CHAPTER 331.

MISCELLANEOUS GENERAL PROVISIONS.

331.01 What actions survive. In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet the title thereto, and for a specific performance of contracts relating to real estate. Actions for wrongful death shall survive the death of the wrongdoer whether or not the death of the wrongdoer occurred before or after the death of the injured person. [*1933 c. 53; 1935 c. 213; 1937 c. 189*]

Note: Power to rescind a deed which was induced by fraud ends with the death of the grantor, but a cause of action for deceit survives the death of the defrauded party as damages done to property rights. Zartner v. Holzhauer, 204 W 18, 234 NW 508.

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 being determined by the statutes applicable to survival of actions in general, and the word "person" in 269.23, conferring the right to revive or continue an action on any person entitled, etc., including a corporation within the rules of 370.01 for construction of the statutes. Such cause of action was assignable, and vested after three years in the sole stockholder of the corporation, under 181.02; hence, a corporation owning all the stock of such dissolved corporation was entitled to revive the latter's action for breach of warranty and negligence. Marsh W. P. Co. v. Babcock & Wilcox Co., 207 W 209, 240 NW 392.

A single tortious act which causes injury to a person and his property gives rise to a single cause of action with separate items of damage; and such person may as an incident to recovery have all the damages which proximately flow from the violation of his primary right to be free from damage by the negligent act of others. Booth v. Frankenstein, 209 W 362, 245 NW 191.

Claim for funeral expenses is not part of cause of action for death by wrongful act so as to fall with cause of action which did not survive death of wrongdoer who predeceased victim (Stats. 1933). Hegel v. George et al., 218 W 327, 259 NW 862, 261 NW 14.

Whatever actions survive are assignable. Northern Assur. Co. v. Milwaukee, 227 W 124, 277 NW 149.

An action by a surviving partner for a partnership accounting will lie against the administrator of a deceased managing partner when the partnership assets and business are in charge of the administrator. Caveney v. Caveney, 234 W 637, 291 NW 818.

The survivability of a right of action created by act of the congress must be determined in accordance with federal law. In general, at common law, contract actions survived while tort actions died with the person. In general, a cause of action to enforce the personal liability of an officer of a corporation is regarded as of a penal or personal rather than of a contractual nature, in which event it does not survive, but if

the cause of action against the officer is of a remedial or contractual rather than of a personal nature, it survives his death. Wogahn v. Stevens, 236 W 122, 294 NW 503.

The right to rescind a deed for fraud of the grantee does not pass by assignment, and on the death of the grantor without rescission all power to rescind dies with him since actions or rights of action to set aside conveyances or to recover real estate for fraud do not survive unless in existence at the time of the death of the person in whom they are vested, and such rights of action do not arise until the person defrauded exercises the right to rescind. Krueger v. Hansen, 238 W 638, 300 NW 474.

An action to recover damages for fraud and deceit in inducing a conveyance of real estate survives the defrauded party's death, and under 287.01 such an action can be maintained by the executor or administrator of the defrauded party. Krueger v. Hansen, 238 W 638, 300 NW 474.

An action against a corporation's president for breach of contract to use moneys received for common stock to retire preferred stock survived the president's death and could be revived. Luster v. Martin, 58 F (2d) 537.

331.02 Measure of damages against executor. When any action mentioned in section 331.01 shall be prosecuted to judgment against the executor or administrator the plaintiff shall be entitled to recover only for the value of the goods taken or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged outrage to the feelings of the injured party.

331.03 Recovery for death by wrongful act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

Note: In order that a husband may recover for the wrongful death of his wife, the circumstances must have been such as to have entitled the wife, had she lived, to maintain an action for her injuries. A mother who sustained physical injuries as a result of the fright or shock of witnessing, from a window of her home, the negligent killing of her child as the child was crossing a highway, could not have recovered for the physical injuries resulting from such fright or shock had she lived, and hence her husband could not recover for her death from such injuries. Waube v. Warrington, 216 W 603, 258 NW 497.

Action for wrongful death accrues, as respects limitation, at date of death, and not date of appointment of administrator. Terbush v. Boyle, 217 W 636, 259 NW 859.

Action for death in Illinois could be maintained in Wisconsin court, notwithstanding Illinois statute provided that no action should be brought in Illinois to recover damages for a death occurring outside of Illinois. Sheehan v. Lewis, 218 W 588, 260 NW 633.

A person who was killed while driving an automobile while intoxicated could not have recovered against the vendor of the liquor had he survived the accident, and hence his widow could not recover for his death under this section. Demge v. Feierstein, 222 W 199, 268 NW 210.

Motorist involved in collision when he made left turn in path of oncoming automobile approaching intersection held not entitled to recover, under wrongful death statute, for death of his wife killed in the collision and for his own injuries and damage to his automobile, where collision was attributable more to motorist's negligence than negligence of oncoming automobile driver. Grasser v. Anderson, 224 W 654, 273 NW 63.

In a civil action against an automobile host for the wrongful death of a guest, actual intent to do the guest bodily harm, so as to deprive the host of defenses which he might otherwise have against liability, will not as a matter of law be imputed to the host from the mere fact that the host was driving while intoxicated. Schubring v. Weggen, 234 W 517, 291 NW 788.

With respect to personal injury sustained by him, an unemancipated minor may not bring an action against his parent's automobile liability insurer grounded on the parent's negligence, since the fact that the parent is insured does not give rise to a cause of action based on the parent's negligence where no cause of action exists against the parent if not insured. Lasecki v. Kabara, 235 W 645, 294 NW 33.

A wife cannot maintain an action against her husband and his liability insurer for the loss of the society of the spouses' infant daughter killed through the father's negligent operation of his automobile, since the infant could not have maintained an action against her father had she lived, and since, further, the recovery authorized by 331.04 (2) in favor of a parent for the loss of the society of a deceased child is not a different cause of action from that authorized by 331.03 but is only an item of damage recoverable in that action. Cronin v. Cronin, 244 W 372, 12 NW (2d) 677.

331.031 Recovery from estate of wrongdoer. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the wrongdoer who would have been liable if death had not ensued, although such wrongdoer shall die prior to the time of death of such injured person, shall be liable to an action for damages notwithstanding his prior death and notwithstanding the death of the person injured; provided that such action shall be brought for a death caused in this state. Any right of action which may accrue by such injury to the person of another although the death of the wrongdoer occurred prior thereto shall be enforced by bringing an action against the executor or administrator or personal representative of such deceased wrongdoer. [*1937 c. 189*]

331.04 Who to bring action; damages limited. (1) Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased the amount recovered shall be paid over to his or her lineal descendants and to his or her lineal ancestors in default of such descendants, but if no husband, or widow, or

lineal descendant, or ancestor survive the deceased, the amount recovered shall be paid over to the brothers and sisters; and in every such action the jury may give such damages, not exceeding twelve thousand five hundred dollars, as they may deem fair and just in reference to the pecuniary injury, resulting from such death to the relatives of the deceased specified in this section; and a nonresident alien surviving wife and minor children shall be entitled to the benefits of this section. If any of the foregoing relatives shall die at any time after such cause of action shall have accrued, the relative or relatives next in order named above shall be entitled to recover for the wrongful death of the deceased; provided, that if there be no cause of action in favor of the estate of such decedent and the person or persons to whom the whole amount sued for and recovered belongs, as above provided, shall be the husband, widow, or parent or parents, lineal descendant or ancestors, brothers or sisters of the deceased, suit may at his or her or their option be brought directly in his or her or their name or names instead of being brought in the name of the personal representative of such deceased person.

(2) In addition to the benefits provided for in subsection (1), a sum not exceeding twenty-five hundred dollars for loss of society and companionship shall accrue to the parent or parents or husband or wife of the deceased. [*1931 c. 263*]

Note: Statute limiting damages for loss of husband's society to two thousand five hundred dollars is valid. Cameron v. Union A. Ins. Co., 210 W 659, 246 NW 420, 247 NW 453.

For awards held not excessive, see Warrichaiet v. Standard Oil Co., 213 W 619, 252 NW 187.

An award of six hundred dollars to the father for financial loss for the death of his eleven-year-old son is held not excessive. An award of twenty-five hundred dollars to the father for loss of society and companionship of his son, made under authorization of (2), permitting a sum not exceeding that amount, was not excessive in view of the unusually close and affectionate relationship between the father and the son. Erikson v. Wisconsin Hydro-Electric Co., 214 W 614, 254 NW 106.

A blanket award of $3700 to the parents for the death of their five-year-old daughter is not excessive, in view of (2), authorizing a maximum allowance of $2500 for loss of society and companionship in addition to damages for pecuniary injury. Madison Trust Co. v. Helleckson, 216 W 443, 257 NW 691.

In action under wrongful death statute, statement of plaintiff's counsel that the law had fixed minimum amount of damages which might be allowed should have been definitely corrected by court, notwithstanding instruction that damages must be based upon evidence of case and not in arbitrary manner. Hoffman v. Regling, 217 W 66, 258 NW 347.

A wife was entitled to maintain an action to recover her pecuniary loss resulting from the wrongful death of her husband, including a right to recover for funeral expenses incurred, where no cause of action existed in favor of his estate for pain and suffering, and the estate had neither paid nor been charged with his funeral expenses, but it appeared by inference that the wife had assumed obligations therefor and paid them in part. Van Gilder v. Gugel, 220 W 612, 265 NW 706.

It is contended that the award to Thomas Potter of the sum of $2,500 for loss of society and companionship of his wife was excessive. The principal basis for this claim is that Thomas Potter was seventy-six years of age and had an expectancy of slightly less than six years. His wife was sixty-seven years of age, and the joint expectancy of the two parties is claimed to be less than five years. We are dealing with a nonpecuniary item of damage, and there are very few yardsticks by which it may satisfactorily be measured. In view of the long period of their married life, and the fact that they had lived in harmony with each other for that period of time, taken in connection with the need of the aged plaintiff for comfort and companionship during his declining years, we cannot say that the amount of the award for loss of society is excessive. Potter v. Potter, 224 W 251, 272 NW 34.

Action commenced by mother's special administrator against son in whose automobile mother sustained injury from which she died, for conscious pain and suffering prior to her death, held not dismissable on ground that son as tort-feasor would benefit from his own wrong as heir of his mother, since cause of action was an asset of mother during her lifetime and recovery would ultimately be distributed according to general laws of descent. Potter v. Potter, 224 W 251, 272 NW 34.

The parents of an unemancipated minor killed by the wrongful act of his unemancipated minor brother may maintain an action for such death against the wrongdoer. Munsert v. Farmers Mut. Automobile Ins. Co., 229 W 581, 281 NW 671.

A statement by counsel to the jury of the statutory limitation of the amount of damages recoverable is improper as suggesting permissible allowance of the maximum. Schulz v. General Casualty Co. 233 W 118, 288 NW 803.

On the wife's death, the cause of action which she would have had against her husband, had she survived, went to her children since there was no surviving husband (331.03, 331.031 and 331.04) so that the children had a cause of action for the wrongful death of their mother, and a suit against the deceased husband's automobile liability insurer by the guardian ad litem for the children instead of by the personal representative of the deceased mother was therefore permissible (331.04). Lasecki v. Kabara, 235 W 645, 294 NW 33.

An award of $2,500 for loss of the society and companionship of her deceased husband to a surviving wife 27 years old, although the statutory limit, was not excessive. Kuhle v. Ladwig, 237 W 147, 295 NW 41.

The right of parents to recover damages for loss of society and companionship of a child killed by wrongful act is based on the parental relationship, and an award to parents for loss of society and companionship of an eleven-year-old son was not improper as to the father on the ground that the father sustained no such loss because the parents were divorced and the legal custody of the children was in the mother. Likewise, an award for pecuniary loss was not improper as to the father on the ground that he sustained no such loss in the circumstances. Straub v. Schadeberg, 243 W 257, 10 NW (2d) 146.

An action for wrongful death can be brought by a beneficiary designated by 331.04 (1), only where there is no cause of action in favor of the estate of the decedent. The action can be brought only by the personal representative of the decedent where there is a cause of action in favor of the estate. In order for a designated beneficiary to maintain an action for wrongful death, he must bring himself within the statute and allege facts to negative the existence of any cause of action in favor of the estate of the decedent. Schilling v. Chicago, North Shore & Milwaukee R. Co. 245 W 173, 13 NW (2d) 594.

331.045 Comparative negligence; when bars recovery. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering. [*1931 c. 242*]

Note: Driving an automobile on the highway by one intoxicated constitutes gross negligence. Where the defendant is grossly negligent, whether the plaintiff is contributorily negligent is immaterial. Tomasik v. Lanferman, 206 W 94, 238 NW 857.

Failure to protest at an excessive or dangerous speed is not strictly contributory negligence, but the duty to protest grows out of the host and guest relationship and constitutes an essential element in the question of whether the guest may recover damages resulting from the negligence of the host, within the rule that the host owes to the guest the duty of not increasing the danger or creating a new one naturally resulting from the guest's acceptance of the host's invitation. Haines v. Duffy, 206 W 193, 240 NW 152.

That both drivers were negligent does not require dismissal of the action, the comparative negligence statute applying, under which where both parties to a collision are negligent and there is a counterclaim one of the parties may recover when there is a finding that his negligence is less than that of the other. Paluczak v. Jones, 209 W 640, 245 NW 655; Cameron v. Union A. Ins. Co., 210 W 659, 246 NW 420, 247 NW 453.

Unless plaintiff was guilty of contributory negligence, comparative negligence statute has no application in case involving joint tort-feasors. Cross-complainants held entitled to contingent judgment of contribution against impleaded defendants—joint tort-feasors—against whom no judgment was sought by plaintiffs. Brown v. Haertel, 210 W 345, 246 NW 691.

Whether on-coming motorist's negligence in failing to see automobile parked on highway at night without lights was equal to or greater than negligence in leaving automobile parked in such fashion held for jury. Where, in situations raising jury questions, total damage has been properly determined, amount which one guilty of greater negligence is responsible for is arrived at by diminishing amount of total damage by proportion one least negligent contributed to result. Engebrecht v. Bradley, 211 W 1, 247 NW 451.

Action against city for injuries due to "insufficient" highway, or to highway "in want of repairs" is "action for negligence" within comparative negligence act. Morley v. Reedsburg, 211 W 504, 248 NW 431.

Question of proportionate negligence of county inspector of materials, who fell when plank supporting rock pile gave way, and of road construction company which failed to fasten plank, held for jury in action under safe place statute. Mullen v. Larson-Morgan Co., 212 W 362, 249 NW 67.

This section, if affecting the question of contribution at all, is inapplicable thereto where, as here, there is no claim that the person for whose injuries recovery is sought was contributorily negligent. Zurn v. Whatley, 213 W 365, 252 NW 435.

In an action to which the comparative negligence statute applies, submitting a verdict which permits the jury to consider the negligence of the plaintiff in only one respect, when the evidence admits of inferences that he was negligent in other respects, constitutes prejudicial error. McGuigan v. Hiller Bros., 214 W 388, 253 NW 403.

Under the comparative negligence statute the causal negligence of the person seeking to recover is to be compared with the causal negligence of all of the other participants in the transaction, and, if the causal negligence of the person seeking to recover was as great as the causal negligence of some one of the tortfeasors against whom recovery is sought there is no right to recover against that particular tortfeasor, but, from every remaining tortfeasor against whom recovery is sought whose causal negligence was greater than that of the person seeking to recover there exists a right to recover, subject to the limitation in the statute that the damages allowed shall be diminished in proportion to the negligence attributable to the person recovering. The comparative negligence statute does not effect any change in the common-law rule that every joint tortfeasor who is liable at all is individually liable to the injured person for the entire amount of damages recoverable by him, except that the statute requires the damages allowed to be diminished in proportion to the negligence attributable to the person recovering. Walker v. Kroger G. & B. Co., 214 W 519, 252 NW 721.

While the supreme court will not ordinarily determine whether a plaintiff's negligence was greater than that of a defendant as a matter of law, or substitute its judgment for that of the jury as to the percentages of negligence, it will, in a proper case, set aside a jury's finding and order a new trial when the percentages fixed are grossly disproportionate under the evidence. Hammer v. Minneapolis, St. P. & S. S. M. R. Co., 216 W 7, 255 NW 124.

This section is not applicable to action for injuries sustained prior to June 16, 1931. Peters v. Milwaukee E. R. & L. Co., 217 W 481, 259 NW 724.

In an automobile collision case, submission of the question of comparative negligence so that the negligence of the plaintiff was compared with that of the defendant driver of the automobile, instead of with the combined negligence of such driver and the driver of the truck in which the plaintiff was riding at the time of the accident, constituted error, but it was not prejudicial to the defendants, since it operated in their favor. Ross v. Koberstein, 220 W 73, 264 NW 642.

In an automobile collision case, inclusion in the special verdict of a question as to comparative negligence which the jury were not to answer unless they first found the plaintiff guilty of contributory negligence, and which they did not answer, was harmless to the defendants. Rashke v. Koberstein, 220 W 75, 264 NW 643.

Where, among other things, the nature of the work of the shipper's employe in blocking the tractor shovel on the flatcar was such as to make it quite impossible for him to maintain a constant lookout for trains, it was noisy where he was working, and he might reasonably assume that his presence between the flatcar and the main line would be observed and that timely warning of the approach of a train would be given, the evidence authorized the jury's finding that the negligence of the trainmen with respect to lookout and warning constituted eighty-five per cent, and that the negligence of the shipper's employe with respect to lookout and listening constituted only fifteen per cent, of the total causal negligence involved in the accident. Brennan v. Chicago, M., St. P. & P. R. Co., 220 W 316, 265 NW 207.

In this case the comparative negligence of the plaintiff and the defendant owner of the warehouse in which the plaintiff was injured was a question for the jury, and the jury's determination fixing the plaintiff's negligence at five per cent and the defendant's negligence at ninety-five per cent would not be disturbed; the negligence of the plaintiff and that of the defendant being entirely different in character. Tomlin v. Chicago, M., St. P. & P. R. Co., 220 W 325, 265 NW 72.

The refusal of the trial court to submit a requested question as to whether the driver

was negligent in permitting the decedent to ride on the running board of the automobile was not error, since, although the driver was negligent, the decedent was likewise negligent, and in such a situation a jury's finding that the negligence of the driver was greater than that of the decedent could not be sustained. Manitowoc Trust Co. v. Bouril, 220 W 627, 265 NW 572.

In an action against a town for damage to the plaintiff's automobile caused by a defect in the highway, where the car was being operated at the time of the accident by the plaintiff's fifteen-year-old daughter under authority of 85.08 (1a), making the parent responsible for negligent operation by the child licensed thereunder, the damages recoverable by the plaintiff parent are subject to diminution in the proportion of negligence attributable to the daughter. Scheibe v. Lincoln, 223 W 425, 271 NW 47.

Where the contractor was negligent because the guardrail of the paving machine was broken off, and the pedestrian was negligent because he did not observe the evident danger, the question of the proportionate negligence was for the jury. Powers v. Cherney Construction Co., 223 W 586, 270 NW 41.

A child of six years may be found guilty of contributory negligence if from his capacity, discretion, knowledge and experience he knew or should have known of dangers involved in act in question, and, in exercise of such ordinary care as he should have exercised, he could have avoided injury. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

In action for death of six-year-old boy where questions were submitted requiring jury to compare negligence of truck driver and boy, reading to jury comparative negligence statute was error as instructing jury as to effect of their answers. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

Under the comparative negligence law, an instruction that the plantiff had the burden of proving the percentage of causal negligence attributable to the defendant, and that the defendant had the burden of proving the percentage of causal negligence attributable to the plaintiff, was not prejudicial to the defendant. Gauthier v. Carbonneau, 226 W 527, 277 NW 135.

An intelligent milk deliveryman, stepping from the left side of his delivery truck directly into the path of an oncoming automobile about 20 feet away, without first looking for traffic, was guilty of negligence as great as that of the automobile driver, as a matter of law, so as to bar recovery from the latter for injury sustained when struck by the automobile. Hustad v. Evetts, 230 W 292, 282 NW 595.

Whether the deceased's negligence was equal to or greater than that of the defendant in a death action is ordinarily for the jury, but where such facts appear as matter of law, the court should so hold. Peters v. Chicago, M. St. P. & P. R. R., 230 W 299, 283 NW 803.

In an action by the insurer to recover the amount paid into the state treasury, under the workmen's compensation act, for the death of an employe, the negligence of the driver of the auto in which the employe was riding at the time of the accident was immaterial since the comparative negligence statute did not apply. Western Casualty & Surety Co. v. Shafton, 231 W 1, 283 NW 806, 285 NW 408.

Upon a motion for rehearing in the Shafton case the court held that this section did not apply to an action by an insurer to recover the amount of money which he had paid into the state treasury. It was held that he may recover the whole amount. Western Casualty & Surety Co. v. Shafton, 231 W 1, 285 NW 408.

The rule that contributory negligence is not a defense in cases of gross negligence is inapplicable in an action by an automobile guest against his host wherein the question is as to whether the guest assumed the risk of injury, since "assumption of risk" is not "contributory negligence". When a guest in an automobile is injured or killed through the gross negligence of his host in recklessly driving while intoxicated, the guest assumes the risk of injury resulting from the host's intoxication if the guest voluntarily became so intoxicated from drinking with his host while the host was becoming intoxicated that the guest is unable to appreciate the hazard incident to the host's intoxication. Schubring v. Weggen, 234 W 517, 291 NW 788.

No rule of thumb can be laid down with respect to the apportionment of negligence between a plaintiff and a defendant. Under the evidence in the instant case, the jury could apportion the negligence twenty-five per cent to the plaintiff pedestrian, found negligent in respect to yielding the right of way to the defendant motorist and in respect to maintaining a proper lookout for traffic, and seventy-five per cent to the defendant, found negligent in respect to speed and in respect to keeping a proper lookout and proper control of her automobile but found not negligent in respect to yielding the right of way, as against the contention that as a matter of law the negligence of the plaintiff was at least equal to that of the defendant. Fronczek v. Sink, 235 W 398, 291 NW 850, 293 NW 153.

The jury's affirmative answer to a question in the special verdict as to whether the plaintiff in walking up the stairway was negligent in respect to his duty to observe the position of his feet immediately prior to his fall, under instructions that the jury should consider what position the plaintiff was in just before he fell and where he placed his feet and whether he used ordinary care in watching his step, was warranted by the evidence, as was the jury's findings that such negligence constituted twenty per cent of the total causal negligence. Burling v. Schroeder Hotel Co., 235 W 403, 291 NW 810.

Even if the allegations of the complaint warranted a deduction that the plaintiff was contributorily negligent as a matter of law, this would not constitute a complete defense to the plaintiff's cause of action unless the plaintiff's negligence was at least as great as the defendant's, a fact not appearing from the pleadings. Ryan v. First Nat. Bank & Trust Co. 236 W 226, 294 NW 832.

The causal negligence of the plaintiff in failing to keep a lookout and in entering the path of an approaching westbound streetcar from behind an eastbound streetcar, which was either standing still or just starting up, was at least equal as a matter of law to the causal negligence of the motorman of the westbound streetcar in failing to ring the bell. Nayes v. Milwaukee E. R. & L. Co. 237 W 141, 294 NW 812.

If the motorman of the streetcar, crossing an intersection, was negligent as to management and control in failing to avoid a collision with an automobile which was crossing the intersection and appeared from behind a passing two-car train, so was the plaintiff motorist negligent as to management and control, and his causal negligence in such respect was as great as that of the motorman in the same respect, especially where the streetcar had the right of way over the automobile. Where a motorist crossed an intersection with a view of the trolley of a streetcar over the top of a passing two-car train, but the motorman of the streetcar could not see the automobile through the train, the causal negligence of the plaintiff motorist in respect to lookout was at least as great as that of the motorman in the same respect in relation to the ensuing collision between the automobile and the streetcar. Schmidt v. Milwaukee E. R. & T. Co. 237 W 220, 296 NW 609.

The adoption of the comparative-negligence statute, 331.045, did change the rule that testimony of jurors showing a quotient verdict is not receivable to impeach the verdict, and hence a juror's statement that the apportionment of the negligence of the parties was arrived at by the quotient method was not receivable. [Rule of Gallaway v. Massee, 133 W 638, adhered to and applied.] Jackowska-Peterson v. D. Reik & Sons Co., 240 W 197, 2 NW (2d) 873.

A child, under six years of age when injured, is not, as a matter of law, incapable of contributory negligence. VanLydegraf v. Scholz, 240 W 599, 4 NW (2d) 121.

Where plaintiff brought an action for personal injuries and property damage and also as administrator for death of his wife and the jury found that the plaintiff's failure to yield the right of way contributed 20% of the causal negligence, the plaintiff's recovery as administrator for damages resulting from his wife's death were properly diminished in proportion to the amount of negligence attributable to the plaintiff. Meissner v. Papas, 124 F (2d) 720.

The bus driver was not bound to exercise a higher degree of care toward protecting a crippled passenger in her personal movements than she was bound to exercise herself, and if the driver was negligent in failing to assist the passenger to arise from her seat, the passenger was equally negligent in attempting to arise without requesting assistance, hence could not recover in any event under the comparative-negligence statute. Pazik v. Milwaukee E. R. & T. Co. 245 W 583, 15 NW (2d) 804.

Where a prospective passenger was in a place of safety at the side of the tracks, saw the streetcar approaching, and was familiar with the extent of the overhang of the streetcar, and then stepped toward the streetcar so that she was within the range of the overhang and was struck thereby, her causal negligence in relation to her injuries was as a matter of law at least equal to the causal negligence of the motorman in failing to see her in time to stop the streetcar. Nye v. Milwaukee E. R. & T. Co. 246 W 135, 16 NW (2d) 429.

331.05 Damages in actions for libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

(2) Any true statement, explanation, correction or retraction published without comment in any such newspaper, in a position as prominent as the matter so explained, corrected or retracted, within a reasonable time after any publication in violation of this section, or after the publication of any libelous matter, or within 5 days, or thereafter in the next issue, after written notice specifying the statements claimed to be false, unfair or libelous, or in the absence of such notice, within 5 days, or thereafter in the next issue, after service of complaint in a libel action, may be introduced upon the trial of any such action as a sufficient defense against any imputation of malice and against the recovery of any damages except actual damages. In case positive proof of the true fact is not contained in said notice or complaint or otherwise ascertainable with reasonable diligence, the publication of the libeled person's statement, as such, of the true fact, or so much thereof as shall not be libelous of another, scurrilous or otherwise improper for publication, may be introduced upon the trial and shall have like force and effect as a correction, except that the extent of the mitigation of actual damages shall depend upon the facts of each case. [*1945 c. 262*]

Note: The immunity for publication in any newspaper of a true and fair report of judicial or other official public proceedings, is unconditional. Lehner v. Berlin P. Co., 209 W 536, 245 NW 685.

Newspaper article was unconditionally privileged so far as it was true and fair report of statement in grand jury's report which remained on file after date of publication, notwithstanding it was subsequently stricken as unauthorized. Williams v. Journal Co., 211 W 362, 247 NW 435.

The publication of an untrue statement that the supreme court had held that a trial judge was justified in setting aside a divorce decree after the woman involved had filed an affidavit that a named attorney had fraudulently induced her to sign certain documents, was libelous per se. The sending by the news corporation to its members of the libelous form of article for publication in case a subsequent decision of the supreme court made the article no longer untrue, was conditionally privileged, and actionable only if actuated by malice. Lehner v. Associated Press, 215 W 254, 254 NW 664.

The original publisher of a libelous newspaper article was not liable either upon a separate cause of action or by way of aggravation of damages for the voluntary and unjustifiable repetition of the original libel by the defendants in this case; and therefore the plaintiff's settlement with the original publisher did not bar the plaintiff's cause of action against the defendants. Lehner v. Kelley, 215 W 265, 254 NW 634.

331.06 Recovery of divisible personalty. When personal property is divisible and owned by tenants in common and one tenant in common shall claim and hold possession of more than his share or proportion thereof his cotenant, after making a demand in writing, may sue for and recover his share or the value thereof; and the court may direct the jury, if necessary, in any such action to find what specific articles or what share or interest belongs to the respective parties, and the court shall enter up judgment in form for one or both of the parties against the other, according to such verdict.

331.07 Set-offs. In the following cases a demand by one party may be set off against and as a defense, in whole or in part, to demands by the other:

(1) It must be a demand arising upon a judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty the sum equitably due by virtue of its conditions only shall be set off.

(2) It must be due to him in his own right, either as being the original creditor or payee or as being the assignee and owner of the demand.

(3) It must have existed at the time of the commencement of the action, and must then have belonged to the party claiming to set off the same.

(4) It can be allowed only in actions founded upon demands which could themselves be the subject of set-off according to law.

(5) If the action or counterclaim be founded upon a contract, other than a negotiable promissory note or bill of exchange, which has been assigned to the party a demand existing against such party or any assignor of such contract, at the time of his assignment thereof and belonging to the opposite party, in good faith before notice of such assignment, may be set off to the amount otherwise recoverable upon such contract if the demand be such as might have been set off against the party or assignor while the contract belonged to him.

(6) If the action be upon a negotiable promissory note or bill of exchange which has been assigned to the party after it became due a set-off to the extent of the amount otherwise recoverable thereon may be made of a demand existing against any person who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him.

(7) Judgments for the payment of money may be set off by the court, pro tanto, when the parties in interest are identical, upon motion, in the action in which the mover is the judgment debtor; and notice of motion and proof of service thereof filed in said action shall stay execution till the motion is disposed of; and any assignment during said time shall not prejudice the rights of any party. If the actions are in different courts, the moving party shall, at or prior to the entry of the order of set-off, tender to the other party a proper satisfaction.

Note: The right of a depositor to offset its deposit against its liability on its note to a bank became vested when the bank committed an act of insolvency by closing its doors, although the application was not made as of that day but by the court as of the day when the bank was reopened pursuant to a stabilization agreement. Shawano Oil Co. v. Citizens State Bank, 223 W 100, 269 NW 675.

The right of set-off is purely statutory. The law of set-off relates to the remedy, and therefore set-off is governed by the law of the forum. A Wisconsin indorsee's failure to bring an action on a note against the deceased maker's heir within two years after final settlement of the maker's estate, probated in Indiana, requires disallowance of the amount due on the note as a set-off against the heir's claim against the deceased indorsee's estate, probated in Wisconsin. The Indiana statute, providing that an action on a nonresident creditor's claim against a decedent's heirs, devisees, or distributees must be brought within two years after final settlement of the estate, is not a statute of limitations, but a statute creating a cause of action for a limited time only, and therefore the demand asserted as a set-off had no legal existence, and was not pleadable as a set-off. Estate of Seybold, 223 W 192.

A right of equitable set-off attaches where mutual demands exist, where insolvency has intervened, even though one of the demands has not matured, and where no equities of other claimants are shown to exist. In re Milwaukee Commercial Bank, 236 W 105, 294 NW 538.

331.08 Set-off in actions by trustees, etc. If the party against whom the set-off is claimed be a trustee or a person expressly authorized by statute to sue so much of a demand existing against those whom the party represents or for whose benefit he sues may be set off as will satisfy the claim, if the same might have been set off in an action by those beneficially interested.

331.09 Set-off in actions by executors, etc. In actions brought by executors and administrators demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased.

331.10 Set-off in actions against same. In actions against executors and administrators and against trustees and others sued in their representative character the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same in an action against them.

331.11 Judgment on set-offs. If the amount of a set-off, duly established, be equal to the plaintiff's debt or demand judgment shall be entered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand the plaintiff shall have judgment for the residue only.

331.12 Judgment for balance. If there be found a balance due from the plaintiff in the action to the defendant judgment shall be rendered for the defendant to the amount thereof; but no such judgment shall be rendered against the plaintiff for any balance due from any other person.

331.13 How set-off pleaded. In actions in courts of record a set-off claimed by the defendant shall be pleaded as a counterclaim and regulated by the rules of pleading and practice applicable to counterclaims. When a counterclaim is upon a cause of action derived by assignment a set-off of a demand against the assignor, and a set-off which in any

case may be made to a counterclaim, shall be pleaded, by reply, as a defense to the counterclaim.

331.14 Tender may be pleaded. The payment or tender of payment of the whole sum due on any contract for the payment of money, although made after the money has become due and payable, may be pleaded to an action subsequently brought in like manner and with the like effect as if such tender or payment had been made at the time prescribed in the contract.

331.15 After action. A tender also may be made after an action is brought on such contract of the whole sum then due thereon, with the legal costs of suit incurred up to the time, at any time before the action is called for trial. It may be made to the plaintiff or his attorney, and if not accepted the defendant may plead the same by answer or supplemental answer, in like manner as if it had been made before the commencement of the action, bringing into court the money so tendered for costs as well as for debt or damages.

331.16 Proceedings on acceptance of tender. If such tender be accepted the plaintiff or his attorney shall, at the request of the defendant, sign a stipulation of discontinuance of the action for such reason and shall deliver it to the defendant; and also a certificate or notice thereof to the officer who has any process against the defendant, if requested; and if any further costs shall be incurred for any service made by the officer after tender accepted and before he receives notice thereof the defendant shall pay the same to the officer or the tender shall be invalid.

331.17 Involuntary trespass. A tender may also be made in all cases of involuntary trespass before action is commenced; and when in the opinion of the court or jury a sufficient amount was tendered to the party injured, his agent or attorney for the trespass complained of judgment shall be entered against the plaintiff for costs; provided, that the defendant kept his tender good by paying the money into court at the trial for the use of the plaintiff.

331.171 Payment into court of tender; record of deposits. (1) When tender of payment in full is made and pleaded, the defendant shall pay the same into court before the trial of the action is commenced and notify the opposite party in writing, or be deprived of all benefit of such tender. When the sum so tendered and paid into court shall be sufficient, the defendant shall recover the taxable costs of the action, if the tender was prior to the commencement of the action; and he shall recover such costs from the time of the tender, if the tender was after suit commenced.

(2) When any party, pursuant to an order or to law, deposits any money or property with the clerk of court, such clerk shall record in the minute book the fact of such deposit, describing the money or property and stating the date of the deposit, by whom made, under what order or for what purpose and shall deliver a certificate of such facts to the depositor, with the volume and page of the record indorsed thereon. [*Court Rule XV; Supreme Court Order, effective Jan. 1, 1934*]

Note: Denial of interest on amount of judgment in mortgage foreclosure suit for balance due on note secured by mortgage from time of defendants' tender of such amount until time of trial was erroneous, where defendants did not pay amount tendered into court before commencement of trial. Rosecky v. Tomaszewski, 225 W 438, 274 NW 259.

Where, on the trial the defendant's attorney stated that "defendant tenders the sum of ninety dollars" but no money was offered and the plaintiff's attorney replied "That tender is not accepted", the trial court erred in dismissing the complaint as to such item, since a valid tender, if there was one, would not discharge the defendant's liability for the ninety dollars and would entitle him at most to a remission of costs accruing after the tender. James Talcott, Inc. v. Cohen, 226 W 418, 275 NW 906.

331.175 Sending notices before cutting timber or Christmas trees. (1) FORESTS OR WILD LAND AREAS. Before any person shall cut, or cause to be cut, any timber or Christmas trees upon any land in, upon, or adjoining any forest or wild land area within this state, such person each year shall send a notice in the English language containing the name and post-office address of such person, and also a description of all the lands upon which such cutting is to be done, designating the same by each forty acre governmental subdivision or fraction thereof with the proper section, town and range, by registered letter properly enveloped, sealed, postage prepaid and addressed to the county clerk of each county in which said land is located; and the county clerk shall mail a copy of such notice to the district forest ranger and the town chairman of each town in which said lands upon which such timber and Christmas trees are to be cut are located.

(2) PENALTY. Any person who fails to send such notice as in this section required shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars, or more than one hundred dollars or imprisoned in the county jail for not less than twenty days, or more than ninety days. Provided, however, that the provisions of this section shall not apply to any person who shall be engaged in cutting cord-

wood or other fuel wood upon his own land or engaged in cutting timber or trees for clearing any land actually owned and occupied by him. [*1935 c. 107; 1937 c. 320*]

Note: As to the meaning of "forest or wild land area" as used in this section, see 31 Atty. Gen. 162.

331.18 Damages for wrongfully cutting timber; offer of judgment; proceedings. (1) In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff or to recover damages for such trespass the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been, at any time before the trial, while in the possession of the trespasser or any purchaser from him with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided.

(2) The defendant in any such action may, at or before the time of the service of his answer, serve on the plaintiff his affidavit that such cutting was done by mistake and therewith an offer in writing, to allow judgment to be taken against him for the sum therein specified, with costs. If the plaintiff accept the offer and give notice thereof in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, which shall be in full satisfaction of the matters alleged in the complaint. If notice of acceptance be not so given the affidavit of the defendant shall be deemed traversed.

(3) Upon the trial the jury shall find specially upon such issue and also the true value of such logs, timber or lumber when so cut, as well as their highest market value aforesaid. If the jury find such cutting was by mistake and the sum, exclusive of costs, for which judgment was so offered was not less than the value of such logs, timber or lumber when cut, with interest from that time to the time of such offer and ten per centum as damages upon the combined sum, principal and interest, the plaintiff shall have judgment for the amount of such offer only, less the costs and disbursements of the action since the date of such offer, to be taxed and deducted in favor of the defendant.

(4) If the jury find such cutting was by mistake, but the sum, exclusive of costs, for which judgment so offered was less than such value and interest and ten per centum damages combined, judgment shall be awarded the plaintiff on the verdict for the value found at time of cutting, with interest from the time of such cutting and ten per centum thereon aforesaid, besides the costs of the action.

(5) If there be several defendants not alike liable either or any may serve such affidavit and offer and have a separate trial as to him or them; provided, that in all actions hereafter commenced when the defendant shall have in good faith acquired a title to and entered upon the land under the same, believing such title to be valid, and shall have cut the timber therefrom under such circumstances, then the plaintiff, if he shall recover, shall recover only the actual damages sustained by reason of such cutting.

(6) The defendant in his answer shall state the facts upon which he relies to establish such claim of title, and the burden of proof shall be on the defendant. And the judgment or decree of any court of general jurisdiction in this state, adjudging said defendant to be the owner of such logs, timber or lumber, and unreversed, shall be sufficient evidence of such title, acquired in good faith, and believed to be valid, and on which such defendant may rely.

Note: Where J. was found to cut and deliver timber to a company and had a right to go on the land for such purpose, but A. purchased the timber from J. and, with notice of the company's rights cut and removed the timber, there was a wrongful cutting of the timber as to the company, and 331.18 was applicable in assessing the company's damages. Jeske v. Hotz Mfg. Co., 238 W 116, 297 NW 357.

331.19 When legal notice published in adjoining county. Whenever a legal notice is required by law to be published in a newspaper in any county and no public newspaper shall be printed therein, or when there shall be but one such newspaper and the publisher thereof shall refuse to publish such notice, such notice shall, unless otherwise specially provided, be deemed required by law to be published in a newspaper printed in an adjoining county, if there be any such; and proof by affidavit of the reason why such publication was made in an adjoining county shall accompany the proof of publication or the order for publication, when any is necessary, may be made or amended by the court or judge so as to designate a newspaper in an adjoining county, upon affidavit showing the necessity therefor. Whenever publication is made in an adjoining county, under this section, copies of the notice shall be posted in at least three public places in the first county. Whenever a legal notice is required by law to be published in a newspaper in any county having a village or city situated partly in said county and partly in an adjoining county where there is no newspaper printed in such village or city within the county first mentioned, but there shall be a newspaper published in such village or city within such adjoining county, such notice may be published in such last mentioned newspaper, and no copies of such notice need be posted, but such newspaper publication shall be sufficient.

331.20 Legal notices, newspapers eligible to publish. (1) No publisher of any newspaper or other medium of distribution in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, advertisement or report of any kind or description required to be published by or in pursuance to any law or by order of any court unless, for at least two years immediately before the date of such notice, advertisement or report, such newspaper has had all the requirements enabling it to be entered by the United States post office department as entitled to second class mailing privileges and has had a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, and one thousand copies in cities of the first and second class, and further that such newspaper shall have been regularly and continuously published in such city, village, township or county from which such legal notice, advertisement or report is received, for at least two years immediately before the date of such notice, advertisement or report, providing that the two years' requirement shall not apply to papers in existence in their present location on May 24, 1931. A newspaper in the contemplation of this section is a publication appearing at regular intervals, which shall be at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, and designed for the information of the general reader. Such definition shall include a daily newspaper published in a county having a population of five hundred thousand or more, devoted principally to business news and publishing of records, which has been designated by the courts of record of said county for publication of legal notices for a period of six years or more immediately prior to January 1, 1931.

(2) Any person charged with the duty of causing legal notices, advertisements or reports to be published, and who shall cause any legal notice, advertisement or report, to be published in any newspaper or any other publication not eligible to so publish under the requirements of subsection (1) hereof, or who shall fail to cause such legal notice, advertisement or report to be published in any medium whatsoever, shall be guilty of a misdemeanor, and shall be punished by a fine of not to exceed the sum of one hundred dollars for each offense. Every daily publication of such newspaper or other publication containing such legal notice, advertisement or report, or in which such notice, advertisement or report should have been published according to law, shall constitute a separate offense hereunder.

(3) When any newspaper in the state of Wisconsin which on January 1, 1942, shall have been eligible under the requirements of subsection (1) to have published therein legal notices, advertisements or reports required to be published by or in pursuance to any law or by order of any court, and which shall thereafter for any cause attributable to the present war lose such eligibility, the publisher thereof may, any time thereafter before the expiration of one year after the termination of the present war, as proclaimed by the President or Congress of the United States, resume publishing in such newspaper any such legal notices, advertisements or reports and make charges therefor so long as such newspaper shall at the time of such resumption and thereafter when such notices, advertisements or reports are published therein, have all the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges, a bona fide paid circulation to actual subscribers as required in subsection (1), and shall be regularly and continuously published in the city, village, township or county from which such legal notices, advertisements or reports are received. The provisions of this subsection shall supersede any provision of law in conflict therewith. [*1931 c. 143; 1939 c. 361; 1943 c. 145; 43.08 (3)*]

Note: Green County Herold, published in German, and Green County Herald, published in English, are one newspaper under this section, but all legal notices should be published in both editions. 22 Atty. Gen. 207.

Mere change of name of newspaper does not create disqualification for publication of legal notices. Neither does change of its location from village to city in same county. 25 Atty. Gen. 544; 27 Atty. Gen. 394.

Newspaper may be "published," within meaning of this section, within county even though physical work performed in printing thereof is performed in another county. 26 Atty. Gen. 103.

Printing of official proceedings and legal notices of city of second and third class provided for in 62.10 in foreign language newspaper does not entitle publisher thereof to compensation under 331.20. 26 Atty. Gen. 228.

Two-year provision of 331.20, Stats. 1937, was not applicable to other requirements set forth therein nor did fact that newspaper skipped issue within two-year period, that had otherwise been continuously published for two years or more, prevent paper from being one that had been "regularly and continuously published" within meaning of statutes. 28 Atty. Gen. 181.

331.21 Discontinuance of paper before publication completed. Whenever a legal notice shall be required or ordered to be published in a particular newspaper in any county and such newspaper shall cease to be printed and published in said county before the publication of such legal notice shall be commenced, or when commenced shall so cease before such publication is completed, the order for publication, when one is required in the first instance, may be amended by order of the court or judge, on proof of the fact by affidavit,

so as to designate another newspaper, as may be necessary; and if no order is required in the first instance such publication may be made or completed in any other newspaper; and any time during which such notice shall be published in the first newspaper shall be reckoned a part of the time required for the publication thereof, proof of which may be made by affidavit of any person acquainted with the facts. The second newspaper may be one published in an adjoining county in the cases mentioned in section 331.19.

331.22 Change of name of paper. Whenever a legal notice shall be required or ordered to be published in a particular newspaper and the name of such newspaper shall be changed before such publication is commenced or before it shall be completed the publication shall be made or continued in the newspaper under its new name with the same effect as if the name had not been changed. The proof of the publication shall state the change of name and specify the period of publication in such newspaper under each name.

331.23 Computation of time, Sundays, legal holidays. (1) The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event, of which notice is given, is to happen or which completes the full period required for publication.

(2) The time within which an act is to be done or proceeding had or taken, as prescribed by the rules of procedure, shall be computed by excluding the first day and including the last; if the last day be Sunday or a legal holiday the party shall have the next secular day in which to do the act or take such proceeding. [*Court Rule XXIV; Supreme Court Order, effective Jan. 1, 1934*]

Note: A year "from the date" does not start to run until the date has expired. Forest Lumber Co. v. Potter, 213 W 288, 251 NW 442.

331.24 Forfeiture for refusal to publish. If the publisher or printer of a newspaper shall, after payment or tender of his legal fees therefor, refuse or wilfully neglect to publish any legal notice required in pursuance of law or a lawful order of publication to be published in his newspaper, being able to make such publication, he shall forfeit twenty-five dollars, one half to the party prosecuting therefor.

331.25 Fees for publishing. (1) The fees for publishing a legal notice shall be not more than one dollar per folio for the first insertion, and seventy cents per folio for each insertion after the first.

(2) Provided that in all newspapers published in counties containing more than two hundred thousand population the fees for the publication of a legal notice may be equal to, but not in excess of, the regular publishing rate actually required from time to time of private advertisers for similar advertising matter.

(3) No fee shall be paid and no public funds shall be used for subsidizing any privately owned medium of distribution, or for payment for any public advertising or notice in any privately owned medium of distribution which has not previously qualified as a public newspaper for a period of two years as defined in this chapter. [*1939 c. 239*]

331.26 Legal notice defined. Sections 331.19, 331.21 to 331.25 and the term legal notice as used therein embrace every summons, order, citation, notice of sale or other notice and every other advertisement of any description required to be published by law or in pursuance of any law or of any order of any court.

331.27 Publication on Sunday; need not be on same day each week. Any notice, advertisement, statement or publication required by law or the order of any court to be printed or published in any newspaper may be printed and published in a newspaper printed on Sunday, and such printing and publication shall be a lawful publication and a full compliance with the order of the court or officer ordering such publication, the same to all intents and purposes as though the same had been printed and published in a newspaper printed on a secular day; and any such notice, advertisement, statement or publication that may, by law or the order of any court, be required to be published for any given number of weeks may be published on any day in each week of such term, and if so published as many weeks and as many times in each week as may be required by such law or order, the same shall be as lawful a publication thereof and as full a compliance with the order of such court or officer as if the same had been printed and published on the same day of each such week.

331.28 Remedies not merged. When the violation of a right admits of both a civil and criminal remedy the right to prosecute the one is not merged in the other.

331.29 Process not to be served Sunday. No person shall serve or execute any civil process from midnight preceding to midnight following the first day of the week; and any such service shall be void; and any person serving or executing any such process shall be liable in damages to the party aggrieved in like manner and to the same extent as if he had not had any such process.

331.30 Nor on Saturday, when. Whenever an execution or other final process shall be issued against the property of any person who habitually observes the seventh day of the week, instead of the first, as a day of rest the officer to whom such process shall be directed shall not levy upon or sell any property of any such person on the seventh day of the week; provided, that said person shall deliver to such officer an affidavit in writing, setting forth the fact that he habitually keeps and observes the seventh day of the week instead of the first, as a day of rest, at any time before such levy or at least two days before such sale, as the case may be; and such sale may, at the time appointed therefor, be adjourned to any day within the life of the execution or such execution may be renewed as in other cases.

331.31 Foreign trustees may sue, make conveyances, etc. When a trustee of any express trust shall have been duly appointed in any other state, territory or country, either as an original or substitute trustee, and no trustee shall have been appointed in this state upon that part of the trust estate situate in this state, such foreign trustee may have recorded in the office of any register of deeds of any county in which any part of such trust estate may be situated his original appointment or a copy thereof duly authenticated, as required to make the same receivable in evidence, and thereafter may exercise any powers over such trust estate, including sales and conveyances and assignments thereof or of any part thereof; and may prosecute or defend any action or proceeding relating thereto and have all the rights, remedies and defenses in regard to the property, real and personal, and interests, legal and equitable, and to collect any demands of such estate which such a trustee could have if he were so appointed within and pursuant to the laws of this state.

331.32 Foreign guardians may sue, convey property, etc. When a guardian shall have been duly appointed in any other state, territory or country for any person a resident thereof at the time of such appointment and no guardian for such person shall have been appointed in this state, such foreign guardian, upon filing his original appointment or a copy thereof duly authenticated, so as to make the same receivable in evidence in any county court in the state, may thereafter exercise any powers over the estate of such ward, including sales and assignments of the same or any part thereof, and may prosecute or defend any action or proceeding relating thereto, and have all the rights, remedies and defenses in regard to the property, real and personal, and interests, legal and equitable, and to collect any demands of such estate or person which a guardian duly appointed by any county court of this state could have or exercise in relation thereto.

331.33 Limitation of surety's liability. Any person may limit the amount of his liability as a surety upon any bond or other obligation required by law or ordered by any court, judge, magistrate or public official for any purpose whatever. The amount of such limited liability may be recited in the body of the bond or stated in the justification of the surety thereto; and in any action brought upon such bond no judgment shall be recovered against such surety for any sum larger than the amount of his liability stated as aforesaid, together with his pro rata share of the costs of said action. And in any such action a surety may deposit in court the amount of his liability, stated as aforesaid, whereupon he shall be discharged and released from any further liability under such bond.

331.34 Renewal of sureties upon becoming insufficient and effects thereof. If any bail bond, recognizance, undertaking or other bond or undertaking given in any civil or criminal action or proceeding, shall become at any time insufficient, the court or judge thereof, justice of the peace or any magistrate before whom such action or proceeding is pending, may, upon notice, require the plaintiff or defendant, as the case may be, to give a new bond, recognizance or undertaking. Every person becoming surety on any such new bond, recognizance or undertaking shall be liable from the time the original was given, the same as if he had been the original surety. If any person shall fail to comply with the order made in such case the adverse party shall be entitled to any order, judgment, remedy or process to which he would have been entitled had no bond, recognizance or undertaking been given at any time.

Note: The power of the court to increase the bail exists independently of the statute. State ex rel. Ryan v. Kjelstad, 230 W 579, 284 NW 554.

331.345 Justification of individual sureties. (1) This section shall apply to any bond or undertaking in an amount of more than $1,000 whereon individuals are offered as sureties, which is authorized or required by any provision of the statutes to be given or furnished in or in connection with any civil action or proceeding in any court of record in this state, in connection with which bond or undertaking real property is offered as security.

(2) Before any such bond or undertaking shall be approved, there shall be attached thereto and made a part of such bond or undertaking a statement under oath in duplicate

by the surety that he is the sole owner of the property offered by him as security and containing the following additional information:

(a) The full name and address of the surety.

(b) That he is a resident of this state.

(c) An accurate description by lot and block number, if part of a recorded plat, or by metes and bounds of the real estate offered as security.

(d) A statement that none of the properties offered constitute the homestead of the surety.

(e) A statement of the total amount of the liens, unpaid taxes and other incumbrances against each property offered.

(f) A statement as to the assessed value of each property offered, its market value and the value of the equity over and above all incumbrances, liens and unpaid taxes.

(g) That the equity of the real property is equal to twice the penalty of the bond or undertaking.

This sworn statement shall be in addition to and notwithstanding other affidavits or statements of justification required or provided for elsewhere in the statutes in connection with such bonds and undertakings. [*1943 c. 520*]

331.35 Expenses in actions against municipal officers. (1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer. [*1939 c. 513 s. 56*]

Note: This statute is constitutional. In defending his right to the office, the officer acts not only for himself but for the citizens who have chosen him. The municipality may pay his expenses if it will but the statute does not compel it to do so. Page v. Milwaukee County, 230 W 331, 283 NW 833.

Members of county board, county clerk and county treasurer may be reimbursed by county for legal expenses incurred in successfully resisting proceedings to subject them to personal liability growing out of performance of their official duties. County board member may not be reimbursed by county for legal expenses incurred in successfully defending quo warranto action based on alleged ineligibility to hold such office. District attorney may be reimbursed by county for legal expenses incurred in successfully defending ouster proceedings based on alleged misconduct in office. 26 Atty. Gen. 243.

See note to 59.39, citing 28 Atty. Gen. 96.

It is not necessary under this section that municipal officer be compensated on salary basis in order to receive reimbursement for expenses incurred in defending himself against criminal charge. 30 Atty. Gen. 318.

331.36 [*Repealed by 1933 c. 227*]

331.37 Abrogation of defenses. (1) In any action to recover damages for a personal injury sustained within this state by an employe while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

(a) That the employe either expressly or impliedly assumed the risk of the hazard complained of.

(b) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

(c) When such employer has at the time of the injury in a common employment three or more employes, that the injury or death was caused in whole or in part by the want of ordinary care of the injured employe, where such want of ordinary care was not wilful.

(2) Any employer who has elected to pay compensation as provided in chapter 102 shall not be subject to the provisions of this section.

(3) Paragraphs (a), (b) and (c) of subsection (1) shall not apply to farm labor, except that in determining the number of employes in common employment of an employer not engaged in farming, farmers or farm laborers working along with the employes of such an employer shall be counted.

(4) No contract, rule, or regulation, shall exempt the employer from any of the provisions of this section. [*Stats. 1929 s. 102.01, 102.02; 1931 c. 403 s. 3, 4; Stats. 1931 s. 331.37; 1939 c. 513 s. 57*]

Note: For gross negligence, see note to 331.045, citing Tomasik v. Lanferman, 206 W 94, 238 NW 857.

A guest occupant of an automobile who knows the careless habits, or the intoxicated condition, of the driver, or who permits the driver to continue at an unlawful and dangerous speed, assumes the risk of resulting injuries. Biersach v. Wechselberg, 206 W 113, 238 NW 905.

A farmer who was injured when his foot was caught in a silo filler, and the owner of the silo filler, also a farmer, who were assisting a neighbor in filling a silo pursuant to an arrangement of a community of farmers for an exchange of work, were engaged in "farm labor" within 331.37 (3) so that the injured farmer could not recover if his contributory negligence amounted to fifty per cent or more (section 331.045). Schuster v. Bridgeman, 225 W 547, 275 NW 440.

331.38 Surety, how discharged. (1) Any surety or the personal representative of any surety upon the bond of any trustee, guardian, receiver, executor, or other fiduciary, may be discharged from liability as provided in this section. On five days' notice to the principal in such bond, application may be made to the court where it is filed, or which has jurisdiction of such fiduciary or to any judge of such court for a discharge from liability as surety, and that such principal be required to account.

(2) Notice of such application may be served personally within or without the state. If it shall satisfactorily appear to the court or the judge that personal service cannot be had with due diligence within the state, the notice may be served in such manner as the court or judge shall direct. Pending such application the principal may be restrained from acting, except to preserve the trust estate.

(3) If at the time appointed the principal shall fail to file a new bond satisfactory to the court or judge, an order shall be made requiring the principal to file a new bond within five days. When such new bond shall be filed, the court or judge shall make an order requiring the principal to account for all his acts to and including the date of the order, and to file such account within a time fixed not exceeding twenty days; and shall discharge the surety making such application from liability for any act or default of the principal subsequent to the date of such order.

(4) If the principal shall fail to file a new bond within the time specified, an order shall be made removing him from office, and requiring him to file his account within twenty days. If he shall fail to file his account as required, the surety may make and file such account; and upon settlement thereof and upon the trust fund or estate being found or made good and paid over or properly secured, credit shall be given for all commissions, costs, disbursements and allowances to which the principal would be entitled were he accounting.

(5) The procedure for hearing, settling and allowing such account shall be according to the practice prescribed by chapter 317 in the matter of account of executors and administrators. Upon the trust fund or estate being found or made good and paid over or properly secured, such surety shall be discharged from all liability. Upon demand by the principal, the discharged surety shall return the unearned part of the premium paid for the canceled bond.

(6) Any such fiduciary may institute and conduct proceedings for the discharge of his surety and for the filing of a new bond; and the procedure shall in all respects conform substantially to the practice prescribed by this section in cases where the proceeding is instituted by a surety, and with like effect. [*Stats. 1931 s. 204.15; 1933 c. 487 s. 145*]

331.39 Juror's oath. (1) In every case and in all courts the jurors selected to try the issues in the action or proceeding, civil or criminal, shall be sworn; and the oath may be administered in substantially the following form: Do you and each of you swear (or affirm) that you will well and truly try the issue joined between ...., plaintiff, and ...., defendant, and, unless discharged by the court, a true verdict give, according to law and the evidence given in court, so help you God.

(2) The juror's assent to the oath may be manifested by the uplifted hand. [*Supreme Court Order, effective Jan. 1, 1937*]

331.40 Oath of officer in charge of jury. When the issues have been submitted to the jury the jurors shall be under the charge of a proper officer until they agree upon a verdict or are discharged by the court; the officer shall be sworn for that purpose and the following oath may be administered to him: You do swear that, unless otherwise ordered by the court, you will, to the utmost of your ability, keep all jurors sworn on this trial together in some private and convenient place, without drink except water, that you will not suffer any person to speak to them or speak to them yourself, except it be to ask whether they have agreed on their verdict, until they have agreed on their verdict or are discharged by the court, and that you will not, before they render their verdict, communicate to any person the state of their deliberations or the verdict they have agreed upon, so help you God. [*Supreme Court Order, effective Jan. 1, 1937*]

331.41 Employe's cash bonds to be held in trust; duty of employer; penalty. (1) Where any person, firm or corporation requests any employe to furnish a cash bond, the cash constituting such bond shall not be mingled with the moneys or assets of such person, firm or corporation demanding the same, but shall be deposited by such person, firm or corporation in any bank, trust company or federal savings and loan association whose deposits are insured by a federal agency to the extent of five thousand dollars, as a separate trust fund, and it shall be unlawful for any person, firm or corporation to mingle such cash received as a bond with the moneys or assets of any such person, firm or corporation, or to use the same. No employer shall deposit more than five thousand dollars with any one depository. The bank book, certificate of deposit or other evidence thereof shall be in the name of the employer in trust for the named employe, and shall not be withdrawn except after an accounting had between the employer and employe, said accounting to be had within ten days from the time relationship is discontinued or the bond is sought to be appropriated by the employer. All interest or dividends earned by such sum deposited shall accrue to and belong to the employe and shall be turned over to said employe as soon as paid out by the depository. Such deposit shall at no time and in no event be subject to withdrawal except upon the signature of both the employer and employe or upon a judgment or order of a court of record.

(2) In the event of the failure of any person, firm or corporation, such moneys on deposit shall constitute a trust fund for the benefit of the persons who furnished such bonds and shall not become the property of the assignee, receiver or trustee of such insolvent person, firm or corporation.

(3) In case of the death of such employe before such cash bond is withdrawn in the manner provided in subsection (1) of this section such accounting and withdrawal may be effected not less than five days after such death and before the filing of a petition for letters testamentary or of administration in the matter of the decedent's estate, by the employer with the decedent's surviving spouse; and if there be no surviving spouse with his children; and if he shall leave no children, his father or mother; and if he shall leave no father or mother, his brother or sister, in the same manner and with like effect as if such accounting and withdrawal were accomplished by and between the employer and employe as provided in subsection (1) of this section. The amount of such cash bond, together with principal and interest, to which the deceased employe would have been entitled had he lived, shall, as soon as paid out by the depository, be turned over to such relative of the deceased employe effecting such accounting and withdrawal with the employer, and such turning over shall be a discharge and release of the employer to the amount of such payment. If no such relatives survive, the employer may apply such cash bond, or so much thereof as may be necessary, to paying creditors of the decedent in the order of preference prescribed in section 313.16 for satisfaction of debts by executors and administrators and the making of payment in such manner shall be a discharge and release of the employer to the amount of such payment.

(4) Any person who shall violate any provision of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine equal to the amount of the bond or by imprisonment in the county jail for not less than ten days nor more than sixty days, or by both such fine and imprisonment. [*1937 c. 117; 43.08 (2); 1939 c. 60*]

Note: Funds deposited by employer under (1) are trust funds. Five thousand dollar limitation is without reference to employer's individual account and is limitation only upon amount which may be deposited with respect to any one trust or individual employe. 27 Atty. Gen. 525.

This section is not retroactive in effect and does not apply to moneys deposited by employes prior to its effective date. 27 Atty. Gen. 721.

331.42 Deposit of undistributed money and property by administrators and others. (1) In case in any proceeding in any court of record it is (a) determined that moneys or other personal property in the custody of or under the control of any administrator, executor, trustee, receiver or other officer of the court, belongs to a natural person if he is alive, or to an artificial person if it is in existence and entitled to receive, otherwise to some other person, and the court or judge making such determination finds that there is not sufficient evidence showing that the natural person first entitled to take is alive, or that the artificial person is in existence and entitled to receive, or (b) in case such money or other personal property, including any legacy or share of intestate property cannot be delivered to the legatee or heir or person entitled thereto because of the fact that such person is a member of the military or naval forces of the United States or any of its allies or is engaged in any of the armed forces abroad or with the American Red Cross society or other body or other similar business, then in either or any of such cases, the court or judge may direct that the officer having custody or control of such money or other personal property, deposit the same in any trust company, or any state

or national bank within the state of Wisconsin authorized to exercise trust powers, or with the public administrator, taking its or his receipt therefor, and the said receipt shall, to the extent of the deposit so made, constitute a complete discharge of the said officer in any accounting by him made in said proceeding.

(2) In case such deposit is directed to be made, the court shall require the trust company or bank in which said deposit is ordered to be made, or the public administrator, as a condition of the receipt thereof, to accept and handle, manage and invest the same as trust funds to the same extent as if it or he had received the same as a testamentary trust, unless the court shall expressly otherwise direct, except that the reports shall be made to the court of its or his appointment.

(3) No distribution of the moneys or personal property so deposited shall be made by the depository as such trustee or otherwise without an order of the court on notice as prescribed by section 324.18, and the jurisdiction of the court in the proceeding will be continued to determine, at any time at the instance of any party interested, the ownership of said funds, and to order their distribution. [*1943 c. 446*]

335.01 to 335.25 [*Repealed by 1943 c. 179*]