the trial, and the defendants were residents of another state during such period, the statute did not run. National Bank of Oshkosh v. Davis, 100 W 240, 75 NW 1005.

In an action by a foreign corporation upon a note given in this state, the period when the defendant was absent from the state should be excluded in computing the period of limitation. Weyburn & Briggs Co. v. Bemis, 122 W 318, 99 NW 1050.

Where a person is out of the state a large portion of the time but retains his homestead in this state, he does not change his residence within sec. 4231, Stats. 1898. Taylor v. Thieman, 132 W 38, 111 NW 229.

Notes executed from time to time by a maker residing in Minnesota to a payee residing in Wisconsin were not barred by sec. 4231. Estate of Gilbert, 167 W 291, 166 NW 442.

An action against a nonresident labor union and its members for property damages arising from an automobile collision, brought more than 6 years after the collision, was not barred by 330.30. Bode v. Flynn, 213 W 509, 252 NW 284.

Where the defendant continued to have his legal domicile in Wisconsin, the time spent by him in Florida, after the causes of action had accrued, was not deductible in computing the statutory bar. Spellbrink v. Bramberg, 245 W 103, 13 NW (2d) 600.

See note to 272.04, citing Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905.

The statute is not repugnant to sec. 2, art. IV, U. S. Constitution. Chemung Canal Bank v. Lowery, 93 US 72. See also Bode v. Flynn, 213 W 509, 252 NW 284.

See note to sec. 1, art. I, on equality, citing Zalutuka v. Metropolitan Life Ins. Co. 90 F (2d) 230.

893.31 History: R. S. 1849 c. 127 s. 31; R. S. 1858 c. 138 s. 31; R. S. 1878 s. 4232; Stats. 1898 s. 4232; 1925 c. 4; Stats. 1925 s. 330.31; 1965 c. 66 s. 2; Stats. 1965 s. 893.31.

893.32 History: 1917 c. 409; Stats. 1917 s. 4232a; 1925 c. 4; Stats. 1925 s. 330.32; 1927 c. 473 s. 55; 1965 c. 66 s. 2; Stats. 1965 s. 893.32.

Enactment and enforcement of ch. 409, Laws 1917, granting exemption from civil process and proceedings to all residents of the state who are in the military service of the United States or of this state, are not an exercise of the war powers of congress or a violation of the 14th amendment to the U. S. Constitution. Neither does it deny an immunity or privilege to citizens of other states. Konkel v. State, 168 W 335, 170 NW 715.

893.33 History: R. S. 1849 c. 127 s. 12; R. S. 1858 c. 138 s. 29; R. S. 1878 s. 4233; Stats. 1898 s. 4233; 1925 c. 4; Stats. 1925 s. 330.33; 1965 c. 66 s. 2; Stats. 1965 s. 893.33.

As used in sec. 29, ch. 138, R. S. 1858, the word "insane" is not to be confined to persons "wholly without understanding," but includes every person who is non compos or "of unsound mind," as that phrase is used in the statute of wills. If the payee of a note, when a cause of action therein arises in his favor, has not sufficient mental capacity "to understand what he is about" or is incapable, by reason of mental unsoundness, of managing his affairs, the statute does not begin to run. Burnham v. Mitchell, 34 W 117.

When nothing appears on the face of a complaint showing that action was commenced after expiration of the time allowed it will be presumed that it was commenced before that time. Zaegel v. Kuster, 51 W 31, 7 NW 781.

330.33 applies only to actions in courts of general jurisdiction, as distinguished from probate courts, and makes no exception as to claims against estates of decedents. Estate of Bocher, 249 W 9, 23 NW (2d) 615.

An action for assault and battery was not barred by the 2-year limitation of 330.21 (2), where the plaintiff was an infant when the assault took place, and the disability of infancy still existed when the summons and complaint were served. Asplund v. Palmer, 258 W 34, 44 NW (2d) 624.

Action may be maintained if brought within one year after plaintiff attains majority, notwithstanding dismissal of his guardian ad litem's earlier action because not brought within the limitation period. Grummitt v. Sturgeon Bay Winter Sports Club, 218 F Supp. 946.

893.34 History: R. S. 1849 c. 103 s. 8, 9; R. S. 1849 c. 127 s. 33; R. S. 1858 c. 138 s. 30; R. S. 1858 c. 147 s. 8, 9; R. S. 1878 s. 4234; Stats. 1898 s. 4234; 1925 c. 4; Stats. 1925 s. 330.34; 1965 c. 66 s. 2; Stats. 1965 s. 893.34.

A note not barred at death of the maker and presented to the county court for allowance more than 6 years after it became due, but less than one year after administration granted, was not barred. Boyce v. Foote, 19 W 199.

Sec. 4234, R. S. 1878, was not intended to regulate the time for taking appeals. Sambs v. Stein, 53 W 569, 11 NW 53.

The special limitation of sec. 3844 prevails over that of secs. 4234 and 4260. Carpenter v. Murphey, 57 W 541, 15 NW 798.

Sec. 4234, Stats. 1898, does not apply to an action on a life insurance contract in which a special limitation is inserted. Fey v. I. O. O. F. M. L. Ins. Society, 120 W 358, 98 NW 206.

Sec. 4234 is limited to cases where the death of a person occurs during the last year of his right to begin the action. Palmer v. O'Rourke, 130 W 507, 110 NW 389.

Where a client of a trust company died before his cause of action against the company for a negligent loaning of his funds was barred by the statute of limitations, and where the trust company itself became the executor of the deceased before the expiration of one year next following his death, and then breached its obligation and duty by qualifying as executor and by failing thereafter to take any pro-

ceedings to collect the money loaned, a new and independent cause for action arose against the trust company and the statute of limitations began running from the time of such breach, not from the time when the loan was originally made. Wisconsin T. Co. v. Cousins, 172 W 486, 179 NW 801.

The filing of a claim against the estate of a deceased constituted the commencement of an action within the meaning of 330.34. Estate of Dobrecevich, 17 W (2d) 1, 115 NW (2d) 597.

893.35 History: R. S. 1858 c. 138 s. 32; R. S. 1878 s. 4235; Stats. 1898 s. 4235; 1907 c. 279; 1925 c. 4; Stats. 1925 s. 330.35; 1965 c. 66 s. 2; Stats. 1965 s. 893.35.

A new action, commenced by an amended complaint setting up causes of action for procuring, directing and conspiring to commit an assault on the plaintiff, and commenced within one year after the reversal of a judgment for the plaintiff in an action commenced within the statutory time to recover damages for an assault, was not barred by the statute of limitations. Krudwig v. Koepke, 227 W 1, 277 NW 670.

893.35 applies where the court modifies a judgment as well as where it reverses one. Pattermann v. Whitewater, 32 W (2d) 350, 145 NW (2d) 705.

893.36 History: R. S. 1858 c. 138 s. 33; R. S. 1878 s. 4236; Stats. 1898 s. 4236; 1925 c. 4; Stats. 1925 s. 330.36; 1965 c. 66 s. 2; Stats. 1965 s. 893.36.

Editor's Note: In Albright v. Albright, 70 W 528, 36 NW 254, sec. 4236, R. S. 1878, was invoked by counsel but held to be inapplicable.

893.37 History: R. S. 1858 c. 138 s. 34; R. S. 1878 s. 4237; Stats. 1898 s. 4237; 1925 c. 4; Stats. 1925 s. 330.37; 1965 c. 66 s. 2; Stats. 1965 s. 893.37.

893.38 History: R. S. 1858 c. 138 s. 35; R. S. 1878 s. 4238; Stats. 1898 s. 4238; 1925 c. 4; Stats. 1925 s. 330.38; 1965 c. 66 s. 2; Stats. 1965 s. 893.38.

893.39 History: R. S. 1858 c. 138 s. 27; R. S. 1878 s. 4239; Stats. 1898 s. 4239; 1925 c. 4; Stats. 1925 s. 330.39; 1965 c. 66 s. 2; Stats. 1965 s. 893.39.

The mere mailing of a summons and its receipt do not constitute such service. Sherry v. Gilmore, 58 W 324, 17 NW 252.

An action is not begun against a person brought in by amendment until he is made a party thereto. Levy v. Wilcox, 96 W 127, 70 NW 1109.

Under secs. 4239 and 4240, Stats. 1898, a person not a party to an action originally brought, but possessed of an independent right in the subject thereof, cannot be bound by the filing of notice of the pendency of such action under sec. 3187 with regard to the right to the benefit of the statute of limitation. Webster v. Pierce, 108 W 407, 83 NW 938.

However necessary a party may be to the general purposes of an action, it is not commenced against him until he is actually made a party thereto. Gager v. Paul, 111 W 638, 87 NW 875.

An action against a city is not commenced by serving a summons on an officer who is not empowered to receive service. Amy v. Watertown, 130 US 301.

893.40 History: R. S. 1858 c. 138 s. 27; R. S. 1878 s. 4240; Stats. 1898 s. 4240; 1925 c. 4; Stats. 1925 s. 330.40; 1965 c. 66 s. 2; Stats. 1965 s. 893.40.

There is no attempt to commence an action unless the summons is delivered to the proper officer with intent that it shall be served. Sherry v. Gilmore, 58 W 324, 17 NW 252.

The time when a summons issued by a justice was delivered to the sheriff for service may be proved by parol. If, after such delivery, the return day therein is changed the process is made entirely different and in contemplation of law the sheriff did not and could not receive it until the alteration was made. The fact and time of alteration may be proved by parol. Woodville v. Harrison, 73 W 360, 41 NW 526.

An attempt to commence an action requires at least the delivery of a judicial process to an officer competent to serve it with the intention that he should seasonably make such service, the process being good in fact as well as in form so that jurisdiction of the defendant would be obtained by such service. Johnson v. Turnell, 113 W 468, 89 NW 515.

330.40 applies to actions in which service of summons may not be made by publication as well as to actions in which service may be made in that manner. (Contrary statements in Mariner v. Waterloo, 75 W 438, Levy v. Wilcox, 96 W 127, and Moulton v. Williams, 101 W 236, repudiated.) Rhode v. Quinn Construction Co. 219 W 452, 263 NW 200.

A summons is not a writ issuing from a court, and the return of the summons to the court does not render it functus officio, so that if the summons, theretofore improperly served, is thereafter properly served within the 60-day period provided by 330.40, the action will be deemed commenced from the date the summons was originally given to the sheriff with the intention that it be served. Burke v. Madison, 247 W 326, 19 NW (2d) 309.

330.40 relates solely to an attempt to commence an action as an ordinary court proceeding and not to proceedings before boards, commissions, or other administrative agencies. State ex rel. McIntyre v. Board of Election Comm. 273 W 395, 78 NW (2d) 752.

It is no excuse for the failure to commence an action that the plaintiff was unable to make service because of defendant's designed elusion of it. Amy v. Watertown, 130 US 320.

An action is not commenced so as to stop the running of the statute until process is served or service attempted and followed by actual service within 60 days or publication within that time. Knowlton v. Watertown, 130 US 327.

The legal construction and effect of sec. 27, ch. 138, R. S. 1858, taken in connection with the preceding sections of the same chapter, was that the service of the summons or its delivery to an officer with intent that it shall be served was the act by which the period of limitation must be computed; and the definition of that act was an integral part of the statute of limitations and as such appli-

cable, as the rest of the statute undoubtedly was, to actions in the courts of the United States. But in order to come within the second sentence of that section, requiring the summons to be delivered, with the intent that it shall be actually served, to the sheriff or other proper officer, it does not appear to be necessary that there should be a manual delivery of the summons to the officer in person. It is enough if the summons was made out by the clerk of a federal court pursuant to the direction of the plaintiff's attorney and placed by the clerk in a box in his office designated by the marshal, with the clerk's assent, as a place where process to be served by him might be deposited and from which his custom was to take them daily. Michigan Ins. Bank v. Eldred, 130 US 693.

Delivery of a federal court summons to the marshal prior to the running of the statute of limitations and service by him within 60 days is good under 330.40, Stats. 1963. Magid v. Decker, 251 F Supp. 955.

893.41 History: R. S. 1878 s. 4242; Stats. 1898 s. 4242; 1917 c. 553 s. 2; 1925 c. 4; Stats. 1925 s. 330.41; 1965 c. 66 s. 2; Stats. 1965 s. 893.41.

Presentation to the county court of a note made by a decedent is the commencement of an action. Boyce v. Foote, 19 W 199.

Presentation of a claim upon which an action has been commenced to commissioners to adjust claims against an estate, instead of reviving the action is the prosecution of a new remedy, and where the statute has run the claim cannot be allowed. Jones v. Keene, 23 W 45.

Neglect to have a claim passed upon for 2 years will not operate as a bar. Large v. Large, 29 W 60.

Presentation to a county board of a claim for moneys paid upon void tax certificates is commencement of an action. If the claim be disallowed for lack of proof of ownership or because several claims are included in one account and the claimant, before the next annual meeting of the board, but after expiration of 6 years, presents the claim in due form, it will be a continuance of first proceeding and will avoid the bar of the statute. Marsh v. St. Croix County, 42 W 355.

If the town board of audit is not in session, filing a claim with the town clerk is the presentment of it. Parish v. Eden, 62 W 272, 22 NW 399.

A cause of action to recover for services rendered under an agreement to bequeath real and personal property as compensation therefor does not accrue until the death of the party for whom they are rendered, and demand is properly made by filing the claim for compensation against the estate. Estate of Kessler, 87 W 660, 59 NW 129.

The presentation of a claim to a county board is not the commencement of an action, in a judicial sense, but merely within the statute of limitations. Rice v. Ashland County, 108 W 189, 84 NW 189.

The filing of a claim in probate court against the estate of a deceased stockholder, based on the stockholder's liability under 180.40 was not required by law, and did not constitute the commencement of an action for the purpose of determining whether an action in the circuit court to enforce the stockholder's liability had been commenced before the statute of limitations had run thereon. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

893.42 History: R. S. 1858 c. 138 s. 37; R. S. 1878 s. 4243; Stats. 1898 s. 4243; 1925 c. 4; Stats. 1925 s. 330.42; 1965 c. 66 s. 2; Stats. 1965 s. 893.42.

When the statute of limitations has run against a debt, the debt is extinguished, and the bar of the statute is not removed by any mere admission of legal liability, but only by an unqualified promise to pay; and under sec. 4243, R. S. 1878, such promise must be in writing, signed by the alleged debtor. Pierce v. Seymour, 52 W 272, 9 NW 71. See also: Martin v. Fox & Wisconsin I. Co. 19 W 553; Carpenter v. Fox, 41 W 36; Phelan v. Fitzpatrick, 84 W 240, 54 NW 614; and Moore v. Blackman, 109 W 528, 85 NW 429.

An oral promise to pay for services previously performed was an independent contract and not a new promise within sec. 4243, Stats. 1898. Murtha v. Donohue, 149 W 481, 134 NW 406, 136 NW 158.

The statute of limitations upon the note was tolled by a letter written with the knowledge of the maker acknowledging the indebtedness and by indorsements on the note properly crediting the maker with dividends. Marshall v. Wittig, 213 W 374, 251 NW 439.

In an action to recover on a promissory note, the evidence warranted findings that the note was given as a renewal of previous notes and obligations owed by the defendant to the plaintiff, and hence constituted a sufficient written acknowledgment or promise to pay the past-due obligations to the extent of the amount of the renewal note, so as to take the cause of action for the recovery of that amount out of the operation of the statute of limitations. Hessman v. O'Brien, 258 W 243, 45 NW (2d) 730.

330.42, although applying to a claim depending on the revival of a debt against which the statute of limitation has run, does not apply to a claim which rests on the promisor's recognition of a moral obligation to pay for services previously rendered and as to which he never was legally indebted and as to which, therefore, there never was a debt for the statute of limitations to extinguish. Estate of Gerke, 271 W 297, 73 NW (2d) 506.

In order to renew a debt once barred, there must be an express acknowledgment of the debt with the intention to renew it as a legal obligation. Estate of Hocking, 3 W (2d) 79, 87 NW (2d) 811.

Oral promise to compensate by a legacy for prior services. 40 MLR 345.

893.43 History: R. S. 1849 c. 127 s. 36; R. S. 1858 c. 138 s. 38; R. S. 1878 s. 4244; Stats. 1898 s. 4244; 1925 c. 4; Stats. 1925 s. 330.43; 1965 c. 66 s. 2; Stats. 1965 s. 893.43.

Whether or not sec. 4244, R. S. 1878, applies to partners as joint contractors in respect to a firm note, all of them will be bound by a promise to pay or an acknowledgment of such note made by one of them after the dissolution of the firm, but within the period of limi-

tation, if such dissolution was unknown to the payee. Clement v. Clement, 69 W 599, 35 NW 17.

893.44 History: R. S. 1849 c. 127 s. 37; R. S. 1858 c. 138 s. 39; R. S. 1878 s. 4245; Stats. 1898 s. 4245; 1925 c. 4; Stats. 1925 s. 330.44; 1965 c. 66 s. 2; Stats. 1965 s. 893.44.

It is not a defense to an action of foreclosure that the personal liability of one of the defendants is barred. Cleveland v. Harrison, 15 W 670.

330.44 does not apply to payments made by a member of a syndicate to buy lands. Reinig v. Nelson, 199 W 482, 227 NW 14.

893.45 History: R. S. 1849 c. 127 s. 38; R. S. 1858 c. 138 s. 40; R. S. 1878 s. 4246; Stats. 1898 s. 4246; 1925 c. 4; Stats. 1925 s. 330.45; 1965 c. 66 s. 2; Stats. 1965 s. 893.45.

The plaintiff in an action against one on a joint contract, the complaint showing that the statute had run as to the other party to the contract, was not bound to make him a party. Caswell v. Engelmann, 31 W 93.

893.46 History: R. S. 1849 c. 127 s. 39; R. S. 1858 c. 138 s. 41; R. S. 1878 s. 4247; Stats. 1898 s. 4247; 1925 c. 4; Stats. 1925 s. 330.46; 1965 c. 66 s. 2; Stats. 1965 s. 893.46.

Sec. 4247, R. S. 1878, makes no distinction between claims barred and those not barred. Partial payment, either before or after the action is barred, is, in the absence of any condition or qualification which limits its effect, sufficient evidence of a new or continuing contract to take the case out of the statute. Engmann v. Immel, 59 W 249, 18 NW 182.

An absolute part payment, voluntarily made after a debt has become barred, is sufficient evidence of a new or continuing contract to revive and take such debt out of the statute; and such a payment by one joint debtor has that effect as against him. Marshall v. Holmes, 68 W 555, 32 NW 685.

If a debtor voluntarily delivers money to his creditor in payment of an account, not questioning his indebtedness or liability, and promises to make other payments, and accepts and retains a receipt for the sum as paid on account he has made a completed payment; and he cannot, subsequently, add qualifications or conditions to the payment so made. Marshall v. Holmes, 68 W 555, 32 NW 685.

Where a note was given in 1881 for an account, and the latter continued, payments being made thereon as though no note had been given, but in 1893 money was demanded on the note and a payment made because defendant knew he was indebted on the note, a payment was made thereon. Lyle v. Esser, 98 W 234, 73 NW 1008.

In an action on a promissory note by the indorsee against the maker the jury found that certain checks drawn by the maker's trustee in favor of the payee in payment of rent owing by the maker to the payee were transferred to the indorsee within the period of statutory limitation and applied by consent of all 3 parties as payments on the note in the hands of the payee. Under these circumstances the bar of the statute was removed. John Hoffman & Sons. Co. v. Parks, 175 W 303, 184 NW 1035.

Entry in a book kept by a claimant for his own use, not amounting to an admission against interest or account between the claimant and deceased, is inadmissible to show payment by the deceased on the note. The claimant alleging payment on the note to remove the bar of limitations had the burden of establishing payment. An indorsement on the note, though insufficient to remove the bar of limitation, was sufficient to identify the note with the transaction showing payment. Estate of Patterson, 201 W 362, 230 NW 137.

In an action by an executor to recover on a note for $1,800 executed in 1923, the mere transfer in 1954 and 1955 of amounts totaling $80 by the defendant for use by the decedent, and a memorandum as to payment of interest on the reverse side of the note appended by an unidentified person, when considered in connection with the other circumstances appearing of record, were not sufficient to establish a clear inference that the defendant maker recognized the note as an existing liability or that he indicated a willingness on his part to pay the balance, and hence did not operate to renew the debt and avoid the bar of the statute of limitations. (Estate of Patterson, 201 W 362, distinguished.) Estate of Hocking, 3 W (2d) 79, 87 NW (2d) 811.

A partial payment, to operate as a new promise and avoid the bar of the statute of limitations, must be made under such circumstances as to warrant a clear inference that the debtor recognized the debt as an existing liability, and indicated his willingness, or at least an obligation, to pay the balance. Estate of Hocking, 3 W (2d) 79, 87 NW (2d) 811.

893.47 History: R. S. 1849 c. 127 s. 40; R. S. 1858 c. 138 s. 42; R. S. 1878 s. 4248; Stats. 1898 s. 4248; 1925 c. 4; Stats. 1925 s. 330.47; 1965 c. 66 s. 2; Stats. 1965 s. 893.47.

If a joint debtor, on being called on for payment, refers the person calling on him to his codebtor this amounts to an express direction to the latter to pay for him, and if he does so the debt will be continued as to both. Cleveland v. Harrison, 15 W 670.

Where joint debtors agree that one shall make payments, which are made in pursuance of such agreement, this operates to keep the obligation in force as to all. National Bank of Delavan v. Cotton, 53 W 31, 9 NW 926.

A partial payment by a partner after dissolution of the firm will prevent the bar of the statute as to other partners in favor of a firm creditor who has had no notice of the dissolution of the firm. Clement v. Clement, 69 W 599, 35 NW 17.

Payments made by the grantee of mortgaged land who, as part of the consideration, assumed and agreed to pay the mortgage, cannot be imputed to the mortgagor so as to remove the bar of the statute as against the latter. Cottrell v. Shepherd, 86 W 649, 57 NW 983.

Payment made upon a note by one of 2 joint makers does not affect the running of the statute as to the other. State Bank of West Pullman v. Pease, 153 W 9, 139 NW 767.

A husband and the heirs of his wife are not joint contractors under a note and mortgage executed by the husband and wife; and payments of interest on the note by the hus-

band after her death, without the knowledge of or any contribution by the heirs, did not stop the running of the statute of limitations in the heirs' favor. McLean v. McLean, 184 W 495, 199 NW 459.

The statute of limitations commenced to run in favor of the guarantor on a note at maturity though the guarantor promised to pay at maturity or thereafter. Interest payment by the maker of the note did not toll the statute of limitation applicable to the guarantor. Bishop v. Genz, 212 W 30, 248 NW 771.

The statute of limitations is no defense where the lapse of time occurred because of acts in which the debtor intentionally participated for the purpose of inducing credit, and which continued the debt as a recognized obligation; and such rule is not affected by 330.47. Bowe v. La Buy, 215 W 1, 253 NW 791.

A note authorizing renewal without notice to signers or indorsers did not authorize payment of interest after maturity so as to toll the limitations statute as to an accommodation maker in the absence of either renewal or definite time extension; the word "renewal" usually means execution of a new note. Estate of Schmidt, 218 W 444, 261 NW 240.

Under a demand note providing that sureties or endorsers consent that the time of payment may be extended without notice thereof, the payee's mere retention of the note did not constitute an extension, and where accommodation makers did not furnish money paid as interest on the note, the payee never requested either accommodation maker to make any payments on the interest, and neither accommodation maker ever authorized the principal maker to make payment on their behalf, the statute of limitations was not tolled as to such accommodation makers. Accola v. Giese, 223 W 431, 271 NW 19.

The signer of an undertaking that "for value received, we hereby guarantee the payment of the within note" was a guarantor and not an indorser. The liability of such a guarantor is several and his liability is unaffected by payment made by the maker of the note, on the question of the statute of limitation. Zuehlke v. Engel, 229 W 386, 282 NW 579.

The guarantor's liability for payment of the note was on his own separate undertaking and was a several, not a joint liability, so that he would be entitled to the benefit of the statute of limitations notwithstanding payments made by the maker after maturity of the note, but where, after maturity but before the running of the statute, the guarantor himself not only made a written acknowledgement of his indebtedness, as guarantor, but in his own behalf arranged with the payee for an extension of time for payment and specifically provided for a 15-day notice of demand before suit could be commenced, such agreement took the case out of the operation of the statute of limitations as to the guarantor. Albright v. Weissinger, 238 W 355, 298 NW 220.

Effect of part payment by co-maker on extending liability of accommodation maker. 20 MLR 42.

893.48 History: R. S. 1849 c. 127 s. 21; R. S. 1858 c. 138 s. 25; 1861 c. 282 s. 1; R. S. 1878 s. 4249; Stats. 1898 s. 4249; 1925 c. 4; Stats. 1925 s. 330.48; 1965 c. 66 s. 2; Stats. 1965 s. 893.48.

A right of action against a village, which had attempted to incorporate but had no legal existence, began to run from the passage of a validating act. Winneconne v. Winneconne, 122 W 348, 99 NW 1055.

The limitation on a cause of action for failure to carry out a contract made by decedent did not begin to run until demand upon the executor. Ott v. Boring, 131 W 472, 110 NW 824.

893.49 History: R. S. 1878 s. 4250; Stats. 1898 s. 4250; 1925 c. 4; Stats. 1925 s. 330.49; 1965 c. 66 s. 2; Stats. 1965 s. 893.49.

W commenced an action in November, 1877, against B, the owner of the lands, to foreclose his tax deeds. B answered, alleging defects in the tax proceedings which invalidated the deeds, the remedy upon which was not then barred. This action was discontinued February 9, 1880, and an action of ejectment was then commenced by B against W for the same lands. Sec. 4250, R. S. 1878, was applicable and the limitation of sec. 1210d ceased to run against B during the pendency of the foreclosure suit. Becker v. Wing, 61 W 252, 21 NW 47.

Where the grantee in tax deeds brought a suit to quiet title and it was claimed as a defense that the deeds were invalid and the suit was dismissed, and the defendants thereupon brought ejectment setting up the same invalidity to the tax deeds, the time which elapsed during the pendency of the first action should not be included as part of the period of limitation. Preston v. Thayer, 127 W 123, 106 NW 672.

Under sec. 4250 a tax deed was not protected by the statute of limitations from attack in an action to set the same aside as a cloud upon title, where, although more than 3 years had elapsed from the recording of the tax deed when the action was begun, a prior action for the foreclosure of the deed was pending during the greater part of the intervening period and until discontinued by the plaintiff therein. Home Inv. Co. v. Emerson, 153 W 1, 140 NW 283.

A prior owner of unoccupied land brought ejectment against a tax deed grantee a few days after the deed had been issued, alleging possession in the defendant by virtue of his recording of the tax deed. Within a year thereafter plaintiff built a cabin on the land and continued to occupy it. Nearly 4 years after its commencement plaintiff dismissed his ejectment action which had never been brought to trial and began an action to quiet title. Before such dismissal defendant had conveyed the land and his grantee was made a defendant in the new action. Under sec. 4250 the 3 years' limitation had not run against the tax deed. St. Croix C. C. Co. v. Guaranteed Inv. Co. 166 W 459, 166 NW 28.

A former action, which involved, among other things, a contract and certain notes of which the plaintiff therein was maker and the defendant therein was payee, and which action was ultimately dismissed, was in effect an equitable action for an accounting; and in such action the rule that affirmative relief will not be granted to a defendant unless he

demands the same by setoff or counterclaim did not apply, but the complaint itself and allegations in the answer that the plaintiff failed to pay his obligations under the contract sufficiently raised the issue of the plaintiff's indebtedness to the defendant, so that, by virtue of 330.49 the time during which the former action was pending was not to be deemed a part of the time limited for the commencement of an action by the defendant to recover on his cause of action on the notes. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

893.50 History: R. S. 1878 s. 4251; Stats. 1898 s. 4251; 1925 c. 4; Stats. 1925 s. 330.50; 1965 c. 66 s. 2; Stats. 1965 s. 893.50.

Sec. 4251, Stats. 1898, cannot be relied upon if it is not pleaded. Stehn v. Hayssen, 124 W 583, 102 NW 1074.

An action for conversion of personal property after a decedent's death, where there is no administrator appointed, comes within sec. 4251. Palmer v. O'Rourke, 130 W 507, 110 NW 389.

893.51 History: R. S. 1858 c. 138 s. 36; R. S. 1878 s. 4252; Stats. 1898 s. 4252; 1925 c. 4; Stats. 1925 s. 330.51; 1965 c. 66 s. 2; Stats. 1965 s. 893.51.

The words "liability created" by law refer to liability created by statute law alone and not to common-law liability. Gores v. Field, 109 W 408, 84 NW 867, 85 NW 411.

The phrase "moneyed corporation or banking association" is used in apposition, or at least as referring to like kinds of institutions, and not to every sort of corporation except nonprofit corporations. Bank of Verona v. Stewart, 223 W 577, 270 NW 534.

893.52 History: 1951 c. 295; Stats. 1951 s. 330.52; 1965 c. 66 s. 2; Stats. 1965 s. 893.52.

330.52 does not apply to a proceeding involving a question of whether a final judgment was res adjudicata so as to bar grandchildren born after a testator's death and after such judgment from asserting their rights under a testamentary trust. Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.

CHAPTER 895.

Miscellaneous General Provisions.

895.01 History: R. S. 1849 c. 96 s. 6; R. S. 1858 c. 135 s. 2; R. S. 1878 s. 4253; 1887 c. 280; Ann. Stats. 1889 s. 4253; Stats. 1898 s. 4253; 1907 c. 353; 1917 c. 56; 1925 c. 4; Stats. 1925 s. 331.01; 1933 c. 53; 1935 c. 213; 1937 c. 189; 1965 c. 66 s. 2; Stats. 1965 s. 895.01.

On limitations of commencement of actions see notes to various sections of ch. 893.

Statutes allowing actions to survive are strictly construed. Woodward v. Chicago & Northwestern R. Co. 23 W 400.

The words "or other damage to the person" were added to sec. 4253, R. S. 1878, by ch. 280, Laws 1887. They do not include a cause of action arising out of a conspiracy to monopolize a business and to drive the plaintiff out of it. Murray v. Buell, 76 W 657, 45 NW 667.

The right of an employe of a corporation to recover compensation for his services against the stockholders personally under sec. 1769, R. S. 1878, survives. Day v. Vinton, 78 W 198, 47 NW 269.

Where a complaint charges the acquisition of property by fraud and seeks to obtain a return of that which the defendant has fraudulently obtained, rather than damages for defendant's deceit, the cause of action survives. Allen v. Frawley, 106 W 638, 82 NW 593.

An action for wrongful conversion of the good will of the corporation is an injury to the personal estate and survives. Lindemann v. Rusk, 125 W 210, 104 NW 119.

A mere fraud or cheat by which one sustains a pecuniary loss is not a deprivation of property so as to give rise to a cause of action which survives. Borchert v. Borchert, 132 W 593, 113 NW 35.

The amendment of Sec. 4253, R. S. 1898, by ch. 353, Laws 1907, did not validate a previous assignment of the then unassignable cause of action. Puffer v. Welch, 144 W 506, 129 NW 525.

When a trust company to which money was intrusted for investment fraudulently invested it in worthless or depreciated securities, a cause of action at once arose in favor of the owner for damages on account of the resulting loss to him. Such cause of action survives to the personal representatives and does not pass by the judgment of the county court to a testamentary trustee. Woodard v. Citizens S. & T. Co. 167 W 435, 167 NW 1054.

An action of waste survives against the estate of a deceased life tenant. Payne v. Meisser, 176 W 432, 187 NW 194.

An action by decedent's representative for the pain and suffering caused decedent is a separate action from one under 331.03, Stats. 1925, and a recovery under both is not a double recovery, but a recovery for a double wrong. Koehler v. Waukesha M. Co. 190 W 52, 208 NW 901.

The negligence of a husband in the care and treatment of an injury to his wife's finger (the wife being free from any negligence in this regard) would not defeat a recovery by the wife's estate for damages for her pain and suffering. Koehler v. Waukesha M. Co. 190 W 52, 208 NW 901.

An action by a wife under 246.07 for the alienation of her husband's affections does not survive the death of the defendant, there being no allegations that plaintiff was deprived of her husband's support; and the words "damage to the person" do not include injury to the feelings. Howard v. Lunaburg, 192 W 507, 213 NW 301.

The word "action" as used in 331.01 means more than a legal proceeding pending in court, and is broad enough to include what is ordinarily meant by the phrase "cause of action." Mesar v. Southern S. Co. 197 W 578, 222 NW 809.

The cause of action of a corporation for breach of warranty of boiler tubes sold to it and negligence in manufacture thereof survived dissolution of the corporation, as an action to recover for "all damages done to property rights or interests of another"; survival of actions in favor of corporations are determined by the statutes applicable to survival of actions in general, and the word "person" in 269.23 confers the right to revive or