

CHAPTER 268.

INJUNCTIONS, NE EXECUT AND RECEIVERS.

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268.01 Order substituted for injunction. The writ of injunction is abolished. An injunction may be the final judgment in the action or may be allowed as a provisional remedy therein; and when so allowed it shall be by order as prescribed by this chapter.

268.02 Temporary injunction; when granted. (1) When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

(2) If, after the commencement of any action for waste or to restrain waste, or any action for the recovery of land or the possession or partition thereof or after any real estate has been levied upon by execution, any party to such action or execution shall commit waste or shall threaten or make preparations to commit waste upon the lands, tenements, or anything appertaining thereto, he may be restrained by injunction from committing any waste or further waste thereto. Such injunction may be issued in any of said actions or in cases of the levy above mentioned by the court from which the execution issued.

(3) In an action for that purpose commenced by the attorney-general in the name of the state against a corporation, the court may restrain it from assuming or exercising any franchise, liberty or privilege or transacting any business not authorized by its charter; and in the same manner may restrain individuals from exercising corporate rights, privileges or franchises not granted to them by law; and such court, pending such action, may issue a temporary injunction until final judgment.

(4) No temporary restraining order or injunction shall be issued by any judge or court in any action where it does not appear that the county where the application for such temporary restraining order or injunction is made is within the judicial circuit in which is located the county that is the proper place of trial of the action, and no temporary restraining order or injunction shall issue unless the residence of each defendant is stated if known. Any temporary restraining order or injunction issued in violation of this subsection shall be void.

The court could make an injunction permanent where it was satisfied that because of the competition between the parties the situation had not so changed as to preclude the necessity for a permanent injunction to protect the plaintiff's rights under its consumer contracts. *Skelly Oil Co. v. Peterson*, 257 W 300, 43 NW (2d) 449.

Where the trial court had jurisdiction of the subject matter and of the parties in an action for an injunction restraining the defendants from picketing the plaintiff, and the defendants, who appeared and submitted their defense on affidavits, did not question the sufficiency of the complaint, and the court issued a temporary restraining order

on the basis of a correct determination of the issue involved, the failure of the complaint to comply with the requirements of (4), as to stating the residence of each defendant, if known, was waived or cured. *Brown v. Sucher*, 258 W 123, 45 NW (2d) 73.

Ordinarily, an injunction restraining trespasses on property will not be granted unless the plaintiff's title has been either admitted or established by a legal adjudication. The court will not restrain a mere trespass and, under the guise of so doing, try title to land, thus converting an action in equity into an action in ejectment. *Lipinski v. Lipinski*, 261 W 327, 52 NW (2d) 922.

Where the plaintiffs were entitled to re-

lief under the complaint but, under such complaint, no part of a judgment which would follow could be said to consist of restraining some act, the commission or continuance of which during the litigation would injure the plaintiffs, the granting of a temporary injunction, enjoining the disposition or use of a down payment which the plaintiffs were seeking to recover, was improper. *Frangesch v. Kamp*, 262 W 446, 55 NW (2d) 372.

See note to 293.01, citing *State ex rel. Grosvold v. Board of Supervisors*, 263 W 518, 58 NW (2d) 70.

In addition to damages awarded to the plaintiff covering and contemplating the continuance of the discharge of effluent from the defendant's disposal plant through the ditch which had been worn across the plaintiffs' farm, the plaintiffs were entitled to a permanent injunction restraining and enjoining the defendant from thereafter precipitating on or across the plaintiffs' farm any sewage not first so deodorized and purified as not to contain foul or noxious matter capable of injuring the plaintiffs' farm or causing a nuisance thereto, but the plaintiffs were not entitled to an injunction which would require the defendant to incur the great expense involved in either closing up its disposal plant or channeling the effluent through an inclosed tile drain. *Briggson v. Viroqua*, 264 W 47, 58 NW (2d) 546.

Where substantial redress can be afforded by the payment of money, and the issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied, although the wrongful acts are indisputable. *Briggson v. Viroqua*, 264 W 47, 58 NW (2d) 546.

Although it was not an abuse of discretion for the trial court, invoking the principle of equitable estoppel, to deny a requested mandatory injunction to compel the removal of that portion of the defendants' garage which encroached on the plaintiffs' premises, the court should not have dismissed the action entirely but should have retained jurisdiction to determine the damages to which the plaintiff was relegated in lieu of the mandatory injunction and specified options to be offered the parties. *Knuth v. Vogels*, 265 W 341, 61 NW (2d) 301.

See note to 85.08, citing *Madison v. Pierce*, 266 W 303, 62 NW (2d) 910.

Under (1) the granting of a temporary injunction is not mandatory but is only discretionary on the part of the trial court. *Mogen David Wine Corp. v. Borenstein*, 267 W 503, 66 NW (2d) 157.

It is not an abuse of discretion to deny a temporary injunction where the defendant's answer denied the basic facts alleged by plaintiff and plaintiff offered no proof of

them at the hearing, or where the answer raised a defense grounded on a point of law which would have to be decided by the trial court before granting any injunctive relief, or where a temporary injunction would have disturbed the status quo in the circumstances. *Mogen David Wine Corp. v. Borenstein*, 267 W 503, 66 NW (2d) 157.

The power of the court to grant a temporary injunction is a discretionary one, but the court which is to exercise the discretion is the trial, not the appellate, court, and the trial court's exercise of the discretion will not be reversed on review except for abuse of discretion. Generally, it is the better practice, when legal or equitable defenses are raised which appear meritorious to the trial court, to deny an application for a temporary injunction until such issues can be disposed of, but a court which grants a temporary injunction without first resolving such legal questions has not necessarily thereby abused its discretion. *Culligan, Inc. v. Rheaume*, 269 W 242, 68 NW (2d) 810.

A contract requiring a licensee of a process of softening water on the premises of water users, operating as a furnisher of the licensor's type of service, to purchase all of the licensee's service requirements of equipment and materials from the licensor, clearly implied the negative that the licensee would not purchase them elsewhere. The power of the court to restrain temporarily a breach of contract is not wiped out by the fact that the promisor trades across a state line, and a temporary injunction which requires the defendant to observe the terms of a contract does not violate the commerce clause of the federal constitution merely because of the incidental effect which such observance may have on the defendant's commerce with out-of-state customers. *Culligan, Inc. v. Rheaume*, 269 W 242, 68 NW (2d) 810.

A record showing that the plaintiff's business reputation was an asset of great value, and that materials sold by the defendant to the plaintiff's dealers, in imitation of the plaintiff's products, were inferior and defective, was a sufficient showing as to irreparable damage to sustain the discretionary power of the trial court to grant a temporary injunction. *Culligan, Inc. v. Rheaume*, 269 W 242, 68 NW (2d) 810.

The propriety of a temporary injunction depends on a showing of a reasonable probability of the plaintiff's ultimate success. *Vredenburg v. Safety Device Corp.* 270 W 36, 70 NW (2d) 226.

The court, in the issuance of an injunction to abate a nuisance, is not permitted to designate the means whereby the nuisance is to be abated. *Thomas v. Clear Lake*, 270 W 630, 72 NW (2d) 541.

268.025 Ex parte restraining orders. (1) No court commissioner shall issue any injunction or order suspending or restraining the enforcement or execution of any statute of the state or of any order of an administrative officer, board, department, commission or other state agency purporting to be made pursuant to the statutes of the state. If so issued such injunction or order shall be void.

(2) The application for such an injunction or restraining order made to a court shall not be heard except upon notice to the attorney-general and to such other persons as may be defendants in the action; but if the court is of the opinion that irreparable loss or damage will result to the applicant unless a temporary restraining order is granted, the court may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction. However, such temporary restraining order shall be effective only for 5 days unless extended after notice and hearing thereon, or upon written consent of the parties or their attorneys, and in no event shall such temporary restraining order remain in force beyond the time of the determination of the application for an interlocutory injunction.

268.026 Remedy against heirs and legatees; temporary injunction; receivership; judgment. In an action, in a court of record, for damages founded upon contract or upon a judgment, when it appears that the defendant is interested, as heir, legatee or devisee, in the estate of a decedent and that the defendant's property liable to execution is probably insufficient to satisfy the plaintiff's claim for damages, the defendant may be enjoined by the court, pending the action, from assigning or otherwise disposing of his

interest in such estate; and a receiver therefor may be appointed. The judgment may compel the defendant to transfer sufficient of his interest to satisfy the judgment or may adjudge such transfer. The remedy given by this section is in addition to that given by section 318.08 and by proceedings supplementary to execution under chapter 273. If a receiver is appointed, he shall give prompt notice thereof to the administrator or executor.

268.03 When granted defendant. A temporary injunction may also be granted on the application of the defendant, when it shall appear that the plaintiff is doing, or threatens, or is about to do, or is procuring or suffering to be done some act in violation of the defendant's rights respecting the subject of the action and tending to his injury or to render ineffectual such judgment as may be rendered in his favor.

268.04 Same; when granted; Sunday or holiday. The injunction may be granted at any time before judgment upon its appearing satisfactorily to the court or judge, by the complaint or answer or by affidavit that sufficient grounds exist therefor. A copy of the pleading or affidavit on which granted must be served with the injunction unless previously served. In case of exigency an injunction may be granted and may be served on Sunday or on a legal holiday.

268.05 Notice required. (1) An injunction shall not be allowed after the defendant shall have answered, unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

(2) In an action against an insurance company or fraternal benefit society for an injunction or a receiver the commissioner of insurance shall be notified. Mailing a copy of such notice addressed to the commissioner of insurance at Madison, Wisconsin, shall be sufficient service.

268.06 Security for damages. In proceedings under section 247.23 the court or judge may, and in all other proceedings the court or judge shall require a bond of the party seeking an injunction, with sureties, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction if the court shall finally decide that the party was not entitled thereto. Copies of such bond, affidavit or other pleading shall be served upon the party enjoined and the officer serving the same shall, within 8 days after such service, file his return in the office of the clerk of the court.

The fact that the bond was not filed, until after the defendants had appealed from the temporary restraining order, was not prejudicial to the defendants and did not invalidate the order. *Brown v. Sucher*, 258 W 123, 45 NW (2d) 73.

268.07 Assessment of damages; bill of particulars; costs. Upon an assessment of the damages caused by an injunction the defendant may be required to serve upon the plaintiff and his sureties, within such time and in such manner as the court or referee shall direct, a bill of particulars. The plaintiff or the sureties may within ten days after such service offer in writing to permit the court or referee to assess the defendant's damages at a specified sum together with the costs of such proceeding incurred up to the time of such offer. If such offer be not accepted in writing within five days after it is made, it shall be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to obtain a more favorable assessment of damages he cannot recover costs, but must pay the costs of the opposite party from the time of the offer.

268.08 Injunction, defendant may be heard before enjoined. The court or judge may, before granting the injunction, make an order requiring cause to be shown why the injunction should not be granted, and the defendant may in the meantime be restrained.

268.09 Injunctions against corporations. An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or presiding judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers of the corporation except where the state is a party to the proceedings, unless the plaintiff give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.

268.11 Injunction, additional security. The party enjoined may, upon notice, apply for additional security and may combine such application with one to vacate or modify the injunction, and the presiding judge may require a further bond, in a sum and with sureties to be approved by him, as a condition of the continuance of the injunction.

268.13 Writ of ne exeat. The court or a judge may grant the writ of ne exeat to prevent any defendant from going out of the state until he shall give security. It may be granted at any time before judgment.

268.14 Same; when granted. No writ of ne exeat shall be granted unless it appears to the court or judge by the complaint or an affidavit that grounds exist therefor; and the court or judge granting such writ shall direct to be indorsed thereon the penalty of the bond and security to be given by the defendant.

268.15 Same; discharge of. If the defendant shall satisfy the court or judge granting such writ that there is no reason for his restraint or shall give security for the performance of the judgment in the action the writ shall be discharged.

268.16 Receivers. A receiver may be appointed:

(1) On the application of either party, when he establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired.

(2) By the judgment, or after judgment, to carry it into effect or to dispose of the property according to the judgment.

(3) To preserve the property during the pendency of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment or in an action by a creditor under chapter 273.

(4) When a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.

(5) In accordance with the practice which obtained when the code of 1856 took effect except as otherwise provided in this chapter.

(6) The receiver shall give to and file with the clerk of the court a bond, conditioned in the usual manner, with sureties to be approved by the judge making the appointment sufficient to cover all property likely to come into his hands.

268.17 Receiver; payment of employes' wages. Whenever a receiver shall be appointed to manage or close up any business he shall immediately report to the court the amount due the employes in such business; and said court shall order him to pay out of the first receipts of said business, after the payment of costs, debts due the United States or this state, taxes and assessments and the current expenses of carrying on or closing said business, the wages of such employes earned during the last three months of employment and within one year prior to his appointment.

268.22 Absentee's property act; insurance policy provisions invalid. (1) No provision concerning the effect to be given to evidence of absence or of death in any policy of life or accident insurance or in the charter or by-laws of any mutual or fraternal insurance association hereafter executed or adopted, shall be valid.

(2) When any such policy, charter or by-laws hereafter executed or adopted contains a provision requiring a beneficiary to bring suit upon a claim of death within one year or other period after the death of the insured, and the fact of the absence of the insured is relied upon by the beneficiary as evidence of the death, the action may be begun, notwithstanding such provision in the policy or charter or by-laws, at any time within the statutory period of limitation for actions on contracts in writing dating from the date of the giving of written notice of such absence to the insurer, which notice shall be given within one year from the date when the beneficiary last heard of the absent insured. If such notice is not given then the statutory period runs from the time when the absent person was last heard of by the beneficiary.

268.23 Receiver may be appointed when. (1) (a) When a person domiciled in this state and having an interest in any form of property disappears and is absent from his place of residence without being heard of after diligent inquiry, upon application for a finding of such disappearance and absence and of the necessity for the appointment of a receiver to the circuit court of the county of the absentee's domicile by any person who would have an interest in said property were said absentee deceased or by an insurer or surety or creditor of such absentee, after notice as provided in section 268.24, and upon good cause being shown, the court may find that he was last heard of as of a date certain and may appoint a receiver to take charge of his estate. The absentee shall be made a party to said proceeding; and any other person who would have an interest in said property were said absentee deceased, upon direction by the court, may be made a party to said proceeding.

(b) When a person is a member of the armed forces of the United States without this state, or is serving as a merchant seaman outside of the limits of the United States included within the 48 states and the District of Columbia, or is outside such limits by

permission, assignment or direction of any department or official of the United States government in connection with any activity pertaining to the prosecution of any war in which the United States is then engaged, and has an interest in any form of property in this state and no adequate power of attorney on his behalf has been recorded in the office of the register of deeds of the county of his domicile or of the county where such property is situated, upon application for findings establishing the foregoing and the necessity for appointment of a receiver, to the circuit court of the county of such person's domicile or of the county where such property is situated, by any person who would have an interest in said property were such person deceased, or by an insurer or surety or creditor of such person, or by any other person or on the court's own motion, after notice as provided in section 268.24, and upon good cause being shown, the court may, on making such findings, appoint a receiver to take charge of such person's estate. Such person should be made a party to such proceedings; and any other person who would have an interest in said property were said person deceased, upon direction by the court, may be made a party to said proceedings. Such person shall be deemed an "absentee" within the meaning of sections 268.23 to 268.34.

(2) The receiver, upon giving bond to be fixed in amount and with surety to be approved by the court and upon such conditions as will insure the conservation of such property, shall under the direction of said court administer said property as an equity receivership with power (a) to take possession of all property of the absentee wherever situated, (b) to collect all debts due the absentee, (c) to bring and defend suits, (d) to pay insurance premiums, (e) with the approval of the court in each case, to pay all debts due by the absentee, and (f) to pay over the proceeds of such part or all of said property, or the income thereof as may be necessary for the maintenance and support of the absentee's dependents; and if the personal property of said absentee be not sufficient to pay all his debts, and to provide for the maintenance and support of his dependents, the receiver may apply to the court for an order to sell or mortgage so much of the real estate as may be necessary therefor; said sale or mortgage to be reported to, approved and confirmed by the court and said receiver to be ordered to make deed conveying or mortgaging said real property to the purchaser or lender upon his complying with the terms of sale or mortgage.

(3) Upon the filing of the application referred to in subsection (1), the court may for cause shown appoint a temporary receiver to take charge of the property of the absentee and conserve it pending hearing upon the application. Such temporary receiver shall qualify by giving bond in an amount and with surety to be approved by the court and shall exercise only the powers named by the court. Should a permanent receiver be appointed, the temporary receiver shall turn over all property in his possession, less such as may be necessary to cover his expenses and compensation as allowed by the court, to the permanent receiver, shall file his final account and upon its approval be discharged. Should the application for permanent receiver be denied, the temporary receiver shall restore to those from whom it may have been obtained, all property in his possession, less such only as may be necessary to cover his expenses and compensation as allowed by the court, shall file his final account and be discharged. Where the application is denied, the expenses of the temporary receivership and the compensation of the temporary receiver may in the discretion of the court be taxed as costs of the proceeding to be paid by the applicant and shall be enforceable by the temporary receiver against him.

268.24 Notice. All notices required under sections 268.22 to 268.34 shall be served upon all parties ordered by the court to be served in the manner prescribed by existing statutes or rules, except that in addition thereto the absentee shall be served by publication once a week for 3 successive weeks in a newspaper printed in the English language of general circulation in the county of the absentee's domicile, the last publication to be not less than 10 nor more than 20 days prior to the time set for any hearing. The original notice prescribed in section 268.23 (1) shall require each person claiming an interest in the property of the absentee to file in court within a time fixed by the court a statement of the nature and extent of such interest. In relation to a person in military service similar notice shall be given; except that where it appears to the court that such person was not domiciled in this state immediately prior to such service, publication may be made in the county where property of such person is situated; publication hereby required shall not exceed 3 weeks.

268.25 Search for absentee. (1) The court, upon application, may direct the receiver to make search for the absentee in any manner which the court may deem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the absentee's whereabouts;

(b) By notifying officers of justice and public welfare agencies in appropriate locations of the absentee's disappearance;

(c) By engaging the services of an investigation agency.

(2) The expenses of such search and of the notices provided for in section 268.24 shall be taxed as costs and paid out of property of the absentee.

268.26 Final hearing and finding. (1) At any time, during the proceedings, upon application to the court and presentation of satisfactory evidence of the absentee's death, the court may make a final finding and decree that the absentee is dead; in which event the decree and a transcript of all of the receivership proceedings shall be certified to the probate court for any administration required by law upon the estate of a decedent, and the receivership court shall proceed no further except for the purposes set forth in subsections (1) and (3) of section 268.28.

(2) After the lapse of 5 years from the date of the finding provided for in subsection (1) of section 268.23, if the absentee has not appeared, the court may proceed to take further evidence and thereafter make a final finding and enter a decree declaring that all interest of the absentee in his property has ceased and devolved upon others by reason of his failure to appear and make claim.

(3) At any time, upon proof to the court that a power of attorney has been recorded as provided by section 268.23 (1) (b), the court shall direct termination of the receivership proceedings and transfer of property held thereunder to the person in military service or to the attorney named in such power of attorney upon payment of reasonable expenses and compensation of the receiver in the discretion of the court.

268.27 Claim of absentee barred. No action shall be brought by an absentee to recover any portion of this property after the final finding and judgment provided for in section 268.26.

268.28 Termination of receivership and disposition of property of absentee. Upon the entry of any final finding and decree as provided in section 268.26, the court shall proceed to wind up the receivership and terminate the proceedings:

(1) In the case of a finding under subsection (1) of section 268.26 that the absentee is dead:

(a) By satisfying all outstanding debts and charges of the receivership; and

(b) By then certifying the proceedings to the probate court; or

(2) In the case of a finding under subsection (2) of section 268.26:

(a) By satisfying all outstanding debts and charges;

(b) By then deducting for the insurance fund provided in section 268.31 a sum equal to five per cent of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life;

(c) By distributing the remaining property as provided in section 268.29; and

(3) In both cases by requiring the receiver's account and upon its approval discharging him and his bondsmen and entering a final decree terminating the receivership.

268.29 Distribution of property of absentee. The property remaining for distribution in accordance with the provisions of paragraph (c) of subsection (2) of section 268.28 shall be distributed among those persons who would be entitled thereto under the laws of descent and distribution of this state had the absentee died intestate as of the date determined by the court in its final finding and decree; or in case the absentee leaves a document which, had he died, would under the laws of this state be entitled to probate as his will, the distribution shall be according to the terms of that document as of that date. The validity and effect of the distribution of said property shall be determined by the court administering the receivership and shall be final and binding upon all persons including the absentee.

268.30 Insurance policies. (1) At the time of the distribution under section 268.29, the court may direct the payment to the beneficiaries of any sums due and unpaid under any policies of insurance upon the life of the absentee, if the claim is uncontested by the insurer.

(2) If the claim is contested, the court shall take jurisdiction of the action and shall submit to a jury, if one be called for, the issue of death of the insured and any other issues arising under the policy.

(3) Where the survival of a named beneficiary is not established, the provisions of sections 268.22 to 268.34 shall apply as if the proceeds of the insurance were a part of the estate of the absentee.

(4) If in any proceeding under subsections (1) and (2) the absentee is not found to be deceased and the policy provides for a surrender value, the beneficiary may request the receiver, acting for the insured, to demand the payment of surrender value. The receiver's receipt for such payment shall be a release to the insurer of all claims under

the policy. The receiver shall pay over to the beneficiary (if he survives the insured, otherwise to the estate of the absentee) the sum thus received, reserving only an amount allowed by the court as costs of the proceedings under this section.

(5) Payment by an insurer hereunder shall be in full discharge of all contractual liability. No action shall be brought by an absentee to recover any portion of the proceeds, or any other benefits or values, arising out of contracts of life insurance issued upon his life, after any distribution of such property pursuant to this section.

268.31 Absentee insurance fund. (1) In each case of termination of receivership as provided in section 268.28, the court, except in cases where the proceedings have been certified to the probate court under subsection (1) of section 268.26, shall set aside the sum there named and direct its payment by the receiver, to the state treasurer.

(2) The state treasurer shall retain or invest the funds thus paid in.

(3) If at any time thereafter an absentee whose estate has been distributed under a final finding and judgment made as herein provided shall appear and make claim for reimbursement, the court may in a proceeding by the claimant against the state treasurer order payment to the claimant as in its opinion may be fair and adequate under the circumstances.

History: 1951 c. 319 s. 221, 222.

268.32 Uniformity of interpretation. Sections 268.22 to 268.34 shall be so construed as to make uniform the law of those states which enact it.

268.33 Name of act. Sections 268.22 to 268.34 may be cited as the "Uniform Absence as Evidence of Death and Absentee's Property Act."

268.34 Time of taking effect and not retroactive. The provisions of sections 268.22 to ~~268.34~~ shall ~~not be retroactive~~ and they shall take effect on July 1, 1942.