CHAPTER 269.

PRACTICE REGULATIONS.

269.01 Agreed case; affidavit; judgment. Parties to a controversy which might be the subject of a civil action, may agree upon a verified case containing the facts upon which the controversy depends and submit the same to any court which would have jurisdiction if an action were brought. The court shall, thereupon, render judgment as in an action. Judgment shall be entered and docketed as other judgments and with like effect, but without costs for any proceeding prior to the trial.

History: Sup. Ct. Order, effective January 1, 1958.

269.02 Offer of judgment; effect. The defendant may, in any action, before the trial, serve upon the plaintiff an offer, in writing, to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accept the offer and give notice thereof in writing, before trial and within ten days, he may file the summons, complaint and offer, with an affidavit of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance be not given the offer is withdrawn and cannot be given as evidence on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, he shall not recover costs but the defendant shall have full costs computed on the demand of the complaint.

Cross Reference: For tender of payment, see 331.14 to 331.171.

See note to 269.04, citing Feiges v. Racine Dry Goods Co. 231 W 284, 285 NW 805.

269.03 Defendant's offer as to damages, accepted. The defendant may serve upon the plaintiff a written offer that if he fail in his defense the damages be assessed at a specified sum, and if the plaintiff accepts the offer in writing, within ten days and before the trial and prevails on the trial, the damages shall be assessed accordingly.

269.04 Offer of damages not accepted. If the plaintiff does not accept the offer made under 269.03 he shall not be permitted to give it in evidence, and if the damages assessed in his favor do not exceed the damages offered, the defendant shall recover his

expenses incurred in consequence of any necessary preparations or defense in respect to the question of damages; such expenses shall be determined by the presiding judge and carried into the judgment.

Where recovery did not exceed judgment offered, plaintiff is not entitled to costs of trial. Feiges v. Racine Dry Goods Co. 231 W 284, 285 NW 805.

269.05 Consolidation of actions. When two or more actions are pending in the same court, which might have been joined, the court or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order.

The right to contribution is based on common liability. 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. Where 4 separate actions arising out of an automobile collision in which one driver was killed were brought against the other driver and his liability insurer, and all were consolidated for trial, and both drivers were found negligent in a single verdict, but the deceased driver's widow as administratrix was not a party nor impleaded as a defendant in the actions brought by her individually for her damages and by the owner of the car driven by the deceased driver, the judgments obtained against the defendant driver and his insurer in such 2 actions were not binding on the deceased driver's estate and were not determinative of common liability so as to entitle the defendant driver's insurer to a summary judgment for contribution against the estate in a subsequent action brought for that purpose against the widow as administratrix. An unappealed denial of a motion for contribution at the trial of the 4 previous 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 Indemnity Co. v. Prunty, 263 W 27, 56 NW (2d) 540.

269.06 Court may order delivery of property. When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party or which belongs or is due to another party the court may order the same to be deposited in court or delivered to such party with or without security, subject to the further direction of the court.

269.07 Refusal to deliver property; title passed by judgment. When a court shall have ordered the deposit, delivery or conveyance of property and the order is disobeyed, the court may order the sheriff to take the property and deliver, deposit or convey it in conformity with the direction of the court and the court may pass title by its judgment.

269.08 Summons to joint debtors not originally summoned. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 270.55, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. The summons shall be subscribed by the judgment creditor, his representatives or attorneys, shall describe the judgment and require the person summoned to show cause, within twenty days after the service of the summons, and shall be served in like manner as the original summons. The summons shall be accompanied by an affidavit of the person subscribing it that the judgment has not been satisfied to his knowledge or information and belief, and specifying the amount due thereon.

269.09 Parties may defend. The party summoned may answer within the time specified and may make any defense which he might have originally made to the action, and may deny the judgment or make any defense which may have arisen subsequently.

269.10 Pleadings and trial. The party issuing the summons may demur or reply to the answer and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution or the application of the property charged to the payment of the judgment be compelled by attachment, if necessary.

269.12 Summons where no jurisdiction. When judgment shall have been entered in an action against any defendant upon whom service was attempted, but whereby jurisdiction was not acquired, such defendant may be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned. The summons shall be like that provided in s. 269.08, with a like accompanying affidavit when the judgment is for a sum of money. It may be served in any manner as an original summons might be. Proceedings thereon shall be had as prescribed in ss. 269.09 and 269.10, and judgment upon default or otherwise be entered, as the nature of the case demands. This section shall apply to minors and incompetents.

History: Sup. Ct. Order, 265 W vii.

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 When action not to abate. An action does not abate by the occurrence of any event if the cause of action survives or continues.

269.14 Continuance if interest transferred, etc. In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, or the court may direct the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party, as the case requires.

269.15 Action by officer, receiver, etc., not to abate. When an action or special proceeding is lawfully brought by or in the name of a public officer or by a receiver or by any trustee appointed by virtue of any statute his death or removal shall not abate the same, but it may be continued by his successor, who may be substituted therefor by order of the court or a judge.

269.16 Death or disability of party. In case of the death or disability of a party, if the cause of action survives, the court may order the action to be continued by or against his representatives or successor in interest.

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 Joint actions not abated by death; liability of estate. Where there are several plaintiffs or defendants in any action, if any of them shall die and the cause of action survives to or against the others the action may proceed, without interruption, in favor of or against the survivors. If all the plaintiffs or defendants shall die before judgment the action may be prosecuted or defended by the executor or administrator of the last surviving plaintiff or defendant, as the case may be. But the estate of a party jointly liable upon contract with others shall not be discharged by his death, and the court may, by order, bring in the proper representative of the deceased defendant, when it is necessary so to do, for the proper disposition of the matter; and where the liability is several as well as joint may order a severance of the action so that it may proceed separately against the representative of the decedent and against the surviving defendants.

269.18 Death of parties; effect on action. In case of the death of any of several plaintiffs or defendants, if part only of the cause of action or part or some of two or more distinct causes of action survives to or against the others the action may proceed without bringing in the successor to the rights or liabilities of the deceased party, and the judgment shall not affect him or his interest in the subject of the action. But when it appears proper the court may order the successor brought in.

269.19 Action to recover real property. (1) DEATH OF PLAINTIFF. In an action for the recovery of real property if any plaintiff shall die before judgment his heir or devisee or his executor or administrator, for the benefit of the heir, devisee or creditors, may be admitted to prosecute the action in his stead.

(2) DEATH OF A DEFENDANT. When there are several defendants and any of them shall die before judgment the action may be prosecuted against the surviving defendants for so much of the premises as they shall hold or claim.

269.20 Same. If the interest of the deceased party passes to the surviving plaintiffs, or if there be no motion for the admission of another person as heir, executor or administrator within the time allowed by the court for that purpose, the surviving plaintiffs may prosecute the action for so much of the premises in question as may be claimed by them.

269.22 Death after verdict or findings; practice. After an accepted offer to allow judgment to be taken, or after a verdict, report of a referee or finding by the court in any action the action does not abate by the death of any party, but shall be further proceeded with in same manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside. But a verdict, report or finding rendered against a party after his death is void.

269.23 Proceedings to revive action. Whenever any person shall be entitled to continue any action or proceeding interrupted by death, removal from a trust or other disability he may file with the clerk a petition setting out the necessary facts and thereupon give notice to the other party of the time and place of such filing, and that unless he shows cause by affidavit within twenty days after service of such notice on him, exclusive of the day of service, why such action or proceeding should not be revived the same will stand revived according to such petition. Such notice may be served in the same manner as a summons Upon filing such notice with proof of service and that no affidavit has been received the court or a judge shall order the action or proceeding revived. An affidavit showing cause

against such revivor may be served on the party subscribing such notice as a pleading is served; and the court shall make such order as the circumstances may require.

See notes to 85.05, citing 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 Action dismissed if not revived. At any time after the death of the plaintiff the court may, upon notice to such persons as it shall direct and on the application of the adverse party or of a person whose interest is affected, order the action dismissed unless continued by the proper parties within the time therein specified; and unless so continued within such time the same shall stand dismissed.

269.25 Dismissal for delay. The court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement.

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 this section, 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 this section, 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. This section is in the nature of a statute of limitations; and a judgment of dismissal thereunder is res adjudicata 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.

269.27 Motion defined; when and where made; stay of proceedings. An application for an order is a motion. Motions in actions or proceedings in the circuit court must be made within the circuit where the action is triable; in other courts, within their territorial jurisdiction. Orders out of court, without notice, may be made by the presiding judge of the court in any part of the state; and they may also be made by a county judge or court commissioner of the county where the action is triable. No order to stay proceedings after a verdict, report or finding in any circuit court shall be made by a county judge or court commissioner, or in any county court by a court commissioner. No stay of proceedings for a longer time than twenty days shall be granted by a judge out of court except upon previous notice to the adverse party.

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.

Instead of submitting a form of question asking the jury to assess damages for "personal injury" to a person who died about 7 hours after being injured in an accident, it would have been better to have used the term "conscious pain and suffering," but the terms used were not erroneous when considered in the light of the instructions given in connection therewith. Blaisdell v. Allstate Ins. Co. 1 W (2d) 19, 82 NW (2d) 886.

269.28 Orders, how vacated and modified. An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice shall not be modified or vacated except by the court upon notice, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order.

269.29 Restriction as to making orders; review by court. Where an order or proceeding is authorized to be made or taken by the court it must be done by the court in session; where an order or proceeding is authorized to be made or taken by the presiding judge or the circuit judge, using such words of designation, no county judge or court commissioner can act. Except as so provided or otherwise expressly directed a county judge or court commissioner may exercise within his county the powers and shall be subject to

the restrictions thereon of a circuit judge at chambers but such orders may be reviewed by the court. The court may make any order which a judge or court commissioner has power to make.

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 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 Motions, how heard if judge disqualified. Where a motion is made to be heard before the court or the presiding judge thereof and such judge is disqualified to hear the motion it may be transferred by his order to some court having concurrent jurisdiction of the subject of the action or it may be so transferred by the written stipulation of the parties. The court so designated shall make the proper order for the determination thereof and carrying the same into execution, which shall be transmitted to and entered by the clerk of the court where the action is pending and have the same effect as if made by that court.

269.31 Time of notice of motion. When a notice of motion is necessary, unless the time be fixed by statute or the rules of court, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

269.32 Motions and orders; service of papers. (1) All such motions shall be brought to hearing on written notice or order to show cause. Such notice of motion or order to show cause shall state the nature of the order or relief applied for, and if based on irregularity, it shall specify the irregularities complained of.

(2) Copies of all records and papers upon which a motion or order to show cause is founded, except such as have been previously filed or served in the same action or proceeding, shall be served with the notice thereof or the order to show cause, and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, not served with the motion papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs, should request therefor be made.

(3) When a notice of a motion for an order has been served either party may take depositions, on notice, to be used on the hearing of such motion. Testimony may be taken on the hearing and such testimony shall be transcribed, certified and filed at the expense of the party offering the same unless otherwise ordered.

(4) All orders shall refer to the records and papers used, and the testimony taken upon the application for the order.

269.33 Papers to be legible. Every paper in any action or proceeding and copies thereof shall be legible and on substantial paper and shall have indorsed thereon the title of the action or proceeding and character of the paper and serial record number of the action if filed after the clerk had given the action a number, and if not so prepared and indorsed, the clerk may refuse to file the paper and the party to be served need not receive it. The clerk shall indorse on all papers filed the date of filing.

269.34 Service of papers; personal and by mail. (1) The service of papers may be personal by delivery of a copy of the paper to be served to the party or attorney on whom the service is to be made.

(2) Service upon an attorney may be made during his absence from his office by leaving such copy with his clerk therein or with a person having charge thereof; or, when there is no person in the office, by leaving it in a conspicuous place in the office; or, if it be not open then by leaving it at the attorney's residence with some person of suitable age and discretion. If admission to the office cannot be obtained and there is no person in the attorney's residence upon whom service can be made, it may be made by mailing him a copy to the address designated by him upon the preceding papers in the action; or where he has not made such a designation, at his place of residence or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

(3) Service upon a party may be made by leaving the copy at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

(4) Service may be made by mailing such copy 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. The copy of the paper to be served must be properly enclosed in a postpaid wrapper (which may bear the sender's name and address) and must be addressed to the person on whom it is to be served at his proper post-office address, but, except as to proceedings in county court, without any request to the postal officers upon the wrapper for the return thereof in case of nondelivery to the person addressed.

History: 1957 c. 272.

269.36 Mail service increases time allowed. If a certain time before an act to be done is required for the service of any paper and if, after service of any paper, a specified time is allowed a party to do an act in answer to or in consequence of such service, service by mail shall increase by 5 days the time required or allowed to do such act in case of personal service.

History: Sup. Ct. Order, 271 W x.

269.37 Service on attorney; when service not required. When a party to an action or proceeding shall have appeared by an attorney the service of papers shall be made upon the attorney. When a defendant shall not have appeared in person or by attorney service of notice or papers in the ordinary proceedings in an action need not be made upon him unless he be imprisoned for want of bail.

269.38 Service of papers dispensed with. When a party's residence and post office are not known and neither can with due diligence be learned and he has designated no place for service of papers upon him, service of notice and other papers on him is dispensed with unless there is a special rule requiring publication of notice, in which case the special rule shall be observed.

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

269.39 Applicability of service provisions. The provisions of ss. 269.34, 269.37 and 269.38 shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

History: 1955 c. 108.

269.41 Sheriff's certificate as evidence; proof of service. When service of a notice or paper in an action or proceeding is authorized to be made by the sheriff his certificate of service shall be evidence thereof. Proof of service of notices and papers where no special mode of proof is provided may be made as provided by section 328.18.

269.42 Papers, where filed. All affidavits and papers used on any motion shall be filed with the clerk of the court or with the judge by whom the motion is heard, and the judge shall, after decision thereof, file all such papers with the clerk. All undertakings given in actions or proceedings must be filed with the clerk unless otherwise directed by these statutes or the court expressly provides for a different disposition thereof.

269.43 Mistakes and omissions. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

269.44 Amendments of processes, pleadings and proceedings. The court may, at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding, nothwithstanding it may change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa; provided, the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based.

The plaintiff sought to recover only for permanent injuries and pain and suffering, and the case was submitted by a special verdict asking as to damages only in those respects. There was proof only of injuries of a temporary nature other than pain and suffering. This section does not authorize striking the amount assessed by the jury for permanent injuries and entering judgment for pain and suffering only, but in such case a new trial should be had as to damages. 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 to the relator, overruling the defendant's demurrer ore tenus and 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 nor offer any additional testimony on the new issue raised. Beranek v. Gohr, 260 W 282, 50 NW (2d) 459.

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 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.

269.45 Enlargement of time. (1) The court or a judge may with or without notice, for cause shown by affidavit and upon just terms and before the time has expired, extend the time within which any act or proceeding in an action or special proceeding must be taken, except the time for appeal.

(2) After the expiration of the specified period or as extended by any previous order, the court may in its discretion, for like cause, upon notice, extend the time where the failure to act was the result of excusable neglect; except the time for appeal.

The trial court did not abuse its discretion in granting an extension of time within which to settle the bill of exceptions to appellants who had ordered a transcript of the record 10 or 12 days before the expiration of the 90-day statutory period but were told by the court reporter that he could not get out the record in the allotted time. Rhodes v. Shawano Transfer Co. 256 W 291, 41 NW (2d) 288.

Judgment was entered against the defendant on June 15th; the defendant then went into bankruptcy and did not serve, nor apply for an extension of the time for serving, a proposed bill of exceptions within the statutory 90-day period; on November 14 he applied for an extension of the time for taking an appeal under authority from the referee in bankruptcy. On the facts as to the intervening bankruptcy proceedings, and the necessity of the consent of the referee to taking an appeal, the trial court, in the exercise of its discretion could order an extension of the time for serving the bill of exceptions. Ernst v. Ernst, 259 W 26, 47 NW (2d) 296.

On a record disclosing that the plaintiff requested the court reporter, 2 weeks before the expiration of the statutory 90-day period for serving a bill of exceptions, to prepare transcripts of the testimony for inclusion therein, but that the reporter could not complete the transcripts in time because of a large amount of work in process, and could not have done so if requested even earlier, there was a sufficient showing of good cause so that an order entered within the 90-day period and extending the time for serving the bill of exceptions was not an abuse of discretion. A determination of the trial court will not be disturbed except where it clearly appears that its discretion has been abused. Greenfield v. Milwaukee, 259 W 101, 47 NW (2d) 291.

See note to 252.10, citing Wegner v. Chicago & N. W. R. Co. 262 W 402, 55 NW (2d) 420.

The words "for like cause," as used 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 that which may 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 the 90-day period for serving a bill of exceptions expired on November 5, 1951, and the appellant did not apply for an order extending the time until March 31, 1952, although it knew long before such latter date the reasons why it was unable to serve a bill of exceptions sooner, the supreme court, if it were passing on the question originally and not on review, would have denied the application because of the long delay in applying for the order, but cannot hold as a matter of law that the trial court abused its discretion in granting the order. Valentine v. Patrick Warren Construction Co. 263 W 143, 56 NW (2d) 860.

Where notice of entry of judgment was served on the defendant on April 30, 1952, while the trial judge was still in office, and a successor judge entered an ex parte order on July 2d, extending the time to settle a bill of exceptions to October 1st, but entered an order on September 15th vacating the order of July 2d on certain erroneous grounds, the affidavit of the defendant's attorney, addressed to the trial judge on September 24th in support of an application for an extension of time and stating that he had relied on the successor judge's prior order of July 2d granting an extension to October 1st, established excusable neglect for failing to apply for such new order for extension before the expiration of the statutory 90-day period for settling a bill of exceptions, and also established good cause for the trial judge's order of September 24th granting an extension to October 15th. The provision in (1), permitting a court or judge to enter an order granting an extension of time to settle a bill of exceptions without notice, if such order is entered within the statutory 90-day period for settling a bill of exceptions, is not unconstitutional as denying due process of law, since such order is a mere procedural order not affecting substantive rights, 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. Such order having been made as a result of an erroneous view of the law, it will be re-

versed without requiring that an abuse of discretion on the part of the judge be established. Briggson v. Viroqua, 264 W 40, 58 NW (2d) 543.

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

Where notice of entry of judgment was served April 17 and a transcript ordered May 18, it was not an abuse of discretion for the court to grant an extension of time to serve the bill of exceptions. Bachmann v. Chicago, M., St. P. & P. R. Co. 266 W 466, 63 NW (2d) 824.

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 (2) may direct. Miller v. Belanger, 275 W 187, 81 NW (2d) 545.

The alteration of "good cause" to "cause" in 269.45, (Stats. 1949) and the mention of the trial court's discretion in (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.

269.46 Relief from judgments, orders and stipulations; review of judgments and orders. (1) The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding.

(2) No agreement, stipulation or consent, between the parties or their attorneys, in respect to the proceedings in an action or special proceeding, shall be binding unless 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.

(3) All 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 end of the term of entry thereof.

History: Sup. Ct. Order, 259 W v.

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]

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.

Where the husband moved the trial court to modify a judgment of divorce as to division of property, and the court held hearings thereon, all within the 60-day period allowed for the review of judgments in the same court, the continuing jurisdiction of the court was thereby invoked so that the court had the power thereafter to amend the judgment, and to correct it to the disadvantage of the husband as well as to his advantage. Barrock v. Barrock, 257 W 565, 44 NW (2d) 527.

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.

Where a wife had brought divorce proceedings in which the husband acted without an attorney and conveyed to the wife by quitclaim deed their homestead owned in joint tenancy and was served with notice of entry of the divorce judgment confirming such conveyance, the husband, in an action of ejectment by the executrix of the estate of the former wife, could not by counterclaim obtain a vacation of the divorce judgment and a cancellation of the quitclaim deed on the ground that he and the wife continued to live together until her death and that he believed that the divorce judgment had been vacated; and, in the absence of any charge of fraud perpetrated on the defendant, the trial court properly sustained a demurrer to the counterclaim and directed a final judgment dismissing the counterclaim and confirming title to the premises in the plaintiff, instead of permitting the defendant to plead over. Kehl v. Britzman, 258 W 513, 46 NW (2d) 841.

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 not holding that the judgment should be vacated and set aside, but as holding that the judgment was merely to be opened up so as to afford the defendant the opportunity to defend on the merits, thereby permitting the lien of the judgment to stand pending the outcome of the trial on the merits; and hence, in implementing such opinion, it was proper for a successor judge, in his order amending an order of a prior successor judge by deleting therefrom its provision for vacation of 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 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 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 fendant 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.

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 (2), that a stipulation thus made in open court, to be binding, must be "entered in the miuntes." Czap v. Czap, 269 W 557, 69 NW (2d) 488.

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. Casualty 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.

See note to 256.08, citing Cram v. Bach, 1 W (2d) 378, 83 NW (2d) 877.

269.465 Affidavit of advice of counsel. Whenever it shall be necessary in any petition or affidavit to swear to the advice of counsel, a party shall, in addition to what has usually been required, swear that he has fully and fairly stated the case to his counsel and shall give the name and place of residence of such counsel.

269.47 Defense where service by publication. When service of the summons shall have been made by publication, if the summons shall not have been personally served on a defendant nor received by such defendant through the post office, he or his representative

shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected.

269.48 Adding new defendants. In every action the summons or the summons and complaint may be amended of course, without costs, and without prejudice to the proceedings already had by adding other persons as parties defendant and making the proper allegations for such purpose. Service of the amended summons, together with the complaint or a notice of the object of the action, may be made upon such new defendants as prescribed in chapter 262. No further service shall be necessary on the original defendants, but the action shall proceed in the same manner as if the new parties had been originally joined.

269.49 Copy of paper may be used, when. If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

269.50 Affidavits need not be entitled. It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

269.51 Irregularities and lack of jurisdiction waived on appeal; jurisdiction exercised; transfer to proper court. (1) When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction of the appellate court, unless he shall move to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it shall appear upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, said court shall, if it appear that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appear that the error arose from mistake.

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.

See note to 324.05, citing Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

See note to 274.33, citing Jaster v. Miller, 269 W 223, 69 NW (2d) 265.

Although the respondent's motion to dismiss the appeal because of the appellant's failure to serve a copy of the undertaking was denied, the supreme court, because of the appellant's failure in such particular and failure to include an appendix in a first brief served, will allow $25 costs to the respondent on the motion to dismiss the appeal, the same to be offset against the costs taxable by the appellant on the appeal. Bulova Watch Co. v. Anderson, 270 W 21, 70 NW (2d) 243.

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

269.52 Mistaken remedy or action; no dismissal; amendment; transfer to court having jurisdiction. In all cases where upon objection taken or upon demurrer sustained or after trial it shall appear to the court that any party claiming affirmative relief or damages has mistaken his remedy, his action, proceeding, cross complaint, counterclaim, writ, or relation shall not be finally dismissed or quashed, but costs shall be awarded against him and he shall be allowed a reasonable time within which to amend and the amended action or proceeding shall continue in that court except in case that court has no jurisdiction to grant the relief sought, in which case the action in whole or in such divisible part in which jurisdiction is lacking shall be certified to some other court which has jurisdiction.

Where the impleaded defendants would have had the right to set up the defense of contributory negligence on the part of one plaintiff and to implead such plaintiff for purposes of contribution if the plaintiffs had amended their complaint to seek relief

against the impleaded defendants, but the plaintiffs made no claim of negligence against the impleaded defendants in the entire action, the granting of plaintiffs' motion after verdict for amendment of the pleadings or proceedings to conform to the facts as found by the jury, and ordering judgment in favor of the plaintiffs against the impleaded defendants, constituted prejudicial error requiring a new trial as to all parties. 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.

269.53 Release of joint debtor; effect. (1) If any creditor to whom persons are jointly indebted, either upon contract or the judgment of a court of record, shall release any of them such release shall operate as a satisfaction or discharge of such joint debt to the amount of the proportion which the person so released ought in equity, as between himself and the other joint debtors, to pay; and the balance of such joint debt shall remain in force as to joint debtors not released and may be enforced against them. If the amount paid by a debtor to procure his release shall exceed the proportion of such joint debt which he, as between himself and co-debtors ought to pay then such joint debt shall thereby be satisfied to the extent of the sum so paid. If the person released is only a surety his release shall operate as payment of such joint debt to the extent of the money paid by him and no further.

(2) This section does not permit the discharge of a principal debtor without also discharging his sureties.

Cross Reference: See also 113.05 concerning release of co-obligor.

269.55 Interpreters for deaf mutes. Upon trial or examination of any deaf mute or deaf person who is unable to read and write, or upon any examination into the mental status of any such person, the court or person or body conducting such trial or examination shall call in an interpreter competent to converse in the special language, oral, manual or sign, familiar to or used by such deaf mute or deaf person. The necessary expense of furnishing such interpreter shall be paid by the county in which such trial or examination is held if satisfactory proof be offered that said deaf mute or person is unable to pay the same.

269.56 Declaratory judgments act. (1) SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(2) POWER TO CONSTRUE, ETC. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. No party shall be denied the right to have declared the validity of any statute or municipal ordinance by virtue of the fact that he holds a license or permit under such statutes or ordinances.

(3) BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

(4) EXECUTOR, ETC. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(5) ENUMERATION NOT EXCLUSIVE. The enumeration in subsections (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in subsection (1) in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(6) DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(7) REVIEW. All orders, judgments and decrees under this section may be reviewed as other orders, judgments and decrees.

(8) SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(9) JURY TRIAL. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

(10) COSTS. In any proceeding under this section the court may make such award of costs as may seem equitable and just.

(11) PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

(12) CONSTRUCTION. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

(13) WORDS CONSTRUED. The word "person" wherever used in this section, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

(14) PROVISIONS SEVERABLE. The several sections and provisions of this section except subsections (1) and (2) are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

(15) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(16) SHORT TITLE. This section may be cited as the "Uniform Declaratory Judgments Act."

History: 1951 c. 20.

In a declaratory judgment affirmed on appeal, a seniority contract between plaintiff employes and employer was held valid against later attempts by the defendant union and the employer, to change the same, and thereby avoid the provisions of the seniority contract. Plaintiffs were entitled under (8), on their application for supplemental further relief, to a hearing and an adjudication as to whether they had the right to specific performance in relation to their rights under the seniority contract; and on the trial court's denial thereof they were entitled to appeal and have a review of the adjudication in question. An action for declaratory relief is essentially equitable in character. The supplemental relief contemplated by (8) is not limited to further declaratory relief, but includes any relief essential to making effective the declaratory judgment entered by the court. Belanger v. Local Division No. 1128, 256 W 274, 40 NW (2d) 504.

The trial court by declaratory judgment, and the supreme court on appeal, had determined that a union had acted arbitrarily, unfairly, and capriciously toward 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 supplement 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.

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. 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.

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), 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.

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.

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 nor 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 acton 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.

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

In an action for a declaratory judgment, brought by a pharmaceutical association against the state board of pharmacy, charged with the administration and enforcement of 151.07, which action 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, the requested declaratory judgment would not be binding on such 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.

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.

Under (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.

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.

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.

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

(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.

269.565 Declaratory judgments against obscene matter. (1) GROUNDS FOR AND COMMENCEMENT OF ACTION. Whenever there is reasonable cause to believe that any book, magazine, or other written matter, or picture, sound recording or film, which is being sold, loaned or distributed in any county, or is in the possession of any person who intends to sell, loan or distribute the same in any county, is obscene, the district attorney of such county, as plaintiff, may file a complaint in the circuit court for such county directed against such matter by name. Upon the filing of such complaint, the court shall make a summary examination of such matter. If it is of the opinion that there is reasonable cause to believe that such matter is obscene, it shall issue an order, directed against said matter by name, to show cause why said matter should not be judicially determined to be obscene. This order shall be addressed to all persons interested in the publication, production, sale, loan, exhibition and distribution thereof, and shall be returnable within 30 days. Notice of such order shall be given by publication once each week for 2 successive weeks in a daily newspaper of general circulation in such county. A copy of such order shall be sent by certified mail to the publisher, producer, and one or more distributors of said matter, to the

persons holding the copyrights, and to the author, in case the names of any such persons appear on such matter or can with reasonable diligence be ascertained by said district attorney. Such publication shall commence and such notices shall be so mailed within 72 hours of the issuance of the order to show cause by the court.

(2) RIGHT TO DEFEND; JURY TRIAL. Any person interested in the publication, production, sale, loan, exhibition or distribution of such matter may appear and file an answer on or before the return day named in said notice. If in such answer the right to trial by jury is claimed on the issue of the obscenity of said matter, such issue shall be tried to a jury. If no right to such trial is thus claimed, it shall be deemed waived, unless the court shall, for cause shown, on motion of an answering party, otherwise order.

(3) DEFAULT. If no person appears and answers within the time allowed, the court may then, without notice, upon motion of the plaintiff, if the court finds that the matter is obscene, make an adjudication against the matter that the same is obscene.

(4) SPEEDY HEARING; RULES OF EVIDENCE. If an answer is filed, the case shall be set down for a speedy hearing. If any person answering so demands, the trial shall not be adjourned for a period of longer than 72 hours beyond the opening of court on the day following the filing of his answer. At such hearing, subject to the ordinary rules of evidence in civil actions, the court shall receive the testimony of experts and evidence as to the literary, cultural or educational character of said matter and as to the manner and form of its production, publication, advertisement, distribution and exhibition. The dominant effect of the whole of such matter shall be determinative of whether said matter is obscene.

(5) FINDINGS AND JUDGMENT. If, after such hearing, the court, or jury (unless its finding is contrary to law or to the great weight and clear preponderance of the evidence), determines that such matter is obscene, the court shall enter judgment that such matter is obscene. If it is so determined that such matter is not obscene, the court shall enter judgment dismissing the complaint, and a total of not more than $100 in costs, in addition to taxable disbursements, may be awarded to the persons defending such matter. Any judgment under this subsection may be appealed to the supreme court pursuant to ch. 274 by any person adversely affected, and who is either interested in the publication, production, sale, loan, exhibition or distribution of said matter, or is the plaintiff district attorney.

(6) ADMISSIBILITY IN CRIMINAL PROSECUTIONS. In any trial for a violation of s. 944.21 or 944.22, the proceeding under this section and the final judgment of the circuit court under sub. (3) or (5) shall be admissible in evidence on the issue of the obscenity of said matter and on the issue of the defendant's knowledge that said matter is obscene; provided, that if the judgment of the court sought to be introduced in evidence is one holding the matter to be obscene, it shall not be admitted unless the defendant in said criminal action was served with notice of the action under this section, or appeared in it, or is later served with notice of the judgment of the court hereunder, and the criminal prosecution is based upon conduct by said defendant occurring more than 18 hours after such service or such appearance, whichever is earlier.

History: 1957 c. 434.

269.57 Inspection of documents and property; physical examination of claimant. (1) The court, or a judge thereof, may, upon due notice and cause shown, order either party to give to the other, within a specified time, an inspection of property or inspection and copy or permission to take a copy of any books and documents in his possession or under his control containing evidence relating to the action or special proceeding and may require the deposit of the books or documents with the clerk and may require their production at the trial. If compliance with the order be refused, the court may exclude the paper from being given in evidence or punish the party refusing, or both.

(2) The court or a presiding judge thereof may, upon due notice and cause shown, in any action brought to recover for personal injuries, order the person claiming damages for such injuries to submit to a physical examination by such physician or physicians as such court or a presiding judge may order and upon such terms as may be just; and may also order such party to give to the other party or any physician named in the order, within a specified time, an inspection of such X-ray photographs as have been taken in the course of the treatment of such party for the injuries for which damages are claimed, and inspection of hospital records and other written evidence concerning the injuries claimed and the treatment thereof; and if compliance with the portion of said order directing inspection be refused, the court may exclude any of said photographs, papers and writings so refused inspection from being produced upon the trial or from being used in evidence by reference or otherwise on behalf of the party so refusing.

History: 1957 c. 97.

This section 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.

The provisions of (1), that the court may order either party to give to the other an inspection and copy or permission to take a copy of any books and documents in his possession or under his control containing evidence relating to the action "or" may require the deposit of the books or documents with the clerk and may require their production at the trial, are not mutually exclusive and the court may, in its sound discretion, grant both in the same order. Culligan, Inc. v. Rheaume, 268 W 298, 67 NW (2d) 279.

In an action of unfair competition charging defendant with inducing breaches of contract and illegal use of trade secrets and trade-marks 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 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 (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.

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 (1). Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

The orders contemplated by (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 term "evidence," as used in (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, nor on the court's opinion, presently, of their probable admissibility. Thompson v. Roberts, 269 W 472, 69 NW (2d) 482.

An order denying to the defendant, in an action for violating a city ordinance, an inspection, under 269.57 (1) of a "drunk-o-meter" device used by the city to test him for intoxication was appealable under 274.33 (3) as an order denying a provisional remedy. Where the trial court did not exercise its discretion but erroneously ruled as a matter of law that the defendant was not entitled to such inspection, the order denying inspection is reversed and the cause remanded for further proceedings. Appleton v. Sauer, 271 W 614, 74 NW (2d) 167.

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

Requiring the defendant's attorney to produce a written report of accident made by the defendant to his automobile liability insurer and delivered by it to such attorney, and permitting such report to be used for cross-examination and read into the record and received as an exhibit, all over objection, was error because such report was privileged under the circumstances. Wojciechowski v. Baron, 274 W 364, 80 NW (2d) 434.

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

269.59 Consolidation of actions. The circuit court may, upon notice, order certified to said court any civil action pending in any other court in the same county for the purpose of consolidation or consolidation for trial with any action pending in said circuit court, in any case where such consolidation or consolidation for trial would be proper if the actions were originally brought in said court. Sections 261.10 and 261.11 so far as applicable shall govern such change in the place of trial. The change shall be deemed complete and the action transmitted shall proceed as other actions in the circuit court, upon the filing of the papers in said court.

269.60 Borrowing court files regulated. The clerk shall not permit any paper filed in his office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than ten days. If any paper is not returned to the clerk within ten days the person retaining the paper shall not be permitted to take any other paper from the office of the clerk until such paper shall have been returned. All papers in causes on the calendar shall be returned to the clerk at least one day before the opening of the term, and no paper in any cause shall be taken from the

courthouse during the trial of such cause except upon written order of the presiding judge.

269.65 Pre-trial procedure. (1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) The advisability of a preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;

(f) Such other matters as may aid in the disposition of the action.

(2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

269.70 Conciliators. (1) A circuit judge of the circuit court of any county may appoint, and remove at any time, any retired circuit judge to act, in matters referred to him by the judge, in conciliation matters and in pre-trial procedure under s. 269.65. When a matter for conciliation is referred to him for such purpose, the conciliator shall have full authority to hear, determine and report findings to the court. Such conciliators may be appointed court commissioners as provided in s. 252.14 (2).

(2) The circuit judges of such county shall make rules, not inconsistent with law, governing procedure before and pertaining to such conciliators and the county board shall fix and provide for their compensation.

History: 1953 c. 610; 1955 c. 420.

269.80 Settlements in behalf of minors; judgments. (1) COMPROMISE OR SETTLEMENT. A compromise or settlement of an action or proceeding to which a minor or mentally incompetent person is a party may be made by his guardian ad litem with the approval of the court in which such action or proceeding is pending.

(2) COMPROMISE OR SETTLEMENT WITHOUT ACTION. A cause of action in favor of or against a minor or mentally incompetent person may, with the approval of any court of record, be settled by a guardian ad litem without the commencement of an action thereon; and for such purpose, the court may appoint a guardian ad litem upon application made as provided in s. 260.23 (2). An order approving a settlement or compromise under this subsection and directing the consummation thereof shall have the same force and effect as a judgment of the court.

(3) AMOUNTS NOT EXCEEDING $1,500. If the amount awarded to a minor by judgment or by an order of the court approving a compromise settlement of a claim or cause of action of said minor does not exceed $1,500 (exclusive of interest and costs and disbursements), and if there is no general guardian of the ward, the court may upon application by the guardian ad litem after judgment, or in the order approving settlement, fix and allow the expenses of the action, including attorney's fees and fees of guardian ad litem, authorize the payment of the total recovery to the clerk of the court, authorize and direct the guardian ad litem upon said payment to satisfy and discharge the judgment, or to execute releases to the parties entitled thereto and enter into a stipulation dismissing the action upon its merits. Said order shall also direct the clerk upon such payment to him to pay the costs and disbursements and expenses of the action and to dispose of the balance in one of the manners provided in s. 319.04 (2) as selected by the court.

History: 1955 c. 210; Sup. Ct. Order, 271 W x; 1957 c. 48, 699.