268.28 History: 1941 c. 81; Stats. 1941 s. 268.28; 1961 c. 495.

268.29 History: 1941 c. 81; Stats. 1941 s. 268.29.

268.30 History: 1941 c. 81; Stats. 1941 s. 268.30.

268.31 History: 1941 c. 81; Stats. 1941 s. 268.31; 1951 c. 319 s. 221, 222; 1961 c. 495.

268.32 History: 1941 c. 81; Stats. 1941 s. 268.32.

268.33 History: 1941 c. 81; Stats. 1941 s. 268.33.

268.34 History: 1941 c. 81; Stats. 1941 s. 268.34.

CHAPTER 269.

Practice Regulations.

269.01 History: 1856 c. 120 s. 275 to 277; R. S. 1858 c. 140 s. 9 to 11; R. S. 1878 s. 2788; Stats. 1898 s. 2788; 1925 c. 4; Stats. 1925 s. 269.01; 1935 c. 541 s. 131; Sup. Ct. Order, 275 W vi.

A voluntary submission of a matter in controversy arising out of an order relative to rents of the land in suit made prior to the judgment appealed from cannot be made after the cause is remanded with directions to enter judgment dismissing the complaint. The trial court can enter no different judgment in the action pursuant to any such voluntary submission. Kuenzli v. Burnham, 124 W 480, 102 NW 940.

In an agreed case no conclusion of law is necessary as the judgment determines both facts and law in favor of the party for whom it is rendered. Hoff v. Hackett, 148 W 32, 134 NW 132.

An agreed case to review the action of a board of equalization by which an assessor's valuation has been reduced must be governed as to evidence considered and relief awarded by the same rules that would control a proceeding by certiorari brought for the same purpose. State ex rel. Althen v. Klein, 157 W 308, 147 NW 373.

Where all of the parties to an action asked for a final judgment upon the summons and complaint, an order to show cause and the return thereto, that amounted to an agreement to submit the case upon the complaint and the affidavits, and judgment was entered accordingly. Luebke v. Watertown, 230 W 512, 284 NW 519.

Where a landowner appealed to the circuit court from the county judge's determination denying his petition for the appointment of commissioners to assess compensation for land taken by the county, which appeal was ineffective to confer jurisdiction because not authorized by statute, but the parties treated the matter in circuit court as an "action" and stipulated that the petition and pleadings, testimony and the entire record be submitted to the court, and that in the event of the circuit court's reversing the county judge's decision the circuit court should proceed with the selection of a jury to try the issue of damages and any other issues involved, the case is deemed pending in the circuit court as an action on an agreed case. Olen v. Waupaca County, 238 W 442, 300 NW 178.

A stipulation signed and filed by the parties in interest for the determination of the validity of a sale of corporate personal property, made by a trustee under a trust deed, constituted an agreed case, although no summons had been issued in a proceeding instituted by a creditor for the appointment of a receiver to wind up the affairs of the corporation. (In re Citizens State Bank of Gillette, 207 W 434, distinguished.) In re Davis Bros. Stone Co. 245 W 130, 13 NW (2d) 512.

In an action to recover on an insurance policy for medical expenses incurred by the insured as a result of an automobile collision and for damages to the insured's automobile, the defendant insurance company was not estopped from appealing the judgment against it by the fact that it had neither served an answer to the complaint nor responded to the plaintiff's trial brief, since the action had been submitted by stipulation of the parties as an agreed case and it was therefore not necessary that the defendant serve an answer. Mueller v. American Ind. Co. 19 W (2d) 349, 120 NW (2d) 89.

269.02 History: 1858 c. 97; R. S. 1858 p. 837, c. 97; R. S. 1878 s. 2789; Stats. 1898 s. 2789; 1925 c. 4; Stats. 1925 s. 269.02; 1935 c. 541 s. 132; 1937 c. 145; 1949 c. 301; Sup. Ct. Order, 29 W (2d) vi.

Comment of Advisory Committee, 1949: This addition to 269.02 repeats 271.04 (7). It is brought here to complete (in 269.02) the rule covering the effect of an offer of judgment. In R. S. 1878 (2789) it is provided that plaintiff "must pay defendant's costs from the time of the offer." That was amended out when 271.04 (7) was created. 269.02, 271.04 and other sections were amended by ch. 145, Laws of 1937 (Bill 208-A). That chapter created 271.04 (7); and struck out the concluding phrase of 269.02 above quoted. Bill 208-A was introduced by Assemblyman Vaughan at the request of the Advisory Committee on Rules. The "offer" mentioned in 269.04 means the offer under 269.03. (Bill 30-S)

The plaintiff cannot accept an offer of judgment and also reserve the right to try any part of the cause. Sellers v. Union L. Co. 36 W 398.

The fact that a case proceeds to trial after an offer of judgment is made is ample evidence that it was refused. The paper was a proper instrument to be in the files of the case and it was the duty of the court to consider it in determining the costs. Bourda v. Jones, 110 W 52, 85 NW 671.

Payment of money into court on behalf of a reward offered and the interpleading of the claimants is not an offer of judgment within sec. 2789, Stats. 1898, and the costs cannot be ordered paid from the fund in court. Kinn v. First Nat. Bank, 118 W 537, 95 NW 969.

An admission in a defendant's answer of a liability to the extent of $200 is not a tender of judgment under sec. 2789, Stats. 1919. Every such tender must be made in a separate document and not in a pleading. Tullgren v. Karger, 173 W 288, 181 NW 232.

269.02 requires a defendant who seeks its

benefits to make his offer a reasonable time before trial, not the last minute before trial, and while the statute does not expressly require 10 days, it contemplates the plaintiff's acceptance within 10 days and before trial for the purpose of entering a judgment. If a lesser period can be justified on the facts of a case, the trial court can so find for the purpose of applying the statute. Vroman v. Kempke, 34 W (2d) 680, 150 NW (2d) 423.

Offer of judgment and offer of damages. Metzner, 41 WBB, No. 3.

269.05 History: R. S. 1849 c. 95 s. 9; R. S. 1858 c. 125 s. 42; R. S. 1878 s. 2792; Stats. 1898 s. 2792; 1925 c. 4; Stats. 1925 s. 269.05.

Where separate actions were brought on 2 promissory notes and a sufficient answer filed in each the mere consolidation of the 2 actions into one, without change in the plaintiff's allegations, does not render necessary a new or amended answer. Harris v. Wicks, 28 W 198.

When 3 actions between the same parties were consolidated by stipulation providing that they might be consolidated for the purposes of trial and appeal, there should have been but one finding and one judgment. Capron v. Adams County, 43 W 613.

Actions can be consolidated only when they might have been joined. Formerly trespass against a railroad company for taking lands to build its road could not be joined or consolidated with a condemnation proceeding. Blesch v. Chicago & Northwestern R. Co. 44 W 593.

Two actions for goods sold, one by the plaintiff as surviving partner and the other individually, may be consolidated. McCartney v. Hubbell, 52 W 360, 9 NW 61.

Separate appeals taken from awards made by the commissioners of appraisal to the same party may be consolidated into one action in the circuit court. Washburn v. Milwaukee & L. W. R. Co. 59 W 364, 18 NW 328.

Where the consolidation of actions would tend to render the trial protracted and embarrassing it should not be ordered. Winninghoff v. Wittig, 64 W 180, 24 NW 912.

Where several actions to enforce liens were consolidated and the judgment fixing the rights of the lien claimants was affirmed on appeal of the debtor, all the lien claimants together constitute the prevailing party, and only one attorney's fee can be taxed. Allis v. Meadow Springs D. Co. 67 W 16, 29 NW 543, 30 NW 300.

If there are several actions pending and they arose out of transactions which are common to them all, and the evidence which will sustain a recovery in one of the actions will sustain it in each of the others, a consolidation is proper. It was not intended that the parties to each of the actions must necessarily be the same. Biron v. Edwards, 77 W 477, 46 NW 813.

The consolidation of actions brought by different parties, no change being made in the pleadings, does not aid an insufficient complaint of one plaintiff, that of another not being a part of it. Hinckley v. Pfister, 83 W 64, 53 NW 21.

An action begun in the justice court but triable in the circuit court as an action originally brought there may be consolidated with an action begun in the circuit court. Lauterbach v. Netzo, 111 W 322, 87 NW 230.

Where several actions have been brought against the same defendant and the relief sought was the subjecting of the same real estate to sale for the benefit of all the creditors of a deceased person, a consolidation was proper. A dismissal of the individual action of one of the plaintiffs did not render such plaintiff aggrieved by the action of the court. Allen v. McRae, 122 W 246, 100 NW 12.

When suits are consolidated the order of consolidation should require the title of the case and the pleadings to be amended to conform to the order of consolidation. The practice of retaining all of the pleadings in each action and presenting them to the court as the pleading of the consolidated action is not approved. Eastern W. R. Co. v. Hackett, 135 W 464, 115 NW 376.

Two separate actions at law by different plaintiffs against a single defendant to recover compensation for finding the same purchaser for the defendant's real estate cannot be consolidated because they could not have been joined in the first place. Schenck v. Sterling E. & C. Co. 151 W 266, 138 NW 637 and 769.

Two actions growing out of the same transaction and depending upon substantially the same evidence should be consolidated and each plaintiff should be permitted to introduce any relevant and competent testimony. Winnek v. Moore, 164 W 53, 159 NW 558.

An order consolidating 2 actions merges them into one new action which must be entitled and prosecuted as directed, and the original actions are thereby terminated. First T. Co. v. Holden, 168 W 1, 168 NW 402.

Whether cases should proceed together before the same jury rests largely in the discretion of the trial court. The trial of an action of a child for personal injuries with that of the father for medical and other expenses was not error where the facts and proofs and answers in each case were practically identical and both parties were represented by the same counsel. Schmidt v. Riess, 186 W 574, 203 NW 362.

The denial of a request to try together the separate actions arising out of the same collision was not an abuse of discretion. Reardon v. Terrien, 214 W 267, 252 NW 691.

Consolidation of actions under 269.05 and the general rules of practice is discretionary with the trial court. Tupitza v. Tupitza, 251 W 257, 29 NW (2d) 54.

Consolidation of cases for trial does not operate to make each and every party in one case a party in each of the consolidated cases. An unappealed denial of a motion for contribution at the trial of 4 consolidated cases was not res adjudicata of the issue of contribution, where one of the elements necessary to make an issue res adjudicata, namely, that the same parties shall have been involved, was lacking. Connecticut Ind. Co. v. Prunty, 263 W 27, 56 NW (2d) 540.

The matter of joining cases for trial only is not a true "consolidation," but merely a union of convenience, resting largely in the discretion of the court where there can be no prejudice from a joint trial and expense and delay

can be lessened thereby. Where similar easement rights were being condemned over 3 farms, the respective owners of the farms were represented by the same attorneys, and the landowners intended to and did use the same expert witnesses to establish the value of the taking as to all 3 farms, the trial court did not abuse its discretion in consolidating the 3 appeals for purposes of trial. Braun v. Wisconsin E. P. Co. 6 W (2d) 262, 94 NW (2d) 593.

269.06 History: 1856 c. 120 s. 154; R. S. 1858 c. 129 s. 14; R. S. 1878 s. 2793; Stats. 1898 s. 2793; 1925 c. 4; Stats. 1925 s. 269.06.

Moneys deposited in court in an action of ejectment by virtue of the judgment, in which action plaintiff was required, as a condition of obtaining possession of the land, to pay into court the purchase price of the land, which money, if the judgment should be reversed on appeal, would belong to the plaintiff, with interest, taxes, etc., cannot be applied to the payment of the costs taxed upon reversal of the judgment. The money having been paid into court for a special purpose could be applied to no other. Mohr v. Porter, 55 W 149, 12 NW 374.

269.07 History: 1856 c. 120 s. 155; R. S. 1858 c. 129 s. 15; R. S. 1878 s. 2794; Stats. 1898 s. 2794; 1925 c. 4; Stats. 1925 s. 269.07; 1935 c. 541 s. 133.

269.08 History: 1856 c. 120 s. 278, 280, 281; R. S. 1858 c. 140 s. 1, 4, 5; R. S. 1878 s. 2795; Stats. 1898 s. 2795; 1925 c. 4; Stats. 1925 s. 269.08.

Secs. 2795-2797, R. S. 1878, have no application to the case of joint and several debtors. Dill v. White, 52 W 456, 9 NW 404.

Where plaintiff sought, on appeal to the circuit court, from a judgment of the civil court of Milwaukee county, to bring in, as a party, a wife who had signed the note upon which such judgment had been rendered against her husband, the plaintiff should have had a summons issued with a description of the judgment or statement of the amount due and unsatisfied. Mandelker v. Goldsmith, 177 W 245, 188 NW 74.

269.09 History: 1856 c. 120 s. 282; R. S. 1858 c. 140 s. 6; R. S. 1878 s. 2796; Stats. 1898 s. 2796; 1925 c. 4; Stats. 1925 s. 269.09.

269.10 History: 1856 c. 120 s. 283; R. S. 1858 c. 140 s. 7; R. S. 1878 s. 2797; Stats. 1898 s. 2797; 1925 c. 4; Stats. 1925 s. 269.10.

269.12 History: 1865 c. 409 s. 1; R. S. 1878 s. 2799; Stats. 1898 s. 2799; 1925 c. 4; Stats. 1925 s. 269.12; Sup. Ct. Order, 207 W vi; 1943 c. 275 s. 61; Sup. Ct. Order, 265 W vii.

Sec. 1, ch. 409, Laws 1865, does not apply to a judgment obtained by gross fraud upon the court and defendant, as where the plaintiff obtained an order of publication and a judgment of divorce by falsely swearing that she did not know the defendant's residence or stopping place; such judgment should be set aside as soon as its true character is judicially determined. Crouch v. Crouch, 30 W 667.

The procedure to subject a defendant to a prior judgment is by summons to show cause, not by summons and complaint. State ex rel. Lachenmaier v. Gehrz, 272 W 188, 74 NW (2d) 801.

269.13 History: 1856 c. 120 s. 25; R. S. 1858 c. 135 s. 1; R. S. 1878 s. 2800; Stats. 1898 s. 2800; 1925 c. 4; Stats. 1925 s. 269.13.

An equitable suit in aid of attachment does not abate upon the plaintiff making an assignment for the benefit of creditors, but his assignee may be substituted as plaintiff and the action may be continued in his name. Evans v. Virgin, 69 W 148, 33 NW 585.

An action for trespass under sec. 4269, R. S. 1878, survives against the personal representative of the wrongdoer; but the plaintiff can recover only the value of the stumpage. Cotter v. Plumer, 72 W 476, 40 NW 379.

An action of ejectment abates upon the death of the sole defendant; and the claim for mesne profits and a counterclaim for the value of improvements are in this state mere incidents to the action, and upon the death of the defendant cannot be revived. Farrall v. Shea, 66 W 561, 29 NW 634; Illinois S. Co. v. Rogall, 159 W 214, 149 NW 394.

See note to 180.787, citing State ex rel. Pabst v. Circuit Court, 184 W 301, 199 NW 213.

See note to 895.01, citing Markman v. Becker, 6 W (2d) 438, 95 NW (2d) 233.

269.14 History: 1856 c. 120 s. 25; R. S. 1858 c. 135 s. 1; R. S. 1878 s. 2801; Stats. 1898 s. 2801; 1925 c. 4; Stats. 1925 s. 269.14.

Where one railway company became merged in another and the latter was substituted for the former in an action pending against it, and the notice of substitution was served by a letter sent by mail to E. and P. without anything to show that either of them was the attorney of the company, such notice so served did not give jurisdiction of the latter company, and a judgment against it must be reversed. Sturtevant v. Milwaukee, W. & B. V. R. Co. 11 W 61.

Where one of several defendants in an action to enforce a joint and several liability against them dies, the action may be revived against his personal representatives separately, under sec. 1, ch. 135, R. S. 1858, but not against them jointly with the other defendants. Jones v. Estate of Keep, 23 W 45.

Sec. 1, ch. 135, R. S. 1858, will not prevent the court from allowing, on defendant's motion, a discontinuance of the action as to one of the plaintiffs who has sold his interest to the defendant. Noonan v. Orton, 31 W 265.

Sec. 2801, R. S. 1878, has no application to a case where the original sole plaintiff has ceased to exist as an abolished town. It refers only to cases where the original plaintiff still exists and the right has passed to another. La Pointe v. O'Malley, 47 W 332, 2 NW 632.

A settlement with original plaintiff is valid, after transfer of his interest, unless there is some action of the court, either in allowing the action to be continued in the name of the original plaintiff or in directing the substitution or joinder of the real owner of the cause of action. Mason v. Beach, 55 W 607, 13 NW 884.

A voluntary assignment by a debtor of his property to a trustee is not a devolution of liability upon the assignee within sec. 2801, R. S. 1878. Howitt v. Blodgett, 61 W 376, 21 NW 292.

The original plaintiff in replevin may con-

tinue an action although, during its pendency, he has sold the property involved. Johnston v. King, 88 W 211, 58 NW 1105.

Where the successful party, pending an appeal, has transferred his interest a substitution of parties is not essential; the court will not dismiss the appeal, but permit it to be defended in the name of such party, leaving the trial court to protect his rights. Belden v. Hurlbut, 94 W 562, 69 NW 357.

Where the original owner of land conveyed the same by quitclaim deed after the entry of judgment by default in an action to foreclose a tax deed and before the vacation of such judgment, he might apply for the vacation of the judgment and leave to defend. Home I. Co. v. Emerson, 153 W 1, 140 NW 283.

An action of ejectment against a single defendant and sole occupant may be revived against his transferees who acquired title pending the action, after death of the original defendant and notwithstanding the fact that such action cannot be revived against the heirs. Illinois S. Co. v. Rogall, 159 W 214, 149 NW 394.

269.14, Stats. 1939, applies to a special proceeding, as well as to an action. In re Henry S. Cooper, Inc. 240 W 377, 2 NW (2d) 866.

269.15 History: R. S. 1849 c. 96 s. 15; R. S. 1858 c. 135 s. 11; R. S. 1878 s. 2802; Stats. 1898 s. 2802; 1925 c. 4; Stats. 1925 s. 269.15.

In case of the death of the party who is a public officer the action is not affected thereby. Cairns v. O'Bleness, 40 W 469.

269.16 History: 1856 c. 120 s. 25; R. S. 1858 c. 135 s. 1; R. S. 1878 s. 2803; Stats. 1898 s. 2803; 1925 c. 4; Stats. 1925 s. 269.16; 1935 c. 541 s. 134.

Where it did not appear of record that any motion had been made to allow the continuance of an action in the name of the administrator of a deceased plaintiff, nor any order therefor, but an action was continued and prosecuted with the administrator's consent, the formal defect could be disregarded. Tarbox v. French, 27 W 651.

In case of the death of a sole plaintiff no further step can be taken until a substitution or revival has been had. La Pointe v. O'Malley, 47 W 332, 2 NW 632.

After an action has been revived, appearing and arguing a demurrer by the opposite party is a waiver of objection to the order of revival. Brooks v. Northey, 48 W 455, 4 NW 589.

Upon the death of defendant mortgagor all who succeed to his interest in the land must be made parties upon a revival of the action or they will retain the right to redeem notwithstanding the judgment. Zaegel v. Kuster, 51 W 31, 7 NW 781.

Where the plaintiff in ejectment transferred an undivided half of the premises to his counsel by a quitclaim deed absolute on its face, but it appeared that it was really given to secure fees, an order compelling the grantee to be joined was erroneous. Mohr v. Porter, 55 W 149, 12 NW 374.

An action may be continued in favor of or against the representatives of a deceased party although the complaint does not disclose facts showing that it survives. Plumer v. McDonald L. Co. 74 W 137, 42 NW 250; Cavanaugh v. Scott, 84 W 93, 54 NW 328.

There was no abuse of discretion in denying an application to revive an action brought on a policy of insurance by the insured and his mortgagee, where the action had been pending 9 years before the former's death, and an administrator was not appointed until 2 years thereafter, the application being delayed yet another year, and a trial and dismissal of the action having been had in the meantime. Carberry v. German Ins. Co. 86 W 323, 56 NW 920.

An application to revive an action is a special proceeding and is addressed to the sound discretion of the court; and the applicant must show diligence, good faith and that his laches, if any, will not prejudice adverse parties. Pereles v. Christensen, 164 W 163, 159 NW 817.

269.16 authorizes the revival of an action against the representative or successor in interest of the deceased; the heirs are not interested, and the guardian ad litem of minor children need not give consent or have notice. Nelson v. Ziegler, 196 W 426, 220 NW 194.

The inability of the widow to appeal from an order in the estate of her deceased husband before her death entitled the executrix of her estate to be substituted in the matter of the appeal, so that the county court should have continued the action in the executrix where the executrix applied for such substitution within the statutory period for taking an appeal. Estate of Steck, 273 W 303, 77 NW (2d) 715.

269.17 History: R. S. 1849 c. 96 s. 8, 9; R. S. 1858 c. 135 s. 4, 5; R. S. 1878 s. 2804; Stats. 1898 s. 2804; 1925 c. 4; Stats. 1925 s. 269.17.

The survivorship statutes (269.17 and 269.18) do not apply to proceedings in the supreme court so as to permit an appeal to be prosecuted therein after the death of a party affected by the judgment appealed from. Stevens v. Jacobs, 226 W 198, 275 NW 555, 276 NW 638.

269.18 History: R. S. 1878 s. 2805; Stats. 1898 s. 2805; 1925 c. 4; Stats. 1925 s. 269.18; 1935 c. 541 s. 135.

Revisers' Note, 1878: A new section from the New York revision.

269.17 and 269.18, relating to the revival of actions, apply when a party dies before judgment in circuit court but they do not apply after that judgment and they have no application to the supreme court. Bond v. Breeding, 234 W 14, 290 NW 185.

Where one defendant, in an action on contract against trustees of an unincorporated church congregation, died, and his death was called to the attention of the trial court before trial, and the action was not revived against his personal representative, the entry of judgment against such defendant personally was erroneous. Mitterhausen v. South Wisconsin Conference Asso. 245 W 353, 14 NW (2d) 19.

269.19 History: R. S. 1849 c. 96 s. 10, 11; R. S. 1858 c. 135 s. 6, 7, 9; R. S. 1878 s. 2806, 2808; Stats. 1898 s. 2806, 2808; 1925 c. 4; Stats. 1925 s. 269.19, 269.21; 1935 c. 541 s. 136, 137; Stats. 1935 s. 269.19.

Upon the death of the owner of land it descends to his heir, who may continue any action for its recovery. The administrator may take possession of the property in case it is

necessary to pay debts, but is not required to do so. Jones v. Billstein, 28 W 221, 230.

If the plaintiff in an action to set aside his conveyances of real and personal property on the ground of undue influence dies intestate pending the action, and there is a revivor of it in the name of his special administrator, who stipulates with the defendants for a judgment settling the title to the real estate, leave should be granted the heirs of the deceased plaintiff to revive the action in their name and set aside the judgment. Jones v. Graham, 80 W 6, 49 NW 122.

269.20 History: R.S. 1849 c. 96 s. 12; R. S. 1858 c. 135 s. 8; R. S. 1878 s. 2807; Stats. 1898 s. 2807; 1925 c. 4; Stats. 1925 s. 269.20.

269.22 History: R. S. 1849 c. 96 s. 13; 1856 c. 120 s. 25; R. S. 1858 c. 135 s. 1; R. S. 1878 s. 2809; Stats. 1898 s. 2809; 1925 c. 4; Stats. 1925 s. 269.22.

Revisers' Note, 1878: Last sentence of section 1, chapter 135, R. S. 1858, amended to embrace cases when the cause of action is so established as to be ripe for judgment in other modes as well as by the verdict, and to explicitly declare the law as it is in case of death before verdict.

269.23 History: 1860 c. 363; R. S. 1878 s. 2810; Stats. 1898 s. 2810; 1925 c. 4; Stats. 1925 s. 269.23; 1935 c. 541 s. 138.

The notice need not mention a time and place for showing cause. If cause is not shown within 20 days the action stands revived. No order of revival was necessary under ch. 363, Laws 1860. Durbin v. Waldo, 15 W 352.

The remedy here provided for is cumulative to that provided by sec. 1, ch. 135, R. S. 1858. Stevens v. Magor, 25 W 533.

The rule that when a mortgagor dies pending an action for foreclosure all who succeed to his interest in the land should be made defendants in his stead and that any person not made a party will retain the right of redemption is not changed by ch. 363, Laws 1860. Zaegel v. Kuster, 51 W 31, 7 NW 781.

An action to recover the price of furs sold to defendant's wife was begun in June, 1906; in June, 1907, it was continued by stipulation; and thereafter nothing was done by either party to bring it to trial; defendant secured a divorce in December, 1908; in August, 1911, the defendant died. In April, 1913, after a motion to dismiss for want of prosecution, plaintiff moved for a revival of the action. The order granting the motion was an abuse of discretion. R. G. Uhlmann F. Co. v. Gates, 155 W 385, 144 NW 991.

An order reviving an action is discretionary. But in view of the policy expressed by sec. 2811a, Stats. 1921, authorizing the dismissal of an action not brought to trial within 5 years, it was an abuse to order a revival of an action 2 years after the plaintiff's death which action had at that time been pending 12 years, especially as such revival would work hardship on the defendant. Wills v. Shepard, 184 W 26, 198 NW 618.

Revival of actions is within the sound discretion of the trial court. Kearney v. Morse, 199 W 150, 225 NW 729.

See note to 895.01, citing Marsh W. P. Co. v. Babcock & Wilcox Co. 207 W 209, 240 NW 392.

After a mortgage foreclosure judgment finally determining a defendant's liability for deficiency has been entered, the action was so "pending" that after the death of the defendant his personal representative could be substituted as a party in his place in the subsequent proceedings, and judgment be entered against the representative for the deficiency. Johnson v. Landerud, 209 W 672, 245 NW 862.

Where the guardian of an incompetent heir appealed to the supreme court from an order of the county court appointing an administrator of the estate of a sister, and such heir died during the pendency of the appeal, his special administrator was a proper party in interest and entitled to an order reviving the appeal. Estate of Edwards, 234 W 40, 289 NW 605.

The petition and notice provided in 269.23 are included in the broad meaning of the word "process." Tarczynski v. Chicago, M., St. P. & P. R. Co. 261 W 149, 52 NW (2d) 396.

A motion for revival of an action abated by the death of a party is addressed to the discretion of the trial court, and should not be granted when the burden cast on the other party thereby will grievously preponderate over the benefits to the applicant, nor where delay and laches have intervened so as to place the defendant at serious disadvantage, and usually not where such delays have permitted a statute of limitations to run against the original demand. Schmitz v. Schuh, 267 W 442, 66 NW (2d) 141.

269.24 History: R. S. 1878 s. 2811; Stats. 1898 s. 2811; 1925 c. 4; Stats. 1925 s. 269.24; Sup. Ct. Order, 217 W vii.

Where the plaintiff dies before serving his complaint there is no statutory provision limiting the right to revive the action to one year; and the court will not impose any such limitation, especially as the defendant may expedite the proceedings under sec. 2811, R. S. 1878. Plumer v. McDonald L. Co. 74 W 137, 42 NW 250.

An appeal is not dismissible on the ground that the action was not revived in the court below, since the revivor statutes do not apply where a party dies after judgment in the action. Hirchert v. Hirchert, 243 W 519, 11 NW (2d) 157.

269.25 History: 1897 c. 119; Stats. 1898 s. 2811a; 1925 c. 4; Stats. 1925 s. 269.25; 1935 c. 541 s. 139; 1969 c. 269.

Sec. 2811a, Stats. 1898, does not apply where an appeal is taken from the disallowance of a claim by a county board, which does not reach the circuit court until more than 5 years after it was filed with the clerk. Rice v. Ashland County, 108 W 189, 84 NW 189.

It is an abuse of discretion to refuse to vacate an order dismissing an action for want of prosecution when the continuance over the period was agreed to at the request of the attorneys for the defendant. Hine v. Grant, 119 W 332, 96 NW 796.

Where a case is dismissed under sec. 2811a, Stats. 1898, such dismissal is a bar to a subsequent suit on the same cause of action. Geo.

Walter Co. v. Hemseleit, 146 W 666, 132 NW 631.

Sec. 2811a, Stats. 1915, is permissive, not mandatory, and does not absolutely bar actions not brought to trial within 5 years. Pereles v. Christensen, 164 W 163, 159 NW 817.

A judgment of dismissal under sec. 2811a will not be reversed unless there is a clear and justifiable excuse for not bringing the action to trial within the prescribed 5 years. Condon W. M. Co. v. Racine E. & M. Co. 183 W 435, 198 NW 268.

Dismissal of the action to foreclose the mechanic's lien for failure to bring it to trial for nearly 9 years after its commencement was proper. Wisconsin L. & S. Co. v. Dahl, 214 W 137, 252 NW 714.

The circuit court practice of dismissing actions not brought on for trial within 5 years is ordained by statute, limited in application, and does not actually or by analogy extend to county courts in matters of claims filed against decedents' estates. Filing of a claim in county court is not the commencement of a civil action. Estate of Smith, 218 W 640, 261 NW 730.

Denial of a motion to dismiss, for want of prosecution, an action which was not brought to trial within 5 years owing to the neglect of counsel first retained by the plaintiff is not an abuse of discretion where the circumstances showed that the plaintiff on its own behalf was as diligent and vigilant as clients usually are who rely on counsel to keep them advised and there was no defense set up in the answer. Northwestern M. I. Co. v. McMahon, 222 W 653, 269 NW 653.

The denial of a plaintiff's motion of 1949 to reinstate an action dismissed without notice in 1943, for failure to bring the action to trial within 5 years after its commencement, was not an abuse of discretion where the plaintiff, although claiming to have been misled by reliance on her attorney, had caused him to withdraw from the case in 1940, and the plaintiff had been advised by another attorney in 1940 concerning 269.25, but she did not engage new counsel in the interim from 1940 to 1949. Schleif v. Defnet, 257 W 170, 42 NW (2d) 926.

Where, in addition to other extenuating circumstances, it appeared that some portion of the delay in bringing to trial in the circuit court an appeal taken by a city policeman under 62.13 (5) (h), from a suspension order of the board of fire and police commissioners, was due to a stipulation to hold the case in abeyance pending the disposition of a companion case, and that thereafter the attorneys for the appealing party had made sufficient application to 2 separate judges at various times to fix a date of trial, the dismissal of the appeal for want of prosecution within 5 years was an abuse of discretion. Ford v. James, 258 W 602, 46 NW (2d) 859.

Where a mortgagee, electing to exercise its option to accelerate the maturity of a mortgage note, declared the note and mortgage due before maturity because of the alleged insolvency of the mortgagors, and brought an action for foreclosure and a deficiency judgment, an order dismissing such action under 269.25, for failure to bring it to trial within 5 years, was a dismissal on the merits, and was res adjudicata of the mortgagee's cause of action under the note and mortgage as a defense in a subsequent action to quiet title brought by the mortgagors after maturity of the note and mortgage. The mortgagee's only cause of action under the note and mortgage was the debt obligation when it became due, and the fact that different matters of proof would have been required for the mortgagee to maintain its prior action, than would be required now to show that the obligation is due and payable, did not make the cause of action in the prior case a different one than the mortgagee attempted to assert here. 269.25 is in the nature of a statute of limitations; and a judgment of dismissal thereunder is res judicata as to all matters necessary to support a judgment of dismissal on the merits. An order of dismissal is discretionary and will not be granted where good cause is shown for continuing the action. Pautsch v. Clark Oil Co. 264 W 207, 58 NW (2d) 638.

269.25 applies to all actions pending for more than 5 years after commencement, whether or not issue has been joined. Unless the trial court abused its discretion, the supreme court will not reverse. Neuhaus v. Clark County, 14 W (2d) 222, 111 NW (2d) 180.

269.27 History: 1856 c. 120 s. 303; R. S. 1858 c. 140 s. 29; R. S. 1878 s. 2813; Stats. 1898 s. 2813; 1925 c. 4; Stats. 1925 s. 269.27.

An order at chambers is of no force until served. Spaulding v. Milwaukee & H. R. Co. 11 W 157.

An order to stay proceedings and an order to extend the time in which a particular act or proceeding is to take place are not synonymous. An order to stay proceedings puts an end to all progress in the action and no step can be lawfully taken during its continuance. But it is not so with an order enlarging the time in which a particular act is to be done or step taken. It may operate incidentally to produce delay, but any step may be taken which is not dependent upon or connected with the order. Wallace v. Wallace, 13 W 224.

Where a stay as to the defendant joint debtor has been obtained plaintiff may proceed against the rest, and if he recover must take judgment against all. Bacon v. Bicknell, 17 W 523.

A circuit judge may stay proceedings under a previous order appointing a receiver. State ex rel. Pfeiffer v. Taylor, 19 W 566.

A stay for a longer time than 20 days and then a second stay by a court commissioner without notice is void. Holmes v. McIndoe, 20 W 657.

A second motion to stay proceedings on execution should be denied where the relief might have been asked on the first motion. Bonesteel v. Orvis, 23 W 506.

A motion to dismiss an appeal should be founded on affidavits with any papers necessary to show the facts. Amory v. Amory, 26 W 152.

Certiorari operates as a stay of proceedings unless the judgment or order brought up has begun to be executed. Gaertner v. Fond du Lac, 34 W 497.

On the defendant's giving proper security it is the general policy of the law to allow him to stay proceedings pending an appeal. On refusal so to stay proceedings in the circuit court after appeal he may apply to the supreme court, and the stay will be ordered on giving proper security. Levy v. Goldberg, 40 W 308.

An order discontinuing an action as to certain defendants, granted without notice, is not a bar to an application by them to be reinstated; and such application is, in effect, a motion to set aside the order. Morse v. Stockman, 65 W 36, 26 NW 176.

A stay of proceedings in an action was granted until the determination of a motion. Judgment was afterward entered and subsequently, on the same day, an order denying such motion was entered nunc pro tunc. The judgment was not entered pending the stay of proceedings. Rollins v. Kahn, 66 W 658, 29 NW 640.

Where the plaintiff served a notice of dismissal of an action to collect a tax in order to begin supplementary proceedings under sec. 1127, R. S. 1878, then supposing that defendant was a resident of the county, but it appeared that he had become a resident of another state, the court could not, on plaintiff's application, restore the action dismissed. Juneau County v. Hooker, 67 W 322, 30 NW 357.

An order of dismissal for want of prosecution of an action pending more than 3 terms in the circuit court is proper, and the direction from the bench of dismissal of the action was complete, definite, final and sufficient, though orally made and not followed by an order in writing or a judgment of dismissal. O'Brien v. Rice, 186 W 523, 203 NW 332.

The plaintiff's right to discontinue his action not being absolute, and it being the duty of the trial court to exercise discretion in the matter, the motion for dismissal should have been heard on notice and, where it was not, the order of dismissal is reversed, so that the trial court may hear such motion on notice and consider the defendant's assertion that she has been prejudiced by the dismissal. Burling v. Burling, 275 W 612, 82 NW (2d) 807.

269.28 History: 1856 c. 120 s. 133, 134; R. S. 1858 c. 129 s. 8, 9; 1860 c. 264 s. 20, 33; R. S. 1878 s. 2781, 2814; Stats. 1898 s. 2781, 2814; 1925 c. 4; Stats. 1925 s. 268.10, 269.28; Sup. Ct. Order, 217 W vii; Stats. 1937 s. 269.28.

A party against whom an injunction has been granted on ex parte application has a right to a hearing upon the regularity thereof, and is not deprived of the right by a violation of such injunction. Kaehler v. Dobberpuhl, 56 W 497, 14 NW 631, and 60 W 256, 18 NW 841.

An order dissolving an interlocutory injunction is a discretionary order and will not be reversed unless there has been an abuse of discretion. When all the material allegations upon which the equities rest are fully met and denied, the injunction will be dissolved, and especially if it is not clear that the determination of the questions involved is within the court's jurisdiction. Walker v. Backus H. Co. 97 W 160, 72 NW 230.

Under sec. 2781, R. S. 1878, the court cannot, except upon notice, vacate an injunctional order granted without notice by a court commissioner upon a complaint stating facts sufficient to show a colorable right to make the order. Walker v. Backus H. Co. 97 W 160, 72 NW 230.

Where an action to dissolve an injunction is heard, the fact that plaintiff supports the allegations of his complaint by numerous affidavits will not prevent dissolving the injunction when proof is produced in opposition, the matter being in the discretion of the court. Tiede v. Schneidt, 99 W 201, 74 NW 798.

The court cannot, except upon notice, vacate an injunctional order granted without notice by a court commissioner upon a complaint stating facts sufficient to show a colorable right to make the order, even though such facts are not sufficient to warrant the interference of equity in plaintiff's behalf. Marshfield L. & L. Co. v. John Week L. Co. 108 W 268, 84 NW 434.

Where allegations in the complaint in support of a temporary injunction were made upon information and belief and were positively contradicted by affidavits, the temporary injunction should be dissolved. Carstens v. Fond du Lac, 137 W 465, 119 NW 117.

Where a demurrer to the complaint is sustained on the ground that several causes of action are improperly united, but a good ground for a temporary injunction is stated, a temporary injunction may be continued under leave to amend. Carstens v. Fond du Lac, 137 W 465, 119 NW 117.

Where the court had dismissed an action for divorce on its own motion without notice, it could reinstate the action without notice. Vishnevsky v. Vishnevsky, 11 W (2d) 259, 105 NW (2d) 314.

269.29 History: R. S. 1858 c. 140 s. 31; 1862 c. 85 s. 1; R. S. 1878 s. 2815; 1879 c. 194 s. 2 sub. 24; Ann. Stats. 1889 s. 2815; 1895 c. 252; Stats. 1898 s. 2815; 1925 c. 4; Stats. 1925 s. 269.29; 1935 c. 541 s. 142; 1961 c. 495.

A court commissioner has no authority to strike out irrelevant, redundant or scandalous matter from a pleading. Balkins v. Baldwin, 84 W 212, 54 NW 403.

An order adding parties plaintiff is unauthorized if made at chambers, and the refusal of the court to set it aside has only the effect of continuing it as an order made at chambers. Such refusal does not make the order that of the court. Day v. Buckingham, 87 W 215, 58 NW 254.

A court commissioner has jurisdiction upon habeas corpus to hear and determine whether a person who is held for trial on an offense punishable by imprisonment in the state's prison is imprisoned contrary to law. Longstaff v. State, 120 W 346, 97 NW 900.

To review the action of a court commissioner for mere judicial errors, an ordinary motion in the proceeding in the circuit court for that purpose is the proper method of invoking the superior judicial authority. In case of an appeal to the general equity power of the circuit court to prevent or redress a wrong or for other relief, the method of approach should be by action in the absence of any special statutory authorization. Potter v. Frohbach, 133 W 1, 112 NW 1087.

An order made by a judge at chambers is

not an "order of the court." Yanggen v. Wisconsin Michigan P. Co. 241 W 27, 4 NW (2d) 130.

The provision that the court may make any order which a judge or court commissioner has power to make is applicable only to a situation where the judge is acting in a judicial, and not in an administrative, capacity. State v. Marcus, 259 W 543, 49 NW (2d) 447.

A circuit court has no power to reverse an order entered by a court commissioner in a habeas corpus proceeding except for error. The weight to be accorded to the findings of fact made by a court commissioner is the same as that which the supreme court gives to the findings of fact made by any trial judge, viz., they must stand if not against the great weight and clear preponderance of the evidence. If the court commissioner enters a finding of fact which is against the great weight and clear preponderance of the evidence, he has committed error which the circuit court is empowered to correct on review. State ex rel. Tuttle v. Hanson, 274 W 423, 80 NW (2d) 387.

269.30 History: 1876 c. 44; R. S. 1878 s. 2816; Stats. 1898 s. 2816; 1925 c. 4; Stats. 1925 s. 269.30; 1935 c. 541 s. 143.

269.31 History: 1856 c. 120 s. 304; R. S. 1858 c. 140 s. 30, 40; R. S. 1878 s. 2817; Stats. 1898 s. 2817; 1925 c. 4; Stats. 1925 s. 269.31.

Motions noticed for a day when the court is not in session may be heard on the next motion day without further notice. Platt v. Robinson, 10 W 128.

A substitution of parties, upon a transfer of interest, cannot be had without notice. Sturtevant v. Milwaukee, W. & B. V. R. Co. 11 W 61.

The presumption is that legal notice has been given. Allen v. Beekman, 42 W 185.

If the court adjourn sine die before hearing the motion it goes down and must be renewed on notice. Brockway v. Newton, 49 W 406, 5 NW 781.

One who resists a motion on the merits thereby waives notice of such motion. Cartright v. Belmont, 58 W 370, 17 NW 237.

After defendant's appearance is withdrawn notice of application for judgment need not be given. Day v. Mertlock, 87 W 577, 58 NW 1037.

An appeal from an order which recites that it was made on certain papers and other evidence will be dismissed. Glover v. Wells & Mulrooney G. Co. 93 W 13, 66 NW 799.

The failure to require an undertaking upon obtaining an injunctional order is a mere irregularity, and is waived if a motion to vacate the order is not made. Oppermann v. Waterman, 94 W 583, 69 NW 569.

The sole office of an order to show cause in connection with an application for an order is to prescribe a shorter time for hearing than that prescribed for notice of a motion. State ex rel. Ashley v. Circuit Court, 219 W 38, 261 NW 737.

An order to show cause is equivalent to a notice of motion, and the court proceeds thereon as on a motion. Kling v. Sommers, 252 W 217, 31 NW (2d) 206.

No notice of motion is necessary for the dismissal of an action on the ground that required security for costs has not been furnished, and hence, as to such a motion, the provision in 269.31, requiring 8 days' notice of motion "when a notice of motion is necessary," has no application. Sheldon v. Nick & Sons, Inc. 253 W 162, 32 NW (2d) 260.

Where on motion after verdict the full time limit of motions was not given to plaintiffs' counsel because the date of hearing was set by the trial judge, who was from another circuit, plaintiffs could not claim prejudice where, although refusing to argue, their counsel filed motions after verdict, thereby waiving the defect of short notice. Keplin v. Hardware Mut. Cas. Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

269.32 History: 1856 c. 120 s. 311, 316; R. S. 1858 c. 140 s. 35, 40; R. S. 1878 s. 2818; Stats. 1898 s. 2818; 1925 c. 4; Stats. 1925 s. 269.32; Court Rule XI; Sup. Ct. Order, 212 W x; Sup. Ct. Order, 217 W vii.

Where notice of motion assigns specially the reason therefor it is error to grant it for a different reason. Corwith v. State Bank of Illinois, 8 W 376.

On a motion for judgment it is not necessary to serve copies of affidavit of service and failure to answer, etc. with the notice. Smith v. Hoyt, 14 W 252.

Under 269.32 (3), applying to motions generally, and providing that on a motion for an order testimony "may" be "taken" on the hearing, the movant has no absolute right to present testimony but, instead, the court is thereunder authorized to take testimony on a motion at its discretion. Bloomquist v. Better Business Bureau, 17 W (2d) 101, 115 NW (2d) 545.

While 269.32 (2) generally permits presentation of affidavits by the moving party to be used on the hearing of motions under certain circumstances, the supreme court does not construe the statute to permit, and expresses its disapproval, of the practice of litigating disputed facts in controversies involving child custody by use of affidavits rather than by sworn testimony. Whitman v. Whitman, 28 W (2d) 50, 135 NW (2d) 835.

269.33 History: 1873 c. 77; R. S. 1878 s. 2819; Stats. 1898 s. 2819; 1925 c. 4; Stats. 1925 s. 269.33; Court Rule I s. 1; Sup. Ct. Order, 212 W x; Sup. Ct. Order, 217 W viii.

269.34 History: 1856 c. 120 s. 312 to 314; R. S. 1858 c. 140 s. 36 to 38; R. S. 1878 s. 2820, 2821; Stats. 1898 s. 2820, 2821; 1925 c. 4; Stats. 1925 s. 269.34, 269.35; Sup. Ct. Order, 217 W viii; Stats. 1937 s. 269.34; 1957 c. 272; 1959 c. 78.

Where service by mail was attempted to be made upon a corporation through its attorneys, but there was nothing to show that the persons to whom the notice was sent were such attorneys, the service was void. Sturtevant v. Milwaukee, W. & B. V. R. Co. 11 W 61.

Service on an attorney is invalid when it shows that the paper was left with a person in charge of his office, but does not show his absence or name such person. Johnson v. Curtis, 51 W 595, 8 NW 489; Cleveland v. Hopkins, 55 W 387, 13 NW 387.

The only manner in which effectual service of an answer can be made to the plaintiff's at-

torney, when such attorney is in his office, is by delivering a copy to him personally. Union Nat. Bank v. Benjamin, 61 W 512, 21 NW 523.

Where proof of service read that undertaking and notice were "personally" served on the clerk of the court and the attorney by delivering the same to them it was sufficient. Harris v. Snyder, 113 W 451, 89 NW 660.

Notice of filing a summons and complaint under 85.05, Stats. 1925, cannot be given until the papers are actually filed with the proper state officer, and depositing them in the post office for carriage by mail is not sufficient. State ex rel. Stevens v. Grimm, 192 W 601, 213 NW 475.

An admission of "due sufficient and personal service" of a notice of retainer, sent by mail by the defendant, on receipt of the plaintiff's summons, without, however, any attempt to make service of the notice by mail in accordance with 269.34 (4), Stats. 1937, was equivalent to an admission that the notice had been personally served so that the service of the notice was not service by mail which would increase the time within which the plaintiff's complaint might be served. Banking Comm. v. Flanagan, 233 W 405, 289 NW 647.

269.34 (4), providing for service of papers by mail "where the person making the service and the person on whom it is made reside in different places between which there is a communication by mail," does not require that such places of residence be in different municipal subdivisions. Estate of Callahan, 251 W 247, 29 NW (2d) 352.

269.34 (4), Stats. 1965, which permits service of papers in an action or proceeding on a party or his attorney by mail, is not qualified by 269.34 (2), which enumerates certain methods of effecting substituted service on an attorney and mentions service by mail as one of the alternatives; hence service by mail upon an attorney in an action is effective and not conditioned upon other attempts at personal or substituted service. IFC Collateral Corp. v. Commercial Units, Inc. 43 W (2d) 98, 168 NW (2d) 124.

269.36 History: 1856 c. 120 s. 315; R. S. 1858 c. 140 s. 39; R. S. 1878 s. 2822; Stats. 1898 s. 2822; 1925 c. 4; Stats. 1925 s. 269.36; Sup. Ct. Order, 271 W x.

Twenty days allowed by the special charter of the city of Eau Claire for taking an appeal from a disallowance by its common council of a claim made against the city must be increased where the claim was made by a county for aid furnished to poor persons and the notice of its disallowance was served by mail. Green Lake County v. Eau Claire, 167 W 304, 166 NW 656, 167 NW 442.

Service of notice of hearing of a motion for an extension of time for settling a bill of exceptions by mail only 5 days before the date set for the hearing was defective, 8 days' notice being required in case of personal service, and increased time in case of service by mail. Morris v. P. & D. General Contractors, Inc. 236 W 513, 295 NW 720.

No inference of personal service arose out of an admission of "due service" of a notice of entry of judgment served by mail, and the person admitting the service could establish that it was in fact made by mail pursuant to 269.34 (4), which operated to increase the time for serving a proposed bill of exceptions. Estate of Callahan, 251 W 247, 29 NW (2d) 352.

269.36 applies only to a judicial action or proceeding; it does not apply to proceedings before the industrial commission. Chevrolet Division, G.M.C. v. Industrial Comm. 31 W (2d) 481, 143 NW (2d) 532.

269.37 History: 1856 c. 120 s. 317; R. S. 1858 c. 140 s. 41, 43; R. S. 1878 s. 2823; Stats. 1898 s. 2823; 1925 c. 4; Stats. 1925 s. 269.37.

The provision that service of notice or papers in the ordinary proceedings in an action need not be made on a nonappearing defendant is a part of Title XXV of the statutes and hence, by virtue of 260.01, applies only to proceedings in the circuit court or other courts of record having concurrent jurisdiction therewith, and has no application to matters pending in the supreme court. Benton v. Institute of Posturology, Inc. 243 W 514, 11 NW (2d) 133.

When a party retains an attorney to appear in an action, the party contemplates the usual and ordinary proceedings which may be taken after judgment, and the statutory provisions for appeal and review of the judgment within specified periods from the date of entry, and, in the absence of a substitution or withdrawal of the attorney of record, service of notice on such attorney is sufficient in all such proceedings. Hooker v. Hooker, 8 W (2d) 331, 99 NW (2d) 113.

269.37 applies only to judicial actions or proceedings; it does not apply to the service of notice of appeal from a condemnation commission proceeding, which was administrative, even though the attorney had represented the party sought to be bound by the appeal. Fontaine v. Milwaukee County Expr. Comm. 31 W (2d) 275, 143 NW (2d) 3.

Where jurisdiction over a party is obtained by service of a summons and he thereafter appears by an attorney, 269.37, Stats. 1965, requires that service of further papers in the action or proceeding be made upon the attorney. IFC Collateral Corp. v. Commercial Units, Inc. 43 W (2d) 98, 168 NW (2d) 124.

269.38 History: 1856 c. 120 s. 318; R. S. 1858 c. 140 s. 42; R. S. 1878 s. 2824; Stats. 1898 s. 2824; 1925 c. 4; Stats. 1925 s. 269.38; Sup. Ct. Order, 217 W ix; Sup. Ct. Order, 229 W vi.

Where a plaintiff failed to serve a notice of injury, or actually serve a complaint, within the 2-year period required by 330.19 (5), but merely delivered a complaint to the sheriff for service on a defendant whose residence and post office in this state were known but who was absent from the state without leaving a forwarding address, such absence did not dispense with the required service of notice or complaint under provisions in 269.38 dispensing with service of notice and other papers when a "party's" residence and post office are not known and he has designated no place for service of papers on him, since "party" means one who has become a party in pending litigation, and such section does not apply in any event unless the party's residence and post of-

fice are not known. Martin v. Lindner, 258 W 29, 44 NW (2d) 558.

269.39 History: 1856 c. 120 s. 321; R. S. 1858 c. 140 s. 44; R. S. 1878 s. 2825; Stats. 1898 s. 2825; 1925 c. 4; Stats. 1925 s. 269.39; 1955 c. 108.

269.41 History: 1873 c. 116 s. 2; R. S. 1878 s. 2827; 1887 c. 184; Ann. Stats. 1889 s. 2827, 2830a; Stats. 1898 s. 2827; 1925 c. 4; Stats. 1925 s. 269.41.

The rule, that an officer's return to the process of a court is conclusive, is not recognized in Wisconsin. (Statement in Davis v. State, 187 W 115, implying to the contrary, disapproved.) Where an action is brought in one state on a judgment rendered in another state, the officer's return of service of process in the sister state is not conclusive as to the parties, and may be attacked to prove lack of jurisdiction. Mullins v. LaBahn, 244 W 76, 11 NW (2d) 519.

269.42 History: 1856 c. 120 s. 326; R. S. 1858 c. 140 s. 49; 1859 c. 174 s. 2; R. S. 1878 s. 2828; Stats. 1898 s. 2828; 1925 c. 4; Stats. 1925 s. 269.42.

269.43 History: 1856 c. 120 s. 84; R. S. 1858 c. 125 s. 40; R. S. 1878 s. 2829; Stats. 1898 s. 2829; 1925 c. 4; Stats. 1925 s. 269.43.

On reversible errors see notes to 274.37.

Sec. 40, ch. 125, R. S. 1858, cures a multitude of errors, as the numerous cases in which it has been acted upon by this court will show. It is a beneficent statute, designed to reach just such a case as this. It is a matter of no consequence to a party separately liable to a judgment that some other person is included with him in the same judgment. Decker v. Trilling, 24 W 610.

Where there was no formal motion for the continuance of an action or order granting such continuance after the plaintiff's death, but it was continued with the knowledge and consent of the administrator and the approval of the court, the judgment would not be set aside. Tarbox v. French, 27 W 651.

Where a good cause of action or defense is shown by the evidence, without objection, but it is not alleged in the pleadings, and it appears that justice has been done and there was no surprise or improper advantage taken, judgment will not be reversed. Bowman v. Van Kuren, 29 W 209.

The judgment will not be reversed merely for the giving of an instruction not strictly accurate in form, but which could not mislead the jury. Allard v. Lamirande, 29 W 502.

Where the proper practice was not pursued in settling issues in an equity case, the questions of fact being sent to a jury, the judgment, being in accordance with the weight of evidence, will not be reversed. Soenksen v. Weyhausen, 32 W 521.

In the absence of a meritorious defense the failure to give notice of the assessment of damages or to properly verify the complaint, as well as the plaintiff's disregard of the defendant's demand of a change of the place of trial, are irregularities which will be disregarded on a motion to vacate the judgment by default. Bonnell v. Gray, 36 W 574.

Upon appeal from a judgment the supreme court will review interlocutory orders involving the merits and affecting the judgment, but will not reverse the judgment for errors in other orders involving matters of practice which might have been questioned before judgment, but which, if errors, are those for which the judgment could not be reversed. American B. Co. v. Gurnee, 38 W 533.

Defects in an affidavit of plaintiff's agent annexed to the complaint, upon which there was a judgment by confession, the means of affiant's knowledge not being shown, are immaterial unless the judgment is unjust. Pirie v. Hughes, 43 W 534.

Although an order striking matter from a pleading as immaterial may be erroneous, still if all evidence admissible under the original pleading can be introduced, the error is immaterial. Sloteman v. Mack, 61 W 575, 21 NW 527.

If the relief granted is consistent with the facts proved a failure to amend the complaint so as to conform to such facts is not ground for reversal. Forcy v. Leonard, 63 W 353, 24 NW 78.

If a specific demand for rents and profits in ejectment is necessary in the complaint amendment may be made at the trial to supply such demand. Maxwell v. Newton, 65 W 261, 27 NW 31.

A judgment will not be reversed for an error unless it appears that the error was prejudicial to the appellant. Bosworth v. Tollman, 66 W 22, 27 NW 404.

A judgment which is equitable will not be set aside for immaterial errors or defects, as that a defendant who was in default had no notice of the application for judgment or for taxation of costs. Rollins v. Kahn, 66 W 658, 29 NW 640.

The fact that findings of the court are embodied in the same paper with the judgment affects no substantial right and must be disregarded. Pier v. Prouty, 67 W 218, 30 NW 232.

Although special damages be not alleged in assault and battery, if evidence thereof was admitted without objection the complaint may be considered as accordingly amended. Atkinson v. Harran, 68 W 405, 32 NW 756.

In an action for a breach of promise of marriage, where the defendant concedes the promise and the refusal to marry, an error in admitting improper evidence to prove the promise will not work a reversal. Olson v. Solverson, 71 W 663, 38 NW 329.

Judgment dismissing an action instead of abating it is immaterial when another action is necessary and the statute of limitations has run, it being manifest that that defense would be made. Schriber v. Richmond, 73 W 5, 40 NW 644.

An error in computation, by which the judgment appealed from is slightly too large, will not cause a reversal unless the attention of the trial court was called to the matter, or the respondent has been requested to correct the error. Morris v. Peck, 73 W 482, 41 NW 623.

The admission of evidence as to the value of an insured building, being immaterial to any issue in the cause, affects no substantial right of the defendant. Kircher v. Milwaukee M. M. Ins. Co. 74 W 470, 43 NW 487.

If counsel abuse their privileges or the trial court exceeds its discretion and the record shows the fact an exception will be sustained, but not otherwise. Smith v. Nippert, 79 W 135, 48 NW 253.

An error in overruling an objection to an alternative writ of mandamus because it was signed by the judge instead of the clerk and was not sealed did not affect any substantial right. State ex rel. Jones v. Oates, 86 W 634, 57 NW 296.

Where objection was urged against a judgment on the ground that the court made numerous remarks in rulings upon the admission of testimony, but because it did not appear that appellant's rights were prejudiced thereby, the judgment will not be reversed. Stiles v. Neillsville M. Co. 87 W 266, 58 NW 411.

The omission of the signature of the officer to the jurat verifying a petition for a writ of certiorari may be cured by his signing it nunc pro tunc. State ex rel. Weber v. Cordes, 87 W 373, 58 NW 771.

Where the copy of the summons served on the defendant laid the venue in the wrong county, and his attorneys had knowledge of the fact that the mistake was a clerical one and did not call the attention of the plaintiff's attorney to the error until a motion was made to set aside a default judgment, the court may disregard the error. Day v. Mertlock, 87 W 577, 58 NW 1037.

If errors or defects in pleadings and proceedings, resulting from noncompliance with rules prescribed for the county courts, have not prejudiced appellant's rights, the judgment will stand. Schinz v. Schinz, 90 W 236, 63 NW 162.

A judgment will not be reversed because evidence was excluded which might have entitled plaintiff to nominal damages. Bilgrien v. Dowe, 91 W 393, 64 NW 1025.

A judgment may be reversed because the trial judge absented himself from the courtroom for a considerable time during the argument of the cause to the jury, without the parties' consent. Smith v. Sherwood, 95 W 558, 70 NW 682.

Where a verdict was rendered in form against all of the defendants and a judgment against one alone, he alone being liable, the error does not affect substantial right and should be disregarded. Little v. Staples, 98 W 344, 73 NW 653.

Where an action was brought upon an account stated, the admission of evidence to prove an open account is not reversible error. Warder v. Angell, 99 W 298, 74 NW 789.

Where the plaintiff was unable to attend the trial and her testimony was taken at her home in the presence of the judge and the jury and the attorneys, it was an irregularity, but not reversible error. Selleck v. Janesville, 100 W 157, 75 NW 975.

Where reformation of a contract is sought, error in failing to reform the instrument before entering judgment is no ground for reversal. Wisconsin M. & F. Ins. Co. Bank v. Mann, 100 W 596, 76 NW 777.

The reading of law to a jury is improper but is not reversible error, unless the jury was prejudiced thereby, or it appears clearly that such was probably the effect. Boltz v. Sullivan, 101 W 608, 77 NW 870.

In an action for injuries claimed to have been caused by existence of a defective highway, medical testimony that the accident as described might produce an injury such as he had sustained and that the plaintiff was incapacitated to the extent of two-thirds of his regular work, while conjectural is not reversible error. Conrad v. Ellington, 104 W 367, 80 NW 456.

A mistake in the entry of a judgment amendable on motion in the court where it occurred will be corrected on appeal or treated as corrected and the appeal decided in accordance therewith. Packard v. Kinzie Avenue H. Co. 105 W 323, 81 NW 488.

Where a judgment is entered on a defense of waiver which was not pleaded, but the evidence was admitted without objection, the case will not be reversed. Deuster v. Mittag, 105 W 459, 81 NW 643.

Mistake in the initials of one of defendants is immaterial. Bell v. Peterson, 105 W 607, 81 NW 279.

Where the only question to be submitted to the jury was the question of damages, a refusal to grant a special verdict did not constitute reversible error. Gatzow v. Buening, 106 W 1, 81 NW 1003.

Where an action was brought to recover for support furnished a deceased, testimony that she had trouble with relatives with whom she had resided just prior to the commencement of her residence with the plaintiff, while irrelevant and immaterial, is not reversible error. Dodge v. O'Dell's Estate, 106 W 296, 82 NW 135.

Where a court tried a case without a jury against objection, but the evidence was so uncontradicted that it would have been the duty of the court to direct a verdict, the refusal to allow a jury trial is not reversible error. Brauchle v. Nothhelfer, 107 W 457, 83 NW 653.

In a proceeding to recover compensation for land taken by a railroad company, failure to specifically describe the land will not operate for reversal where no prejudice to the company is shown. Lenz v. Chicago & Northwestern R. Co. 111 W 198, 86 NW 607.

In an action of ejectment where defendant's claim to title is wholly bad, failure of court to adjudicate the extent and quality of plaintiff's title is not reversible error. Grindo v. McGee, 111 W 531, 87 NW 468.

Where a complaint states 2 causes of action, one for the reformation of a paper and the recovery thereon as reformed, and the other for recovery without reformation, it is error to overrule a demurrer to the first cause of action but if the paper needs no reformation the error is not prejudicial. Reeg v. Adams, 113 W 175, 87 NW 1067.

Immaterial variances may be disregarded on appeal. Gates v. Paul, 117 W 170, 94 NW 55.

The supreme court has power to permit necessary corrections in the appellate procedure after notice of appeal duly given, although the record filed is not such as to give it jurisdiction to decide the merits. While it will pursue a general policy of liberality in that regard, yet such corrections will be permitted

only in furtherance of justice, considering the effect on both parties and when mistakes or omissions to be corrected are excusable. Milwaukee T. Co. v. Sherwin, 121 W 468, 98 NW 223, 99 NW 229.

In applying sec. 2829, Stats. 1898, to a pleading, every reasonable intendment or presumption is to be made in favor of it for the purpose of supporting it. It is not to be condemned for mere indefiniteness or uncertainty. Emerson v. Nash, 124 W 369, 102 NW 921.

Where a complaint in an action for injuries caused by existence of a defective sidewalk contained allegations sufficient to charge the city officers with notice, striking out the word "thereafter" and inserting in lieu thereof the words "prior thereto" regarding such knowledge does not affect any substantial right of the defendant. Alft v. Clintonville, 126 W 334, 105 NW 561.

In an action to rescind a contract a person who fails to show in his application any defense to the action cannot complain on the refusal of the trial court to make him a party. Mash v. Bloom, 126 W 385, 105 NW 831.

Where in an action quia timet certain tax deeds were alleged to be void for certain specified irregularities, and for "other reasons," evidence could be received as to irregularities not specified. Coe v. Rockman, 126 W 515, 106 NW 290.

The omission of a seal of the court on a writ of assistance is a mere irregularity, and where a motion is made to set aside the writ on the merits the irregularity is waived. Prahl v. Rogers, 127 W 353, 106 NW 287.

The admission of incompetent testimony will not affect the judgment where there is abundance of evidence to support the findings without it. Boyle v. Robinson, 129 W 567, 109 NW 623.

An inaccurate charge as to the burden of proof may be disregarded. Pelton v. Spider Lake L. Co. 132 W 219, 112 NW 29.

An error in a charge as to the general rule as to the impeachment of witnesses may be disregarded, where no question as to impeachment arose in the case. Pelton v. Spider Lake L. Co. 132 W 219, 112 NW 29.

A judgment for the value of the land taken, and damages sustained to the remaining land without a suitable crossing, with a provision, however, that upon payment of a sum equal to the value of the land taken and furnishing a proper crossing the remainder of judgment should be perpetually stayed, is irregular in form, but where it was in substantial conformity to defendant's offer on the trial, the irregularity was immaterial. Manitowoc C. P. Co. v. Manitowoc G. B. & N. W. R. Co. 135 W 94, 115 NW 390.

The assessment of damages under sec. 2778, Stats. 1898, by the court before a decision upon the merits of the case and in the action itself, while irregular, is not ground for reversal. Lewis v. Eagle, 135 W 141, 115 NW 361.

Where no issue of payment was raised by the pleadings, an erroneous instruction as to the burden of proof should be disregarded. Fallon v. Vandesand, 136 W 246, 116 NW 176.

On a hearing in supreme court on appeal from an order, which recited that it was in part granted upon a certain affidavit and no such affidavit appeared among the papers, the supreme court ordered the case submitted and the record perfected pending a decision. Thereafter, upon the furnishing of a true copy of the affidavit, it was held that the appeal should be decided as if the record had been properly returned. Colle v. Kewaunee, G. B. & W. R. Co. 149 W 96, 135 NW 536.

On appeal errors will not be regarded as prejudicial unless from the whole record it appears with reasonable clearness that had they not occurred the result might probably have been immediately more favorable to the complaining party. The court will not only decline to presume error but where error appears will refuse to presume that it is prejudicial. Koepp v. National E. & S. Co. 151 W 302, 139 NW 179.

Where the trial court erroneously withheld from consideration by the jury a severable part of plaintiff's claim but the jury found that the contract alleged to be the basis of the entire claim was never entered into, the error was harmless. Dalberg v. Jung B. Co. 155 W 185, 144 NW 198.

An erroneous instruction as to the burden of proof, followed by a verdict against the party on whom the burden is erroneously laid, constitutes reversible error. Pennsylvania C. & S. Co. v. Schmidt, 155 W 242, 144 NW 283.

On appeal a party cannot urge as error the submission to the jury of a question not pleaded if he entered no objection to such submission. Lewandowski v. McClintic-Marshall C. Co. 155 W 322, 143 NW 1063.

Error in the admission of incompetent evidence to establish a demand and right of recovery that were admitted in the answer was nonprejudicial. Landauer v. Kasik, 155 W 376, 144 NW 974.

If the damages assessed by the jury were too large a new trial may be ordered for errors in the admission of evidence affecting damages that otherwise might have been held nonprejudicial. Nelson v. Snoyenbos, 155 W 590, 145 NW 179.

An erroneous instruction in a slander case that the words spoken in the presence of A., which were privileged as to him, were also privileged as to his wife and son if their presence "could not have been avoided" was rendered harmless by indisputable proof that their presence was necessary and lawful for advice and consultation, there being also other legitimate grounds upon which the verdict might be based. Cook v. Gust, 155 W 594, 145 NW 225.

Slight inaccuracies in stating the issues by the trial court will be disregarded upon appeal if the evidence made them clear. Robertson v. Dow, 155 W 605, 145 NW 652.

In a civil action for damages where one of the facts essential to a recovery constitutes a crime the jury must be satisfied of the existence of that fact by a clear and satisfactory preponderance of the evidence; but an instruction that they must be satisfied "by a fair preponderance of the evidence and to a reasonable certainty," was a nonprejudicial error. Trzebietowski v. Jereski, 159 W 191, 149 NW 743.

Prosecution of an action in justice's court by a minor without having a "next friend" appointed did not affect any "substantial rights of the adverse party." Redlin v. Wagner, 160 W 447, 152 NW 160.

Where the judgment was for a sum larger than the amount found due, error in the findings was presumed because there was no motion to correct the same; and as there had been a reargument in the trial court after its decision, in the course of which the amount stated in the judgment had been agreed upon as the amount due under the plaintiff's theory, the judgment was affirmed. Morgan v. Richter, 170 W 111, 174 NW 712.

The notice required to be given by one claiming compensation from a municipality for injuries resulting from existence of a defective highway, being a condition precedent to the right to recover, is not a pleading or proceeding within the meaning of sec. 2829, Stats. 1919, and cannot be ignored as not affecting a substantial right. Hogan v. Beloit, 175 W 199, 184 NW 687.

Sec. 2829, Stats. 1919, is supplemented by sec. 3072m, and, under the rule they prescribe, the court, on appeal, will not reverse a judgment for a misdirection of the jury unless it affirmatively appears of record, with reasonable clearness, that the error has affected unfavorably the appellant's substantial rights. Under this rule the court refused a reversal for an erroneous instruction respecting a view of the premises by the jury and the use to be made of it as evidence. Heintz v. Schenck, 176 W 562, 186 NW 610.

A judgment obtained against a necessary party who was not originally joined will not be reversed for such nonjoinder where ample opportunity was had to interpose all defenses. Mandelker v. Goldsmith, 177 W 245, 188 NW 74.

To allow a cross-examination of a handwriting witness respecting signatures on a document not in evidence was not reversible error where the court rejected the document when offered, struck out the testimony and directed the jury to disregard it. Alesch v. Haave, 178 W 19, 189 NW 155.

Sec. 2829, Stats. 1921, applies to immaterial errors in instructions and in the admission and rejection of evidence. Zeidler v. Goelzer, 182 W 57, 195 NW 849.

A judgment in an equity action may be reversed solely to locate a boundary which was in dispute with such definiteness and certainty as would leave no opportunity for future controversy. Halls v. McKearn, 192 W 456, 212 NW 257.

One seeking to overturn judicial action or to quash an indictment against him must not only show that error has been committed, but he must establish the fact that such error has prejudiced him by affecting his substantial rights. State v. Westcott, 194 W 410, 217 NW 283.

Repeated insinuation by the defendant's attorney that the plaintiff was drunk and disorderly at the time of the automobile accident was prejudicial error, especially where the verdict awarded no damages. Rissling v. Milwaukee E. R. & L. Co. 203 W 554, 234 NW 879.

A judgment will not be set aside for a mere irregularity in the proceedings leading to the entry thereof where no resulting prejudice is shown. If the defect is such as to render the judgment void, the judgment is subject to being stricken from the record at any time for that reason. Where substantial prejudice is shown, ordinarily the supreme court in the exercise of its discretion will vacate the judgment where no notice of application for judgment was given. Federal Land Bank v. Olson, 239 W 448, 1 NW (2d) 752.

269.43 does not apply to allow assignment of a cause of action to cure a defect of parties after a plea in abatement is served. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

269.44 History: 1856 c. 120 s. 81, 82; R. S. 1858 c. 125 s. 37; R. S. 1878 s. 2830; 1887 c. 184; Ann. Stats. 1889 s. 2830, 2830a; Stats. 1898 s. 2830; 1911 c. 353; Stats. 1911 s. 2669a, 2830; 1925 c. 4; Stats. 1925 s. 263.29, 269.44; Sup. Ct. Order, 212 W xi; Stats. 1933 s. 269.44.

Where the plaintiff, whose name was "Witte," filed a petition for a mechanic's lien by the name of "Witter," and recovered judgment by a suit begun in his real name, the mistake in the petition should have been amended. The court below erred in setting aside the judgment. Witte v. Meyer, 11 W 295.

The statute relates only to such defects as do not render process absolutely void. Whitney v. Brunette, 15 W 61.

In an action by a teacher for wages it is error to refuse leave to amend by alleging that there is money in the treasury to pay her. Edson v. Hayden, 18 W 628.

On appeal from a justice the court should permit an amendment increasing the claim beyond the jurisdiction of the justice. Felt v. Felt, 19 W 193.

An execution which does not state where and when the judgment on which it issued was docketed may be corrected after a levy and sale. A certificate of sale issued pursuant to such writ will not be annulled by a court of equity because of such defect. Sabin v. Austin, 19 W 421.

Where a judgment upon confession failed to state the names of the judgment debtors in full, referring to them only by their last names, but their full names appeared in the warrant of attorney filed with the clerk, the record supplied the means of curing the defect, and the defect must be disregarded or amended by the court. McIndoe v. Hazleton, 19 W 567.

On a new trial plaintiff having alleged negligence may amend by setting up specific acts thereof. Imhoff v. Chicago & M. R. Co. 22 W 682.

An amendment which would revive a cause of action barred by the statute or prevent a defense resting thereon is not considered to be in furtherance of justice. Stevens v. Brooks, 23 W 196.

An error or insufficiency in the pleadings, discovered at the trial, should ordinarily be corrected by an immediate motion to amend; but where the attorney fails to make the motion until after judgment it is still within the discretion of the court to set aside the judgment upon terms and allow a new trial

upon an amended answer. Kennedy v. Waugh, 23 W 468.

A count ex contractu may be added, on the trial, to quantum meruit for the same demand. Pellage v. Pellage, 32 W 136.

In an action on a note plaintiff may amend on the trial by asking judgment for the money loaned. Matteson v. Ellsworth, 33 W 488.

Interest may be allowed, though not asked, when the proof shows that the plaintiff is entitled to it. Hodge v. Sawyer, 34 W 398.

A quantum meruit count may be added after judgment in an action on express contract. Davis v. Hubbard, 41 W 408.

In an action for a breach of a contract it was not error to permit plaintiff, after he had rested his case, to amend the complaint so as to allege willingness on his part to perform the contract. Hill v. Chipman, 59 W 211, 18 NW 160.

In an action for waste by cutting timber it was not an abuse of discretion to refuse to permit the complaint to be amended at the trial so as to allege nonpayment of taxes as a ground of waste. Wilkinson v. Wilkinson, 59 W 557, 18 NW 527.

It is an abuse of discretion to allow an amended complaint which does not state a cause of action. Smith v. Gould, 61 W 31, 20 NW 369.

Allowing the statute of limitations to be pleaded by amendment is discretionary. A refusal to exercise such discretion, on the assumption that the court has no power, is error. Smith v. Dragert, 61 W 222, 21 NW 46.

The only limitation upon the power of the court, in cases where it may be exercised under any circumstances, is that it must be in furtherance of justice. Morgan v. Bishop, 61 W 407, 21 NW 263.

A condition upon setting aside a judgment for $5,616.80, that defendants file a bond for $10,000 for the payment of any judgment which plaintiff might recover, was an abuse of discretion. Union Bank v. Benjamin, 61 W 512, 21 NW 523.

In an action to recover for professional services the defendant denied that part of the services were performed for him, but omitted to set up a payment. After introducing evidence of such payment he moved to amend his answer so as to allege that, if it should be found that the services were performed for him, then that such payment had been made. The amendment should have been allowed. Thorn v. Smith, 71 W 18, 36 NW 707.

An amendment was properly allowed where the defendant's name as given in the summons and complaint was the W. S. Railway Co. it being evident that the W. S. Railroad Co., the former's successor, was intended, and the papers being served on a person who was president of both companies. Parks v. West Side R. Co. 82 W 219, 52 NW 92.

The imposition of costs as a condition of allowing an amendment is a matter within the discretion of the court. McIlquham v. Barber, 83 W 500, 53 NW 902.

A mistake in the date of a writ of attachment may be cured by amendment. Shakman v. Schwartz, 89 W 72, 61 NW 309.

If a case appealed from justice's court is triable as if originally brought in the circuit court the latter may amend the proceedings at any stage of the action by ordering that a new party be brought in. Marlett v. Docter, 89 W 347, 61 NW 1125.

It is an abuse of discretion in an action for injury to land caused by fires set by a locomotive to allow an amendment to the complaint by inserting a claim for injury by the same fire to other land a mile distant from that described in the original complaint, the application being made nearly 3 years after action begun and nearly 9 years after the fire, and after said claim as an independent cause of action was barred. O'Connor v. Chicago & Northwestern R. Co. 92 W 612, 66 NW 795.

It is too late after trial to introduce a new defense or to set up for the first time a cause of action by counterclaim, changing substantially the defense. Wheeler v. Russell, 93 W 135, 67 NW 43.

To permit a garnishee defendant, whose original answer was a denial of liability, to amend such answer at the trial, after the plaintiff's evidence is in, by admitting his holding of certain property of the principal defendant and setting forth the facts showing that he holds the same as collateral security for a debt owing him by such defendant, was not an abuse of discretion. Rock v. Collins, 99 W 630, 75 NW 426.

It was not an abuse of discretion to deny leave to amend answers in fire insurance cases showing that the plaintiffs had been indemnified by the contractor rebuilding the building at his own expense. St. Clara F. A. v. Northwestern Nat. Ins. Co. 101 W 464, 77 NW 893.

In an action upon a promissory note, where a defendant's answer denying the making of the note was not sufficiently specific to put in issue the genuineness of his signature, it was within the discretion of the court to permit him, on the trial, to raise that issue by filing the required affidavit. Withee v. Simon, 104 W 116, 80 NW 77.

It is not an abuse of discretion to refuse to permit the answer to be amended so as to set up the statute of limitations. Sullivan v. Collins, 107 W 291, 83 NW 310.

Where an execution was issued out of the superior court of Milwaukee county, but by mistake the seal of the circuit court for that county was affixed, it was not error to permit affixing the proper seal. Davelaar v. Blue Mound I. Co. 110 W 470, 86 NW 185.

Where there is a conflict of fact to be decided in order to allow the sheriff to amend his return to accord with what he declares to be the fact, there is no forum except the trial court capable of deciding it. Smith, Thorndike & Brown Co. v. Mutual Fire Ins. Co. 110 W 602, 86 NW 241.

Refusal to permit an answer to be amended by setting up the statute of limitations was not an abuse of discretion. Rive v. Ashland County, 114 W 130, 89 NW 908.

When it appears that an omission in any proceeding is material, or that proceedings taken so fail to conform to provisions of law as to be fatal to rights which might otherwise be protected, and that such omission or failure is through mistake, inadvertence, surprise or excusable neglect, it is an abuse of

discretion not to supply such omission and permit amendment of the proceedings. Platt v. Schmidt, 115 W 394, 91 NW 992.

Where defendants in ejectment knew or ought to have known when they answered both the date of the execution and recording of the tax deed which they pleaded and the day of the commencement of the action, there was no abuse of discretion in refusing to permit them, after obtaining a statutory new trial, to amend their answer by setting up the statute of limitations. Kennan v. Smith, 115 W 463, 91 NW 986.

A complaint may be amended in an action on express contract so as to make it an action on quantum meruit. Manitowoc S. B. Works v. Manitowoc G. Co. 120 W 1, 97 NW 515.

Refusal to allow a proper amendment of an answer was not a prejudicial error, where evidence was admitted as though the amendment had been made. Seifen v. Racine, 129 W 343, 109 NW 72.

It is not error to refuse to allow a complaint to be amended to state a cause of action arising after the suit was begun. Pope v. Carlton, 130 W 123, 109 NW 968.

An amendment of the complaint from express contract to quantum meruit should not be allowed after the running of the statute of limitations. Such amendment does not relate back to the commencement of the action. Meinshausen v. Gettelman B. Co. 133 W 95, 113 NW 408.

An amendment inconsistent with all of the evidence was properly denied, especially because it would, if permitted, bring the cause of action within the statute of limitations. Teipner v. Teipner, 135 W 380, 115 NW 1092.

An action at law to recover an amount alleged to be due on a land contract, which cannot be enforced until reformed, cannot be maintained; but the complaint may be amended so as to change the action to one in equity. Jilek v. Zahl, 162 W 157, 155 NW 909.

Where a liability insurer, defendant with an automobile driver in an action for a personal injury, defended the action, its attorney representing both itself and the driver, where no concealment had been practiced and no claim made that the insurer was not liable because injury had been inflicted by a car substituted for the one described in the policy until late in the course of the trial, the denial, after a new trial had been granted, of an application for leave to amend the answer so as to set up that the policy did not insure against injuries inflicted by the substituted car, was proper. Ehlers v. Gold, 176 W 336, 186 NW 596.

The common-law rule that a complaint sounding in contract could not be amended so as to charge fraud was expressly changed by sec. 2669a, Stats. 1921. Wulfers v. E.W. Clark Motor Co. 177 W 497, 188 NW 652.

An amendment of a complaint for damages for false representations respecting the acreage of tillable land in a farm purchased by the plaintiff could not be properly allowed where the allegations of the complaint and the plaintiff's testimony showed that he had knowledge of such falsity before closing the deal. Knerzer v. Worthing, 183 W 39, 197 NW 199.

Permitting defendant to amend a counterclaim by increasing the amount of damage to a certain amount in conformance with uncontradicted evidence was not error. Industrial H. & E. Co. v. Austin, 200 W 367, 228 NW 503.

269.44, Stats. 1929, is inapplicable to an action brought by mistake against the brother of the person causing an injury. Baker v. Tormey, 209 W 627, 245 NW 652.

Where the facts set forth in a complaint are such as to make the cause removable to the federal court and a proper petition and bond for removal are filed in the state court, the state court is without jurisdiction thereafter to permit an amendment of the complaint to delete facts making the cause removable. Egan v. Preferred Accident Ins. Co. 223 W 129, 269 NW 667.

269.44 refers only to amendments of pleadings made by the trial courts and to the power of these courts to amend the pleadings while cases are pending therein and in the few instances in which the trial court still has power to act notwithstanding it has entered judgment. The section does not refer to practice in the supreme court. State Farm Mut. Auto. Ins. Co. v. Duel, 247 W 121, 19 NW (2d) 315.

269.44 gives to the trial court a wide discretion in the matter of amendment of pleadings. Kuester v. Rowlands, 250 W 277, 26 NW (2d) 639.

Where the plaintiff brought an action to restrain the directors from ratifying action of the president in discharging the plaintiff as manager, the trial court, after it had vacated a temporary injunction and the directors had ratified the discharge, could permit the plaintiff to file a supplemental complaint setting forth causes of action seeking to recover the value of stock pursuant to an agreement whereby the corporation was to repurchase the plaintiff's stock at his option in case of termination of his employment, and damages for unlawful discharge. Mitchell v. Lewensohn, 251 W 424, 29 NW (2d) 748.

269.44, in authorizing the trial court "in furtherance of justice" to amend any process, pleading, or proceeding, gives broad powers to the court, but its primary purpose is to enable the court to allow such amendments as will prevent technical errors from avoiding a just result, and it requires that the substantive rights of both parties be considered. Lofgren v. Preferred Accident Ins. Co. 256 W 492, 41 NW (2d) 599.

In a mandamus action to compel a building inspector to issue building permits, permitting the relator to amend his petition so as to set out that the village ordinance, which was set out in the answer, imposed a duty on the building inspector to issue such permits, was within the discretion of the trial court. State ex rel. Schroedel v. Pagels, 257 W 376, 43 NW (2d) 349.

Permitting an amendment to a counterclaim before the close of the trial was proper under our liberal rules for the amendment of pleadings and where the plaintiffs did not claim surprise or offer any additional testimony on the new issue raised. Beranek v. Gohr, 260 W 282, 50 NW (2d) 459.

In an action for breach of contract where the plaintiff, when the case was called for trial, was allowed to file an amended com-

plaint, the defendant was entitled to reconsider its position in the light of the facts newly alleged by the plaintiff, and to make a new defense if that appeared to be desirable, and the trial court's refusal to allow the defendant to file an amended answer and counterclaim was an abuse of discretion. Erickson v. Westfield M. & E. L. Co. 263 W 580, 58 NW (2d) 437.

An amendment of a summons and complaint to correct the name under which the right party is sued will be allowed, but if it is to bring in a new party, it will be refused. Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

In an action, brought by a guest against the driver of the other vehicle involved in the collision, the plaintiff's belated motion to amend his complaint to allege a cause of action against his host was properly denied under the doctrine that pleadings should be such that litigants know at least the general position of the parties to the action at the time of trial so that they may be apprised of the charges against which they must defend. Omer v. Risch, 269 W 61, 68 NW (2d) 541.

Where no advance notice was given of the defendants' intention to ask leave of the trial court to file or serve an amended answer on the day of the trial so as to set up additional defenses, but there was no claim of surprise by the plaintiffs' counsel, and no showing that they were prevented from subpoenaing necessary witnesses, it was not an abuse of discretion for the trial court to permit the defendants to file such amended answer on the day of trial. Heinemann Creameries v. Milwaukee Auto. Ins. Co. 270 W 443, 71 NW (2d) 395.

In an action to recover on a life insurance policy, the denial of motions of the defendant insurer for leave to file in the furtherance of justice an amended answer to set up an additional defense was not an abuse of discretion where the defendant, in support of such motions, at no time claimed that it was ignorant of the facts sought to be pleaded by the amendment when the original answer was drafted and served. Ludwig v. John Hancock Mut. Life Ins. Co. 271 W 549, 74 NW (2d) 201.

A motion to amend a complaint to conform to proof, made 5 years after the event complained of, on a claim of absolute liability of sellers of hogs because of alleged transportation of diseased animals in violation of 95.19, was properly denied as being too late to impose on the sellers the burden of meeting the new cause of action. Schroeder v. Drees, 1 W (2d) 106, 83 NW (2d) 707.

Where, after all the testimony was taken, the defendants moved to amend their answer to allege that the plaintiff was negligent as to lookout, and the trial court allowed it, considering it as one conforming the pleading to the proof, and the only objection which the plaintiff made at the time was that the amendment was not timely but made no claim of surprise, the trial court did not err in allowing the amendment; furthermore, since the alleged error was not raised by the plaintiffs' motions after verdict, the question is not properly raised on appeal. Musha v. United States F. & G. Co. 10 W (2d) 176, 102 NW (2d) 243.

See note to 270.27, citing Giemza v. Allied Am. Mut. Fire Ins. Co. 10 W (2d) 555, 103 NW (2d) 538.

269.44 allows amendments of pleadings in civil actions in which a forfeiture is sought for the violation of a municipal or county ordinance. Sauk County v. Schmitz, 12 W (2d) 382, 107 NW (2d) 456.

In an action under the safe-place statute it was error for the trial court to deny the plaintiff's motion to amend the complaint on the ground that the statute of limitations had run on the common-law action for negligence which the plaintiff proposed to allege, since there was but one cause of action, and that was for negligence, which was alleged in the original complaint in terms of a violation of the safe-place statute but necessarily included common-law negligence. Lealiou v. Quatsoe, 15 W (2d) 128, 112 NW (2d) 193.

269.44 gives the trial court wide discretion as to the allowance of amendments to the pleadings. Girtz v. Omen, 21 W (2d) 504, 124 NW (2d) 586.

In a forfeiture action for violation of a municipal ordinance the trial court did not abuse its discretion in amending the complaint at the close of the trial to charge violation of another ordinance based on evidence which incorporated a full inquiry into defendants' conduct, and proof of facts and circumstances relevant to both violations where no new element was introduced by the amendment, no valid claim of surprise was established, and defendants failed to show how they might have defended against the second charge in any other manner than they did against the first. Milwaukee v. Wuky, 26 W (2d) 555, 133 NW (2d) 356.

A complaint based upon an assault served more than 2 years after the period of limitations prescribed for an assault action in 330.21 (2) could not be amended to allege a cause of action for negligence so as to stop the running of the statute of limitations on actions for negligence by relating back to the date on which the original complaint was served and thus fall within the 3-year period prescribed in 330.205 for injuries to the person. Johnson v. Bar-Mour, Inc. 27 W (2d) 271, 133 NW (2d) 743.

Under 269.44 and 270.57 the court has power after verdict and before judgment in furtherance of justice and upon such terms as may be just to allow an amendment to increase the amount of the ad damnum clause to the amount of the verdict so the pleadings and verdict will support a judgment of the amount awarded. (Language to the contrary in Pierce v. Northey, 14 W 9, and in McCartie v. Muth, 230 W 604, overruled.) Zelof v. Capital City Transfer, Inc. 29 W (2d) 384, 139 NW (2d) 1.

The trial court did not err in refusing during the course of trial to permit plaintiff to amend his complaint so as to encompass claims of negligent care and treatment extending back to the date of injury, where it appeared that the action was commenced more than 3 years subsequent to the events of that date, and that the statute of limitations barred any claim for personal injuries arising out of any such acts. Shurpit v. Brah, 30 W (2d) 388, 141 NW (2d) 266.

Where plaintiff by error omitted an alle-

gation as to insurance coverage, he should have been allowed to amend the complaint the day before trial where defendant insurance company made no allegation of prejudice or surprise. Wipfli v. Martin, 34 W (2d) 169, 148 NW (2d) 674.

Where there was testimony that a driver slowed to 5 miles per hour at night where highway conditions did not require it, the court did not abuse its discretion in allowing an amendment to allege negligent slow speed at the conclusion of testimony. Bentzler v. Braun, 34 W (2d) 362, 149 NW (2d) 626.

In an action by a town for expenses of installing a road which defendant (platter of the land) had agreed to install, where the complaint was based on an express contract for the road by the defendant, the court did not err in allowing a motion to amend the pleadings to conform to the proof to state a cause of action in implied contract. Ripon v. Diedrich, 34 W (2d) 459, 149 NW (2d) 580.

Under 269.44 the trial court has much discretion in granting amendments to pleadings, the only statutory proviso being that the amended pleading shall state a cause of action arising out of the contract, transaction, or occurrence, or be connected with the subject of the action upon which the original pleading is based. Vande Hei v. Vande Hei, 40 W (2d) 57, 161 NW (2d) 379.

In an action by a volunteer fireman to recover for injuries sustained during a hose-testing drill, the trial court did not abuse its discretion and defendant suffered no prejudice by disallowance of an amendment to the answer. McCraw v. Witynski, 43 W (2d) 313, 168 NW (2d) 537.

269.45 History: 1856 c. 120 s. 308; R. S. 1858 c. 125 s. 38; R. S. 1858 c. 140 s. 32; R. S. 1878 s. 2831; Stats. 1898 s. 2831; 1925 c. 4; Stats. 1925 s. 269.45; Sup. Ct. Order, 212 W xi; Sup. Ct. Order, 255 W v.

The court or judge has power upon an ex parte application to extend the time for the transmission of the record to the county to which the venue has been changed. Cartright v. Belmont, 58 W 370, 17 NW 237.

These words "a judge" include a county judge or court commissioner. Woodruff v. Depere, 60 W 128, 18 NW 761.

Objections to a reassessment had in an action to set aside taxes may be allowed after the expiration of 20 days from the completion of the reassessment. The filing and serving thereof is a "proceeding in an action." Woodruff v. Depere, 60 W 128, 18 NW 761.

The court may allow exceptions to be filed and a bill of exceptions to be settled after the time limited therefor has expired. Milwaukee County v. Pabst, 64 W 244, 25 NW 11.

The time for the payment of costs awarded on setting aside a verdict may be extended. Smith v. Grover, 74 W 171, 42 NW 112.

It is an abuse of discretion to deny a motion to dismiss an action because of the unexcused default of the plaintiff in complying with an order requiring security for costs and allow the plaintiff then to file security without imposing terms. Felton v. Hopkins, 89 W 143, 61 NW 77.

A circuit court may, even after the end of the second term after filing the return on an appeal from justice's court, continue or reinstate a case for good cause shown. Whitham v. Mappes, 89 W 668, 62 NW 430.

The time within which a person may be substituted for the defendant, upon application, may be enlarged for cause. Merriam v. Horner, 92 W 654, 66 NW 808.

Although a bill of exceptions may be settled after the one year allowed for taking an appeal has expired, the court should exercise that power with caution, and only in cases where the rules have been complied with, and where such exercise will not extend the time within which the rights of parties may become fixed. The application for the extension should be supported by affidavits of persons having personal knowledge of the facts. Mere unexcused lapse of time should not avail. A showing of good and adequate cause should be required. Ward v. Racine College, 176 W 168, 185 NW 635; State ex rel. Union Free High School Dist. v. Chaney, 178 W 585, 190 NW 353.

Time will not be enlarged in the absence of any ground upon which it might properly be granted. Arthur J. Straus Co. v. Weiskopf, 180 W 323, 192 NW 1008.

Orders extending the time within which any act or proceeding in an action or special proceeding must be taken can not be granted as matters of grace. Wendlandt v. Hartford A. & I. Co. 222 W 204, 268 NW 230.

Affidavits which merely stated that the bill of exceptions was not served in due time because appellant's attorney was busy with other legal matters were insufficient to show "good cause" for the extension, and granting an extension of time was reversible error. Meyers v. Thorpe, 227 W 200, 278 NW 462.

An order requiring parties appealing from a judgment to pay the sum of $30 as a condition for an extension of the time within which to settle the bill of exceptions was within the discretion of the trial court. Warnke v. Braasch, 233 W 398, 289 NW 598.

An extension of the time within which any act or proceeding in an action or special proceeding must be taken can be granted only on notice and good cause shown by affidavit, where the motion is made after expiration of the time. The power is highly discretionary and the determination of the trial court will not be disturbed except where it clearly appears that its discretion has been abused. Banking Comm. v. Flanagan, 233 W 405, 289 NW 647.

Granting the defendant's motion to extend the time for settling the bill of exceptions was not an abuse of discretion where there had been a substitution of attorneys after judgment and the defendant was endeavoring to get the appeal taken and acted with reasonable diligence, and by inadvertence of defendant's present counsel the application was not made within the required time. Bettack v. Conachen, 235 W 559, 294 NW 57.

"Good cause" must be shown for extending the time for serving the bill of exceptions, and an extension of the time cannot be granted as a matter of grace, or for the mere convenience of a party, or merely because an

extension will not cause a term in the supreme court to be lost. Becker v. Smith, 237 W 322, 296 NW 620.

"Good cause" for extending the time for serving and settling a bill of exceptions must appear in the record. Millar v. Madison, 242 W 617, 9 NW (2d) 90.

The order, in extending the time for serving the complaint to 10 days after the filing of the deposition of the nonresident defendant with the clerk of the circuit court, is not beyond the power of the circuit court. State ex rel. Walling v. Sullivan, 245 W 180, 13 NW (2d) 550.

On the showing made in this case as to the mistake of counsel regarding the effectiveness of an ex parte order extending the time to serve a proposed bill of exceptions, the engagement of counsel in other matters, the shortage of stenographic help, and the adequate expediting of the appeal, the trial court was warranted in finding that good cause existed for extending the time. Daugherty v. Herte, 249 W 543, 25 NW (2d) 437.

The facts stated in the affidavit in support of the motion were insufficient to show cause for an extension of time to settle the bill of exceptions. O'Hare v. Fink, 254 W 65, 35 NW (2d) 320.

The trial court did not abuse its discretion in granting an extension of time to settle a bill of exceptions where the reporter could not prepare a transcript in the 10 or 12 days between the time ordered and the expiration of the 90-day statutory period. Rhodes v. Shawano Transfer Co. 256 W 291, 41 NW (2d) 288. See also: Ernst v. Ernst, 259 W 26, 47 NW (2d) 296; Greenfield v. Milwaukee, 259 W 101, 47 NW (2d) 291; and Bachmann v. Chicago, M. St. P. & P. R. Co. 266 W 466, 63 NW (2d) 824.

The words "for like cause," in 269.45 (2) mean that the excuse for granting an order extending the time to serve a bill of exceptions is the same after the expiration of the 90-day period under 270.47 as before; but what might have been "excusable neglect" which delayed the filing of the application for extension beyond the 90-day period can thereafter cease to be "excusable neglect" due to the lapse of further time. Where appellant did not apply for extension of the time until nearly 5 months after the time expired, although the reasons for delay were known long before, the supreme court would have denied the application if before it as an original question, but cannot hold as a matter of law that the trial court abused its discretion in granting the order. Valentine v. Patrick Warren C. Co. 263 W 143, 56 NW (2d) 860.

The provision in 269.45 (1), permitting an extension of time without notice, is not unconstitutional as denying due process of law, since it is merely procedural and due process does not require the giving of notice where substantive rights are not affected. An order extending the time for settling a bill of exceptions is an appealable order, and even though such an order did affect substantive rights, it would not be a denial of due process to enter such an order without notice to the opposite party, inasmuch as there exists such right of review by appeal. An erroneous order vacating a prior timely order of extension establishes excusable neglect for an application after expiration of time and good cause for granting a new extension. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

The affidavit of counsel as to illness of the court reporter and congested condition of his office allegedly delaying the furnishing of a transcript, considered with the undenied counter-affidavit of opposing counsel concerning delay in ordering the transcript, was insufficient to show good cause for an extension of time for settling a bill of exceptions. Hensle v. Carter, 264 W 537, 59 NW (2d) 455.

In an action by a 4-year-old boy by guardian ad litem, and by the child's father, for injuries sustained by the child and damages sustained by the father, that part of an order denying to the father an extension of time to serve a proposed bill of exceptions is affirmed, but, for the protection of the infant plaintiff as a ward of the court and not to be charged with the father's inexcusable neglect, that part of the order denying an extension to the infant plaintiff is reversed, with directions to the trial court to entertain a renewal of the motion for extension made in his behalf and then to determine such motion as the court's discretion under 269.45 (2) may direct. Miller v. Belanger, 275 W 187, 81 NW (2d) 545.

The alteration of "good cause" to "cause" and the mention of the trial court's discretion in 269.45 (2), by supreme court order effective July 1, 1950, was designed to assure trial judges that the supreme court would approve greater liberality in granting extensions of time than had been the case in the recent past, without, however, encouraging a belief that extensions which appeared to be granted arbitrarily or merely for favor would be affirmed. Miller v. Belanger, 275 W 187, 81 NW (2d) 545.

Where the basis of an application for extension of the time within which to settle and serve a bill of exceptions was the serious illness of a brother of the attorneys for the appellant, the trial court did not abuse its discretion in granting the extension on the ground of excusable neglect. Andraski v. Gormley, 3 W (2d) 149, 87 NW (2d) 818.

Where it appeared that the failure to settle a bill of exceptions within the statutory period or to apply for an extension of time within such period, was due to a client's indifference or indecision in the matter of her appeal, and not to any neglect on the part of the attorney who was perfecting the appeal, the denial of a motion for an extension of time, which motion was made after the expiration of the statutory period, was not an abuse of discretion. Syver v. Hahn, 4 W (2d) 468, 90 NW (2d) 632.

Where appellant's attorney obtained a transcript but failed to serve it for 170 days after notice of entry of judgment, and claimed press of other business as an excuse, denial of extension of time was proper. Failure to serve notice of entry of judgment on a guardian ad litem does not give the court authority to extend the time. Jolitz v. Graff, 12 W (2d) 52, 106 NW (2d) 340.

Under facts disclosing in part that a transcript of the testimony was delivered to the defendants' counsel on May 31, that the de-

fendants' counsel relied on the court reporter's erroneous statement that the extended time for settling the bill of exceptions would not expire until June 9, that the defendants' counsel was in the trial of an important case at the time of such statement, and that his own files and records were not then available to him, the trial court did not abuse its discretion in granting a second extension of time for serving the bill of exceptions. Hupf v. State Farm Mut. Ins. Co. 12 W (2d) 176, 107 NW (2d) 185.

Where an attorney received a transcript 3 weeks before the final date for service of the bill of exceptions but did not serve it or apply for an extension of time until 14 weeks after the deadline, the trial court properly denied an extension of time for service. The words "excusable neglect" in 269.45 (2) refer to the failure to apply for an extension of time as well as to the failure to serve. Millis v. Raye, 16 W (2d) 79, 113 NW (2d) 820.

The provision in 269.45, that a court may extend the time within which any act or proceeding in an action or special proceeding must be taken, even "after the time has expired," does not apply so as to authorize a court to extend the time for hearing a motion under 270.49 (1) for a new trial on the judge's minutes after that time has expired, but in such case the special provision in 270.49 (1), that the order must be made before the expiration of the time, controls. Harweger v. Wilcox, 16 W (2d) 526, 114 NW (2d) 818.

On a motion of the attorney for an appealing party for an extension of time on the ground that the attorney was unfamiliar with the provisions of 270.47 and believed that he had a longer period than 90 days from the date of entry of judgment, an order granting an extension for "excusable neglect" and "cause shown" was within the discretion of the trial court. Hernke v. Northern Ins. Co. of N. Y. 19 W (2d) 189, 120 NW (2d) 123.

See note to 269.46, on relief from judgments, orders and stipulations, citing Cruis Along Boats, Inc. v. Stand. S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

A showing of excusable neglect is made under 269.45 (2) where it is shown that a decision of the supreme court rendered after a denial of a prior motion for summary judgment would require the granting of the motion. Shelby Mut. Ins. Co. v. Home Mut. Ins. Co. 25 W (2d) 25, 130 NW (2d) 296.

Where defendant, after expiration of its time to move for summary judgment, applied for an extension, but the adverse party did not oppose the same, he thereby waived objection and could not assert error because the movant had not shown that its failure to act was the result of excusable neglect. Rice v. Gruetzmacher, 27 W (2d) 46, 133 NW (2d) 401.

Granting an extension of time to answer after the expiration of the 20 days was not an abuse of discretion where defendant had served a notice of retainer and attempted to examine plaintiff adversely within the 20 days and moved for extension only 10 days after the answer should have been served. Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 328.

The term "excusable neglect", as used in 269.45 (2), Stats. 1967, is not synonymous with neglect, carelessness, or inattentiveness, but is that neglect which might be the act of a reasonably prudent person under the same circumstances. Giese v. Giese, 43 W (2d) 456, 168 NW (2d) 832.

269.46 History: R. S. 1858 c. 125 s. 38; R. S. 1878 s. 2832; Stats. 1898 s. 2832; 1925 c. 4; Stats. 1925 s. 269.46; Court Rule V s. 2; Sup. Ct. Order, 212 W xi; Sup. Ct. Order, 259 W v; 1963 c. 37.

Comment of Judicial Council, 1951: 269.46 (3) was 252.10 (1). This renumbering from the chapter on Circuit Court under Title XXIV to the chapter on Practice Regulations under Title XXV makes clear that this provision applies to certain other courts of record, as well as to circuit courts. [Re Order effective May 1, 1952]

1. Relief from judgments, orders and stipulations.
2. Requirements for binding agreements and stipulations.
3. Review of judgments and orders.

1. Relief from Judgments, Orders and Stipulations.

Where a defendant is properly served with process and makes no defense because he supposes that the principal defendant will make proper defense and preserve his rights, and no fraud is shown, he cannot move after the expiration of the year from the time of service upon him to set the judgment aside. Sanderson v. Dox, 6 W 164.

Where an action was pending on appeal from the county court for 5 years without being brought to a hearing and was then brought on for affirmance without the knowledge of the appellant, the judgment must be set aside upon his application on the ground that it was rendered in surprise of the appellant through sharp practice. McDougal v. Townsend, 6 W 198.

A party who seeks to be relieved from a judgment on the ground of mistake, inadvertence, surprise or excusable neglect must make his application within one year after knowledge of the rendition of such judgment; and the notice thereof need not be in writing. Butler v. Mitchell, 17 W 52.

Where a motion is made promptly and prosecuted with reasonable diligence and an appeal is taken which is not disposed of for more than a year, with the result that the motion is denied because of a question of practice, leave being given to renew it, the renewal should be regarded as a continuation of the original motion. Butler v. Mitchell, 17 W 52.

Where counsel for defendant appeared at the trial and applied for a postponement on the ground that his attorney had not informed him that it was noticed for trial, and did not take any steps to try it, the application should have been granted. Hanson v. Michelson, 19 W 498.

Where default occasioned by ignorance and inability to understand English it was not an abuse of discretion to open it. Bertline v. Bauer, 25 W 486.

An order, made at a subsequent term, granting a new trial on account of failure to plead a defense by reason of a supposition of counsel on both sides and the court that it was unnecessary to do so, was not an abuse of discretion. State ex rel. Voight v. Hoeflinger, 33 W 594.

Where a party prepared to resist a motion to open a default of 7 years' standing, which was not heard as noticed, but was afterwards granted in his absence, his omission to appeal in time was excusable neglect. Eaton v. Youngs, 36 W 172.

Sec. 38, ch. 125, R. S. 1858, has no application to judgments of the supreme court. Pringle v. Dunn, 39 W 435.

Where the summons was served and an order to show cause why judgment should not be rendered, which was given to an attorney to attend to, who failed to do so, it was not an abuse of discretion to refuse to open the default, defendant's neglect not being excusable. Grootemast v. Tebel, 39 W 576.

A judgment may be vacated at the same term for error; the correction of errors or mistakes of the clerk or other officer and amendments of form at any subsequent term may be had; a void judgment by confession may be set aside at a subsequent term; and a judgment may be ordered satisfied, or its discharge vacated, or ordered not to be enforced against a party by reason of facts occurring too late to affect it at a subsequent term. Scheer v. Keown, 34 W 349; McCabe v. Sumner, 40 W 386.

Where a defendant relied on a continuance or change of venue, both of which were denied, he being represented for this purpose by his codefendant's attorney, and trial was had and judgment was rendered in the absence of his attorney, this was not a case of surprise, mistake, etc. Stilson v. Rankin, 40 W 527.

Any reasonable knowledge of the judgment is sufficient. Where notice of its entry was served upon defendant's attorney he is presumed to have notice of it about that time, and cannot claim to be ignorant of the existence of a judgment from which he appeals. Knox v. Clifford, 41 W 458.

One not a party of record, but who is the real party in interest, may have a judgment vacated upon a proper showing. Lampson v. Bowen, 41 W 484.

Where the ground of surprise was that defendant's attorney had not considered the effect which a discharge in bankruptcy would have upon his defense it was no abuse of discretion to deny the motion. Kalckhoff v. Zoehrlaut, 43 W 374.

Neglect to move promptly after receiving notice is an element to be considered in deciding the motion. Robbins v. Kountz, 44 W 558.

Where the attorney employed by a defendant ceases to be such before receiving notice of the judgment against the defendant such party may move for relief under sec. 38, ch. 125, R. S. 1858, at any time within a year after he himself has such notice. Where such defendant moved to set aside the judgment for fraud he was not guilty of laches in waiting until his motion was determined before moving under this provision, although he delayed such second motion for 5 months after denial of the first. Robbins v. Kountz, 44 W 558.

It is not a case of surprise that the party expected to be able to continue the cause and was surprised at the ruling on a motion therefor. Breed v. Ketchum, 51 W 164, 7 NW 550.

The circuit court has a discretion as to granting a new trial within one year after notice of judgment, on any of the grounds named in sec. 2832, R. S. 1878; and where the moving papers are sufficient in form, the court will not interfere unless there has been a manifest abuse of discretion. Smith v. Smith, 51 W 665, 8 NW 868.

A mistake of an attorney in choosing the form of his action and in applying the law to the facts is not within sec. 2832, R. S. 1878. Carmichael v. Argard, 52 W 607, 9 NW 470.

Where defendant knew nothing of the rendition of the judgment and the summons was not personally served, and attorneys appeared for him inadvertently and without his authority, it was an abuse of discretion to refuse to vacate the judgment. Cleveland v. Hopkins, 55 W 387, 13 NW 387.

The mere fact that costs were not taxed and were waived by the successful party would not prevent the running of the year within which the application to set aside the judgment should be made. Schobacher v. Germantown F. M. Ins. Co. 59 W 86, 17 NW 969.

If a void judgment of a justice of the peace has been docketed in the circuit court that court may, on motion and without an action, vacate the docket entries and strike the transcript from the files. Thomas v. West, 59 W 103, 17 NW 684.

If a judgment at law is not inequitable as between the parties, no matter how irregular or void it may be, a court of equity will leave the parties to their remedy at law, though the judgment creates a cloud upon the title to land. And in such case the plaintiff must pay or tender the amount justly due before relief will be granted. Wilkinson v. Rewey, 59 W 554, 18 NW 513.

Where defendant's attorney is unavoidably absent when judgment is rendered it should be set aside on a proper showing. McArthur v. Slauson, 60 W 293, 19 NW 45.

An order setting aside a judgment by default for $5,616.80, and permitting an answer upon condition that the defendants file a bond with sureties in the penal sum of $10,000 for the payment of any judgment which the plaintiff might finally recover, was an abuse of discretion because its terms were so severe. Union Nat. Bank v. Benjamin, 61 W 512, 21 NW 523.

A new trial on the ground of surprise, etc., cannot be granted when the testimony alleged to cause the surprise is in support of an issue made by verified pleadings. Delaney v. Brunette, 62 W 615, 23 NW 22.

In an action to bar the original owners of 120 distinct parcels of land certain defendants were made parties as being owners of a single parcel, and, having no interest therein, supposed themselves to be merely formal parties and did not appear in the action. The judgment charged them with the whole costs. About 4 years after such judgment was perfected, but within one year after the defend-

ants learned thereof, they moved to open it and for leave to answer; it was an abuse of discretion to deny such motion. Pier v. Millerd, 63 W 33, 22 NW 759.

New proof, to be available, must be such as could not have been discovered before the hearing by the exercise of reasonable diligence. Ketchum v. Breed, 66 W 85, 26 NW 271.

Where important evidence for the judgment creditor became incompetent by the death of the judgment debtor, and there were other relevant circumstances, it was not an abuse of discretion to refuse to open a judgment. Jefferson County Bank v. Robbins, 67 W 68, 29 NW 209 and 893.

Where the moving papers are insufficient in form the supreme court will not interfere with the discretion of the circuit court unless there has been a manifest abuse of discretion. Whereatt v. Ellis, 68 W 61, 30 NW 520, 31 NW 762.

A judgment for a considerable sum was rendered by default on account of the defendant having followed, in good faith, the advice of his attorney. The court upon application and a meritorious defense shown, should set aside the judgment and grant a trial. Whereatt v. Ellis, 70 W 207, 35 NW 314.

A delay of over 6 years, aside from the statute, is unreasonable and inexcusable. Coon v. Seymour, 71 W 340, 37 NW 243.

If the rights of third persons are involved a motion to vacate a judgment for deficiency may be properly denied without a hearing upon its merits and without prejudice to the right to bring an action for the same relief. Hooper v. Smith, 74 W 530, 43 NW 556.

A judgment creditor may at any time remit any portion of his judgment. This may be done by filing notice with the clerk of the court and giving the defendant information thereof. The court may make an order modifying the judgment on an ex parte application so long as the record remains in the court. If the motion to modify is resisted by the defendant it is an abuse of discretion to require that an appeal from the original judgment shall be dismissed or that the costs of the motion shall be paid. German Mut. F. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

A judgment of divorce from bed and board will not be set aside because defendant was misled as to its effect, supposing it to be a divorce from the bond of matrimony, when the motion therefor is made more than one year after he had notice of the judgment. Jones v. Jones, 78 W 446, 47 NW 728.

The statute contemplates a mistake of fact and not of law. Main v. McLaughlin, 78 W 449, 47 NW 938.

The mistake of an attorney in omitting an important fact which his client directed him to insert in a stipulation may be relieved from. W. W. Kimball Co. v. Huntington, 80 W 270, 50 NW 177.

Though an oral agreement to extend the time for answering is not binding, yet if the defendant, in reliance thereupon, fails to answer in time, such failure is due to inadvertence or excusable neglect, and a default judgment should be set aside on terms if the proposed answer sets up a meritorious defense. Heinemann v. Le Clair, 82 W 135, 51 NW 1101.

If all the errors relied on for vacating a judgment "relate to matters upon which the mind of the court did act, or must be presumed to have acted, in rendering the judgment, and appear upon the face of the record," the court is precluded from acting on the same matters at a subsequent term and changing its opinion or altering its judgment, except as authorized by this section. Milwaukee M. L. & B. Society v. Jagodzinski, 84 W 35, 54 NW 102.

Where defendant was insane when summons was served and judgment by default was taken without the appointment of a guardian, it was a case of excusable neglect. Bond v. Neuschwander, 86 W 391, 57 NW 54.

A motion to vacate a judgment, on being denied absolutely, is res judicata, and a second motion for the same purpose, based upon the same ground, should be denied for that reason. Dick v. Williams, 87 W 651, 58 NW 1029.

On the motion of a creditor who did not know of the final hearing to vacate an order allowing the final account of an assignee, the court may vacate such order, notwithstanding sec. 1701, R. S. 1878, provides that such final order shall be conclusive upon all parties. Commercial Bank v. McAuliffe, 92 W 242, 66 NW 110.

Motions to set aside judgments are addressed to the discretion of the court, and action thereon will not be disturbed unless discretion is abused. Pfister v. Smith, 95 W 51, 69 NW 984.

The party applying for relief should pay the reasonable expenses incurred by the other in obtaining the judgment; but these are not to be measured by his disbursements if they were unreasonable. Behl v. Schuette, 95 W 441, 70 NW 559.

Defaults incurred from the ill-advice or negligence of counsel are to be relieved against as well as any others. Behl v. Schuette, 95 W 441, 70 NW 559.

Judgment was rendered for professional services for $1,318.50 against the defendant who had been served with a bill for $217.34 on account of such services, and who had been served with a summons but not with a complaint. Defendant had asked for time, and plaintiff's attorney promised to see his client and give defendant information; but this was not done. The judgment was set aside. Dunlop v. Schubert, 97 W 135, 72 NW 350.

An order vacating a judgment by default will only be reversed where the court has abused its discretion. Boutin v. Catlin, 101 W 545, 77 NW 910.

Where the moving papers show that the party has a good defense and that judgment has been suffered through mistake, inadvertence, surprise or excusable neglect, it is an abuse of discretion to refuse the relief authorized by sec. 2832, Stats. 1898. Bloor v. Smith, 112 W 340, 87 NW 870.

It is error to impose costs on the plaintiff in setting aside a judgment entered on cognovit, although it would be proper to impose costs on defendant. Port Huron E. & T. Co. v. Clements, 113 W 249, 89 NW 160.

Application under sec. 2832, Stats. 1898, was properly denied where it was made nearly 4

years after the entry of the judgment and nearly 3 years after plaintiffs had paid a part of the costs, although the judgment was obtained through surprise, and affidavits stated that the persons making the application did not know of the judgment until about 5 months before. Buchan v. Nelson, 114 W 234, 90 NW 114.

Where an action has been dismissed for want of prosecution and it appears that the case was continued over the 5-year limit at the request of the attorneys for the defendant, and that it was thereafter noticed for the first term after such limit, and again continued on a similar request, it is an abuse of discretion to refuse relief from the judgment of dismissal. Hine v. Grant, 119 W 332, 96 NW 796.

A nominal party has no right to have a judgment vacated. Pier v. Oneida County, 124 W 398, 102 NW 912.

A county court could vacate an order or judgment entered by it where it appeared that such order was entered by fraud or without jurisdiction, even though more than one year had elapsed since notice of the hearing. Parsons v. Balson, 129 W 311, 109 NW 136.

Sec. 2832, Stats. 1898, does not apply to those orders entered during the progress of the case, such as the appointment of the referee. A court has at all times authority to modify such orders. My Laundry Co. v. Schmeling, 129 W 597, 109 NW 540.

One not a party to a judgment which will be a lien on his property may apply for relief on the ground that the judgment has been paid. Jackson M. Co. v. Scott, 130 W 267, 110 NW 184.

A party to an action cannot bring an independent suit to prevent an inequitable enforcement of the judgment, but must proceed by motion in such action. Pleshek v. McDonell, 130 W 445, 110 NW 269.

The only power to vacate or set aside a judgment after the term at which it is rendered, otherwise than for want of jurisdiction, is that granted and limited by sec. 2832, Stats. 1898, which must be invoked within one year after the moving party has knowledge of the judgment. Uecker v. Thiedt, 133 W 148, 113 NW 447.

The fact that judgment was wrong and unauthorized and oppressive to the defendant, so that it would probably have been reversed upon appeal, was a sufficient reason to justify the trial court in setting it aside without requiring the payment of costs. Reeves v. Kroll, 133 W 196, 113 NW 440.

Where a case has been dismissed by stipulation, notice to the attorney of any proceedings inconsistent with such stipulation is not notice to the party and does not start the running of the year provided in sec. 2832, Stats. 1898. Wawrzyniakowski v. Hoffman, 137 W 629, 119 NW 350.

Sec. 2832, Stats. 1898, applies whether or not defendant was personally served and relief may be had under it within one year after notice of the entry of the judgment obtained by service by publication, even though it is more than 3 years after the actual entry of the judgment. (Gray v. Gates, 37 W 614, is overruled insofar as it conflicts with this construction and Pier v. Millard, 63 W 33, 22 NW 759, is followed.) Kingsley v. Steiger, 141 W 447, 123 NW 635.

A verified answer stating a good defense accompanied by affidavits excusing a party's neglect are sufficient and an affidavit of merits is not required. Koch v. Wisconsin P. C. Co. 146 W 267, 131 NW 404.

The right to entertain a motion for a new trial, after the term, for the misconduct of the jury rests upon sec. 2832, Stats. 1898, and it was no abuse of discretion to deny such a motion for even highly censurable misconduct where the court was satisfied that the result was not affected by it. Ketchum v. Chicago, St. P. M. & O. R. Co. 150 W 211, 136 NW 634.

Discretion exercised by the trial court to grant or refuse relief from a judgment will not be disturbed on appeal unless it appears so clearly wrong as to evince an abuse of judicial power. Gowran v. Lennon, 154 W 566, 143 NW 678.

The real party in interest, though not a party of record, may have a judgment vacated upon a proper showing within one year after its entry. Langley R. Co. v. Magee, 156 W 457, 145 NW 1101.

No extension of the time for the taking of an appeal in condemnation proceedings can be had under sec. 2832, Stats. 1913. Filer & Stowell Co. v. Chicago, M. & St. P. R. Co. 161 W 591, 155 NW 118.

A valid judgment cannot be set aside after the term at which it is entered, except under sec. 2832, Stats. 1915, and the motion and order under that section must be made within one year after the moving party had notice of the judgment. Where judgment is entered after a full trial on the merits and pursuant to an order of the court, surprise at the decision of the court on the facts before it is not the kind of surprise for which sec. 2832 provides a remedy. Fischbeck v. Mielenz, 162 W 12, 154 NW 701.

No relief against a judgment can be had except pursuant to sec. 2832, sec. 2879, or in equity to restrain the enforcement of an unconscionable judgment. Gimbel v. Wehr, 165 W 1, 160 NW 1080.

Sec. 2832 does not provide remedies for the recovery of damages caused by conspiracy and successful fraud. Royal I. Co. v. Sangor, 166 W 148, 164 NW 821.

A motion to set aside a judgment will be denied when based upon speculation as to the real facts. Siebert v. Dudenhoefer Co. 178 W 191, 188 NW 610.

A motion to set aside a judgment by confession on a judgment note is addressed to the sound discretion of the court, and a strong case of abuse of such discretion must be made to warrant the supreme court in disturbing the order. Wessling v. Hieb, 180 W 160, 192 NW 458.

Knowledge by one of several petitioners for a new trial of a matter in a county court on the ground of a lack of knowledge of the former action of the court does not bar other petitioners having no such knowledge. Estate of Lehmann, 183 W 21, 197 NW 350.

A foreclosure judgment should not be vacated to permit the mortgagor and the purchaser of the premises to litigate the question of liability on the mortgage, a decision on

which question would not affect the mortgage. Harder v. Davelaar, 184 W 616, 200 NW 368.

Where a motion to vacate a judgment was never brought on for hearing, an action for an injunction to restrain its enforcement, made more than 4 years later, was properly denied because of laches. Kiel v. Scott & Williams, 186 W 415, 202 NW 672.

To open a judgment it is necessary that the defendant present a verified answer showing a good defense and an affidavit of merits. Velte v. Zeh, 188 W 401, 206 NW 197.

The delay of 11 months after personal service of process without any suggestion of any excuse for such delay warranted a finding that the defendant was guilty of such inexcusable neglect as to bar his right to equitable relief. Schulteis v. Trade Press P. Co. 191 W 164, 210 NW 419.

Plaintiff on March 4 served a summons and complaint in an action to recover for a fire loss on an insurance policy, and on March 23 a petition by defendant for removal to the federal court was served. The bond accompanying such petition being insufficient, plaintiff took a default judgment on March 27, and defendant, after unsuccessful attempts in the federal court to have the cause removed, applied for leave to answer in the state court, which was granted, and the judgment vacated upon condition that defendant pay substantial counsel fees and expenses to plaintiff. The terms imposed, while large, do not disclose an abuse of discretion. Brihm v. Aetna Ins. Co. 191 W 633, 211 NW 759.

Upon the nonappearance of garnishees in justice court judgment was entered against them, and after the expiration of the time for appeal a transcript of this judgment was filed in the circuit court and an execution issued thereon. On motion of the garnishees, the circuit court struck the transcript from the records and stayed execution. The circuit court acquires power to review the judgment of an inferior court only by appeal, by common-law writ, or by an equitable action, and it did not have the power to strike the transcript of this judgment which was admitted to be valid from its files and docket. Wernick v. Roth, 195 W 519, 218 NW 812.

Denial of a trustee's timely motion to open a judgment against a bankrupt for substantially a third of the amount owed other creditors was an abuse of discretion. Hickcox v. Schmidt, 198 W 624, 225 NW 140.

Vacating a foreclosure judgment and permitting a defense is within the discretion of the circuit court. Westboro L. Co. v. Schwanker, 199 W 350, 226 NW 313.

Where, after decision, the parties stipulated respecting the judgment, but, upon interposition and objection by new parties, the trial court disregarded it, the supreme court cannot by its judgment restore the stipulation. Massey v. Richmond, 208 W 239, 242 NW 507.

"Stipulations" are of 2 kinds: those which are mere admissions of fact, merely relieving party from inconvenience of making proof; and second, those having all characteristics as concessions of some rights as consideration for those secured, and these stipulations are entitled to all sanctity of ordinary contract. In an action on an insurance policy, a stipulation that the policy was in effect, that plaintiff was the beneficiary, that the beneficiary made proper proofs of loss, and as to amount due in case of recovery, and circumstances and cause of insured's death, was conclusive unless set aside, being more than a stipulation for convenience of parties, but in fact an agreed case. Thayer v. Federal Life Ins. Co. 217 W 282, 258 NW 849.

In a death action against a railroad company, a stipulation as to amount of damage, ownership of the automobile in which decedents were riding, and presence of wigwag equipment at the intersection where the accident occurred, had reference to the trial then pending and was not binding at any future trial, being merely a series of admissions by defendant's counsel for the purpose of shortening the trial. Paine v. Chicago & N. W. R. Co. 217 W 601, 258 NW 846.

A stipulation by which a bankrupt and his wife agreed not to appeal from a judgment in favor of the trustee setting aside a conveyance from the bankrupt to his wife as fraudulent, in consideration of the trustee's withdrawal of his opposition to the bankrupt's discharge, is void as contrary to the bankruptcy act and as against public policy. Beat v. Mickelson, 220 W 158, 264 NW 504.

A motion for relief under 269.46 must be applied for in the trial court. Milwaukee County v. H. Neidner & Co. 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

Subsequent events, revealing that the amount of liquidated damages agreed on by the parties to a contract was inadequate, will not affect the right to limit recovery to the amount stipulated. Keehn v. United States F. & G. Co. 222 W 410, 268 NW 127.

An order setting aside an order of confirmation of a mortgage foreclosure sale and permitting redemption by payment of an amount less than that due under the foreclosure judgment, based on an alleged oral understanding of the parties, was erroneous, since the jurisdiction of the trial court to relieve against the order confirming the sale depended solely on 269.46. First Nat. Bank & Trust Co. v. Hardy, 226 W 457, 277 NW 181.

The power of a court to relieve a party under 269.46 depends upon a showing of mistake, inadvertence, surprise or excusable neglect. Wanting such showing, the court is powerless to afford relief. In re Coloma State Bank, 229 W 475, 282 NW 568.

A court is without jurisdiction to vacate a judgment on the ground of surprise, etc., more than a year after notice of the entry of judgment. The motion to vacate must be decided within such year. Harris v. Golliner, 235 W 572, 294 NW 9. See also State Central Cr. Union v. Bayley, 33 W (2d) 367, 147 NW (2d) 265.

An agreement made before the public service commission by counsel for 2 cities, that one should pay the other for water furnished by it at a rate to be fixed by the commission until the effective date of the commission's order, subject to the right of either party to appeal from the order, was comparable to a stipulation made in open court and was bind-

ing on both cities. Milwaukee v. West Allis, 236 W 371, 294 NW 625.

It is not enough that the motion for relief be made within a year; the court must act within a year. Kellogg-Citizens Nat. Bank v. Francois, 240 W 432, 3 NW (2d) 686.

The trial court is without power to relieve a party from a judgment rendered against him through mistake, surprise or excusable neglect after that judgment has been affirmed by the supreme court. Hoan v. Journal Co. 241 W 483, 6 NW (2d) 185.

For effect of stipulation in a divorce action, see Beck v. First Nat. Bank in Oshkosh, 244 W 418, 12 NW (2d) 665.

The provision in 269.45, for extending the time, etc., even "after the time has expired," does not apply to a case within 269.46 (1), which provides that a court may, at any time "within one year after notice thereof," relieve a party from a judgment obtained through mistake. Boyle v. Larzelere, 245 W 152, 13 NW (2d) 528.

The trial court is vested with control over a stipulation of settlement and a prior order dismissing the action, so that the court can set aside the order of dismissal and further proceedings had in the cause. Anderson v. Ludwig, 248 W 464, 22 NW (2d) 530.

If the wife was insane when granted a divorce and a fraud was perpetrated on the court by not informing the court of the claim of insanity, the judgment of divorce should have been set aside irrespective of whether the wife's insanity would not deprive her of the right to bring the divorce action or would not deprive the court of jurisdiction. Heine v. Witt, 251 W 157, 28 NW (2d) 248.

An application to reopen probate proceedings to permit proof of a will which had been denied probate was properly refused, where the application was made too late for the order denying probate of such will to be set aside under 269.46 and there was no equitable ground which would justify setting it aside. Estate of Callahan, 251 W 247, 29 NW (2d) 352.

On a motion to vacate a judgment affirming a commissioners' order of July 12, 1945, for the laying out of a highway under 80.17 to 80.20, which motion was based on the claim that the movants and their attorneys were not aware, at the time the judgment was entered on August 3, 1946, that 80.20 had been amended by an act published on May 4, 1945, the court could conclude that the judgment was not obtained through any such mistake, inadvertence, surprise or excusable neglect as to entitle the movants to relief therefrom. State ex rel. Borgen v. Nitz, 252 W 155, 31 NW (2d) 193.

Motions to reopen a divorce case in respect to division of property on the ground of mistake, inadvertence, surprise or neglect were addressed to the discretion of the trial court, whose decisions thereon will not be reversed where there does not appear to have been any abuse of discretion. Newman v. Newman, 257 W 385, 43 NW (2d) 453.

After the time has expired within which the trial court can modify its judgment or appeal can be taken, provisions disposing of property can be reached only by an attack on the judgment itself. Equitable relief against a judgment, although not regarded with favor by the courts, may nevertheless be had where sufficient grounds appear; such relief may be had, not of right, but in the exercise of a sound legal discretion. Dunn v. Dunn, 258 W 188, 45 NW (2d) 727.

A valid judgment is not subject to collateral attack. On collateral attack, the question is not whether a judgment was obtained by fraud but whether it was rendered without jurisdiction. Kehl v. Britzman, 258 W 513, 46 NW (2d) 841.

In an action wherein the defendant's attorney signed a stipulation of settlement in court and the defendant, who had not been present in court and did not sign the stipulation, refused to go through with the settlement, but he neither appeared in person nor filed any affidavit in response to an order to show cause served on him personally as well as on his attorney, the record sustained the trial court's conclusion that the stipulation was authorized by the defendant, warranting the entry of judgment pursuant thereto. Balzer v. Weisensel, 258 W 566, 46 NW (2d) 763.

Relief may be had only on notice, and not only the motion but also the order itself must be made within one year after the moving party has notice of the judgment. The court has full control of its judgment for one year, but thereafter it is limited to making corrections to make the judgment conform to the actual pronouncement of the court, and it cannot modify or amend the judgment to make it conform to what the court ought to have adjudged or even intended to adjudge. A nunc pro tunc order, entered 5 years after the entry of a divorce decree made a judicial alteration of the decree, and hence was void because the court had no jurisdiction over the subject matter so as thus to revise its decree after 5 years had elapsed. State ex rel. Hall v. Cowie, 259 W 123, 47 NW (2d) 309.

On an application to vacate a judgment entered without process on a judgment note, and to be allowed to present a defense, the verified proposed answer, alleging that the note was made as part of an oral agreement whereby the maker promised to maintain and care for the payee and his wife during their lifetime and the payee was to leave all his property to the maker, and that the note was given as security for performance of the promise to support, that the support had been furnished and operated as payment of the note but that the payee had willed his property to others so that there was a failure of consideration, together with an affidavit conforming to 269.465, alleged a meritorious defense in sufficient detail to enable the trial court without abuse of discretion to vacate the judgment. Adams v. Congdon, 259 W 278, 48 NW (2d) 469.

It is preferable, in wording an order vacating a judgment on terms, that the order provide for the vacation of the judgment on the terms being met, rather than for vacation at once with a condition that the party relieved pay the sum imposed as terms within 2 weeks and that on failure to pay the judgments be reinstated. State ex rel. Bornemann v. Schultz, 260 W 395, 50 NW (2d) 922.

The one-year period in which the court might grant relief to a party from certain default judgments is measured from the time that the party had notice of the entry or docketing of such judgments, and not from the date of the docketing thereof. It is not necessary that the relief granted to one seeking to be relieved from a default judgment be a vacation of the judgment, since such relief can also take the form of an opening up of the judgment whereby the lien of the judgment remains, pending the outcome of the trial on the merits. State ex rel. Bornemann v. Schultz, 260 W 395, 50 NW (2d) 922.

A written opinion of the trial court, on the question of granting relief to a defendant from a default judgment on a note and allowing the defendant to defend the action, is construed as holding that the judgment was merely to be opened up; and hence, it was proper for a successor judge, in his order amending an order of a prior successor judge by deleting therefrom its provision for vacating the judgment, to provide that the lien of the judgment should stand pending the outcome of the trial of the issues on the merits. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

An order of a judge, made in chambers without pronouncement in open court, directing that a default judgment on a note be vacated and that the defendant be allowed to defend the action, was not binding on the plaintiff in the action and was ineffective to vacate the lien of the plaintiff's judgment, in the absence of notice of the entry of such vacational order having been given to the plaintiff or his counsel. State ex rel. Chinchilla Ranch, Inc. v. O'Connell, 261 W 86, 51 NW (2d) 714.

Where a default judgment for specific performance of an option to purchase a lot was entered in favor of the plaintiff optionee, and the optionee then conveyed the property to third persons, the denial of the defendant optionors' subsequent motion to open the judgment was not an abuse of discretion, considering, among other things, the excuses offered by the defendants for their default and the fact that the rights and interests of persons who were strangers to the record were involved. Williams v. Miles, 268 W 632, 68 NW (2d) 451.

Where the plaintiff, seeking to be relieved of the stipulation for settlement of the action, did not charge that his attorney or anyone else made any misrepresentation to him, nor that he did not hear the stipulation dictated, nor that any fraud or undue influence was exercised on him, nor that he was moved by any improper inducement whatever to stand by silently when the stipulation was made, the trial court's denial of the relief sought was not an abuse of discretion. Czap v. Czap, 269 W 557, 69 NW (2d) 488.

Where plaintiff did not serve a notice of injury or the complaint within 2 years after an accident, and showed no reason why his complaint should not be dismissed, it is not error for the trial court to refuse to set aside the judgment of dismissal 4 months later on an affidavit then stating for the first time reasons why defendant should be barred from asserting the 2-year statute of limitations. Staats v. Rural Mut. Cas. Ins. Co. 271 W 543, 74 NW (2d) 152.

On a record disclosing that the defendant in an action to foreclose a mechanic's lien had been unco-operative in respect to getting the case on for trial and in other respects and that the defendant did not appear on the date set for trial, and that the trial court then ordered the answer on file be stricken and that the plaintiff be free to proceed as a default, the denial of the defendant's motion to reopen the judgment, on the ground that it had been obtained through "surprise, mistake, and excusable neglect" of the defendant, was not an abuse of discretion. Schwarz v. Strache, 275 W 42, 80 NW (2d) 797.

Where there was nothing in the docket entry or elsewhere in the record to show that the order of the Milwaukee civil court vacating the judgment in question was not made in open court, the supreme court must presume that it was made in open court, as an order of the court, as required by 269.29 and 269.46, and not by the judge in chambers, so that failure to serve notice of such order on the plaintiff or its attorneys did not render it ineffectual to vacate the judgment so as to prevent the running of the time for appeal to the circuit court. Transcontinental Ins. Co. v. Hartung Motor Co. 1 W (2d) 159, 83 NW (2d) 744.

Where the mortgagor's application for modification of the foreclosure judgment, so as to extend the time that must elapse before the foreclosure sale could be advertised to more than one year, did not make out a case of a judgment obtained against him through mistake, inadvertence, surprise, or excusable neglect, and where such application was not filed until more than 60 days after the end of the term of entry of such judgment, the requested relief could not be invoked under the provisions of either 269.46 (1) or (3). Welfare Building & Loan Asso. v. Hennessey, 2 W (2d) 123, 86 NW (2d) 1.

Where a substantial defense is pleaded on the defendant's motion to open a judgment entered on cognovit, the trial court should permit its presentation, even though it is attacked as sham, the court being compelled at such stage of the proceeding to assume that the defense is offered in good faith, Uebele v. Rosen, 2 W (2d) 339, 86 NW (2d) 439.

See note to 324.04, citing Estate of Strange, 3 W (2d) 104, 87 NW (2d) 859.

The "inadvertence" which will relieve one from a judgment does not mean mere inadvertence in the abstract but it must be excusable and real. The word "mistake" does not apply to a mistake of law; "surprise" means warrantable and honest surprise, not mere pretense or surprise due to negligence, or surprise at a ruling of the court that should have been anticipated; and "excusable" neglect is neglect through being misled or in spite of reasonable precautions or due to circumstances beyond control of the party, but it does not include neglect which consists in a total sleeping on one's rights. Padek v. Thornton, 3 W (2d) 334, 88 NW (2d) 316.

The one-year provided under 269.46 (1) was

not tolled by the fact that the time was used up in appeal to the circuit court from the civil court which, timely made, had jurisdiction to give relief. Harding v. Janicek, 6 W (2d) 290, 94 NW (2d) 620.

In most cases, where relief is sought by a party against whom a default judgment has been rendered, the interests of justice would seem to be best served by opening up the judgment and granting a trial on the merits, thus retaining the lien of the judgment pending the outcome of such trial, rather than vacating the judgment outright, but nevertheless this is a matter in which the trial courts are free to exercise their own sound discretion. Spohn v. Norden, 7 W (2d) 383, 96 NW (2d) 831.

269.46 (1) is a remedial statute which should be liberally construed in favor of the party who seeks relief. The excusable mistake from which the trial court may grant relief under the statute should not be restricted to a mistake of fact as distinguished from a mistake of law. A mistake of law on the part of an attorney may give rise to a case of excusable neglect on the part of his client; a court of equity is not bound to impute to a client everything that his attorney does or omits to do; and the negligence of an attorney is not necessarily imputable to his client so as to bar the client from claiming excusable neglect and being granted relief. Paschong v. Hollenbeck, 13 W (2d) 415, 108 NW (2d) 668.

The provision in 269.46 (1), that the trial court must act on the motion within the year of the notice of the judgment or order from which relief is sought, does not foreclose the supreme court from deciding an appeal and ordering further proceedings after the year has elapsed, and does not preclude the trial court in such a case from then acting pursuant to the mandate of the supreme court. Paschong v. Hollenbeck, 13 W (2d) 415, 108 NW (2d) 668.

Mere compliance with the formal requirements of an answer and the lack of injustice to the opposing party are not sufficient grounds for granting relief under 269.46 (1); one must show that the judgment was taken against him through his mistake, inadvertence, surprise, or excusable neglect. It was not an abuse of discretion for the trial court to refuse to vacate a default judgment entered against a defendant who, among other things, had been advised by his original counsel of the necessity of filing an answer. Even a stipulation of the parties to reopen the judgment would not be binding on the court. State v. Omernick, 14 W (2d) 285, 111 NW (2d) 135.

A judgment cannot be vacated under 269.46 (1) after the lapse of 60 days subsequent to the expiration of the term of court at which rendered because of error committed in rendering the judgment, since the power to grant relief more than 60 days after the end of the term is limited by 269.46 (1) solely to cases of mistake, inadvertence, surprise, or excusable neglect, and even though there had been errors in the judgment which might shock the conscience of the trial court, it is powerless to grant relief from the judgment after the 60-day period has elapsed following the end of the term, absent a proper showing of mistake, inadvertence, surprise, or excusable neglect. Glassner v. Medical Realty, Inc. 22 W (2d) 344, 126 NW (2d) 68.

The press of other trials and business is not such "excusable neglect" as to make it an abuse of discretion not to grant relief under 269.46 (1) and 269.45 (2). Cruis Along Boats, Inc. v. Stand. S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

While an affidavit of meritorious defense is not required if the motion to vacate a default judgment is supported by a verified answer, a proposed answer, verified by attorney and denying liability and damages on information and belief, will not suffice. Cruis Along Boats, Inc. v. Standard S. P. Mfg. Co. 22 W (2d) 403, 126 NW (2d) 85.

Probate courts are among those subject to 269.46 (1). They have the same power over their judgments and orders as do courts of equity and law. Estate of Hatzl, 24 W (2d) 64, 127 NW (2d) 782, 129 NW (2d) 249.

Where plaintiff made application to the trial court to modify the judgment by including an additional item of costs which it neglected to include at the time costs were settled and the trial court declined to modify the judgment, the matter being one within that court's discretion, its conclusion will not be disturbed. Zeisler Corp. v. Page, 24 W (2d) 190, 128 NW (2d) 414.

269.46 (1), which authorizes the court to relieve a party from a mistake at any time within one year after notice, does not refer to notice of entry of judgment but on the contrary, refers only to notice of judgment. The one-year period starts to run after notice of the judgment or order from which relief is sought, and knowledge is the equivalent of notice. Thorp Small Business Inv. Corp. v. Gass, 24 W (2d) 279, 128 NW (2d) 395.

It was not an abuse of discretion to deny a motion made pursuant to 269.46 (1) to vacate a default judgment entered against the maker of a promissory note given to implement compliance with the terms of a divorce property settlement agreement where the only showing of mistake, inadvertence, surprise, or excusable neglect for omission to defend was movant's failure to employ a lawyer. A proposed answer accompanying the moving papers in which the maker did not deny executing the note, but alleged that it was not the intention of the parties to provide for acceleration by the payee in the event of default—containing no allegation, however, that the acceleration clause was included in the note by mistake, and making no demand for relief by way of reformation—failed to state a defense. Wesolowski v. Wesolowski, 30 W (2d) 15, 139 NW (2d) 660.

After a trial to the court, where appellant made no motion for review, all issues are appealable. Farwell v. Farwell, 33 W (2d) 324, 147 NW (2d) 289.

269.46 (1) extends to the reformation of a stipulation upon which a judgment is based. This section is the exclusive remedy for reformation of a stipulation or judgment; an independent action to accomplish the result will not lie. Kramer v. Bohlman, 35 W (2d) 58, 150 NW (2d) 357.

269.46 (1), Stats. 1967, permitting timely application for relief from a judgment on grounds therein specified, has reference ex-

clusively to the mistake, inadvertence, surprise, and excusable neglect of a party, resulting in a judgment being entered against him which might be inequitable. When a case is briefed, argued and decided under then existing law, modification of the law by subsequent decision of a court of last resort is not a proper ground for relief under the statute. Sikora v. Jursik, 38 W (2d) 305, 156 NW (2d) 489.

While a court has power to vacate a judgment if it is void, or to correct the judgment so as to conform to the actual pronouncement of the court after the lapse of a period of one year (the statutory period specified in 269.46 (1), Stats. 1965), other errors or irregularities in the adjudication may not be corrected after expiration of that period. State v. Conway, 40 W (2d) 429, 162 NW (2d) 71.

The one-year period within which a court may under 269.46 (1), Stats. 1967, relieve a party from a judgment or order obtained against him through mistake, inadvertence, surprise, or excusable neglect starts to run, as the statute prescribes, after notice of the judgment or order from which relief is sought. The test under the statute is purely a subjective one. Tuszkiewicz v. Lepins, 41 W (2d) 102, 163 NW (2d) 188.

On motion to open a judgment obtained by plaintiff as alleged assignee of a cognovit note, defendant's proposed answer setting forth as separate defenses that the note had either been satisfied, or had been assigned to the department of taxation or to a trustee in bankruptcy of the payee's estate, met the statutory ground of "surprise" in 269.46, Stats. 1967, warranting the reopening of the judgment, for, attributing verity thereto for the purpose of the motion, defendant could have assumed that in the normal course of events one of the sources other than the plaintiff would pursue payment or judgment. Quinn Distributors, Inc. v. Miller, 43 W (2d) 291, 168 NW (2d) 552.

In an action for an accounting initially scheduled for trial 5 years after issue was joined and rescheduled a year later, at which time plaintiff and his attorney failed to appear, whereupon the action was dismissed, the trial court did not thereafter abuse its discretion in imposing as terms the payment of costs as a condition for reopening the case, where it appeared that all but one item of the costs and fees were incurred either in procuring the order of dismissal, appearing in response to the plaintiff's motions to vacate the order of dismissal, or were incurred on the morning when the plaintiff and his counsel failed to appear for trial. Khatib v. Frenn, 43 W (2d) 606, 168 NW (2d) 872.

Where the trial court held that excusable neglect had not been established, and denied a motion for a new trial, this was largely a matter of trial court discretion, and there was no abuse of that discretion. Lake Geneva v. States Imp. Co. 45 W (2d) 50, 172 NW (2d) 176.

Courts of record have no power in municipal ordinance cases to review their judgments and impose other sentences, during term or afterwards, after execution of original sentence has commenced. 269.46 (1) is not applicable to such cases. 32 Atty. Gen. 228.

Vacation of order or judgment obtained through mistake of law. 1962 WLR 540.

2. Requirements for Binding Agreements and Stipulations.

269.46 (2), in providing that no agreement, "in respect to the proceedings in an action" shall be binding unless made in open court or made in writing, etc., has reference to stipulations directly affecting the course of an action and does not control subsequent causes of action on different issues or modify accepted contract law. Logemann v. Logemann, 245 W 515, 15 NW (2d) 800.

269.46 (2) does not specify the person who shall enter a stipulation on the minutes, and does not prohibit the trial court from making the minutes of a stipulation. Urban v. Trautmann, 249 W 264, 24 NW (2d) 619.

A stipulation for settlement of an action made in open court in the presence of the parties and their counsel, and recorded in the official reporter's notes and transcribed and made a part of the record in the case, was not ineffective as not being in compliance with 269.46 (2), that a stipulation thus made in open court, to be binding, must be "entered in the minutes." Czap v. Czap, 269 W 557, 69 NW (2d) 488.

When a judge is attended by the court officials and the parties and their counsel and witnesses and proceeds with the dispatch of judicial business, the court is in session, even if the sitting happens to be in a portion of the building that does not have the word "courtroom" on its doors. Pasternak v. Pasternak, 14 W (2d) 38, 109 NW (2d) 511.

If any agreement of settlement on stated terms was reached by the parties in a pending action, it was void for not having been made in court and entered in the minutes or made in writing and subscribed by the party to be bound thereby or by his attorney, as required by 269.46 (2), in order to make it binding, and where the plaintiff did not even bring the agreement to the attention of the trial court, did not further prosecute its action, and the action was dismissed as a default, the plaintiff could not enforce such agreement in a new action brought by it for that purpose. [Logemann v. Logemann, 245 W 515, distinguished.] American Cas. Co. v. Western Cas. & Surety Co. 19 W (2d) 176, 120 NW (2d) 86.

3. Review of Judgments and Orders.

A valid judgment cannot be set aside after the term at which it is entered except under sec. 2832, R. S. 1878. Black v. Hurlbut, 73 W 126, 40 NW 673. See also: Aetna Life Ins. Co. v. McCormick, 20 W 265; Loomis v. Rice, 37 W 262; Fornette v. Carmichael, 38 W 236; Van Dresar v. Coyle, 38 W 672; Salter v. Hilgen, 40 W 363; Pier v. Armory, 40 W 571; and Pormann v. Frede, 72 W 226, 39 NW 385.

A motion to vacate a judgment of foreclosure because it was entered without proof of filing the notice of lis pendens must be made at the term at which judgment was entered. McBride v. Wright, 75 W 306, 43 NW 955.

A judgment in a divorce action, making a final division and distribution of property, cannot be reviewed or altered after the term at which it was rendered, except as is provided otherwise by sec. 2832, Stats. 1919. Towns v. Towns, 171 W 32, 176 NW 216.

Where notice of entry of an order granting a new trial was served on the defendant's attorneys on April 10th, and the term of circuit court expired on May 14th, and the defendant on April 18th served notice of a motion to vacate the order for a new trial, but the court, after extending the time for hearing motions after verdict for proper periods, did not make an order extending the time for a further period until July 17th, the court then, on July 17th, had lost jurisdiction to hear and decide motions after verdict and to review its order of April 10th under the 60-day provisions of 252.10 (1), Stats. 1951. (Statement in Barrock v. Barrock, 257 W 565, 569, as to motion for modification of judgment, made within 60 days, invoking "continuing jurisdiction" of the court under 252.10 (1) is withdrawn.) The trial court had not lost jurisdiction to enter judgment on the verdict. Wegner v. Chicago & N. W. R. Co. 262 W 402, 55 NW (2d) 420.

Where an order for judgment in the circuit court was made and filed April 5 and no notice of entry of the order was served, and the court's written "opinion" that the order for judgment should be vacated and further proceedings taken was filed on June 20 and the term of court in which the order for judgment was made had not expired, the order of June 20 was authorized and timely under 269.46 (3). Gillard v. Aaberg, 5 W (2d) 216, 92 NW (2d) 856.

The circuit court has power even after the term to correct its judgment or to add omitted portions thereto to conform the judgment to that actually pronounced, although the court cannot modify or amend its judgment to make it conform to what the court ought to have adjudged or intended to adjudge. Estate of Gibson, 7 W (2d) 506, 96 NW (2d) 859.

See note to 247.32, citing Anderson v. Anderson, 8 W (2d) 133, 98 NW (2d) 434.

See note to 260.22, citing Matter of Andresen, 17 W (2d) 380, 117 NW (2d) 360.

270.49 (1), providing that a motion to set aside a verdict and grant a new trial on the minutes of the judge must be made, heard, and decided within 60 days after the verdict is rendered unless an order extending the time for cause has been made within such period, limits the relief which may be granted under 269.46 (3), providing that judgments and court orders may be reviewed by the court at any time within 60 days from service of notice of entry thereof but not later than 60 days after the term of entry thereof, and prevents the granting of a new trial when more than 60 days have elapsed after verdict without an order having been entered extending the time for deciding motions after verdict. Alberts v. Rzepiejewski, 18 W (2d) 252, 118 NW (2d) 172, 119 NW (2d) 441.

Where in a trial to the court without a jury a party moves in the trial court for review of the judgment pursuant to 269.46 (3) he is precluded on appeal from raising an issue not raised in the trial court either during trial or on the motion for review. Auto A. & L. Corp. v. Taus, 28 W (2d) 496, 137 NW (2d) 452.

Where, after the jury returned its verdict, the court entered judgment thereon and advised counsel that in doing so such entry would be subject to motions by either party, plaintiff was not thereby precluded from moving the court to change the answers in the verdict on negligence and causation and the answer on the comparison question, for under 269.46 (3) the trial court possessed the necessary power to entertain timely motions after judgment to review the same which encompassed passing upon motions after verdict. Johnson v. McDermott, 38 W (2d) 185, 156 NW (2d) 404.

A contention that the trial court, after sustaining the insurer's plea in bar, erred in refusing to hear arguments on the insured's motion for review was without merit, there being no evidence that the trial court failed to consider the arguments advanced, or that the trial court abused the discretion given to it by the statute. Amidzich v. Charter Oak Fire Ins. Co. 44 W (2d) 45, 170 NW (2d) 813.

269.465 History: Court Rule XIII s. 1; Sup. Ct. Order, 212 W xii; Stats. 1935 s. 269.465; 1963 c. 37.

The fact that defendant was an attorney did not justify him in acting on his own advice. Mawhinney v. Morrissey, 208 W 333, 242 NW 326.

269.47 History: R. S. 1849 c. 84 s. 36; R. S. 1849 c. 112 s. 10; 1856 c. 120 s. 40; R. S. 1858 c. 112 s. 20; R. S. 1858 c. 130 s. 33; 1861 c. 107; R. S. 1878 s. 2833; Stats. 1898 s. 2833; 1925 c. 4; Stats. 1925 s. 269.47.

Where a cestui que trust appeared and made defense, but her trustee was served by publication, he will not be permitted to open the judgment; sec. 10, ch. 124, R. S. 1858, is for the benefit of defendants who have had no real opportunity to defend. Croft v. Mead, 13 W 528.

Sec. 2833, Stats. 1898, gives a remedy to defendants not served, and one within it may demand the relief provided for as a matter of right. Kingsley v. Steiger, 141 W 447, 123 NW 635.

The defendant's motion to vacate a default judgment of divorce, and to permit him to file an answer and counterclaim and defend the action, on the ground of newly discovered evidence of infidelity of the wife, should have been granted, where the motion was sufficiently supported and properly and timely presented and the defendant was not chargeable with lack of diligence. Jermain v. Jermain, 243 W 508, 11 NW (2d) 163.

269.49 History: 1856 c. 120 s. 325; R. S. 1858 c. 140 s. 48; R. S. 1878 s. 2835; Stats. 1898 s. 2835; 1925 c. 4; Stats. 1925 s. 269.49.

269.50 History: 1856 c. 120 s. 309; R. S. 1858 c. 140 s. 33; R. S. 1878 s. 2836; Stats. 1898 s. 2836; 1925 c. 4; Stats. 1925 s. 269.50.

Sec. 33, ch. 140, R. S. 1858, does not cure a defective appeal from a judgment of a justice where both the notice and the affidavit of appeal contain an erroneous given name of one of the parties. Widner v. Wood, 19 W 190.

269.51 History: 1915 c. 219; Stats. 1915 s. 2836a; 1925 c. 4; Stats. 1925 s. 269.51; 1935 c. 541 s. 145.

Sec. 2836a, Stats. 1915, cannot be applied to any appeal attempted under sec. 1797m-80, no appeals under that section being author-

ized. Menasha v. Wisconsin T., L., H. & P. Co. 161 W 605, 155 NW 142.

The enactment of ch. 219, Laws 1915, did not vitalize an appeal previously taken from a disallowance by a city council of a claim not within its jurisdiction to allow or disallow. Read v. Madison, 162 W 94, 155 NW 954.

An action begun in the supreme court to compel the county boards of 2 counties to repair a bridge over a stream forming the boundary between them was certified by authority of sec. 2836a to the circuit court for trial instead of dismissing it. State ex rel. Johnson v. County Boards, 165 W 164, 161 NW 356.

An action in a county court having no jurisdiction to entertain the same should be certified to some court having jurisdiction thereof. Dring v. Mainwaring, 165 W 356, 162 NW 169, and 168 W 139, 169 NW 301.

Where an appeal from a justice's court judgment might have been taken either to the circuit court or to the municipal court at the election of the defendant who was the successful party, and plaintiff appealed to the circuit court, the defendant waived all objections to the jurisdiction of that court by appearing and procuring a continuance before objecting to the court's jurisdiction, and the circuit court might allow the plaintiff to perfect his appeal for a new trial which was defective by reason of his failure to file the necessary affidavit. Zeh v. McCormick, 169 W 238, 171 NW 956.

Sec. 2836a, Stats. 1919, applies to attempted appeals to the supreme court; and a respondent who admitted service of copies of the printed case and appellant's brief, and stipulated for a continuance of the hearing of the appeal, waived any right to question the jurisdiction of the court because notice of the appeal was served by mail instead of personally. Sauer H. Co. v. Stein, 174 W 185, 182 NW 847.

A judgment in a will contest, which was improperly transmitted to the circuit court, but tried there without objection, must stand, as the court had jurisdiction and the errors were not prejudicial. Will of Weidman, 189 W 318, 207 NW 950.

A stipulation for the continuance of a case in the supreme court constituted a waiver of the defect in the appeal proceedings consisting of a single notice of appeal from separate judgments entered in actions combined for the purpose of trial. Fox v. Koehnig, 190 W 528, 209 NW 708.

Where all the facts were before the supreme court on appeal, and dismissal of the appeal would work injustice on all parties, the error of the circuit court in assuming jurisdiction of the action did not require a reversal, and the supreme court will make final disposition of case in the interest of justice under 269.51, 274.35 and 274.37. Cawker v. Dreutzer, 197 W 98, 221 NW 401.

Where the relators opposed a motion to advance the cause for early argument and stipulated in open court that the question presented on the appeal should be confined to the constitutionality of a statute, without making objections to the jurisdiction of the supreme court, they waived an objection that the appeal was taken in the name of a school district clerk, the real party in interest being the school district. State ex rel. Zilisch v. Auer, 197 W 284, 221 NW 860.

Appellants who did not appear on the hearing for final distribution were denied an opportunity to perfect an appeal. In re Sveen's Estate, 202 W 573, 232 NW 549.

Upon reversal of a judgment of the county court solely because such court lacked jurisdiction of the action, the action was allowed, under 269.51 (2), to proceed as if it had been commenced originally in the circuit court with permission to amend the pleadings and proceedings accordingly. Jansen v. Schoepke, 214 W 350, 253 NW 554.

The statutes, giving the court, where an appeal has been attempted in good faith, power to allow a defect or omission in the appeal papers to be supplied with the same effect as if the appeal had been originally properly taken, indicate a general and wholesome policy of liberality in relieving from mistakes and omissions in furtherance of justice when they are excusable and have not misled or otherwise operated prejudicially to an adverse party. Guardianship of Moyer, 221 W 610, 267 NW 280.

269.51 (1) is not limited in its application to procedure in circuit court, but such statute applies as well to attempted appeals to the supreme court. The conduct creating a statutory waiver under 269.51 (1) confers jurisdiction on the supreme court by the statute. Where the appellants attempted in good faith to serve notice of appeal and undertaking on the respondent in time, the respondent, by signing a stipulation for settling, and receiving and retaining a copy of, the bill of exceptions, signing an acceptance of, and retaining copies of, the appellants' printed case, and receiving, and receipting in writing for, copies of the appellants' briefs in the supreme court, so participated in the appeal proceedings, before moving to dismiss the appeal, as to waive irregularities in the service of the notice of appeal, so that the supreme court, by virtue of 269.51 (1), had jurisdiction. (Stevens v. Jacobs, 226 W 198, distinguished.) Maas v. W. R. Arthur & Co. 239 W 581, 2 NW (2d) 238.

Where the appellant neither served nor attempted to serve notice of appeal on necessary adverse parties within the time prescribed by statute, the appeal is ineffective, and the supreme court is without jurisdiction to entertain the appeal and is without power to allow the appellant to serve notice on such parties after the expiration of that period; and 269.51 and 274.32 are inapplicable. Estate of Pitcher, 240 W 356, 2 NW (2d) 729.

269.51 (1) can apply only where there has been a service of a notice of appeal within the time prescribed by statute, unless a party has participated in a proceeding in the appellate court, and in any event what other parties may have done cannot be held a waiver of the rights of parties, not served with the notice of appeal, who have not appeared. Estate of Sweeney, 247 W 376, 19 NW (2d) 849.

The defendant, by stipulating with the appealing plaintiff as to the settlement of a bill of exceptions, did not participate in any "proceedings in the appellate court" so as to bring itself within 269.51 (1), as to waiver of ob-

jections to the regularity or sufficiency of an appeal, since the settlement of a bill of exceptions is a matter for the trial court and not for the supreme court. Kitchenmaster v. Mutual Auto. Ins. Co. 248 W 335, 21 NW (2d) 727.

269.51 refers to defective appeals. It confers no authority upon the supreme court to enter judgment for contribution against a joint tort-feasor, when appellant's motion for contribution has not been acted on by the trial court. Gallagher v. Chicago & N. W. R. Co. 255 W 15, 39 NW (2d) 778 and 863.

A respondent's unqualified acceptance and retention of the appellant's briefs, before motion made to dismiss the appeal, constituted such participation in proceedings in the supreme court as to waive objection to jurisdiction on the ground of late service of notice of appeal. Estate of White, 256 W 467, 41 NW (2d) 776.

An extension of time to appeal under 324.05 based on a stipulation, rather than a petition and notice as there required, is an irregularity but is waived under 269.51 (1) by an adverse party's participation in an appeal without moving that it be dismissed. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

The language of 269.51 (1) cannot be construed to mean that jurisdiction which the court does not otherwise have may be conferred by such waiver, but applies only to such matters as are in their nature appealable. Jaster v. Miller, 269 W 223, 69 NW (2d) 265.

See note to 324.04, citing Guardianship of Barnes, 275 W 356, 82 NW (2d) 211.

Although the plaintiff's appeal from 2 interlocutory orders was not taken within the prescribed time, the failure of the defendants to move for dismissal of these appeals and their participation in this appeal on the merits constituted a waiver of the right to object to the timeliness of the former appeals. Richie v. Badger State Mut. Cas. Co. 22 W (2d) 133, 125 NW (2d) 381.

Although 269.51 (1) permits the curing of errors where there is a good faith attempt to appeal, this does not extend to the situation where the appeal was not timely and there was no participation in the appeal by the objecting party, since the court gains no jurisdiction in this case. Monahan v. Dept. of Taxation, 22 W (2d) 164, 125 NW (2d) 331.

269.51 (2) is intended to prevent the dismissal of actions where a plaintiff commenced his suit in a court not having jurisdiction or where he mistook his remedy. Glomstead v. Chicago & N. W. Ry. 40 W (2d) 675, 162 NW (2d) 630.

269.52 History: 1915 c. 219 s. 2; 1915 c. 604 s. 50; Stats. 1915 s. 2836b; 1925 c. 4; Stats. 1925 s. 269.52; 1935 c. 541 s. 146.

In a personal injury action the complaint did not show that at the time of the injury the parties were engaged in interstate commerce. The answer alleged that fact and also that the action should have been brought under the federal statute. More than 2 years after the injury the plaintiff was allowed to amend so as to make his claim under the federal law. Thereupon the defendant pleaded the federal statute of limitations. The amendment of the complaint did not change the cause of action; there was one cause stated and that was the cause under the federal law; the statute of limitations was no defense; and the answer having disclosed the facts originally omitted from the complaint there could have been no surprise or prejudice caused by the amendment. Curtice v. Chicago & Northwestern R. Co. 162 W 421, 156 NW 484.

Where certain parties who desired to prevent a school board from holding graduating exercises in a church procured a writ of mandamus, this mistake as to the proper remedy might be cured by amendment and the case heard and determined on its merits. State ex rel. Conway v. District Board, 162 W 482, 156 NW 477.

Under sec. 2836b, Stats. 1915, an action to enjoin the continued occupancy of plaintiff's land by an embankment placed there by an interurban railway company should be changed by an order of the court to condemnation proceedings. Cronin v. Janesville T. Co. 163 W 436, 158 NW 254.

An action to obtain relief against the probate procured by fraud of a forged will, improperly brought in the circuit court, may be certified to the county court for trial. Komorowski v. Jackowski, 164 W 254, 159 NW 912.

An action in equity to abate a dam and recover damages for the flooding of lands may be treated as an action at law to obtain compensation which by statute is the sole remedy. McDonald v. Apple R. P. Co. 164 W 450, 160 NW 156.

An action for trespass upon real estate was changed to a condemnation proceeding, the latter being the sole remedy. Peters v. Chicago & Northwestern R. Co. 165 W 529, 162 NW 916.

A county court may acquire jurisdiction of a defendant in an action the subject matter of which is not within its jurisdiction. In such a case the action should be certified for trial to a court having jurisdiction. Dring v. Mainwaring, 168 W 139, 169 NW 301.

A case will not be remanded under sec. 2836b for the trial of a doubtful question not litigated below when the judgment appealed from and affirmed will be no bar to a new action to try such issue. Goldberg v. Seneca, Sigel & Rudolph M. F. Ins. Co. 170 W 116, 174 NW 558.

The industrial commission cannot, by authority of sec. 2836b, certify a proceeding to any court or other tribunal. Brunette v. Brunette, 171 W 366, 177 NW 593.

A plaintiff who, mistaking his remedy, brought an action for a specific performance of a contract breached by the defendant instead of an action to recover the liquidated damages provided in the contract did not thereby waive the right to bring a new action. Dekowski v. Stachura, 181 W 403, 195 NW 403.

An appeal was dismissed instead of sending the case back for further proceedings in the circuit court, where that court had assumed jurisdiction to give relief in a matter of which the county court had full and ample jurisdiction, and in which proper relief could still be had upon petition on the foot of a judgment previously entered by the county court. Lib-

by v. Central W. T. Co. 182 W 599, 197 NW 206.

An action brought in the circuit court to establish a will should be certified under 269.52, Stats. 1919, to the proper county court. Will of Jones, 207 W 354, 241 NW 387.

A court of equity will retain jurisdiction to grant legal relief only where it appears that an equitable cause of action growing out of the transaction existed prior to the commencement of the action, that the equitable action was commenced in good faith to secure equitable relief, that such equitable relief cannot be had or is impracticable, that the constitutional right of trial by jury will not be denied, and that the ends of justice will be best served by retaining the cause for final determination. Clark v. Sloan, 215 W 423, 254 NW 653.

See note to 274.37, citing State ex rel. Adams County Bank v. Kurth, 233 W 60, 288 NW 810.

See note to 263.31, citing Duffy v. Scott, 235 W 142, 292 NW 273.

Where the county court had jurisdiction of the cause of action alleged in the circuit court, and the circuit court did not have jurisdiction, the circuit court should have certified the action to the county court, but the circuit court's entry of a judgment dismissing the complaint is not prejudicial error, plaintiff having expressed no desire below to have the case certified to the county court, and defendant having made no objection to such certification. Hicks v. Hardy, 241 W 11, 4 NW (2d) 150.

See note to 274.37, citing Rhodes v. Shawano Transfer Co. 256 W 291, 41 NW (2d) 288.

Where the plaintiffs stated a cause of action in ejectment under allegations, among others, of possession of the land in the defendants to the exclusion of the plaintiffs, and the plaintiffs' title was put in issue by the defendants, the trial court properly denied the remedy of injunctional relief asked for by the plaintiffs in their complaint, but should not then have dismissed the complaint but should have proceeded with the cause as an action of ejectment entitling the parties to have their rights in the fee of the premises determined. Lipinski v. Lipinski, 261 W 327, 52 NW (2d) 922.

A mistaken remedy does not necessarily require the dismissal of an action. Where the complaint alleged a relation of agency between the defendant and her son in the son's procurement of services and material from the plaintiff, and the proof did not establish an agency relation, but did establish the essential elements of quasi contract entitling the plaintiff to recover for unjust enrichment the trial court, instead of dismissing the action, should have granted the plaintiff's motion to amend the complaint to conform to the proof and for judgment based on quasi contract. Nelson v. Preston, 262 W 547, 55 NW (2d) 918.

If the supreme court were to determine that mandamus was not the proper remedy but rather an action for injunction, the court would be required to remand the case to the trial court to permit the plaintiff to amend, and this would be pure futility since it would merely change the type of affirmative relief granted in view of the fact that the merits of the controversy have been determined. State ex rel. Grosvold v. Board of Supervisors, 263 W 518, 58 NW (2d) 70.

A suit at law to recover damages for fraud bars a subsequent suit for rescission of the contract, not because there has been an election of inconsistent remedies, but because the act of instituting such action at law for damages recognizes the existence of the contract and affirms it. The commencement of a suit for rescission for fraud involves merely a choice of a procedural remedy and effects no change of substantive rights which should preclude the injured party from thereafter abandoning such remedy and affirming the contract by seeking damages for the fraud, unless something has occurred in the nature of an estoppel in pais which would make it inequitable from the standpoint of the defendant for the plaintiff to do so. Schlotthauer v. Krenzelok, 274 W 1, 79 NW (2d) 76.

The harsh doctrine of election of remedies is generally not to be applied where the plaintiff has not been unjustly enriched, the other parties have not been misled to their detriment, the result is not otherwise inequitable, and res adjudicata does not apply. Braun v. Jewett, 1 W (2d) 531, 85 NW (2d) 364.

269.53 History: 1851 c. 381 s. 1; R. S. 1858 c. 137 s. 106, 107; R. S. 1878 s. 4204, 4205; Stats. 1898 s. 4204, 4205; 1925 c. 4; Stats. 1925 s. 269.53, 269.54; 1935 c. 541 s. 147; Stats. 1935 s. 269.53.

Sec. 106, ch. 137, R. S. 1858, only allows a creditor to release one of several joint debtors from the amount which by the contract the person so released was in equity bound to pay. Groat v. Palmer, 7 W 338.

For a release of one joint debtor to discharge another it must be shown that, as between them, there was in equity nothing due from the one not released to the creditors or that the one released paid entire joint debt. Bogert v. Phelps, 14 W 88. See also: Bowen v. Hastings, 47 W 232, 2 NW 301; Lauer v. Bandow, 48 W 638, 4 NW 774.

One surety who has paid a judgment against the principal debtor and all the sureties may, for the purpose of enforcing repayment from the principal or contribution from his co-sureties, be subrogated to all the rights of the judgment, especially if he has taken an assignment of the judgment. German American S. Bank v. Fritz, 68 W 390, 32 NW 123.

Sec. 4204, Stats. 1898, applies to joint sureties as well as to other debtors, save insofar as limited by the proviso. Hallock v. Yankey, 102 W 41, 78 NW 156.

Sec. 4204 does not extend to joint tortfeasors. Frankfort G. Ins. Co. v. Milwaukee E. R. & L. Co. 169 W 533, 173 NW 307.

Release of a surety by operation of law, and release of another surety by act of the surety himself, does not release the remaining sureties on the depository bond. Klatte v. Franklin State Bank, 211 W 613, 248 NW 158, 249 NW 72.

269.53 does not apply to a release of debts in a will, where the debt in question is a joint and several one. Estate of Argue, 5 W (2d) 1, 92 NW (2d) 233.

269.55 History: 1917 c. 330; Stats. 1917 s.

4205m; 1925 c. 4; Stats. 1925 s. 269.55; 1959 c. 187; 1969 c. 255.

269.56 History: 1927 c. 212; Stats. 1927 s. 269.56; 1951 c. 20; 1969 c. 276 s. 585 (3).

Editor's Note: For foreign decisions construing the "Uniform Declaratory Judgments Act," consult *Uniform Laws, Annotated.*

1. Scope.
2. Justiciable controversy.
3. Legal uncertainty.
4. Relief.
5. Parties.

1. Scope.

On judicial power generally see notes to sec. 2, art. VII; and on judicial review of the validity of rules see notes to 227.05.

Under the declaratory judgments act the railroad commission could not be enjoined from objecting to the granting of a permit by the war department for the erection of a building over the bed of a navigable stream. S. S. Kresge Co. v. Railroad Comm. 204 W 479, 235 NW 4, 236 NW 667.

The city of Madison, seeking to abate alleged public nuisances and purprestures in Lake Monona, did not have a cause of action for a declaratory judgment, since no interest in the lake bed was vested in the city and the state was the real party in interest. Madison v. Schott, 211 W 23, 247 NW 527.

The court granted a petition for leave to institute an original proceeding for a declaratory judgment, showing a determination by the petitioners to form the Progressive party and an indication by the defendant secretary of state that he would make rulings rendering the organization of the proposed new party impracticable by denying it a separate column on the ballot. State ex rel. Ekern v. Dammann, 215 W 394, 254 NW 759.

Orders of the railroad commission, establishing the elevation of a proposed dam necessary to maintain normal water levels of Horicon marsh and authorizing the conservation commission to construct and maintain a dam at the established elevation as not materially obstructing navigation, have no bearing on the questions presented in an action by the state against landowners for a declaratory judgment determining the rights of the parties in the marsh. State v. Adelmeyer, 221 W 246, 265 NW 838.

The words "suit to enforce such statute," within 285.06, Stats. 1935, include an action brought under the declaratory judgments act, to have determined the constitutionality of a state statute assailed in a federal court. Dept. of Agriculture and Markets v. Laux, 223 W 287, 270 NW 548.

If the city desires to have determined the questions, (1) whether the city has authority to establish and operate a municipally owned bus system, (2) whether it may operate such a system without acquiring the existing private bus system and (3) whether it may establish and operate such a municipally owned system without first obtaining a certificate of convenience and necessity, it may obtain such relief by bringing an action under the declaratory judgments act. State ex rel. Madison v. Maxwell, 224 W 17, 271 NW 393.

The purpose of the declaratory judgments act is to expedite justice and to avoid long and complicated litigation, but not to interrupt the orderly process of liquidation or other legal proceedings presently in operation, and it would be a grave perversion of the principles of the statute and constitute an abuse of discretion for courts to apply it in such a situation. Where proceedings in liquidation of a mutual insurance company were pending in which a question, whether the commissioner of insurance in his capacity as liquidator could assess the plaintiff company on a policy of reinsurance by which the company being liquidated had reinsured certain risks of the plaintiff for a specified premium, could be fully and finally determined, the fact that certain special circumstances made it desirable from the plaintiff's viewpoint to have a declaration in advance, as to its liability for such assessment, did not make a case for a separate action for declaratory relief and in any event a denial of such relief was not an abuse of discretion. Cheese Makers Mut. Cas. Co. v. Duel, 243 W 406, 10 NW (2d) 125.

Where the duties of a city clerk in respect to the sale of mortgage bonds were purely ministerial, performance thereof could be compelled by mandamus and he was not entitled to raise issues of validity of the bonds, the action is not under the declaratory judgments act. (State ex rel. Young v. Maresch, 225 W 225, distinguished.) State ex rel. Madison v. Bareis, 248 W 387, 21 NW (2d) 721.

The state is a "person" within the declaratory judgments act, and has a sufficient interest under a deed, conveying land to a county for a state trunk highway, to bring an action for a declaratory judgment determining the rights of the state and of parties claiming the land. State v. Jewell, 250 W 165, 26 NW (2d) 825.

An action by a liquor dealer to obtain a construction of an act increasing the rates of the liquor tax, brought against the enforcing officer who was charged with the duty of collecting the tax and who would be acting as an individual in excess of his authority and with no protection under the law if the plaintiff's position in the matter was correct and the officer acted contrary thereto, was not an action against the state, and was maintainable under the declaratory judgments act. Berlowitz v. Roach, 252 W 61, 30 NW (2d) 256.

The trial court by declaratory judgment, and the supreme court on appeal, had determined that a union had acted arbitrarily, unfairly, and capriciously towards the plaintiff employes in changing a 1937 seniority agreement by a 1947 collective-bargaining contract with the employer bus company, and that the 1947 bargaining contract was invalid in such respect, but that a seniority agreement could be changed by valid negotiations between the union and the employer. The trial court, on the plaintiff's application for supplemental relief based on such declaratory judgment, rightly concluded that it should not pass on the validity of a subsequent bargaining contract which was not in existence and not the subject of litigation when the case was tried. Belanger v. Local Division No. 1128, 256 W 479, 41 NW (2d) 607.

Judicial constructions of the uniform declaratory judgments act in other states prior to its enactment in Wisconsin came with it. The section does not compel or permit the courts to give advisory opinions, and they properly refuse declaratory judgments thereunder unless the pleadings present a justiciable controversy ripe for judicial determination. Skowron v. Skowron, 259 W 17, 47 NW (2d) 326.

See note to 227.20, citing Superior v. Committee on Water Pollution, 263 W 23, 56 NW (2d) 501.

Where a property owner had installed a driveway from a new highway pursuant to a permit from the city and had used it several months, the city was estopped from revoking the permit and removing the driveway, and a declaratory judgment should issue. Russell Dairy Stores v. Chippewa Falls, 272 W 138, 74 NW (2d) 759.

Where a foreign corporation and automobile liability insurer, able to get into federal court on the jurisdictional ground of diversity of citizenship, brought an action in federal court for a declaratory judgment under the federal declaratory judgments act as to liability coverage under a policy issued by such insurer, but the federal court refrained from exercising its jurisdiction in the matter, such insurer, having chosen the federal forum for its purpose, will not be permitted later to bring a similar declaratory action in a Wisconsin state court, since to permit this would be permitting a misuse and abuse of the judicial process. Allstate Ins. Co. v. Charneski, 16 W (2d) 325, 114 NW (2d) 489.

Where the question of title to an office is ancillary to the principal cause of action for declaratory judgment it can be tried in that action. Boerschinger v. Elkay Enterprises, Inc. 26 W (2d) 102, 132 NW (2d) 258, 133 NW (2d) 333.

An action for a declaratory judgment will lie against a state board where plaintiff alleges an improper construction of a statute. It is not necessary to name the individual board members. It is not necessary to join as plaintiffs all others who might be affected. Barry Laboratories, Inc. v. State Board of Pharm. 26 W (2d) 505, 132 NW (2d) 833.

A demand for declaratory relief when included in an action for damages is surplusage. Cheese v. Afram Brothers Co. 32 W (2d) 320, 145 NW (2d) 716.

269.56 makes no provision for suits against the state; hence declaratory judgments against it are barred by sovereign immunity. Kenosha v. State, 35 W (2d) 317, 151 NW (2d) 36.

Where declaratory relief is sought in a tax case even the fact that no question of construction or validity is involved does not necessarily mean that there are no questions concerning the rights of the parties to be litigated, so that declaratory relief is unavailable. Ramme v. Madison, 37 W (2d) 102, 154 NW (2d) 296.

In a controversy concerned with the action taken by an ad hoc committee, where resolution of legal issues alone was sought, declaratory judgment to review the action of the committee was an appropriate procedural device to bring such issues before the court, although such relief was also available by certiorari. Outagamie County v. Smith, 38 W (2d) 24, 155 NW (2d) 639.

In an action under 269.56, Stats. 1965, against the commissioner of motor vehicles by manufacturers of farm machines used to deliver and apply fertilizer, seeking judgment declaring the plaintiffs exempt from statutes pertaining to motor vehicle and safety requirements by virtue of a statutory exemption of "implements of husbandry", the complaint was not demurrable on the ground that such action was barred because one against the state, where it was based on the premise that the commissioner's ruling, adverse to plaintiffs' claim, misconstrued the statutory definition of the exemption and was thus outside the bounds of his constitutional or jurisdictional authority. Wisconsin Fertilizer Asso. v. Karns, 39 W (2d) 95, 158 NW (2d) 294. See also Racine v. Morgan, 39 W (2d) 268, 159 NW (2d) 129.

The declaratory judgments act specifically empowers courts of record within their respective jurisdictions to declare rights, status, and other legal relations between the parties in any proceedng involving a bona fide dispute and substantial question, where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty. Humble Oil & Ref. Co. v. Schneider F. & S. Co. 42 W (2d) 552, 167 NW (2d) 223.

Purpose and scope of declaratory relief. Vinje, 4 MLR 106.

Declaratory relief before adoption of declaratory judgments act. Williams, 13 MLR 76.

Challenging governmental action in Wisconsin; the declaratory judgments act. Hack, 1961 WLR 467.

2. Justiciable Controversy.

An action for the declaration of rights of parties in case they should pay a mortgage debt incumbent on others to pay was improperly entertained, where the facts were in dispute and the right of a second mortgagee to proceed with a sale under his judgment of foreclosure was delayed, plaintiffs having no present right of subrogation since such right does not accrue until payment is made. Heller v. Shapiro, 208 W 310, 242 NW 174.

A complaint by a street railway company which alleged that defendant city had passed an ordinance requiring plaintiff to reconstruct track on a designated street and providing that, if plaintiff failed to comply with the ordinance, defendant would reconstruct the track and charge the cost to plaintiff, and that plaintiff was operating the street railway at great loss and was financially unable to make the required expenditure, and praying for a determination of its rights under its franchise, stated a cause of action for declaratory relief. Milwaukee E. R. & L. Co. v. South Milwaukee, 218 W 24, 260 NW 243.

A complaint against state officers alleging that a statute levying taxes for emergency relief purposes was not lawfully enacted or published due to veto of parts thereof disclosed a genuine justiciable controversy entitling the plaintiff to maintain an action for declaratory relief. State ex rel. Wisconsin Tel. Co. v. Henry, 218 W 302, 260 NW 486.

A complaint by a corporation against the commissioner of insurance and the fire insurance rating bureau, alleging that the rating bureau had improperly refused to approve certain forms of policies previously written to meet plaintiff's special needs for use and occupancy coverage or to establish a rate for plaintiff's form of deviated coverage, and that, as a consequence, the insurance companies declined to issue such policies or to issue any policy except upon the standard form having defendants' approval, is insufficient to show existence of a controversy or any basis for declaratory relief, no alleged rights of plaintiff being threatened and plaintiff seeking only a ruling as to whether such a policy, if some insurance company should issue one, would be valid and not subject to control or criticism by defendants, and plaintiff having no standing as a member of the general public, and no insurance company having been made a party to the action. Riebs Co. v. Mortensen, 219 W 393, 263 NW 169.

In an action for a declaratory judgment as to the constitutionality of the Wisconsin recovery act (ch. 110, Stats. 1935) the state's petition disclosed an actual controversy in a matter publici juris, involving the exercise of the sovereign power of the state, the conduct of its high officials, and the welfare of its citizens, warranting the supreme court in taking original jurisdiction. Petition of State ex rel. Attorney General, 220 W 25, 264 NW 633.

In a 15-year lease containing a provision for renewal of the lease, a dispute arose as to the validity of the renewal provisions; and declaratory relief was afforded. Gray v. Stadler, 228 W 596, 280 NW 675.

The city of Milwaukee and its chief of police brought an action for a declaratory judgment that the city police department had no legal obligation to respond to a demand of the county sheriff that city police assist in preserving order at a strike-bound plant outside the city; and plaintiffs moved for summary judgment 12 months after the sheriff had made his demand. The term of office of the sheriff who had made such demand had terminated several months prior to the hearing on the motion, so there did not exist a justiciable controversy because of which the plaintiffs were still entitled to a judicial determination, and the case had become moot, warranting the denial of the motion. City of Milwaukee v. Milwaukee County, 256 W 580, 42 NW (2d) 276.

A wife's complaint against a husband for a judgment declaring void an antenuptial contract stating that the husband would provide a home for the wife during the marriage, and settling the amount she would receive at his death if she survived him and also what she would receive if they were divorced, did not present a justiciable controversy ripe for judicial determination, in that the contract was concerned with future and contingent rights except as to the provision for a home for the wife, and the complaint raised no issue as to that or any other issue warranting a present adjudication concerning the antenuptial contract. A judgment concerning the contract in question could not settle the controversy presented by the allegations of the wife's complaint that by reason of the antenuptial contract the husband was refusing to share his title to his property or his control of his financial affairs with the wife, since he had a right to retain such ownership and control, and no judgment concerning the antenuptial contract could alter such right. Skowron v. Skowron, 259 W 17, 47 NW (2d) 326.

In an action to set aside a deed to the plaintiff's home conveyed by the plaintiff to the defendants in consideration of certain payments to be made and a promise to provide for the plaintiff's support, wherein the defendants offered to the plaintiff a judgment setting aside such deed, the plaintiff was not entitled to declaratory relief declaring her to be an accommodation maker and defining her rights as such in relation to a note and mortgage covering the premises, since there was no showing that a decision was necessary in order to guide the plaintiff, and an opinion in the present action would be only advisory. Voight v. Walters, 262 W 356, 55 NW (2d) 399.

An action for a declaratory judgment, brought by a pharmaceutical association against the state board of pharmacy, charged with the administration and enforcement of the dangerous drug law, involved at most a difference of opinion between the plaintiffs and the defendants concerning the violation of such statute by persons not parties to the action. Wisconsin Pharmaceutical Asso. v. Lee, 264 W 325, 58 NW (2d) 700.

The courts will not declare rights until they have become fixed under an established state of facts, and will not determine future rights in anticipation of an event that may never happen, nor will the courts give merely advisory opinions constituting the giving of legal advice and not the declaration of controversial rights. The courts cannot enjoin the legislature from passing a proposed statute nor enjoin a municipal governing body from passing a proposed ordinance, and will not entertain a declaratory action in respect to the effect and validity of a statute or an ordinance in advance of its enactment. Rose Manor Realty Co. v. Milwaukee, 272 W 339, 75 NW (2d) 274.

An action is proper under the declaratory judgments act to determine the validity of a statute which would seriously restrict plaintiff's method of doing business, even though the state official charged with enforcement has not attempted or even threatened prosecution. Borden Co. v. McDowell, 8 W (2d) 246, 99 NW (2d) 146.

A complaint that the building constructed pursuant to a contract for rent was not in accordance with the contract presents a proper case for declaratory relief to determine the extent to which the rent should be reduced; the court can at the same time declare the proper amount to be paid if an option to purchase the defective building is exercised in the future, since all the facts are before the court; the court can include an award of damages if damages may be predicated on the determination of rights. F. Rosenberg El. Co. v. Goll, 18 W (2d) 355, 118 NW (2d) 858.

A demurrer to a complaint for declaratory relief is a proper pleading to raise the question of whether there exists a justiciable issue. When, in an action for a declaratory judgment,

a justiciable issue is presented, a demurrer should be overruled and an answer put in and the rights declared. Iowa Nat. Mut. Ins. Co. v. Liberty Mut. Ins. Co. 43 W (2d) 280, 168 NW (2d) 610.

3. Legal Uncertainty.

The discretion conferred by 269.56 (6) is not one to entertain the action but to enter or decline to enter judgment, which may be exercised only on the record as it exists when entry of judgment would be appropriate. Declaratory relief being the creation of statute, the jurisdiction of the court is derived from and limited by the statute. The term "uncertainty" referred to in the act is construed to mean legal uncertainty, not uncertainty in fact. An action to determine the status of plaintiff might properly be entertained independent of any controversy relating to other rights, subject to the limitations of proper cases for declaratory relief. Miller v. Currie, 208 W 199, 242 NW 570.

The governor was not entitled to a declaratory judgment as to his power to make ad interim appointments to assertedly vacant statutory offices, although the defendant secretary of state questioned such power, since mere difference of opinion does not make a justiciable controversy, and the governor was not prevented from exercising such appointing power as he possessed, and since there were no gubernatorial appointees who could presently assert a legally protectible interest, and no prospective appointees or holdover officials were before the court, and a judgment would not terminate the uncertainty or controversy. State ex rel. La Follette v. Dammann, 220 W 17, 264 NW 627.

In relation to an automobile liability policy containing a provision excluding from coverage any accident occurring after the transfer of the insured's interest in the automobile without the insurer's consent, the insurer, after an accident has occurred and the injured parties are threatening to bring action, is not entitled to maintain an action against the insured, the driver and alleged transferee, and the injured parties, for declaratory relief on the issue of coverage under the above stated policy provision. New Amsterdam Cas. Co. v. Simpson, 238 W 550, 300 NW 367.

An action for a declaratory judgment that a highway is a town road and public highway, rather than mandamus to compel the town to maintain the highway, is proper where there are bona fide issues of fact as to the status of the highway involved. Zblewski v. New Hope, 242 W 451, 8 NW (2d) 365.

Where the pleadings showed an actual and bona fide controversy as to the validity of the lease to be determined by law, in that the uncertainty with relation to the validity of the lease was a legal uncertainty as distinguished from an uncertainty in fact, the matter was properly one for a declaratory judgment. Milwaukee Hotel Wisconsin Co. v. Aldrich, 265 W 402, 62 NW (2d) 14.

The discretionary power given trial courts in 269.56 (6), is not concerned with entertaining the action or considering the merits of the case, but with entering or declining to enter the judgment or decree; hence such discretion may be exercised only upon the record as it exists when the entry of a judgment would be appropriate. Iowa Nat. Mut. Ins. Co. v. Liberty Mut. Ins. Co. 43 W (2d) 280, 168 NW (2d) 610.

4. Relief.

Where the prayer of the complaint in a suit by an insurance company claiming the right to organize a subsidiary company to write casualty insurance and to purchase and own all stock of such subsidiary company and to control and manage it calls for declaratory relief, a judgment of the trial court dismissing the complaint on the merits without declaring the rights of the parties was improper. Northwestern Nat. Ins. Co. v. Freedy, 201 W 51, 227 NW 952.

In an action on a fire policy in the standard form prescribed by 203.01, Stats. 1931, the defendant insurer's cross-complaint against an interpleaded insurer which also issued a policy covering the same property, and against which plaintiff sought no relief, entitled it to no relief under the declaratory judgments act, and a demurrer thereto should have been sustained, since the very issues as to which declaratory relief was sought had to be determined by the court in order to decide the issues raised by defendant's answer. National R. M. Ins. Co. v. La Salle Fire Ins. Co. 209 W 576, 245 NW 702.

A plaintiff seeking to have a member of the election commission, appointed under 10.01, Stats. 1933, replaced on the ground that such member's party had ceased to be a dominant political party, and to obtain the appointment of a member of the plaintiff's party, was not entitled to declaratory relief. The plaintiff should have brought mandamus or quo warranto and the necessity of so proceeding could not be avoided by prosecuting an action for declaratory relief in the name of a private citizen. McCarthy v. Hoan, 221 W 344, 266 NW 916. See also: State ex rel. Milwaukee County Rep. Committee v. Ames, 227 W 643, 278 NW 273; and State ex rel. State Control Committee v. Board, 240 W 204, 3 NW (2d) 123.

In an action by a grantee who had made part payments on the premises conveyed, seeking various kinds of relief against his grantor, the grantor's predecessor in title, a mortgagee, and creditors of the grantor's predecessor, all made defendants, the complaint, showing that the conveyance to the plaintiff was void as against creditors of the grantor's predecessor who might seek to set it aside, warranted an action by the plaintiff to establish a lien for payments made by him to his grantor before notice of the grantor's fraud, and the complaint stated a cause of action for declaratory relief. Agnes v. Sabatinelli, 235 W 422, 293 NW 173.

In this case the trial court should have entered judgment adjudicating declaratory relief in accordance with its conclusions of law, instead of entering judgment dismissing the complaint. Woodke v. Procknow, 238 W 422, 300 NW 173.

In an action by a union of street, electric-railway, and motor-coach employes, for a declaratory judgment that ch. 414, Laws 1947, is inapplicable to the plaintiffs because they

are properly railroad employes excluded by the act, and that the act is unconstitutional, the burden of proceeding with the case was on the plaintiffs when their demurrers to the answers of the defendants were overruled, and where, instead, the plaintiffs elected to produce no evidence, the trial court should have entered an order dismissing the complaint instead of entering a declaratory judgment. Amalgamated Asso. etc. v. Milwaukee E. R. & T. Co. 255 W 163, 38 NW (2d) 697.

An action for declaratory relief is essentially equitable in character. The supplemental relief contemplated by 269.56 (8) is not limited to further declaratory relief, but includes any relief essential to making effective the declaratory judgment entered by the court. Morris v. Ellis, 221 W 307, 266 NW 921; Belanger v. Local Division No. 1128, 256 W 274, 40 NW (2d) 504.

Where the requested declaratory judgment would not be binding on persons not parties but would be merely an advisory opinion, beyond the scope of 269.56, and would not terminate the uncertainty or controversy giving rise to the proceeding, so that the determination of the trial court, ruling on demurrer that the complaint did not state a cause of action and that there was a defect of parties defendant, properly disposed of the matter. Wisconsin Pharmaceutical Asso. v. Lee, 264 W 325, 58 NW (2d) 700.

Under 269.56 (1) it is improper for a declaratory judgment to do no more than dismiss the complaint. Denning v. Green Bay, 271 W 230, 72 NW (2d) 730.

In a suit for a declaratory judgment, where the subject matter of the suit is adjudicated, the complaint should not be dismissed but the judgment should set forth the declaratory adjudication. David A. Ulrich, Inc. v. Saukville, 7 W (2d) 173, 96 NW (2d) 612.

5. Parties.

In an action by the purchaser against the vendor and others for declaratory relief, the parties thereto having outstanding claims or equities affecting the title are concluded by the judgment. Miller v. Milwaukee Odd Fellows Temple, Inc. 206 W 547, 240 NW 193.

In an action for declaratory relief between a county and a purchaser at a delinquent tax sale, the court could not pass on the validity of the sale as between the purchaser and a property owner who was not a party to the action. The declaratory judgment act does not empower a court to give directions. State v. Milwaukee, 210 W 336, 246 NW 447.

In an action for declaratory relief adjudging the plaintiff's legal name, identity, parentage, legitimacy and other related matters, where it did not appear that the defendant ever stood in any legal relationship to the plaintiff or that either of them ever asserted any legal right or obligation between them by reason of any status, the defendant was entitled to be discharged as a party in the action. Sova v. Ries, 226 W 53, 276 NW 111.

A prayer for a declaratory judgment cannot be considered where all the parties in interest have not been made parties to the action. State ex rel. Joyce, 236 W 323, 295 NW 21.

An action against the commissioner of taxation, the director of the state department of budget and accounts and the state treasurer for a declaratory judgment construing 71.14 (2), Stats. 1949, relating to the apportionment and distribution of income taxes collected and transmitted to the state treasurer, was not a suit against the state and was, therefore, a proper action against the named defendants for declaratory relief. Milwaukee v. Wegner, 258 W 285, 45 NW (2d) 699.

See note to 260.19, citing White House Milk Co. v. Thomson, 275 W 243, 81 NW (2d) 725.

269.56 (11) does not require that residents or taxpayers be made parties in an annexation case, since the town represents them, especially in view of other statutory provisions. Blooming Grove v. Madison, 275 W 328, 81 NW (2d) 713.

In an action by the insurer for a declaratory judgment that its liability policy afforded no protection to the insured under the circumstances of the injuries suffered by an employe of the insured, the injured employe was both a proper and a necessary party. Hardware Mut. Cas. Co. v. Mayer, 11 W (2d) 58, 104 NW (2d) 148.

269.56 (11) does not exclude the procedure of representative defense of the interests of a class from an action for declaratory relief. The purpose of 269.56 (11), in requiring that all interested persons be made parties or that their interests be suitably represented in an action for declaratory relief, is to make it certain that the declaration will terminate the controversy, and that the trial court will not find that it has resolved a question for some of the interested persons, only to have it relitigated by others who were not bound by the first declaration. Lozoff v. Kaisershot, 11 W (2d) 485, 105 NW (2d) 783.

While counties cannot raise the issue of unconstitutionality against another agency of the state, the individual taxpayer and resident of one of the counties affected in his individual capacity by ch. 459, Laws 1961, has the capacity to bring a suit and the right to raise the constitutional issue on behalf of himself and other taxpayers. Columbia County v. Wisconsin Ret. Fund, 17 W (2d) 310, 116 NW (2d) 142.

269.565 History: 1957 c. 434; Stats. 1957 s. 269.565; 1961 c. 606; 1965 c. 252.

Tests of obscenity are discussed in McCauley v. Tropic of Cancer, 20 W (2d) 134, 121 NW (2d) 545.

Obscenity censorship in Wisconsin. 47 MLR 275.

Civil action against obscene literature. 1960 WLR 309.

Expert testimony in obscenity litigation. Whyte, 1965 WLR 113.

269.57 History: 1856 c. 120 s. 290; R. S. 1858 c. 137 s. 93; R. S. 1878 s. 4183; Stats. 1898 s. 4183; 1903 c. 119 s. 1; Supl. 1906 s. 4095a; Stats. 1925 s. 326.19, 327.21; 1927 c. 523 s. 51, 81; Stats. 1927 s. 269.57, 327.21; Sup. Ct. Order, 212 W xii; Stats. 1933 s. 269.57; Sup. Ct. Order, 229 W vi; 1957 c. 97; 1959 c. 301; 1961 c. 327, 488, 622; 1963 c. 160.

Revisor's Note, 1957: In Culligan, Inc., v. Rheaume, 268 Wis. 298 it was held that 269.57 (1) should be construed to include both meth-

ods of relief, so the word "or" is changed to the word "and". [Bill 50-S]

On the taking of depositions see notes to 887.12.

1. Scope of inspection.
2. Basis for inspection.
3. Effect of refusal or failure.
4. Review.

1. Scope of Inspection.

An order requiring the production of the original of a telegram and its deposit with the clerk of the court for inspection is within the discretion of the court. Phelps v. Atlantic & P. T. Co. 46 W 266, 50 NW 288.

The power of the court may be exercised to allow inspection of papers in cases of libel when the pleadings refer to any document. The objection that the production of documents will tend to criminate the party in whose possession they are must be taken by the party himself on oath. Kraus v. Sentinel Co. 62 W 660, 23 NW 12.

A stay under sec. 4183, Stats. 1898, does not bar examination under sec. 4096. Ellinger v. Equitable L. A. Soc. 125 W 643, 104 NW 811.

An order which allowed a party to secretly examine the books and records of the plaintiff was too broad, where it was issued without any limitation as to the time in which the examination should be made, and where no particular documents were specified for examination. Northern Wisconsin Co-op. T. Pool v. Oleson, 191 W 586, 211 NW 923.

Where a statement signed by the plaintiff at the behest of the defendant's claim adjuster, and in the defendant's possession, relates to facts involved in the plaintiff's cause of action for injuries sustained through the defendant's alleged negligence, the matters therein are admissions by her and can be directly introduced on the trial as competent evidence against her, and such statement is subject to inspection by the plaintiff on order of the trial court. Walsh v. Northland Greyhound Lines, Inc. 244 W 281, 12 NW (2d) 20.

In an action for injuries sustained in an automobile accident, where the extent to which an impairment of the plaintiff's left arm and leg was attributable to the accident was in issue because of some disability in the left arm and leg from a form of sclerosis prior to the accident, hospital records, nurses' notes and records, technicians' notes and records, medical reports of attending physicians, and other medical information of a documentary nature, compiled at hospitals, so far as referring to such prior disability and treatment given therefor, were subject to inspection by the defendant under 269.57 (1). Such material is not privileged under 325.21. Leusink v. O'Donnell, 255 W 627, 39 NW (2d) 675.

269.57 is remedial and must be construed liberally. It is an abuse of discretion to deny plaintiff access to books which would disclose business profits to sustain plaintiff's claim under a profit-sharing contract, where defendant did not deny that the records contained the information, even though the same records would disclose other information to the plaintiff who is now a business competitor. Tilsen v. Rubin, 268 W 131, 66 NW (2d) 648.

In an action of unfair competion charging defendant with inducing breaches of contract and illegal use of trade secrets and trademarks in nation-wide sales, it was not an abuse of discretion to require defendant to deposit all of its sales records for inspection, even as to purchasers not franchised by plaintiff, and defendant need not be given the right to supervise plaintiff's examination thereof. Culligan, Inc. v. Rheaume, 268 W 298, 67 NW (2d) 279.

In an action for personal injuries, wherein the plaintiff testified, on adverse examination before trial, that since the accident, and attributable to it, a prior susceptibility to bronchitis and a prior condition of nervousness were much increased, and that he now experiences psychiatric difficulties, and also testified that before the accident he had received medical treatment for bronchitis and had consulted psychiatrists, the records of such psychiatrists, as well as the records of the doctors pertaining to the prior bronchitis, were subject to inspection by the defendants under 269.57 (1). Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

The term "property" as used in 269.57 (1) is analogous to the term "thing." Appleton v. Sauer, 271 W 614, 74 NW (2d) 167.

The orders contemplated by 269.57 (1) are discretionary. Continental Cas. Co. v. Pogorzelski, 275 W 350, 82 NW (2d) 183.

The scope of and restrictions on examination of corporate records are discussed in Wagner Iron Works v. Wagner, 4 W (2d) 228, 90 NW (2d) 110.

A statement relating the facts of an accident, given by an insured to an adjuster for his insurer a few days after the accident and before any action had been commenced or was imminent, and before the insurer had assigned counsel to advise and defend insured, was not a privileged communication. Jacobi v. Podevels, 23 W (2d) 152, 127 NW (2d) 73.

Although a seller of property refused to allow the buyer to inspect his books prior to the sale, on a claim of misrepresentation as to book value the court may order inspection. Wisconsin Steel T. & B. Co. v. Donlin, 23 W (2d) 379, 127 NW (2d) 5.

325.21, disqualifying a physician from disclosing information acquired in attending a patient professionally is not controlling over any right of inspection acquired under 269.57 (1), unless disclosure incident thereto would subject the patient to humiliation, shame, or disgrace. Alexander v. Farmers Mut. Auto. Ins. Co. 25 W (2d) 623, 131 NW (2d) 373.

See note to 887.12, citing State ex rel. Dudek v. Circuit Court, 34 W (2d) 559, 150 NW (2d) 387.

Photographs are part of the work product of an attorney and not available under 269.57 (1), but must be made available upon proof that physical conditions have changed and that the requestor cannot adequately prepare for trial without them. Crull v. Preferred Risk Mut. Ins. Co. 36 W (2d) 464, 153 NW (2d) 591.

2. Basis for Inspection.

An affidavit in an action upon a life insurance policy, stating that allegations of the complaint to the effect that proofs of loss had

been delivered to the company and payment demanded were put in issue by the answer, that no copies of such proofs were retained by the plaintiff, and that the originals were in the possession of the defendant, complied substantially with sec. 4183, R. S. 1878, and supported an order requiring the defendant to furnish the plaintiff with sworn copies of the proofs. Schuetze v. Continental Life Ins. Co. 69 W 252, 34 NW 90.

Where a policyholder may elect as to certain options for the payment of dividends, an order allowing an inspection of the books of the company in order to prepare a complaint on such policy is proper. Ellinger v. Equitable L. A. Soc. 132 W 259, 111 NW 567.

Where the party from whom production of books and papers is sought makes an unqualified and credible denial of the allegation of the petition, it is erroneous to require the production of the books. The burden of proof is upon the applicant, but an affidavit not made on personal knowledge makes a prima facie case, rebutted by the positive denial. Schlesinger v. Ellinger, 134 W 397, 114 NW 825.

An order for the inspection of private writings will not be made unless they are material and in the possession or under the control of the adverse party; and an inspection will not be ordered where it clearly appears that all material correspondence has been produced. It is insufficient to state generally in an application for such an order that the documents in question are material and necessary; facts must be stated showing how and why the discovery or inspection is material. Worthington P. & M. Co. v. Northwestern I. Co. 176 W 35, 186 NW 156.

Records of a university relating to disciplinary action taken by the faculty against classmates of the plaintiff in a student's action to compel the issuance of a diploma to him are immaterial; hence he was not entitled to inspection of such records. Frank v. Marquette University, 209 W 372, 245 NW 125.

To entitle a party to an inspection of papers in the possession of the adverse party there must be facts set forth showing how and why discovery is material. A general allegation of materiality and necessity is insufficient. Cespuglio v. Cespuglio, 238 W 603, 300 NW 780.

In determining the propriety of the plaintiff's resorting to the discovery procedure provided by sec. 269.57 and the relevancy of the records, etc., ordered to be produced, the pleadings and motion papers should be considered to determine the relationship between the parties, the issues in the action, and the nature of the records, etc., sought to be examined. Hudson v. Graff, 253 W 1, 32 NW (2d) 253.

An affidavit for inspection must show specifically the materiality of each document sought to be examined. The test of the right of inspection is the materiality of the items sought to be examined and is not limited because of the wide-reaching effect of the proposed examination. Townsend v. La Crosse Trailer Corp. 254 W 31, 35 NW (2d) 325.

In an action not technically a bill for accounting but an action of unfair competition seeking injunctional relief and damages, part of which damages may be measured by an accounting of the defendant's profits, the trial court may make an interlocutory determination of the issue of unfair competition before proceeding with the trial of the issue of damages. In view of such fact, and that an inspection of the defendant's records of its sales to the plaintiff's franchised service operators may be necessary to establish that the defendant caused such operators to breach their contracts, irrespective of the issue of proving the extent of the damages plaintiff suffered by reason thereof, the trial court was not required first to make an interlocutory determination of whether the plaintiff was entitled to have an accounting of profits before ordering an inspection of the defendant's sales records. Culligan, Inc. v. Rheaume, 268 W 298, 67 NW (2d) 279.

In an action to recover on a barn-construction contract, wherein the defendant counterclaimed for damages because of defective construction, the plaintiffs' motion, made in open court on the day the case was called for trial, for an order permitting inspection of the barn, was not a substitute for the notice and application required by 269.57 (1), and would not support an order permitting inspection, regardless of whether there was an agreement between counsel concerning inspection and whatever its terms may have been. Zutter v. Kral, 268 W 606, 68 NW (2d) 590.

The term "evidence," as used in 269.57 (1), includes records relating to the action although in and of themselves such records may not be admissible in evidence as independent evidentiary documents. The admissibility of such records in evidence must be determined on the trial and may depend on many things, including the foundation laid for the introduction thereof, but the right of a party to inspect records relating to the action does not depend on his ability to get the records admitted in evidence at the trial, or on the court's opinion, presently, of their probable admissibility. Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

3. Effect of Refusal or Failure.

The fact that private books were not brought into court upon petition and special order does not affect the question of their admissibility when offered by the opposite party. Gilchrist v. Brande, 58 W 184, 15 NW 817.

The failure to take proper steps either under sec. 4183, R. S. 1878, or the rule of court to compel the production of papers by the defendant, and to give notice for their production, precludes the plaintiff from giving secondary evidence of their contents. Treleven v. Northern P. R. Co. 89 W 598, 62 NW 536.

Where an order was entered for the examination of correspondence but it was not served upon the plaintiff but only on his counsel who denied having any knowledge of such correspondence, and the plaintiff was not informed of the order until the trial, the court might refuse to enforce the order. Roberts v. Francis, 123 W 78, 100 NW 1076.

4. Review.

See note to 274.33, on orders appealable un-

der 274.33 (3), citing Northern Wisconsin Co-op. T. Pool v. Oleson, 191 W 586, 211 NW 923, and other cases.

The orders contemplated by 269.57 (1) are discretionary, but an order denying an inspection of records thereunder, if based purely on a mistaken view of the law, is not considered to be an exercise of discretion, and is not affected by the rule that the trial court is not to be reversed except for an abuse of discretion. Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

The supreme court will not reverse an order granting or denying an inspection of books and documents under 269.57 (1), Stats. 1967, unless convinced that the trial court's action constituted a clear abuse of discretion, and the burden of establishing such abuse is on the appellant. Wisconsin Fertilizer Asso., Inc. v. Karns, 43 W (2d) 30, 168 NW (2d) 206.

269.59 History: 1939 c. 100; Stats. 1939 s. 269.59.

269.60 History: Court Rule I s. 2; Sup. Ct. Order, 212 W xii; Stats. 1933 s. 269.60.

269.65 History: Sup. Ct. Order, 232 W vi; Stats. 1941 s. 269.65; 1959 c. 264, 652; Sup. Ct. Order, 25 W (2d) vi.

A pretrial conference is not a part of the trial, and the court is not to take up and decide issues presented by the pleadings as to which counsel have not agreed. In the conference an effort is made to have the parties agree as to the disposition of some of the issues, and those issues which are not disposed of by agreement must be disposed of on the trial and are the issues which the trial judge is to embody in his order. Klitzke v. Herm, 242 W 456, 8 NW (2d) 400.

See note to 263.03, citing Schneck v. Mutual Service Cas. Ins. Co. 18 W (2d) 566, 119 NW (2d) 342.

Where plaintiff's counsel did not appear for a pretrial conference after receiving notice of it, which notice and the local court rule did not give any warning of sanctions in the event of failure to appear, a dismissal of the complaint on the merits and granting of judgment on a counterclaim without notice and hearing was an abuse of discretion. Latham v. Casey & King Corp. 23 W (2d) 311, 127 NW (2d) 225.

Pretrial exclusionary evidence rulings. Love, 1967 WLR 738.

269.70 History: 1953 c. 610; Stats. 1953 s. 269.70; 1955 c. 420; 1967 c. 275.

269.80 History: Sup. Ct. Order, 239 W v; Stats. 1943 s. 260.23 (4), (5), 260.24 (2), (3); 1949 c. 301; Stats. 1949 s. 260.23 (4), (5), (6); 1955 c. 210; Stats. 1955 s. 269.80; Sup. Ct. Order, 271 W x; 1957 c. 48; 1957 c. 699 s. 17.

The filing of a petition for approval of a settlement agreement under 269.80 (2), Stats. 1961, tolls the statute of limitations on the cause of action involved until a decision is rendered on the petition, and such proceeding is equivalent to commencement of an action. Carey v. Dairyland Mut. Ins. Co. 41 W (2d) 107, 163 NW (2d) 200.

CHAPTER 270.

Issues, Trials and Judgments.

270.01 History: 1856 c. 120 s. 160; R. S. 1858 c. 132 s. 1; R. S. 1878 s. 2837; Stats. 1898 s. 2837; 1925 c. 4; Stats. 1925 s. 270.01.

270.02 History: 1856 c. 120 s. 161; R. S. 1858 c. 132 s. 2; R. S. 1878 s. 2838; Stats. 1898 s. 2838; 1925 c. 4; Stats. 1925 s. 270.02.

270.03 History: 1856 c. 120 s. 162; R. S. 1858 c. 132 s. 3; R. S. 1878 s. 2839; Stats. 1898 s. 2839; 1925 c. 4; Stats. 1925 s. 270.03.

270.04 History: 1856 c. 120 s. 163; R. S. 1858 c. 132 s. 4; R. S. 1878 s. 2840; Stats. 1898 s. 2840; 1925 c. 4; Stats. 1925 s. 270.04; 1935 c. 541 s. 149.

270.05 History: 1856 c. 120 s. 15; R. S. 1858 c. 122 s. 11; R. S. 1878 s. 2841; Stats. 1898 s. 2841; 1925 c. 4; Stats. 1925 s. 270.05; 1935 c. 541 s. 150.

"Feigned issues, to determine questions of fraud and other questions of fact, were, under the former practice, frequently awarded by courts of equity. Issues may still be awarded, to be tried by a jury, the form of submission only having been changed by statute. R. S., 757, sec. 2841. Such submissions were, and still are, usually ordered at the hearing after the testimony is in." Fairbanks v. Holliday, 59 W 77, 81, 17 NW 675, 677.

Upon vacating the report of a referee the court retains the power to order that an issue of fraud be tried by jury. Fairbanks v. Holliday, 59 W 77, 17 NW 675.

Where the court in an action to foreclose a mechanic's lien orders a jury trial upon an issue of fact the verdict is merely advisory. Huse v. Washburn, 59 W 414, 18 NW 341.

A verdict upon the question of the insanity of a grantor in an action to avoid a deed on that ground is advisory only. Wright v. Jackson, 59 W 569, 18 NW 486.

An order setting aside the submission of a question to a jury and stating that the court decides all the questions involved in the case, together with a finding covering all the issues, is conclusive of the fact that all the issues were tried by the court. Bunn v. Valley L. Co. 63 W 630, 24 NW 403.

Where a jury trial in an equity case has been had and the trial court is of opinion that an objection made to such trial should have been sustained a new trial need not be ordered, but the verdict may be taken as advisory, provided the trial was conducted as it would have been had the cause been regarded throughout as in equity. But where the trial was not so conducted, as where the jury viewed the premises in question and the judge did not, a new trial should be ordered. Fraedrich v. Flieth, 64 W 184, 25 NW 28.

The court is not bound to award a jury trial of any issue in an equitable action, though it may do so. Mason v. Pierron, 69 W 585, 34 NW 921.

270.06 History: 1856 c. 120 s. 164; R. S. 1858 c. 132 s. 5; R. S. 1878 s. 2842; Stats. 1898 s. 2842; 1925 c. 4; Stats. 1925 s. 270.06.

270.07 History: 1856 c. 120 s. 165; R. S. 1858 c. 132 s. 6; R. S. 1878 s. 2843; Stats. 1898 s. 2843;