

solute lien, the privilege ought to be exercised without delay which might be oppressive. It disposed of chapter 273, Laws 1861.

Where defendant sets off the value of improvements and the claim is adjudicated the judgment is conclusive. *Davis v. Louk*, 30 W 308.

The claim must be made within the term at which the judgment in ejectment was rendered. *Thomas v. Rewey*, 36 W 328.

The claim should be made and tried before judgment and be included therein. *Scott v. Reese*, 38 W 636.

The claim may be enforced in an independent action. *Phoenix L. M. & S. Co. v. Sydnor*, 39 W 600.

It is error to enter judgment for plaintiff before trial of claim for improvements. *Hills v. Laporte*, 40 W 113.

Whether a claim is set up as a counterclaim or made after verdict and before judgment the defendant is entitled to have the issue thereon tried by a jury before judgment. The issue may be made after the filing of the findings if the case was tried before the court. *Fowler v. Schafer*, 69 W 23, 32 NW 292.

One against whom a judgment has been recovered in an independent action by the defendant in ejectment and who has no interest or title in the lands, and so alleges in his answer, cannot appeal from a judgment declaring a lien on the land for improvements and taxes. *Herndon v. Bock*, 97 W 548, 73 NW 39.

275.26 History: R. S. 1849 c. 107 s. 3; R. S. 1858 c. 141 s. 32; R. S. 1878 s. 3098; Stats. 1898 s. 3098; 1925 c. 4; Stats. 1925 s. 275.26.

Revisers' Note, 1878: This section takes the place of section 32, chapter 141, R. S. 1858, and while it does not change the law as to the rights of the parties, it provides definitely how expression of them shall be made in the judgment. The advantage of such a provision over the present statute seems too obvious to demand explanation. The value of the improvements is required to be fixed as of the date of the recovery in the ejectment, and hence interest is allowed thereon from that date.

There is but one judgment to be entered under sec. 3098, R. S. 1878, and that is the conditional one for which it provides. If the plaintiff does not, within 3 years after verdict, pay the amount assessed for improvements and taxes he is barred of the right to recover, whether or not it is provided in the judgment. If judgment has not been entered within such time plaintiff cannot have an entry thereof made subsequently, but the defendant is entitled to have it entered nunc pro tunc and made absolute in his favor. *Neeves v. Eron*, 73 W 542, 41 NW 725.

275.27 History: R. S. 1878 s. 3099; Stats. 1898 s. 3099; 1925 c. 4; Stats. 1925 s. 275.27.

275.29 History: 1893 c. 282 s. 1 to 6; Stats. 1898 s. 3100a to 3100d; 1925 c. 4; Stats. 1925 s. 275.29 to 275.32; 1935 c. 541 s. 317; Stats. 1935 s. 275.29.

The judgment granted will be subject to 275.29, permitting a defendant, on certain conditions, to elect to purchase the land on

which a building encroaches. *Gerrits v. Blow*, 7 W (2d) 115, 96 NW (2d) 93.

275.33 History: R. S. 1849 c. 111 s. 16; R. S. 1858 c. 146 s. 16; R. S. 1878 s. 3195; Stats. 1898 s. 3195; 1925 c. 4; Stats. 1925 s. 281.13; 1935 c. 541 s. 388; Stats. 1935 s. 275.33.

CHAPTER 276.

Partition.

276.01 History: R. S. 1849 c. 108 s. 1, 4 to 6; R. S. 1858 c. 142 s. 1, 3; R. S. 1878 s. 3101; Stats. 1898 s. 3101; 1909 c. 283; 1925 c. 4; Stats. 1925 s. 276.01; 1935 c. 541 s. 318; 1949 c. 278.

Comment of Advisory Committee, 1949: 276.01 (1) provides that whenever a person has a life estate and is in possession, any action for partition of estates in remainder or reversion shall be subject to such life estate. The amendment to (2) is proposed in order to reconcile (2) with 233.23, as amended by ch. 371, Laws 1947. The widower's curtesy right is now an absolute right, not terminated by his remarriage. His homestead right, like the widow's, may, if there are children, be terminated by remarriage (237.02 (2)), and should be deemed a life estate for the purpose of 276.01. [Bill 415-S]

The holder of undivided interests in 2 separate parcels of land owned in common by persons whose rights were acquired by descent from the same intestate may maintain a single action for the partition of both parcels, and may join as defendants all who have acquired any interest in any part of such land as purchasers from any of his coheirs. *Grady v. Maloso*, 92 W 666, 66 NW 808.

A life tenant who is not also a joint tenant or a tenant in common of the life estate or the remainder cannot maintain an action for partition. *Pabst Brew. Co. v. Melms*, 105 W 441, 81 NW 882.

An action under sec. 3101, Stats. 1913, can be maintained only by a person having a presently vested interest therein. *Cashman v. Ross*, 155 W 558, 145 NW 199; *Greeney v. Greeney*, 155 W 621, 145 NW 201.

Where the trust was a passive trust in its entirety, legal title in fee simple vested in the beneficiaries subject only to a contingent power of sale in the trustee to sell at the end of 20 years, and any beneficiary or his successor in interest would be entitled to partition during such 20 year period. *Janura v. Fencl*, 261 W 179, 52 NW (2d) 144.

Partition of joint property as between husband and wife is discussed in *Jezo v. Jezo*, 23 W (2d) 399, 127 NW (2d) 246, 129 NW (2d) 195.

Partition where a remainderman also holds a life estate in the land. 39 MLR 398.

Partition and dower. 48 MLR 277.

Partition in the modern context. *Charney*, 1967 WLR 988.

276.02 History: 1851 c. 156 s. 1; R. S. 1858 c. 142 s. 2, 4 to 6; 1861 c. 108; R. S. 1878 s. 3102; Stats. 1898 s. 3102; 1899 c. 336 s. 1; Supl. 1906 s. 3102; 1911 c. 663 s. 434; 1925 c. 4; Stats. 1925 s. 276.02; 1929 c. 210 s. 1; 1935 c. 541 s. 319.

The description must be sufficient to notify the defendant of the premises in question so that he may know whether he claims any interest in them. Such description as makes a reference to public records necessary is insufficient. *Foster v. Hammond*, 37 W 185.

Sec. 3102 and other related sections of R. S. 1878 clearly imply the existence of the common-law rule that all persons having any right, title or interest in the premises which would be involved or necessarily affected by a complete partition or an absolute sale of the whole premises must, if known, be parties. *Morse v. Stockman*, 65 W 36, 26 NW 176.

If the plaintiff omits to disclose an important agreement made between him and his deceased cotenant, the suit being between him and the widow and minor heirs of the latter, who are without knowledge of such agreement, a judgment obtained by him will be void for fraud. *Tucker v. Whittlesey*, 74 W 74, 41 NW 535, 42 NW 101.

Where life tenants are seeking partition of the life estate, owners of reversionary interests therein are proper parties defendant. *Plano M. Co. v. Kindschi*, 131 W 590, 111 NW 680.

276.03 History: R. S. 1849 c. 108 s. 7 to 9; R. S. 1858 c. 142 s. 7 to 9; R. S. 1878 s. 3103; Stats. 1898 s. 3103; 1919 c. 679 s. 96; 1925 c. 4; Stats. 1925 s. 276.03; 1935 c. 541 s. 320.

276.05 History: R. S. 1849 c. 108 s. 16; R. S. 1858 c. 142 s. 16; R. S. 1878 s. 3105; Stats. 1898 s. 3105; 1903 c. 280 s. 1; Supl. 1906 s. 3105; 1925 c. 4; Stats. 1925 s. 276.05; 1935 c. 541 s. 322.

The statute does not authorize a money judgment in favor of plaintiff on account of taxes alleged to have been paid for his cotenant's benefit by him. *Tucker v. Whittlesey*, 74 W 74, 41 NW 535, 42 NW 101.

A cotenant, who was the mother of the other cotenants, was properly allowed on partition the amount by which property had been increased in value through improvements purchased and paid for by her without making an accounting for rents received by her, where all of the other cotenants had fully consented to her possession of the premises and to her receipt and retention of the rents and none ever set up any claim for rents and profits either during or after minority, since under the circumstances neither the cotenants nor one holding under them was in any position to insist on such an accounting. *Hermance v. Weisner*, 228 W 501, 279 NW 608.

Partition being an equitable action, the rights of the cotenants to share in the proceeds of the partition sale by virtue of the enhancement of the value of the land by the construction of improvements are determinable therein, and the court will take such improvements into consideration, in determining the rights of the one who made them, even though they were made without consent or promise of contribution, provided they are necessary, useful, substantial and permanent, enhancing the value of the estate. *Kubina v. Nichols*, 241 W 644, 6 NW (2d) 657.

A cotenant in possession may, in a partition action, be reimbursed for expenditures for improvements made in good faith for the preservation and enhancement in value of the common property. Generally, a cotenant in

possession is not held accountable for use and occupancy in the absence of ouster or agreement to pay rent, or unless the equities of the particular case require it. *Rainer v. Holmes*, 272 W 349, 75 NW (2d) 290.

The fact that property held by husband and wife is in the form of a joint tenancy does not preclude a court of equity in a partition suit from going behind the joint tenancy form in order to decide whether the parties truly intended a joint tenancy in fact. The presumption that a true joint tenancy was intended may be rebutted by evidence showing a different intention. *Jezo v. Jezo*, 23 W (2d) 399, 129 NW (2d) 195.

276.08 History: R. S. 1849 c. 108 s. 20; R. S. 1858 c. 142 s. 19, 20; R. S. 1878 s. 3108; Stats. 1898 s. 3108; 1925 c. 4; Stats. 1925 s. 276.08.

276.09 History: R. S. 1849 c. 108 s. 21; R. S. 1858 c. 142 s. 21; R. S. 1878 s. 3109; Stats. 1898 s. 3109; 1925 c. 4; Stats. 1925 s. 276.09.

276.10 History: R. S. 1849 c. 108 s. 22; R. S. 1858 c. 142 s. 22; 1877 c. 109; R. S. 1878 s. 3110; Stats. 1898 s. 3110; 1907 c. 210; 1925 c. 4; Stats. 1925 s. 276.10; 1935 c. 541 s. 325.

276.11 History: R. S. 1849 c. 108 s. 23; R. S. 1858 c. 142 s. 23; 1877 c. 109; R. S. 1878 s. 3111; Stats. 1898 s. 3111; 1907 c. 210; 1925 c. 4; Stats. 1925 s. 276.11; 1935 c. 541 s. 326.

Revisor's Note, 1935: The present statutes require approval of plats by municipal authorities. [Bill 50-S, s. 326]

Defendant's proposal of a plan of partition is not proper; partition in accordance with statutory procedure should be ordered by the trial court. *White v. Tillotson*, 256 W 574, 42 NW (2d) 283.

276.12 History: R. S. 1849 c. 108 s. 24, 25; R. S. 1858 c. 142 s. 24, 25; R. S. 1878 s. 3112; Stats. 1898 s. 3112; 1925 c. 4; Stats. 1925 s. 276.12; 1935 c. 541 s. 327.

276.13 History: R. S. 1849 c. 108 s. 26; R. S. 1858 c. 142 s. 26; R. S. 1878 s. 3113; Stats. 1898 s. 3113; 1925 c. 4; Stats. 1925 s. 276.13; 1935 c. 541 s. 328.

The provisions of sec. 26, ch. 108, R. S. 1849, are directory. When the allotments made are susceptible of an accurate description by reference to known public boundaries or government surveys they must be regarded as sufficient without a designation of boundaries by posts, stones or other permanent monuments. *Marvin v. Titsworth*, 10 W 320.

As to the time when the value of lands conveyed under an agreement between the cotenants should be determined, see *Tucker v. Whittlesey*, 74 W 74, 41 NW 535, 42 NW 101.

The legislature intended that the report of the commissioners should be controlling in partition and that it should not be set aside except on good cause shown. There is nothing in the statutes relating to partition which authorizes the court to settle allotment disputes by lot. The court has no power to modify the report except possibly as to mistakes in description or like defects. It is the commissioners who make the division and allotment, not the court. *Hayden v. Newman*, 229 W 316, 282 NW 66.

276.14 History: 1899 c. 336 s. 2; Supl. 1906 s. 3113a; 1915 c. 604 s. 42; 1925 c. 4; Stats. 1925 s. 276.14; 1929 c. 210 s. 2; 1935 c. 541 s. 329; 1951 c. 727; 1957 c. 610; 1961 c. 495; 1969 c. 339 s. 27.

276.15 History: R. S. 1849 c. 108 s. 27 to 29; R. S. 1858 c. 142 s. 27 to 29; R. S. 1878 s. 3114; Stats. 1898 s. 3114; 1925 c. 4; Stats. 1925 s. 276.15.

276.16 History: R. S. 1858 c. 142 s. 30; R. S. 1878 s. 3115; Stats. 1898 s. 3115; 1925 c. 4; Stats. 1925 s. 276.16.

276.17 History: R. S. 1849 c. 108 s. 31; R. S. 1858 c. 142 s. 31; 1872 c. 138; R. S. 1878 s. 3116; Stats. 1898 s. 3116; 1925 c. 4; Stats. 1925 s. 276.17.

The judgment is conclusive as to title against all who are parties by name, and where the proceedings are against unknown owners, as against the world. *Kane v. Rock River C. Co.* 15 W 179.

One who acquiesces, though not served with notice, is bound by a judgment. Those served cannot object to the judgment because a cotenant was not served. *Deery v. McClintock*, 31 W 195.

Failure to comply with the statutes will render a judgment void. *Foster v. Hammond*, 37 W 185.

276.18 History: R. S. 1849 c. 108 s. 32; R. S. 1858 c. 142 s. 32; R. S. 1878 s. 3117; Stats. 1898 s. 3117; 1925 c. 4; Stats. 1925 s. 276.18; 1929 c. 210 s. 3.

276.19 History: R. S. 1878 s. 3118; Stats. 1898 s. 3118; 1925 c. 4; Stats. 1925 s. 276.19; 1935 c. 541 s. 330.

276.20 History: R. S. 1849 c. 108 s. 33, 34; R. S. 1858 c. 142 s. 33, 34; R. S. 1878 s. 3119; Stats. 1898 s. 3119; 1911 c. 249; 1925 c. 4; Stats. 1925 s. 276.20; 1929 c. 210 s. 4; 1935 c. 541 s. 331.

The circumstances which will render partition injurious are stated in *Vesper v. Farnsworth*, 40 W 357.

The term "great prejudice to the owners" refers to pecuniary loss. The test is whether the value of the share of each owner in case of partition would be materially less than his share of the money which would probably be obtained from the sale. *Idema v. Comstock*, 131 W 16, 110 NW 786.

The burden of proof to establish the necessary requisites to a sale rather than a partition in kind is on the party alleging the necessity and advisability of such sale, and the necessity must be clearly established. The question to be determined is whether, if the premises are partitioned, the value of the share of each owner will be materially less than his probable share of the purchase money in case the premises are sold. *White v. Tillotson*, 256 W 574, 42 NW (2d) 283.

If the property is so situated that a division in kind is physically feasible, partition in kind must be had unless thereby the value of the share of each owner will be materially less than his probable share of the purchase money in case the premises are sold. The burden of establishing that the value of a share of real estate is materially less than the probable

like share of purchase money is on the party asserting it. *Marshall & Hsley Bank v. De Wolf*, 268 W 244, 67 NW (2d) 380.

276.21 History: R. S. 1849 c. 108 s. 38, 39; R. S. 1858 c. 142 s. 38, 39; R. S. 1878 s. 3120; Stats. 1898 s. 3120; 1925 c. 4; Stats. 1925 s. 276.21; 1935 c. 541 s. 332.

276.22 History: R. S. 1849 c. 108 s. 45, 46; R. S. 1858 c. 142 s. 45, 46; R. S. 1878 s. 3121; Stats. 1898 s. 3121; 1925 c. 4; Stats. 1925 s. 276.22; 1929 c. 210 s. 5; 1935 c. 541 s. 333.

A sale made in the absence of many of the parties in interest, who were absent because of a reasonable expectation that the proceedings would be stayed, and for a very inadequate price and hastily conducted with knowledge that an appeal had been taken, etc., ought to be vacated. *Kemp v. Hein*, 48 W 32, 3 NW 831.

276.23 History: R. S. 1849 c. 108 s. 51 to 53; R. S. 1858 c. 142 s. 51 to 53; R. S. 1878 s. 3122; Stats. 1898 s. 3122; 1925 c. 4; Stats. 1925 s. 276.23; 1935 c. 541 s. 334.

276.24 History: R. S. 1849 c. 108 s. 35 to 37; R. S. 1858 c. 142 s. 35 to 37; R. S. 1878 s. 3123; Stats. 1898 s. 3123; 1925 c. 4; Stats. 1925 s. 276.24; 1935 c. 541 s. 335.

276.25 History: R. S. 1849 c. 108 s. 54 to 57; R. S. 1858 c. 142 s. 54 to 57; R. S. 1878 s. 3124, 3125; Stats. 1898 s. 3124, 3125; 1925 c. 4; Stats. 1925 s. 276.25, 276.26; 1935 c. 541 s. 336, 337; Stats. 1935 s. 276.25.

The granting or denying of confirmation rests in the court's broad discretion, which is encompassed by the rule that a sale will not be set aside merely because the price is inadequate. *Walsch v. Deanovich*, 43 W (2d) 71, 168 NW (2d) 213.

276.27 History: R. S. 1849 c. 108 s. 58; R. S. 1858 c. 142 s. 58; R. S. 1878 s. 3126; Stats. 1898 s. 3126; 1907 c. 326; 1911 c. 119 s. 1; 1925 c. 4; Stats. 1925 s. 276.27.

276.27 is mandatory and requires notice to be served personally or by mail. *Blumenfeld v. Eichenbaum*, 7 W (2d) 1, 95 NW (2d) 754.

276.27 does not require that the party who gives the notice shall serve or have one served on himself. *Blumenfeld v. Eichenbaum*, 9 W (2d) 57, 100 NW (2d) 313.

276.28 History: R. S. 1849 c. 108 s. 59; R. S. 1858 c. 142 s. 59; R. S. 1878 s. 3127; Stats. 1898 s. 3127; 1925 c. 4; Stats. 1925 s. 276.28; 1935 c. 541 s. 339.

Sec. 3101, Stats. 1913, contemplates a final judgment of distribution of the proceeds of the sale; and the statutes provide for the investment of the shares of absentees, infants and tenants in dower. *Greeney v. Greeney*, 155 W 621, 145 NW 201.

Where defendant bought the property at the sheriff's sale, and the balance of the purchase price was deposited with the clerk of court pursuant to a stipulation for defendant's benefit in protecting his funds against alleged misappropriations, the trial court did not abuse its discretion in allowing interest to plaintiff on the deposited sum, the proceeding being one in equity. *Blumenfeld v. Eichenbaum*, 7 W (2d) 1, 95 NW (2d) 754.

276.31 History: R. S. 1849 c. 108 s. 42, 43; R. S. 1858 c. 142 s. 42, 43; R. S. 1878 s. 3130; Stats. 1898 s. 3130; 1925 c. 4; Stats. 1925 s. 276.31; 1935 c. 541 s. 342.

276.32 History: R. S. 1849 c. 108 s. 44; R. S. 1858 c. 142 s. 44; R. S. 1878 s. 3131; Stats. 1898 s. 3131; 1925 c. 4; Stats. 1925 s. 276.32.

276.33 History: R. S. 1849 c. 108 s. 60; R. S. 1858 c. 142 s. 60; R. S. 1878 s. 3132; Stats. 1898 s. 3132; 1925 c. 4; Stats. 1925 s. 276.33; 1935 c. 541 s. 343.

276.34 History: R. S. 1849 c. 108 s. 61; R. S. 1858 c. 142 s. 61; R. S. 1878 s. 3133; Stats. 1898 s. 3133; 1925 c. 4; Stats. 1925 s. 276.34.

276.35 History: R. S. 1849 c. 108 s. 62; R. S. 1858 c. 142 s. 62; R. S. 1878 s. 3134; Stats. 1898 s. 3134; 1925 c. 4; Stats. 1925 s. 276.35; 1929 c. 210 s. 6; 1935 c. 541 s. 344; 1943 c. 275 s. 62.

276.36 History: R. S. 1849 c. 108 s. 47 to 50; R. S. 1858 c. 142 s. 47 to 50; R. S. 1878 s. 3135; Stats. 1898 s. 3135; 1925 c. 4; Stats. 1925 s. 276.36; 1929 c. 516 s. 12.

Revisor's Note, 1929: Dower, when vested, is an estate in fee (section 233.01) and makes the widow a tenant in common with the other owners unless the dower has been assigned, in which case she would not be a party to a partition suit. [Bill 103-S, s. 7]

Whether a judgment of a Texas court, granting a divorce to a husband, on service by publication only, against a wife residing in Wisconsin, bars her right to an allowance for "inchoate right of dower," under 276.36, in a subsequent partition of Wisconsin land in which the former husband owns an interest, or bars an allowance to her as alimony or as a final division of property, is questioned but not decided. *Price v. Ruggles*, 244 W 187, 11 NW (2d) 513.

276.37 History: R. S. 1849 c. 108 s. 63; R. S. 1858 c. 142 s. 63; R. S. 1878 s. 3136; Stats. 1898 s. 3136; 1925 c. 4; Stats. 1925 s. 276.37.

276.38 History: R. S. 1849 c. 108 s. 64; R. S. 1858 c. 142 s. 64; R. S. 1878 s. 3137; Stats. 1898 s. 3137; 1925 c. 4; Stats. 1925 s. 276.38.

276.39 History: R. S. 1849 c. 108 s. 65; R. S. 1858 c. 142 s. 65; R. S. 1878 s. 3138; Stats. 1898 s. 3138; 1925 c. 4; Stats. 1925 s. 276.39.

276.41 History: R. S. 1849 c. 108 s. 67; R. S. 1858 c. 142 s. 67; R. S. 1878 s. 3140; Stats. 1898 s. 3140; 1925 c. 4; Stats. 1925 s. 276.41; 1935 c. 541 s. 346.

276.42 History: R. S. 1849 c. 108 s. 82; R. S. 1858 c. 142 s. 82; R. S. 1878 s. 3141; Stats. 1898 s. 3141; 1925 c. 4; Stats. 1925 s. 276.42.

276.43 History: R. S. 1849 c. 108 s. 68 to 70; R. S. 1858 c. 142 s. 2, 68 to 70; R. S. 1878 s. 3142; Stats. 1898 s. 3142; 1925 c. 4; Stats. 1925 s. 276.43.

276.45 History: R. S. 1849 c. 108 s. 75, 76; R. S. 1858 c. 142 s. 72, 75, 76; 1876 c. 337; R. S. 1878 s. 3144; Stats. 1898 s. 3144; 1925 c. 4; Stats. 1925 s. 276.45; 1935 c. 541 s. 348; 1961 c. 495.

Revisor's Note, 1935: Chapter 246, property

rights of married women, is a later statute than 276.45, and expressly declares that lands of the wife are not subject to the control of the husband but that she may dispose of them as though unmarried, 246.01 to 246.03. See also 319.10, marriage of a minor; 296.06, sale of lands of minors and incompetents. [Bill 50-S, s. 348]

276.46 History: R. S. 1849 c. 108 s. 73, 77; R. S. 1858 c. 142 s. 73, 77; R. S. 1878 s. 3145; Stats. 1898 s. 3145; 1925 c. 4; Stats. 1925 s. 276.46; 1935 c. 541 s. 349.

276.47 History: R. S. 1849 c. 108 s. 74, 78; R. S. 1858 c. 142 s. 74, 78; R. S. 1878 s. 3146; Stats. 1898 s. 3146; 1925 c. 4; Stats. 1925 s. 276.47; 1935 c. 541 s. 350.

276.48 History: R. S. 1849 c. 108 s. 79, 80; R. S. 1858 c. 142 s. 79, 80; R. S. 1878 s. 3147; Stats. 1898 s. 3147; 1925 c. 4; Stats. 1925 s. 276.48; 1961 c. 495; 1969 c. 276.

276.49 History: R. S. 1849 c. 108 s. 81; R. S. 1858 c. 142 s. 81; R. S. 1878 s. 3148; Stats. 1898 s. 3148; 1925 c. 4; Stats. 1925 s. 276.49.

276.50 History: 1861 c. 272 s. 1; R. S. 1878 s. 3149; 1881 c. 203 s. 1; Ann. Stats. 1889 s. 3149; Stats. 1898 s. 3149; 1925 c. 4; Stats. 1925 s. 276.50; 1935 c. 541 s. 351; 1961 c. 495.

See note to sec. 2, art. VII, citing *Janesville C. M. Co. v. Ford*, 55 W 197, 12 NW 377.

A statement in a complaint that the parties are unable to agree upon and determine, etc., is sufficient. *Clark v. Stewart*, 56 W 154, 14 NW 54.

In a complaint under this statute it is enough to aver generally that the parties have certain interests in the water power and the nature thereof, without stating the history and evidence of their respective titles. *Spensley v. Janesville C. M. Co.* 62 W 549, 22 NW 574.

276.51 History: 1861 c. 272 s. 2; R. S. 1878 s. 3150; 1881 c. 203 s. 2; Ann. Stats. 1889 s. 3150; Stats. 1898 s. 3150; 1925 c. 4; Stats. 1925 s. 276.51.

276.52 History: 1861 c. 272 s. 3; R. S. 1878 s. 3151; 1881 c. 203 s. 3; Ann. Stats. 1889 s. 3151; Stats. 1898 s. 3151; 1925 c. 4; Stats. 1925 s. 276.52.

276.53 History: 1861 c. 272 s. 4; R. S. 1878 s. 3152; 1881 c. 203 s. 4; Ann. Stats. 1889 s. 3152; 1897 c. 279; Stats. 1898 s. 3152; 1925 c. 4; Stats. 1925 s. 276.53; 1935 c. 541 s. 352; 1955 c. 652; 1961 c. 495.

Revisor's Note, 1935: The amendment as to the effect of a jury verdict is in the court's language in *Janesville C. Mfg. Co. v. Ford*, 55 W 197, 201. Appeals are covered by chapter 274, sections 274.01, 274.09, 274.10, 274.33. [Bill 50-S, s. 352]

Where the judgment has prescribed the method in which the respective parties shall use water they must abide by it until it is changed by the court. The use of the water in any other way will be enjoined. *Mulberger v. Koenig*, 62 W 558, 22 NW 745.

276.54 History: 1861 c. 272 s. 5; R. S. 1878 s. 3153; Stats. 1898 s. 3153; 1925 c. 4; Stats. 1925 s. 276.54; 1935 c. 541 s. 353.

276.55 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153a; 1925 c. 4; Stats. 1925 s. 276.55; 1935 c. 541 s. 354; 1961 c. 495.

276.57 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153c; 1925 c. 4; Stats. 1925 s. 276.57; 1935 c. 541 s. 356.

276.58 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153d; 1925 c. 4; Stats. 1925 s. 276.58; 1935 c. 541 s. 357.

276.59 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153e; 1925 c. 4; Stats. 1925 s. 276.59; 1935 c. 541 s. 358.

CHAPTER 277.

Partition of Personal Property.

277.01 History: 1887 c. 189 s. 1; Ann. Stats. 1889 s. 2327a; Stats. 1898 s. 2327a; Stats. 1923 s. 3153f; 1925 c. 4; Stats. 1925 s. 277.01; 1935 c. 541 s. 359.

In a suit for the partition of personal property the court has general equity jurisdiction. It may appoint a receiver, enter an interlocutory decree, and by decree provide every possible relief made necessary by the exigencies of the case in order to do final and complete justice. *Laing v. Williams*, 135 W 253, 115 NW 821.

A cheese factory building erected upon a permanent foundation by a voluntary association upon land donated orally for that purpose, but with the condition that the land should revert to the donor whenever the building ceased to be used as a cheese factory, was a proper subject for partition where it appeared that the intent was to give the building the character of personal property. *Brobst v. Marty*, 162 W 296, 156 NW 195.

A livestock association leaving cattle with defendants under an agreement to divide the increase cannot maintain replevin to recover the increase until after division. *Wisconsin L. S. Asso. v. Bowerman*, 198 W 447, 224 NW 729.

277.02 History: 1887 c. 189 s. 2; Ann. Stats. 1889 s. 2327b; Stats. 1898 s. 2327b; Stats. 1923 s. 3153g; 1925 c. 4; Stats. 1925 s. 277.02; 1935 c. 541 s. 360.

277.03 History: 1887 c. 189 s. 3; Ann. Stats. 1889 s. 2327c; Stats. 1898 s. 2327c; Stats. 1923 s. 3153h; 1925 c. 4; Stats. 1925 s. 277.03; 1935 c. 541 s. 361.

CHAPTER 278.

Foreclosure of Mortgages.

278.01 History: R. S. 1849 c. 84 s. 76; R. S. 1858 c. 145 s. 1; R. S. 1878 s. 3154; Stats. 1898 s. 3154; 1925 c. 4; Stats. 1925 s. 278.01; 1931 c. 79 s. 28.

Revisor's Note, 1931: The addition repeats the substance of part of 281.03 (the lis pendens section) and is made to obviate the mistake of entering foreclosure judgment in disregard of the requirement that the notice of the pendency of the action must be filed twenty days before judgment. [Bill 51-S, s. 28]

The mortgagee is not precluded from foreclosing in equity because the power of fore-

closure by advertisement is given in the mortgage. That remedy is merely cumulative. *Walton v. Cody*, 1 W 420.

The statute has reference to ordinary mortgages which leave the fee of the mortgaged premises in the mortgagors. A sale is necessary to divest the mortgagor of the fee. *Church v. Smith*, 39 W 492.

The requirement that the premises be sold is for the benefit of the owner of the equity of redemption and those interested under or through him. *Bresnahan v. Bresnahan*, 46 W 385, 1 NW 39.

In foreclosure, where it is doubtful whether plaintiff's rights are those of a mortgagee or legal owner under a contract to convey, the court inclines to the former construction by the parties. In such case judgment of foreclosure and sale should be rendered. *Rogers v. Burrus*, 53 W 530, 9 NW 736.

The object of foreclosure is to bar the mortgagor and those claiming subject to the mortgage. Plaintiff will not be compelled to litigate questions of paramount title. *Hekla Fire Ins. Co. v. Morrison*, 56 W 133, 14 NW 12.

A mortgage may be foreclosed though the statute of limitations has barred suit on the note which it was given to secure. *Cerney v. Pawlot*, 66 W 262, 28 NW 183.

A personal judgment is erroneous; this can only be contained in a deficiency judgment. *Duecker v. Goeres*, 104 W 29, 80 NW 91.

The suit is wholly regulated by statute, leaving nothing to the ordinary discretionary power. *Sands v. Kaukauna W. P. Co.* 115 W 229, 91 NW 679.

Where the legal title to mortgaged premises remains in the mortgagor, a receiver can be appointed in foreclosure proceedings, but only for the purpose of preventing waste; but delinquent taxes and unpaid interest depreciate the value of the mortgage security and amount to waste. *Grether v. Nick*, 193 W 503, 215 NW 571.

On grounds for employment of a receiver in foreclosure proceedings, see note to 268.16, citing *Crosby v. Keilman*, 206 W 252, 239 NW 431.

Where a land contract required the purchaser to pay the purchase price to children of the vendor and to execute a new contract and mortgage when a deed should be given, but a deed was given without the execution of a new contract or mortgage, the debt was not thereby extinguished, and the vendor and the beneficiaries under the land contract were equitable mortgagees having a specifically enforceable right to the execution of a mortgage and new contract, and to subject the premises to the payment of the debt. *Knutson v. Anderson*, 216 W 69, 255 NW 907.

A holder of a negotiable mortgage note, who had purchased the same after maturity from the agent of parties who had previously assumed the mortgage debt and who through the agent had previously paid the original mortgagee, could not foreclose the mortgage, since the note had been discharged by such payment and was no longer a subsisting obligation. *Michalak v. Nowinski*, 220 W 1, 264 NW 498.

A lessee of premises involved in an action to foreclose a mortgage, who had not been joined as a party, but who, pursuant to an