subject is maritime. Milwaukee v. The Curtis, 37 F 705.

290.02 History: 1871 c. 150 s. 14; R. S. 1878 s. 3349; Stats. 1898 s. 3349; 1925 c. 4; Stats. 1925 s. 290.02.

290.03 History: R. S. 1878 s. 3350; Stats. 1898 s. 3350; 1925 c. 4; Stats. 1925 s. 290.03.

290.04 History: R. S. 1878 s. 3351; 1881 c. 76; Ann. Stats. 1889 s. 3351; Stats. 1898 s. 3351; 1925 c. 4; Stats. 1925 s. 290.04.

Editor's Note: Sec. 21, ch. 150, R. S. 1858, as amended by ch. 99, Laws 1858, and which was superseded by sec. 3351, R. S. 1878, provided that all actions arising under the provisions of that chapter, against boats and vessels navigating the inland waters of the state exclusively, "shall be summoned within three months after the cause of action shall have accrued, and not after that period." The amended section was applied in Hay v. Steamboat "Winnebago", 10 W 428, and in Emerson v. Steamboat "Shawano City", 10 W 433.

290.05 History: R. S. 1878 s. 3352; Stats. 1898 s. 3352; 1925 c. 4; Stats. 1925 s. 290.05.

290.06 History: R. S. 1878 s. 3353; Stats. 1898 s. 3353; 1925 c. 4; Stats. 1925 s. 290.06.

290.09 History: R. S. 1878 s. 3356; Stats. 1898 s. 3356; 1925 c. 4; Stats. 1925 s. 290.09; 1967 c. 276 s. 39; 1969 c. 87.

290.10 History: R. S. 1878 s. 3357; Stats. 1898 s. 3357; 1925 c. 4; Stats. 1925 s. 290.10.

CHAPTER 291.

Unlawful Detainer.

Editor's Note: The legislative histories which follow are the histories of the several sections of ch. 291 through 1969, including the effects of chapters 87 and 284, Laws 1969. Some few provisions of ch. 291 are restated in the revised property law, effective July 1, 1971. For more detailed information concerning the effects of ch. 284, Laws 1969, see the editor's note printed in this volume ahead of the histories for ch. 700.

291.01 History: R. S. 1849 c. 117 s. 12; R. S. 1858 c. 151 s. 12; 1863 c. 303 s. 1; R. S. 1878 s. 3358; 1882 c. 326; Ann. Stats. 1889 s. 3358; Stats. 1898 s. 3358; 1901 c. 26; Supl. 1906 s. 3358; 1917 c. 389; 1925 c. 4; Stats. 1925 s. 291.01; 1943 c. 113; 1959 c. 226; 1965 c. 71; 1969 c. 284.

Acceptance of rent accruing after forfeiture is a waiver of the breach of a condition of the lease that the tenant would not cut timber on the premises, rent having been received with knowledge of the breach. Gomber v. Hackett, 6 W 323.

An assignee or grantee of the lessor may maintain the action. Savage v. Carney, 8 W 162.

The tenant cannot set up a tax title acquired by a third party since the commencement of his term. The tax deed does not operate as an assignment of the lease to the grantee therein or affect the possession of the premises conveyed by it. Chase v. Dearborn, 21 W 57.

A receiver should apply to the court for authority to prosecute the action. King v. Cutts, 24 W 627.

The remedy given extends only to cases where the tenant, at time of demand made in writing that he deliver possession, is holding over after termination of the lease, or contrary to its covenants, or after rent has become due and remained unpaid for 3 days. Ela v. Bankes, 32 W 635; Carter v. Van Dorn, 36 W 289.

The guardian cannot maintain an action for unlawful detainer in his own name against a tenant holding over contrary to terms of a lease executed prior to the guardianship. Such action should be in the name of the ward. Vincent v. Starks, 45 W 458.

To create tenancy so as to bar the landlord's action under this statute there must be evidence that the tenant held over with assent of the landlord and that the latter admitted continuance of the relation of landlord and tenant. Meno v. Hoeffel, 46 W 282, 1 NW 31.

A tenant cannot deny the title of his landlord or that he holds possession under him. Strain v. Gardner, 61 W 174, 21 NW 35.

In proceedings under ch. 145, R. S. 1878, the question of title to land does not arise and cannot be raised by the pleadings. Newton v. Leary, 64 W 190, 25 NW 39.

See note to sec. 16, art. I, citing Toal v. Clapp, 64 W 223, 24 NW 876.

The statute does not extend to a defendant who is a mortgagor, having a right of redemption in the premises. Hunter v. Maanum, 78 W 656, 48 NW 51.

A complaint in prescribed form confers jurisdiction of the subject matter, the summons being merely the means of acquiring personal jurisdiction. An objection that the summons is not in proper form is waived by a general appearance. A notice demanding possession for refusal to pay rent and that plaintiff will proceed unless the rent is paid or possession delivered is sufficient. Brauchle v. Nothhelfer, 107 W 457, 83 NW 653.

Tenancy at will or by sufferance created by implication of law must be terminated by ejectment rather than by proceedings under sec. 3358, Stats. 1898. Maxham v. Stewart, 133 W 525, 113 NW 972.

Where defendant has other rights than those of a lessee, an action for unlawful detainer cannot be maintained. Nightingale v. Barens, 47 W 389, 2 NW 767; Diggle v. Boulden, 48 W 477, 4 NW 678; Lathrop v. Millar, 146 W 82, 130 NW 959.

An action for unlawful detainer is inadequate and an equitable remedy is more appropriate when the relations of the parties, although in form that of landlord and tenant, is such that they constitute a quasi-partnership and the relief sought is a cancellation of the lease as well as surrender of the premises and an accounting of sales by the tenant in order to determine the rental due the landlord. Milwaukee B. Store v. Katz, 153 W 492, 140 NW 1038.

Where a controversy over the question whether a tenancy was from month to month or for a full year was settled by agreement

that the tenant should remain in possession until a specified date, the landlord was not required to give notice to quit on such date in order to maintain an action for unlawful detainer, since the tenancy terminated on the fixed date by express agreement under sec. 3358 (3), Stats. 1919. Mueller v. Derwae, 175 W 580, 185 NW 202.

All parties entering after an action for unlawful detainer is commenced are in subordination to defendant, and equally subject to removal under the writ against him, including all members of his family, his servants and tenants. Persons in possession under claim of title before action brought are not bound by the judgment unless made parties. The rights of a subtenant cannot rise superior to those of the tenant. Lancaster v. Borkowski, 179 W 1, 190 NW 852.

Where an agent occupying offices under a lease to her principal renewed the lease in her own name, intending to occupy them as agent for a competing principal at the end of the current term, the first principal during its term need not resort to proceedings for unlawful detainer, but could enter during the absence of the agent and remove files connected with the agency. Wenneby v. Time Ins. Co. 182 W 650, 197 NW 173.

A lessor having declared a forfeiture of a lease according to its terms for nonpayment of rent and having elected to proceed under 290.01, Stats. 1925, is required to give the alternative notice to vacate the premises or pay rent, and, having failed to do so, is not entitled to the relief provided by that section. Tower B. Co. v. Andrew, 191 W 269, 210 NW 842.

The election by a lessee to surrender premises pursuant to a notice served by the lessor did not affect his obligation to pay rent due on the first of the month preceding the surrender. Compliance by the lessee with such notice by vacating the premises and delivering the key to the lessor's representative amounted to a surrender of the premises. Selts I. Co. v. Promoters of F. N. of W. 197 W 471, 220 NW 220.

A tenant's involuntary and unavoidable holding over because removal of its property from the leased premises was prevented by threats of violence by its striking employes and their picketers was not tortious and did not render the tenant subject to an action for unlawful detainer under 291.01, Stats. 1935, and such holding over was not "unlawful" so as to warrant the recovery of treble damages by the landlord under 291.10. Feiges v. Racine Dry Goods Co. 231 W 284, 285 NW 799.

A notice terminating a lease because of breaches, and demanding "immediate" possession of the premises, instead of demanding that the tenant deliver possession at the expiration of 3 days, was sufficient to support an action commenced more than 3 days after the service of such notice. Baraboo Nat. Bank v. Corcoran, 243 W 386, 10 NW (2d) 112.

A complaint for unlawful detainer need not allege in the exact words of the statute that the tenant is holding over without permission, but is sufficient if it shows in substance that the holding over is without permission. (Conley v. Conley, 78 W 665, overruled so far as in conflict therewith.) Rupp v. Board of Directors, 244 W 244, 12 NW (2d) 26.

An action for unlawful detainer is summary. State ex rel. Milwaukee E. T. Corp. v. River Realty Co. 248 W 589, 22 NW (2d) 593.

Ch. 291 applies only to cases in which the relation of landlord and tenant exists and does not apply to a case of vendee against vendor. Chartier v. Simon, 250 W 639, 27 NW (2d) 751.

A suspension of operations because of unfavorable temporary conditions is not a breach of a condition of user in a lease or deed resulting in a reversion of the property where there is present the intention of the tenant or grantee to resume the specified use as soon as feasible and within a reasonable time. Conditions subsequent will be construed most strongly against the grantor, and forfeiture will not be enforced unless clearly established. Giese v. Hanni, 271 W 184, 72 NW (2d) 752.

291.02 History: R. S. 1878 s. 3359; Stats. 1898 s. 3359; 1925 c. 4; Stats. 1925 s. 291.02; 1969 c. 284.

Revisers' Note, 1878: This section is new, and provides for the removal of persons holding over after foreclosure of a mortgage by advertisement; as the law now stands there is no method of getting possession of the mortgaged premises after sale and conveyance, except by the action of ejectment. It seems highly proper that a more speedy and less expensive method should be provided, especially as against the mortgagor and those in possession under him by title acquired after the recording of the mortgage. The other provision is intended to cover a case of letting land which is supposed not to be covered by the first section.

Sec. 3359 (2), R. S. 1878, was copied from the laws of New York, ch. 471, Laws 1874. It was supposed that there was a class of holdings on shares which the provisions of the former statute did not embrace. The word "owner" as used therein means the person from whom the occupant derived his right to hold temporarily. In proceedings for the occupant's summary removal he is estopped to deny the title of or that he holds possession from such owner. Strain v. Gardner, 61 W 174, 21 NW 35.

Sec. 3359 (1) clearly was not intended to authorize a defendant to set up an adverse title as a defense. Newton v. Leary, 64 W 190, 25 NW 39.

291.03 History: R. S. 1849 c. 117 s. 1, 2; R. S. 1858 c. 151 s. 1, 2; R. S. 1878 s. 3360; Stats. 1898 s. 3360; 1925 c. 4; Stats. 1925 s. 291.03; 1969 c. 284.

Revisers' Note, 1878: This is sections 1 and 2, chapter 151, R. S. 1858, combined and rewritten, omitting so much of them as are provided for in the first section above, and so changed as to make the remedy under this section apply only to cases of unlawful or forcible entry, and forcible detainer after a peaceable entry. This conforms the section to the decision of the supreme court in the case of Winterfeed v. Strauss, 24 W 394. The court in that case held, that in this proceeding before a justice, the question of title could not be tried. We have purposely omitted the

words "lawful and" before the words "peaceable entry," as it is inconsistent with the right, that a man who enters into possession lawfully and peaceably should be turned out because he proposes to defend his possession so obtained. The case of lawful entry and unlawful detainer are also provided for in the two preceding sections.

Where the relation of landlord and tenant does not exist and actual possession of complainant has been wrongfully invaded the action may be maintained without showing that the entry was accompanied with such violence as would sustain an indictment at common law for forcible entry. Jarvis v. Hamilton, 16 W 574.

The proceeding is not one in which title can be tried and it cannot be used as a substitute for ejectment. Carter v. Van Dorn, 36 W 289.

As to the circumstances and degree of force required to bring cases within the statute, see Steinlein v. Halstead, 42 W 422.

One who has contracted to erect a building for another on the land of the latter may be removed and fined if he asserts and maintains possession to the exclusion of the owner. Platteville v. Bell, 66 W 326, 28 NW 404.

As the law provides ample redress for the recovery of the possession of property, and for the recovery of damages for injury sustained by the unlawful withholding of such possession by another, the owner who is not in possession, although lawfully entitled thereto, has no right to attempt to take possession by force; and the law will not justify his resorting to violence and the breach of the public peace in attempting to do so. State v. Carroll, 239 W 625, 2 NW (2d) 211.

A lessor may re-enter and repossess the premises himself, if in accordance with his lease and if he enters in a peaceable manner. Simhiser v. Farber, 270 W 420, 71 NW (2d) 412.

291.04 History: R. S. 1849 c. 117 s. 13; R. S. 1858 c. 151 s. 13; R. S. 1878 s. 3361; Stats. 1898 s. 3361; 1911 c. 342; 1925 c. 4; Stats. 1925 s. 291.04; 1969 c. 284.

291.05 History: R. S. 1849 c. 117 s. 3, 24; R. S. 1858 c. 151 s. 3, 24; R. S. 1878 s. 3362; Stats. 1898 s. 3362; 1925 c. 4; Stats. 1925 s. 291.05; 1949 c. 279; 1951 c. 273; 1961 c. 495; 1969 c. 87, 284.

The pleading need only use the language of the statute. It is not a valid objection that the complaint embraced more land than plaintiff had a right to recover. Jarvis v. Hamilton, 19 W 187.

A statement in the justice's docket that at the hour named in the return of the summons all parties were present in court shows that there was a general appearance which waived defects in the process. State ex rel. Haeselich v. Schweitzer, 131 W 138, 111 NW 219.

A complaint which alleged that defendant entered into possession as a tenant from month to month, paying therefor a stipulated sum in advance on the first day of each month, sufficiently shows that the tenancy began on the first day of the month and expired on the last day of the month. State ex rel. Engle v. Hilgendorf, 136 W 21, 116 NW 848.

A complaint in an action for unlawful detainer, alleging that the plaintiff caused the 30 days' notice to be served, but not alleging or showing the date of the commencement or the termination of the rent month, was insufficient to state a cause of action, in view of the rule that when there is a month-to-month tenancy the 30 days' notice must terminate at the end of the rent month and not before. Hartnip v. Fields, 247 W 473, 19 NW (2d) 878.

The court will apply the same rules in construing complaints in actions for unlawful detainer that it applies in construing pleadings in other actions. State ex rel. Milwaukee E. T. Corp. v. River Realty Co. 248 W 589, 22 NW (2d) 593.

Since a condition precedent in the lease had to be performed by the lessor before the statutory 3-day notice requiring delivery of the premises could be served effectively, and since compliance with the condition precedent was required to appear fully on the face of the complaint, the absence of such showing left the justice court without jurisdiction to issue a summons. Hotel Hay Corp. v. Milner Hotels, Inc. 255 W 482, 39 NW (2d) 363.

291.10 History: R. S. 1849 c. 117 s. 11, 14; R. S. 1858 c. 151 s. 11, 14; R. S. 1878 s. 3367; Stats. 1898 s. 3367; 1925 c. 4; Stats. 1925 s. 291.10; 1969 c. 284.

Statutes providing multiple damages are highly penal and should not be extended to doubtful cases. Where the parties stipulated that the plaintiff should have judgment in an unlawful-detainer action, but that there should be a stay for a specified time thereafter, the subsequent possession was by consent and negatived the right to treble damages. Strimple v. Parker P. Co. 177 W 111, 187 NW 1001.

A landlord seeking to recover one-half of the proceeds of farm produce during the period he was excluded from the demised premises cannot recover treble damages for unlawful detainer. Hauser v. Fetzer, 195 W 504, 218 NW 821.

See note to 291.01, citing Feiges v. Racine Dry Goods Co. 231 W 284, 285 NW 799.

The fact that defendant deliberately, intentionally, and unlawfully withheld possession of the premises from the plaintiff to suit the defendant's own convenience being established by an unappealed judgment for the plaintiff in an action for unlawful detainer, the plaintiff was entitled to recover treble damages in a separate action under 291.10. (Feiges v. Racine Dry Goods Co. 231 W 284, distinguished.) Patefield v. Fidelity & Casualty Co. 255 W 92, 37 NW (2d) 873.

Where a circuit court ordered restitution of premises but stayed execution upon payment of a fixed rental, treble damages claimed above the fixed rental should not be allowed in a later action. Rische Construction Co. v. May, 15 W (2d) 123, 112 NW (2d) 165.

291.11 History: R. S. 1849 c. 117 s. 17, 18; R. S. 1858 c. 151 s. 17, 18; R. S. 1878 s. 3368; 1880 c. 191; Ann. Stats. 1889 s. 3368; Stats. 1898 s. 3368; 1925 c. 4; Stats. 1925 s. 291.11; 1967 c. 276 s. 39; 1969 c. 87, 284.

It is within the discretion of the court to refuse a writ of restitution to defendant, on reversing judgment of justice's court against him, under which plaintiff obtained possession,

if it appears that plaintiff was entitled to the possession. Towle v. Smith, 27 W 268.

The circuit court cannot award a writ of restitution on reversing a judgment on certiorari under which plaintiff was put in possession. Newton v. Leary, 64 W 190, 25 NW 39.

Where the lessee appeals from a judgment awarding possession of the premises to the lessor, the acceptance of rent secured by the undertaking would not deprive the lessor of the right to insist on forfeiture of the lease for nonpayment of the previous rent. Palmer v. City L. Co. 98 W 33, 73 NW 559.

It is not necessary that the justice fees required by sec. 3754, Stats. 1898, be paid in order that the undertaking should operate as a stay of proceedings. Palin v. Probert, 137 W 40, 118 NW 173.

Where the appeal was never perfected by the filing of an affidavit of good faith, there could be no breach of the undertaking given to pay costs on appeal or rent and damages accruing during the pendency of the appeal. Mueller v. Rice, 149 W 548, 136 NW 146.

291.13 History: R. S. 1849 c. 117 s. 19; R. S. 1858 c. 151 s. 19; R. S. 1878 s. 3369; Stats. 1898 s. 3369; 1925 c. 4; Stats. 1925 s. 291.13; 1969 c. 87, 284.

If the defendant executes an undertaking conformably to sec. 3368, R. S. 1878, and thereby secures the right to remain in the possession of the premises, he has no authority to make any material alterations in the buildings. Brock v. Dole, 66 W 142, 28 NW 334.

291.15 History: R. S. 1878 s. 3371; Stats. 1898 s. 3371; 1925 c. 4; Stats. 1925 s. 291.15; 1967 c. 276 s. 40; 1969 c. 87, 284.

Revisers' Note, 1878: Is new, and gives a tenant who is proceeded against in such action upon a default in the payment of rent in case judgment is rendered against him, the right to stay the execution of the judgment upon the payment of all rent due at the date of the judgment, together with the costs of the action. This provision is made in the laws of some other states, and seems a just provision, as in many cases there might be the forfeiture of a valuable lease upon an honest difference upon the question of a default in the payment of a sum claimed to be due. If, after a contest, the tenant is defeated, and pays all the rent then due, with the costs of the action, there would seem to be no good reason why he should not retain the possession.

A court of equity ought not to relieve from a forfeiture for the nonpayment of rent where the statute, 291.15, provides a period of time within which possession may be redeemed or retained by the payment of rent, and no equitable grounds are shown why such payment was not made. The lessor's habitual acceptance of the late tender of the rent and the sublessee's reliance thereon, and the lessor's failure to notify the sublessee of his intention to enforce strict compliance, were not grounds for equitable relief from the judgment obtained in the unlawful-detainer action. Herman v. Kennard Buick Co. 5 W (2d) 480, 93 NW (2d) 340.

CHAPTER 292.

Habeas Corpus.

292.01 History: R. S. 1849 c. 124 s. 1; R. S. 1858 c. 158 s. 1; 1872 c. 176 s. 9, 12; 1878 c. 336; R. S. 1878 s. 598, 3407; Stats. 1898 s. 595, 3407; 1901 c. 367 s. 1; Supl. 1906 s. 595; 1919 c. 347 s. 19; Stats. 1919 s. 3407; 1925 c. 4; Stats. 1925 s. 292.01; 1935 c. 483 s. 129; 1969 c. 255.

On jurisdiction of the supreme court (control over corporations and non-judicial officers) see notes to sec. 3, art. VII; on jurisdiction of circuit courts (extraordinary writs to non-judicial agencies and officers) see notes to sec. 8, art. VII; and on writs of error see notes to 274.05.

If the court or officer who has illegally imprisoned a person has refused his application for a discharge the matter is not res adjudicata. In re Blair, 4 W 522.

The validity of the commitment, on a petition for discharge on the ground that the sheriff has refused jail liberties, is not before the court. Rose v. Tyrrell, 25 W 563.

Where one has been imprisoned upon an attachment for a contempt in disobeying an injunctional order, he cannot, on an application for discharge by habeas corpus, avail himself of mere irregularities in the proceedings upon which the order was based, but must show lack of jurisdiction to make the order. In re Perry, 30 W 268.

When a defendant lawfully arrested on mesne process fails to give bail or is surrendered by his bail before judgment his liability to detention on such process does not expire on recovery of judgment against him; but unless otherwise discharged by the court his detention must abide a capias ad satisfaciendum. In re Kindling, 39 W 35.

A judgment of discharge is final and conclusive and can only be reviewed upon certiorari. While it is unreversed no order for rearrest in the same cause can be made. In re Crow, 60 W 349, 19 NW 713.

Where the judgment brought up for review was rendered by the circuit court on certiorari to a commissioner who had issued the writ and discharged the prisoner, the supreme court is limited to the question of jurisdiction. Wright v. Wright, 74 W 439, 43 NW 145.

Imprisonment under an erroneous judgment is not ground for discharging the prisoner on habeas corpus. In re Eckhart, 85 W 681, 56 NW 375.

In reviewing proceedings had on habeas corpus the court will not go beyond the question of jurisdiction. In re Rosenberg, 90 W 581, 64 NW 299.

Suing out a writ of habeas corpus is the commencement of an action. The final decision of the court or officer is res adjudicata. State ex rel. Gaster v. Whitcher, 117 W 668, 94 NW 787.

Habeas corpus does not reach beyond a commitment to the proceedings leading up thereto, where the person is detained by virtue of the final order or judgment of a court having jurisdiction. In re Shinski, 125 W 280, 104 NW 86.

The writ of habeas corpus only reaches