for sequestering funds due public contractors is made 289.535.

Notice should be taken of the fact that 267.22 and old 304.21 deal with priorities between assignees and garnishees. The crucial time under 267.22 (6) is the date of serving the garnishee summons. But under old 304.21 (3) the time turns on the date of the commencement of the main action. That goes too far back. This remedy, as originally enacted, required that the certified copy be filed within 30 days after entry of judgment. At present there is no such limitation of time for filing. The main action may have been begun in justice court and have been appealed from court to court so that final judgment may be years after the action was begun. In McDonald v. State the action against McDonald in which the state paid $530 was still pending on appeal and it was asserted by McDonald that the recipient of that money was financially irresponsible, so that McDonald, should he prevail in the end, would be unable to recover the $530. McDonald v. State, 203 W 649.

Old 304.21 provides that if the judgment debtor files an affidavit that an appeal has been or will be taken from the judgment, payment shall not be made until final determination of the appeal. In order to speed up the procedure, that provision is omitted from new 267.22 and 289.535.

(1) (b) preserves the second proviso of old 304.21 (2) which reads: "provided further that any repayment to any such officer or employe of disbursements made and expended by such officer or employe in discharge of the duties of his office, shall not be subject to any judgment or lien mentioned and described herein."

(2) It seems obvious that provision should be made in this proceeding for service on the judgment debtor. Due process requires that he have notice. McDonald v. State, 203 W 649, 656; State ex rel. Anderton v. Sommers, 242 W 484. Furthermore it seems just that the public official (usually on a salary himself) should make answer without being paid a fee therefor. He does it on the public's time; and under old 304.21 no fee or deposit is required. In other words he gets no witness fees or other fees in connection with this garnishment or attachment.

(4) is so worded as to make it clear that the * * * sum owing cannot be contested in the garnishment action. (Bill 403-S)

Editor's Note: For annotations to 304.21, Stats. 1943, on quasi-garnishment see Wis. Annotations, 1930, p. 1401, and said statutes, p. 2916.

A wife who holds a judgment for alimony is not a "creditor" in the usual sense of the word. Courtney v. Courtney, 251 W 443, 29 NW (2d) 759.

267.235 History: 1969 c. 127; Stats. 1969 s. 267.235.

267.24 History: 1965 c. 507; Stats. 1965 s. 267.24.

CHAPTER 268.

Injunctions, Ne Exeat and Receivers.

268.01 History: 1856 c. 120 s. 126; R. S. 1858 c. 129 s. 1; R. S. 1878 s. 2773; Stats. 1898 s. 2773; 1925 c. 4; Stats. 1925 s. 268.01; 1935 c. 541 s. 116.

The code has not enlarged the power of equity to restrain or control the proceedings of subordinate tribunals or the official acts of officers, when such acts or proceedings affect real estate, lead to irreparable injury to the freehold, to the creation of a cloud upon the title or to a multiplicity of suits, except in reference to temporary injunctions during the pendency of litigation, which may be granted whether the action was formerly legal or equitable in its character. Montague v. Horton, 12 W 599.

When the complaint lays a foundation for an injunction the court will grant the writ either as a final judgment or as a provisional remedy in all cases where it would be allowed under chancery practice. Trustees of German E. Congregation v. Hoessli, 13 W 348.

An information by the attorney general is equivalent to a bill in chancery or a complaint for the purpose of obtaining an injunction. Attorney General v. Railroad Cos. 35 W 425.

Acts in excess and abuse of corporate franchises and privileges, resulting in private injuries, may be restrained at the suit of private parties. Madison v. Madison G. & E. Co. 129 W 249, 108 NW 65.

A high degree of proof is required before a court will interfere with the enforcement of a judgment on the ground that it was obtained by fraud. Federal Life Ins. Co. v. Thayer, 222 W 658, 269 NW 547.

In an action to enjoin defendants from denying plaintiffs the right to use a silo filler, the complaint, alleging that the plaintiffs and the defendants had purchased a silo filler for their joint use, but that the defendants would not permit the plaintiffs to use it, is not demurrable on the ground that, the parties being tenants in common, the plaintiffs could not secure control of the silo filler by an action against their cotenants in possession, since the parties, although tenants in common, were at liberty to contract as they saw fit as to the use and possession of the silo filler, and the plaintiffs were seeking merely to enforce their right to the use of the silo filler in accordance with the agreement. (Newton v. Gardner, 24 W 232, applied.) Kuenzi v. Liesten, 223 W 481, 271 NW 18.

The power of an equity court to enjoin enforcement of a judgment is not dependent upon its jurisdiction to review the proceedings on which the judgment is based. To authorize an injunction against enforcement of a judgment obtained by perjury, such perjury must be established by the same degree of proof as generally required in proof of criminal acts in civil cases, and the plaintiff must prove that he was not negligent in making timely discovery of such perjury and that he has exhausted legal remedies. Amberg v. Deaton, 223 W 653, 271 NW 396.

Courts may enjoin judgments in cases of extrinsic as well as intrinsic fraud. Equitable relief is not confined to judgments which were procured by fraud practiced on the court. Nehring v. Niemerowicz, 226 W 285, 276 NW 325.

The court could make an injunction permanent where it was satisfied that because of the competition between the parties the

situation had not so changed as to preclude the necessity for a permanent injunction to protect the plaintiff's rights under its consumer contracts. Skelly Oil Co. v. Peterson, 257 W 300, 43 NW (2d) 449.

268.02 History: R. S. 1849 c. 109 s. 7, 8; R. S. 1849 c. 114 s. 2; 1856 c. 120 s. 127; R. S. 1858 c. 129 s. 2; R. S. 1858 c. 143 s. 7, 8; R. S. 1858 c. 148 s. 13, 14; R. S. 1878 s. 2774, 3179, 3236; Stats. 1898 s. 2774, 3179, 3236; 1925 c. 4; Stats. 1925 s. 268.02, 279.10, 286.31; 1935 c. 483 s. 29; 1935 c. 541 s. 117, 117a; Stats. 1935 s. 268.02; 1945 c. 491.

On jurisdiction of the supreme court see notes to sec. 3, art. VII; on jurisdiction of circuit courts see notes to sec. 8, art. VII, and notes to 252.03; and on vacating and modifying orders see notes to 269.28.

1. General.
2. Restraining injurious acts during pendency of actions.
3. Restraining unauthorized transactions.

1. General.

Granting or refusing an injunction rests in the sound discretion of the court; it will not be granted where it would be against good conscience. Sheldon v. Rockwell, 9 W 166; Warden v. Fond du Lac County, 14 W 618; Pettibone v. La Crosse & M. R. Co. 14 W 443; Cobb v. Smith, 16 W 661.

When granted without notice the allegations must be direct and positive; if granted upon notice allegations on information and believe are taken as true unless denied. Dinehart v. La Fayette, 19 W 677.

Allegations on information and belief are insufficient; the facts should be stated positively. Gaertner v. Fond du Lac, 34 W 497.

The order cannot be made before the complaint; and sustaining a general demurrer to the complaint ipso facto dissolves the injunction. Vliet v. Sherwood, 37 W 165.

For the distinction between an injunction and a stay of proceedings, see Rossiter v. Aetna L. Ins. Co. 96 W 466, 71 NW 898.

Where an action in quo warranto to test title to office was pending, there was no abuse of discretion in refusing to grant an order restraining the relators from taking office until their title should be established. Ward v. Sweeney, 106 W 44, 82 NW 169.

It is a universal rule that where all the equities of the complaint, upon which a temporary injunction has been granted, are specifically and positively denied by a verified answer, the injunction will be dissolved, but such rule does not apply where a continuance of the injunction is reasonably necessary for the protection of the rights of either party. Milwaukee E. R. & L. Co. v. Bradley, 108 W 467, 84 NW 870.

Where it was claimed that defendant had converted moneys of the corporation to his own use and an accounting was demanded, it was erroneous to require defendant to pay over to the corporation moneys which he was holding. The proper function of the injunctional order is simply to maintain a status quo. Consolidated V. Works v. Brew, 112 W 610, 88 NW 603.

Where the reason for a perpetual injunction ceased to exist at the time of the trial, although a good reason existed for a temporary injunction, the court may dismiss the complaint, but allow the plaintiffs costs. Clancy v. Geb, 126 W 286, 104 NW 746.

The fact that the petition was addressed to the judge instead of the court and prayed for a judgment instead of for an order was no ground for dismissal. Jackson M. Co. v. Scott, 130 W 267, 110 NW 184.

If there is any ground upon which the temporary injunction might be issued though no such ground is stated in the complaint, an order is not void. If the order is good on its face in that it relates to a subject within the jurisdiction of the court and otherwise appears regular it must be obeyed. Cline v. Whittaker, 144 W 439, 129 NW 400.

If the papers show, upon an application for an order preserving the status quo pending the trial, a reasonable probability of plaintiff's ultimate success, the court should grant such relief, even though there is a conflict between the pleadings and the supporting affidavits of the parties. Dunn v. Acme A. & G. Co. 168 W 128, 169 NW 297.

The granting or refusing of an injunction, pendente lite, is within the sound discretion of the court. Generally, the status quo will not be changed where there is an unqualified denial of plaintiff's right, but this rule is subject to many exceptions. The action will not be tried on its merits upon the affidavits used on such application. Fassbender v. Peters, 179 W 587, 191 NW 973.

On an appeal from an order refusing a temporary restraining order, the merits of the case are not before the court. The only question is whether the trial court abused its discretion. State ex rel. Attorney General v. Manske, 231 W 16, 285 NW 378.

A temporary injunction should not be vacated by an ex parte order, but an order reinstating the injunction must nevertheless be reversed on appeal, where the complaint does not state a cause of action, and where, therefore, the injunction should not have been issued in the first instance and should not have been reinstated. Smith v. Whitewater, 251 W 306, 29 NW (2d) 33.

Where the trial court had jurisdiction of the subject matter and of the parties in an action for an injunction restraining the defendants from picketing the plaintiff, and the defendants, who appeared and submitted their defense on affidavits, did not question the sufficiency of the complaint, and the court issued a temporary (injunction) on the basis of a correct determination of the issue involved, the failure of the complaint to comply with the requirements of 268.02 (4), as to stating the residence of each defendant, if known, was waived or cured. Brown v. Sucher, 258 W 123, 45 NW (2d) 73.

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

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

It is not an abuse of discretion to deny a temporary injunction where the defendant's answer denied the basic facts alleged by plaintiff and plaintiff offered no proof of them at the hearing, or where the answer raised a defense grounded on a point of law which would have to be decided by the trial court before granting any injunctive relief, or where a temporary injunction would have disturbed the status quo in the circumstances. Mogen David Wine Corp. v. Borenstein, 267 W 503, 66 NW (2d) 157.

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

The power of the court to restrain temporarily a breach of contract is not wiped out by the fact that the promisor trades across a state line, and a temporary injunction which requires the defendant to observe the terms of a contract does not violate the commerce clause of the federal constitution merely because of the incidental effect which such observance may have on the defendant's commerce with out-of-state customers. Culligan, Inc. v. Rheaume, 269 W 242, 68 NW (2d) 810.

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

Permanent injunctions are not irrevocable, but they are permanent so long as the conditions which produced the injunction remain permanent. A party to the action who is adversely affected by a permanent injunction may initiate inquiry into the dissolution or modification thereof by a petition to the trial court or by a motion with supporting affidavits showing to the court the changes in the conditions on which the moving party relies. Until the changes in facts and law alleged by the defendants have been proved to the satisfaction of the trial court and the effect of such changes is what the defendants claim for them, it is not error for the court to deny the defendants' motion to dissolve or modify a permanent injunction. Condura C. Co. v. Milwaukee B. & C. T. Council, 8 W (2d) 541, 99 NW (2d) 751.

"A restraining order like an injunction operates upon the person as it is granted in the exercise of equity jurisdiction *in personam;* an injunction has no *in rem* effect to invalidate the act done in contempt of the court's order except where by statutory authorization the decree is so framed as to act *in rem* on property." Town of Fond du Lac v. City of Fond du Lac, 22 W (2d) 525, 528, 126 NW (2d) 206, 208.

"In seeking an injunction it is not necessary to prove that the plaintiff has suffered irreparable damage, but only that he is likely to suffer such damage. The remedy at law may be inadequate because of the difficulty or impossibility of measuring the damages. * * * The purpose of an injunction is to prevent damage, not to compensate for it." Simenstad v. Hagen, 22 W (2d) 653, 664, 126 NW (2d) 529, 535.

2. *Restraining Injurious Acts During Pendency of Actions.*

Where the complaint filed by the trustees of an incorporated religious society alleged that they were in possession of, and held in trust for the society, all its property, and that defendants, falsely pretending to be its trustees, had often interfered with the society's property and threatened to take into their custody all its temporalities and transact its business this was a proper case for an injunction. Trustees of German E. Congregation v. Hoessli, 13 W 348.

Sec. 2, ch. 129, R. S. 1858, includes a garnishee who may be restrained from disposing of the property of a debtor who is insolvent. Malley v. Altman, 14 W 22; Almy v. Platt, 16 W 169.

Past injuries are not within the statute. Cobb v. Smith, 16 W 661.

The injunction contemplated by sec. 2774, R. S. 1878, is only by way of provisional remedy, and it can be granted only "where it shall appear by the complaint that the plaintiff is entitled to the relief demanded." A temporary injunction may issue upon proper allegations to prevent the alleged debtor from making a fraudulent removal or disposal of his property. (Damon v. Damon, 28 W 510, Gibson v. Gibson, 46 W 449, 1 NW 147, and Way v. Way, 67 W 662, 31 NW 15, distinguished.) North Hudson B. & L. Asso. v. Childs, 86 W 292, 56 NW 870.

Where an ancillary receiver had been appointed, an order of the court restraining all creditors of the defendant and all other persons who had not then brought suits against it from bringing any action against it was not void as without jurisdiction but was erroneous and should not have been issued. State ex rel. Fowler v. Circuit Court, 98 W 143, 73 NW 788.

The court may enjoin any threatened act during the litigation when the act would produce injury to the plaintiff's rights, but will go no further than necessary for that purpose. Linden L. Co. v. Milwaukee E. R. & L. Co. 107 W 493, 83 NW 851.

If a claim shows the probability of a recovery which will be ineffective to redress the plaintiff's right unless the defendant is restrained so as to prevent action prejudicial to the alleged rights of the plaintiff, and if without such restraint irreparable damage will accrue to the plaintiff regardless of the final result of the suit, and from such restraint no

injury will accrue to the defendant which cannot adequately be guarded against by a bond, the injunction should be granted. Bartlett v. Bartlett & Son Co. 116 W 450, 93 NW 473.

A temporary injunction restraining corporate officers from selling shares to a third person will not be granted on the application of a stockholder claiming to be entitled to additional shares, where there is ample unissued stock out of which both claims can be satisfied. Quin v. Havenor, 118 W 53, 94 NW 642.

Where the complaint alleged ownership of land upon which the plaintiff constructed a summer home, and that the defendant had repeatedly trespassed and entered upon the land destroying fences and timber thereon, injuring the premises for the purpose for which the plaintiff held the same, and that such trespasses were continued in spite of the protest of the plaintiff, it was error to vacate an injunction pendente lite before the answer was served and without any affidavits being presented. De Pauw v. Oxley, 122 W 656, 100 NW 1028.

The maker of a nonnegotiable note, valid on its face but voidable in fact, cannot have an injunction against the holder. Johnson v. Swanke, 128 W 68, 107 NW 481.

A mandatory order may be made requiring surrender of offices and books and papers in a corporation where it appears that the plaintiff's rights cannot be vindicated without such an injunction. St. Hyacinth Congregation v. Borucki, 141 W 205, 124 NW 284.

A temporary injunction to prevent a judgment on cognovit should not be entered where there has been merely a threat to enter such a judgment and it does not appear that the holder of the note is not responsible. Eller v. Miller, 141 W 225, 124 NW 258.

In an action for damages for fraud based upon notes given by the plaintiff to the defendant, a temporary injunction should not be issued restraining the defendant from transferring the notes or bringing any actions on them where there is no averment that the defendant could not respond in damages. Shepard v. Pabst, 149 W 35, 135 NW 158.

An action to recover money and the possession of a note procured by fraud was an action on implied contract. In such an action injunction to prevent the transfer of the note is a proper remedy. Scheuer v. R. J. Schwab & Sons Co. 170 W 630, 176 NW 75.

Equity will enjoin a threatened nuisance only where a nuisance will inevitably result from the act complained of. (Cunningham v. Miller, 178 W 22, distinguished.) Wergin v. Voss, 179 W 603, 192 NW 51.

A mandatory injunction will not lie to compel an electric utility to reconnect its service to a customer who had wilfully tampered with a meter and refused to pay the cost of reconnection and of installation of a protective device to prevent further tampering. Bartman v. Wisconsin Michigan P. Co. 214 W 608, 254 NW 376.

A lease for 5 years by which the owners of land, undertaking the construction of a filling station in which they subsequently invested upwards of $7,000, leased the premises to an oil company for $1 annually, agreeing personally to operate the station and sell the lessee's products exclusively, and authorizing termination by the lessee on 10 days' notice, and giving the lessee in case of breach, as to the existence of which the lessee was to be the sole judge, the option to take over the premises at a rental of $20 monthly, is determined to be so harsh and one-sided as to preclude the lessee from obtaining injunctive relief equivalent to specific performance. Cities Service Oil Co. v. Kuckuck, 221 W 633, 267 NW 322.

Under the labor code, peaceful picketing and similar acts to induce an employer to conform to union rules governing wages, hours, and other working conditions are justifiable, precluding obtaining an injunction, where the primary purpose of the acts is to protect and improve the conditions of workmen represented by the union. Senn v. Tile Layers Protection Union, 222 W 383, 268 NW 270 and 872, affirmed, Senn v. Tile Layers Protective Union, 301 US 468.

A complaint alleging that an employe had obtained a workmen's compensation award against employers for the loss of the sight of an eye, but that the award had been obtained by fraud in that such employe had lost the sight of the eye years previously and had recovered compensation therefor from another employer; that the employers concerned had used due diligence to discover the facts about such loss of the eye but were unsuccessful until after the award had become effective; and that they had then unsuccessfully appealed to the courts, states a cause of action for an injunction against the enforcement of a judgment based on such award. Amberg v. Deaton, 223 W 653, 271 NW 396.

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

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

It was not an abuse of discretion for the trial court, invoking the principle of equitable estoppel, to deny a requested mandatory injunction to compel the removal of that portion of the defendant's garage which en-

croached on the plaintiff's premises. Knuth v. Vogels, 265 W 341, 61 NW (2d) 301.

Under 268.02 (1) the granting of a temporary injunction is not mandatory but is only discretionary on the part of the trial court. Mogen David Wine Corp. v. Borenstein, 267 W 503, 66 NW (2d) 157.

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

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

A temporary restraining order should limit the period of restraint until the hearing and determination of the order to show cause for temporary injunction, and a temporary injunction should limit its operation until the trial and determination of the action. Laundry, etc., Local 3008 v. Laundry W. I. Union, 4 W (2d) 542, 91 NW (2d) 320.

The fact that a legal remedy exists whereby landowners might have raised their objections to the taking of their land does not necessarily exclude a court of equity of jurisdiction to grant a remedy such as injunction, since the existence of the remedy at law does not deprive equity of jurisdiction unless such remedy is adequate. The legal remedy is never adequate if the injured party will sustain irreparable damage by being forced to resort thereto even though he may ultimately prevail; and acts which destroy, or result in a serious physical change in, the property taken, constitute irreparable injury. Ferguson v. Kenosha, 5 W (2d) 556, 93 NW (2d) 460.

On an appeal in an action by a broadcaster of programs against others for an injunction restraining the defendants from using a certain combination of words in which the plaintiff claimed to have acquired a proprietary interest protectible under the law relating to unfair competition, wherein, among other things, an order requiring the issuance of a temporary injunction pending trial would practically require an examination of the merits and a determination of the issues raised by the pleadings, an order of the trial court denying a temporary injunction will be affirmed. Bartell Broadcasters v. Milwaukee Broadcasting Co. 13 W (2d) 165, 108 NW (2d) 129.

In an action to quiet title and to enjoin a county from widening a county trunk highway on land which the plaintiffs claimed to own and as to which the county claimed an easement, and the plaintiffs claimed that county, unless restrained, would destroy trees, shrubbery, and a well, the trial court did not abuse its discretion under 268.02 (1) in refusing to grant a temporary injunction to the plaintiffs, in that, even if the plaintiffs prevailed on the merits, the county could nevertheless proceed to condemn the land in question, and the plaintiffs could have substantial redress by way of damages. Lehmann v. Waukesha County Highway Comm. 15 W (2d) 94, 112 NW (2d) 127.

3. Restraining Unauthorized Transactions.

Courts of equity have jurisdiction, upon information of the attorney general, to restrain corporations from excess or abuse of corporate franchise or violation of public law to public detriment. Attorney General v. Railroad Companies, 35 W 425.

The attorney general cannot sue in a matter affecting private rights and interests only, as in the case of a private educational institution. Attorney General ex rel. Saunders v. Albion Academy, 52 W 469, 9 NW 391.

An action to restrain a city from exercising powers claimed to be in excess of its authority should be in the name of the state and prosecuted by the attorney general. Bell v. Platteville, 71 W 139, 36 NW 831.

A court cannot enjoin the passage of an ordinance by a city where the council has power to act in that matter. State ex rel. Rose v. Superior Court, 105 W 651, 81 NW 1046.

Sec. 3236, Stats. 1917, does not authorize the attorney general to bring an action in the circuit court to restrain a city canvassing board from proceeding with a recount of ballots cast at a city election. State ex rel. Haven v. Sayle, 168 W 159, 169 NW 310.

268.025 History: 1949 c. 301; Stats. 1949 s. 268.025.

Comment of Advisory Committee, 1949: The chief purpose of 268.025 is to prevent governmental operations being stopped by court commissioners. This section is the result of a study suggested by the attorney general's department. In a letter dated Nov. 8, 1941 the attorney general points out the need of a "rule to curb the indefensible practice of issuing ex parte restraining orders enjoining the operation or execution of statutes and administrative orders." He calls attention to the severe criticism of that practice voiced by the supreme court in Milwaukee Horse & Cow Comm. Co. v. Hill, 207 W 420, 424. He asserts that many actions ostensibly to test the constitutionality of a statute are, in fact, brought in bad faith and for the sole purpose of permitting the plaintiffs to operate illegally for their personal advantage. He cites, as a fact, that the regularity with which new orders of the conservation commission regulating commercial fishing were promptly suspended by ex parte injunctional orders finally resulted in the enactment of 29.174 (8) (d) which provides that "No injunction shall issue suspending or staying any order of the commission, except upon application to the circuit court or the presiding judge thereof, notice to the commission, and hearing." There is a similar statute respecting orders of the public service commission—sec. 196.43. He cites several specific instances of glaring misuse of ex parte restraining orders which tied the hands of state departments for months. In furtherance of the legislative policy expressed in the statutes above cited, and in the protection of the public interest, the advisory committee drafted and recommends for promulgation sec. 268.025 so as to extend those wholesome restrictions upon interference

with the activities of state administrative officers, boards and commissions. [Bill 30-S]

An ex parte temporary injunction restraining the state board of examiners in optometry from enforcing the regulatory statute against the plaintiff optical firm, pending determination of the issue of constitutionality of the statute, was improvidently granted by a court commissioner. Ritholz v. Johnson, 244 W 494, 12 NW (2d) 738.

See note to 343.40, citing Carlyle v. Karns, 9 W (2d) 394, 101 NW (2d) 92.

268.026 History: 1949 c. 301; Stats. 1949 s. 268.026; 1969 c. 339.

Comment of Advisory Committee, 1949: The rule provides for an independent action against debtors to sequester their interests in estates of decedents. The rule does not contemplate interrupting or interfering in any way with the probate of estates. At first the rule was placed in chapter 318 which deals with the distribution of estates. That location now seems to be illogical. Therefore, the rule is placed in chapter 268 which deals with "Injunctions, Ne Exeat and Receivers." Furthermore, the language has been changed so as to expressly limit the remedy to actions based on contract or judgment and to actions in courts of record.

We feel that the rule as now proposed answers the former objections of the county judges and makes it plain that resort to this remedy will not delay the closing of probate proceedings. If the creditor's action is not in judgment when the probate is to be closed, the receiver answers and receipts for the heir or legatee.

Section 318.08 provides a procedure for reaching the interests of nonresidents in estates in probate. That remedy has worked well. It stands to reason that a similar remedy against resident debtors should exist. In fact the committee believes it does exist in favor of judgment creditors. Williams v. Smith, 117 W 142, 148; Mangan v. Shea, 158 W 619, 625.

This recommendation was disapproved by the board of county judges on December 10, 1942. Following such disapproval the subject was again considered by the advisory committee and it was again decided to recommend the rule. The board of county judges unanimously approve the present draft of 268.026. [Bill 30-S]

268.03 History: R. S. 1878 s. 2775; Stats. 1898 s. 2775; 1925 c. 4; Stats. 1925 s. 268.03.

Where the title to land is in issue in replevin the defendant may defeat plaintiff's title by showing that tax redemption receipts upon which his claim was based were forged and that a tax deed issued to him was void; hence an injunction will not issue to restrain the prosecution of the replevin suit. Wolf River L. Co. v. Brown, 88 W 638, 60 NW 996.

268.04 History: 1856 c. 120 s. 128; R. S. 1858 c. 129 s. 3; 1864 c. 393 s. 3; R. S. 1878 s. 2776; Stats. 1898 s. 2776; 1925 c. 4; Stats. 1925 s. 268.04; 1935 c. 541 s. 118.

The delivery of a copy of the order, not certified by the clerk, though informal, is valid. Ramstock v. Roth, 18 W 522.

Though the service of the order be defective, yet if the person enjoined have knowledge of it he will be guilty of contempt of court for disobeying it. Mead v. Norris, 21 W 310.

However improvidently or erroneously issued an injunction must be obeyed by the person enjoined. His sole remedy is by motion to vacate it. State ex rel. Fowler v. Circuit Court, 98 W 143, 73 NW 788.

268.05 History: 1856 c. 120 s. 129; R. S. 1858 c. 129 s. 4; R. S. 1878 s. 2777; Stats. 1898 s. 2777; 1913 c. 209; Stats. 1913 s. 2777, 3219m; 1925 c. 4; Stats. 1925 s. 268.05, 268.14; 1935 c. 483 s. 20; Stats. 1935 s. 268.05.

268.05 History: 1856 c. 120 s. 129; R. S. 1858 c. 129 s. 5; 1859 c. 174 s. 2; R. S. 1878 s. 2778; Stats. 1898 s. 2778; 1903 c. 271 s. 1; Supl. 1906 s. 2778; 1925 c. 4; Stats. 1925 s. 268.06; 1935 c. 541 s. 119; 1949 c. 226.

Omission of the seal of one of the obligors is immaterial. He is presumed to have adopted the seal of some one of his co-obligors. Yale v. Flanders, 4 W 96.

An undertaking by sureties need not be signed by the principal. L. A. Shakman & Co. v. Koch, 93 W 595, 67 NW 925.

The failure to require or give an undertaking is an irregularity merely and does not make a refusal to vacate the order erroneous unless the motion be based on that ground. Oppermann v. Waterman, 94 W 583, 69 NW 569.

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

The bonding requirement does not apply to temporary restraining orders nor to permanent injunctions embodied in a final judgment. The failure to require a bond as a condition to entering a temporary injunction is not a jurisdictional error and the requirement can be waived by the party or his attorney. Laundry, etc., Local 3008 v. Laundry W. I. Union, 4 W (2d) 542, 91 NW (2d) 320.

268.07 History: 1903 c. 271 s. 2; Supl. 1906 s. 2778a; 1925 c. 4; Stats. 1925 s. 268.07; 1935 c. 541 s. 120.

After a preliminary injunction has been dissolved and the action dismissed the damages sustained by reason of the injunction may be assessed, and the court may appoint a referee for that purpose. Kane v. Casgrain, 69 W 430, 34 NW 241.

An order of reference is premature if made before the court decides that the plaintiff was not entitled to an injunction. But on such decision being subsequently made the order will not be reversed. Avery v. Ryan, 74 W 591, 43 NW 317; Supreme Court of Foresters v. Supreme Court of Foresters, 94 W 234, 68 NW 1011.

While it is not necessary that damages be assessed with the assistance of a referee, yet the statute contemplates that the assessment shall be in a proceeding after decision upon the merits, and that recovery shall be had independently of a judgment in the action. The inclusion of the amount of such damages in the judgment was without prejudice and fur-

nished no ground for reversal. Lewis v. Eagle, 135 W 141, 115 NW 361.

The fact that damages were fixed by the findings and not by a separate order entered subsequent to judgment does not prejudice the losing party. Schulteis v. Trade Press P. Co. 191 W 164, 210 NW 419.

Damages sustained by reason of an improvidently issued injunction include the reasonable value of attorney's fees for services in procuring its dissolution, and also for services upon a reference to ascertain damages; hence defendants were entitled to recover attorneys' fees incurred in an unsuccessful effort to dissolve the temporary injunction which, as it was finally determined, the court erred in not dissolving. Muscoda B. Co. v. Worden-Allen Co. 207 W 22, 239 NW 649, 240 NW 802.

Where plaintiff's sureties appeared and stipulated regarding the amount expended by the defendant, and were served with notice of a proceeding to assess damages on dissolving a restraining order, they made themselves parties, and award against them was properly incorporated in the judgment. Schlitz R. Corp. v. Milwaukee, 211 W 62, 247 NW 549.

A defendant's violation of a temporary injunction would not forfeit his right, under a bond given by the plaintiff pursuant to 268.06, to recover damages sustained because of the injunction; the proceeding on the bond is in the nature of an action on contract, not a proceeding in equity. Prest v. Stein, 220 W 354, 265 NW 85.

The inclusion, in the amount awarded to the defendant lessor for damages arising from the temporary injunction issued against him, of $300 as the reasonable value of attorney fees was proper, being computed solely on the basis of services rendered in securing the dissolution of the temporary injunction and the assessment of damages. Nauman v. Central Shorewood Bldg. Corp. 243 W 362, 10 NW (2d) 151.

268.08 History: 1856 c. 120 s. 131; R. S. 1858 c. 129 s. 6; R. S. 1878 s. 2779; Stats. 1898 s. 2779; 1925 c. 4; Stats. 1925 s. 268.08; 1935 c. 541 s. 121.

Where a complaint in an action to enjoin a telephone company from discontinuing telephone service stated a cause of action for the relief demanded, and an order was issued requiring the defendant to show cause why an injunction pendente lite should not be issued, and restraining the defendant from discontinuing its service until the return date, an order continuing the temporary restraining order in force until an adjourned date on condition that the plaintiff appear in court on such date with the records of his business to submit to examination by the defendant, without any answer, affidavit, or evidence as to any reason for such condition, together with an order dissolving the temporary restraining order, on the defendant's motion made on the adjourned date without previous notice or any supporting showing, when the plaintiff failed to appear in person on such date, constituted an abuse of discretion. Simon v. Wisconsin Tel. Co. 248 W 356, 21 NW (2d) 734.

A temporary restraining order should limit the period of restraint until the hearing and determination of the order to show cause for temporary injunction, and a temporary injunction should limit its operation until the trial and determination of the action. Laundry, etc., Local 3008 v. Laundry W. I. Union, 4 W (2d) 542, 91 NW (2d) 320.

268.09 History: 1856 c. 120 s. 132; R. S. 1858 c. 129 s. 7; R. S. 1878 s. 2780; Stats. 1898 s. 2780; 1925 c. 4; Stats. 1925 s. 268.09.

An injunction to restrain a stockholder from voting upon corporate stock at an election of directors for the corporation is not forbidden. Reed v. Jones, 6 W 679.

An injunction to restrain a town, which is without funds or legal authority to incur an indebtedness for the purpose, from laying and constructing an expensive highway is not within the limiting clause of sec. 2780, R. S. 1878, and may, therefore, be granted by a commissioner. Bay L. & I. Co. v. Washburn, 79 W 423, 48 NW 492.

An order requiring a corporation for the relief of its members and beneficiaries and doing a mutual insurance business to refrain from doing any business except with certain of its members, having been granted without notice, is void. Supreme Court of I. O. of Foresters v. Supreme Court of U. O. of Foresters, 94 W 234, 68 NW 1011.

An order enjoining a lumbering corporation from continuous trespass in hauling logs over land owned by plaintiff does not disturb the general ordinary business of such corporation. Marshfield L. & L. Co. v. John Week L. Co. 108 W 268, 84 NW 434.

268.11 History: R. S. 1878 s. 2782; Stats. 1898 s. 2782; 1925 c. 4; Stats. 1925 s. 268.11; 1935 c. 541 s. 123.

268.13 History: R. S. 1849 c. 84 s. 92, 93; R. S. 1858 c. 129 s. 10, 11; R. S. 1878 s. 2784; Stats. 1898 s. 2784; 1925 c. 4; Stats. 1925 s. 268.13; 1935 c. 541 s. 125.

The writ of ne exeat is in the nature of equitable bail, issued only by special order of the court when a party is about to leave its jurisdiction and make its decree ineffectual. It is in no sense imprisonment for debt, though issued in actions arising out of contract relations. It may be issued in a suit to compel a partnership account, it appearing that defendant had converted all his property into money or notes and threatened to leave the state. Dean v. Smith, 23 W 483.

Secs. 2784-2786, Stats. 1898, recognize the common-law writ of ne exeat and regulate the practice but do not change its former character. At common law it was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property or under other circumstances which would render a decree ineffectual. It was issued only against a debtor who was a party to the suit not against a third person not a debtor whether or not he was a party to the suit. Davidor v. Rosenberg, 130 W 22, 109 NW 925.

See note to sec. 13, art. XIV, citing Nixon v. Nixon, 39 W (2d) 391, 158 NW (2d) 919.

268.13, 268.14 and 268.15, Stats. 1967, which recognize the common-law writ of ne exeat, and make certain provisions relating to its issuance, do not pretend to enlarge its scope. Nixon v. Nixon, 39 W (2d) 391, 158 NW (2d) 919.

268.14 History: R. S. 1849 c. 84 s. 93; R. S. 1858 c. 129 s. 11; R. S. 1878 s. 2785; Stats. 1898 s. 2785; 1925 c. 4; Stats. 1925 s. 268.14; 1935 c. 541 s. 126.

Under sec. 11, ch. 129, R. S. 1858, a judge may allow the writ of ne exeat, but it must be issued by the clerk. The writ can be issued only for equitable demands; it cannot be issued in an action on a promissory note. Bonesteel v. Bonesteel, 28 W 245.

A writ issued upon no affidavit is absolutely void; so is a writ issued upon an affidavit showing that no equitable cause of action exists, though if fair on its face it would protect the officer issuing it unless he had notice that it was void. Grace v. Mitchell, 31 W 533.

The writ of ne exeat cannot be granted on an application of a defendant against the plaintiff. Davidor v. Rosenberg, 130 W 22, 109 NW 925.

The circuit court may deny a writ of ne exeat, and the supreme court will not by mandamus compel the circuit court to vacate such an order. State ex rel. Cazier v. Turner, 145 W 484, 130 NW 510.

The grounds upon which a writ of ne exeat may issue must be found either in the common law or in the statutes. 247.01 authorizes circuit courts to issue the writ to prevent judgments for alimony from becoming ineffective. In re Grbic, 170 W 201, 174 NW 546.

268.15 History: R. S. 1849 c. 84 s. 44; R. S. 1858 c. 129 s. 12; R. S. 1878 s. 2786; Stats. 1898 s. 2786; 1925 c. 4; Stats. 1925 s. 268.15; 1935 c. 541 s. 127.

268.16 History: R. S. 1849 c. 114 s. 6; 1856 c. 120 s. 153; R. S. 1858 c. 129 s. 13; R. S. 1858 c. 148 s. 18; R. S. 1878 s. 2787, 3216; Stats. 1898 s. 2787, 3216; 1925 c. 4; Stats. 1925 s. 268.16, 286.10; 1935 c. 483 s. 16; 1935 c. 541 s. 128; Stats. 1935 s. 268.16; 1937 c. 431; 1959 c. 598; 1969 c. 276 s. 600 (4).

In an action against an executor and his grantee to enforce the right of a beneficiary in land conveyed by him it was not an abuse of discretion for the court, on the final hearing, after the deeds had been declared fraudulent, to appoint a receiver to sell the lands. Gunn v. Blair, 9 W 352.

Where a partner has mixed firm property with his own and kept no account, in an action by the administrator of his copartner for an account a receiver may be appointed. Jennings' Adm'r. v. Chandler, 10 W 21.

In an action of account against an insolvent corporation by a judgment creditor, a receiver may be appointed. Adler v. Milwaukee P. B. M. Co. 13 W 57.

Where the mortgage debt and some interest were due, the owner did not pay the taxes and was guilty of fraud, the security was inadequate, and the parties personally liable were unable to pay the deficiency, it was proper to appoint a receiver. Finch v. Houghton, 19 W 150.

No steps can be taken in a court other than the one appointing the receiver which will affect his title or possession. And this rule forbids the action of a state court after a federal court has so acted. Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co. 20 W 165.

A receiver appointed to let property and collect rent does not thereby acquire an interest in the premises and cannot maintain forcible detainer. He should apply to the court for leave to prosecute the action. King v. Cutts, 24 W 627.

When a receiver has been appointed to wind up a partnership neither partner can interfere with his duties or rights in the property. Noonan v. McNab, 30 W 277.

The receiver's title as such cannot be attacked in a collateral proceeding, as against a person for contempt in taking property out of his possession. In re Day, 34 W 638.

A receiver not expressly authorized to sue by the order of appointment may be so authorized by a subsequent order. Lathrop v. Knapp, 37 W 307.

A receiver of a partnership or corporation may maintain an action against a member thereof for a sum due from him to the whole body. Lathrop v. Knapp, 37 W 307.

Where the debtor was insolvent and wilfully neglected to pay taxes, the security inadequate, and neither principal nor interest had been paid, appointment of a receiver was proper. Schreiber v. Cary, 48 W 208, 9 NW 124.

Appointment of a receiver was proper in an action involving title to land, where both parties claimed possession, were interfering with each other in harvesting crops and threatening each other with assaults. Hlawacek v. Bohman, 51 W 92, 8 NW 102.

It is error to appoint a receiver when there is no waste or diminution of security, the debt has been half paid, the premises are salable in parcels, and it does not appear that the debtor is not responsible. Morris v. Branchaud, 52 W 187, 8 NW 883.

It is proper to appoint a receiver where the property of a corporation is being lost to the stockholders and creditors through the collusion and fraud of its officers and directors. Haywood v. Lincoln L. Co. 64 W 639, 26 NW 184.

A receiver in an action to wind up a partnership business cannot attack, on the ground of fraud, the validity of judgments, levies and executions rendered and made before his appointment and which are binding on the firm. A provision in an order appointing a receiver in an action to wind up a partnership business restraining the firm creditors from commencing any action against it is a nullity. Weber v. Weber, 90 W 467, 63 NW 751.

The fact that property is in the custody of the law is no justification for violating the principle that, save as costs are taxable by statute, property should not be taken from its owner directly, or indirectly in the form of allowance to a receiver or other trustee, to pay the expenses of his adversary in the litigation. Speiser v. Merchants' Ex. Bank, 110 W 506, 86 NW 243.

In partition of personal property the court has general equity jurisdiction to appoint a receiver. Laing v. Williams, 135 W 253, 115 NW 821.

If, while a first mortgage is being foreclosed, a second action is started to foreclose a junior mortgage, and without notice to the plaintiff in the first action a receiver is appointed, the receiver may be made a party to the first action, may be removed by the court, and may be succeeded by another person appointed in the first action. Schneider v. Miller, 155 W 239, 144 NW 286.

It was proper to appoint a receiver before judgment in an action by the lessor for cancellation of a lease upon a showing of substantial breaches of the lease by the lessee, such as selling live stock and grain, which should have been divided equally between the parties, without the knowledge or consent of the lessor, and the threatening of violence by the lessee thereby preventing the lessor from entering upon the premises. Baker v. Bohnert, 158 W 337, 148 NW 1093.

A court appointing a receiver for a corporation cannot impair the force of contract obligations and destroy vested rights by burdening the mortgaged property with the payment of unsecured indebtedness. Thomsen v. Cullen, 196 W 581, 219 NW 439.

Equity courts have inherent power to appoint receivers for insolvent corporations and this power was not suspended by the federal bankruptcy act. Such receivers take the bankrupt's title and have legal capacity to sue to collect unpaid stock subscriptions. Hazelwood v. Third & Wells R. Co. 205 W 85, 236 NW 591.

Though waste that lessens the security of the mortgage debt authorizes the appointment of a receiver in a foreclosure action, and such appointment is largely discretionary with the court, an order appointing a receiver without finding that waste reduced the value of the mortgaged premises in excess of the amount by which the mortgage debt had been reduced was unwarranted. While a receiver for a mortgaged homestead may be appointed upon sufficient cause, facts justifying such appointment for premises not a homestead do not always warrant such appointment for the homestead. Crosby v. Keilman, 206 W 252, 239 NW 431.

A motion for a receiver for mortgaged premises, made prior to judgment in a foreclosure action under a trust deed securing bonds, should have been granted where there were prior defaults in the payment of taxes, interest and insurance, where there was a likelihood of future defaults in the payment of interest and taxes to the extent that the amount of the defaulted payments by the time of the sale of the premises would exceed the payments on the principal debt, and where there was a likelihood that a tax deed of the premises might be issued in the meantime unless the trustee redeemed the premises, and he had no funds with which to redeem. Dick & Reutman Co. v. Hunholz, 213 W 499, 252 NW 180, 253 NW 184.

A purchaser's nonpayment of taxes as required by a land contract was "waste," as respects the vendor's right to appointment of a receiver. Scharf v. Hartung, 217 W 500, 259 NW 257.

The mortgagors' impairment of security and commission of waste by using rent moneys collected by them for other purposes than payment of taxes due on realty covered by a mortgage pledging rents and issues thereof justified appointment of a receiver to collect rents. First Wisconsin T. Co. v. Adams, 218 W 406, 261 NW 16.

In an action to foreclose a mortgage on residence property occupied as a homestead, where it appeared that the mortgagors had enjoyed the use of the premises for almost 6 years without paying any interest or taxes, that the cost of improvements made by the mortgagors did not nearly equal the default in payments of interest and taxes, that the security was lessened far below the mortgage debt, that there was no hope for redemption, and that a substantial amount could be realized in renting the property, the refusal to appoint a receiver was an abuse of discretion. Zerfas v. Johnson, 246 W 60, 16 NW (2d) 427.

Appointment of receiver in mortgage foreclosure action. Allen, 16 MLR 168.

268.17 History: 1885 c. 48 s. 1; Ann. Stats. 1889 s. 2787a; Stats. 1898 s. 2787a; 1925 c. 4; Stats. 1925 s. 268.17; 1933 c. 473 s. 1; 1935 c. 541 s. 129.

A stockholder in a corporation which has never been organized so that it might do business with others than its stockholders cannot be a preferred creditor under sec. 2787a, Ann. Stats. 1889, on account of money paid laborers for the corporation immediately preceding the appointment of a receiver. Fay & Egan Co. v. Brown, 96 W 434, 71 NW 895.

268.22 History: 1941 c. 81; Stats. 1941 s. 268.22.

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

The presumption of death after the absence of a person for 7 years without being heard from raises a question of fact for the jury or court whether the absent one is dead or alive. Estate of Langer, 243 W 561, 11 NW (2d) 185.

There is a presumption of death from the fact of an absence of 7 years unexplained, but there is no presumption as to when during the 7-year period death occurred and this must be established. The evidence in this case was insufficient to support the jury's finding that he died within 77 days after he disappeared. Kietzmann v. Northwestern Mut. Life Ins. Co. 245 W 165, 13 NW (2d) 536.

268.23 History: 1941 c. 81; Stats. 1941 s. 268.23; 1943 c. 425; 1945 c. 548; 1967 c. 26.

268.24 History: 1941 c. 81; Stats. 1941 s. 268.24; 1943 c. 425; 1947 c. 506; 1965 c. 252.

268.25 History: 1941 c. 81; Stats. 1941 s. 268.25.

268.26 History: 1941 c. 81; Stats. 1941 s. 268.26; 1943 c. 425; 1961 c. 495.

268.27 History: 1941 c. 81; Stats. 1941 s. 268.27.

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

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

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

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

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

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

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

CHAPTER 269.

Practice Regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

269.02 requires a defendant who seeks its