

CHAPTER 269.

PRACTICE REGULATIONS.

269.01	Agreed case; affidavit; judgment.	269.32	Motions and orders; service of papers.
269.02	Offer of judgment; effect.	269.33	Papers to be legible.
269.03	Defendant's offer as to damages, accepted.	269.34	Service of papers; personal and by mail.
269.04	Offer or damages not accepted.	269.36	Mail service doubles time allowed.
269.05	Consolidation of actions.	269.37	Service on attorney; when service not required.
269.06	Court may order delivery of property.	269.38	Service of papers dispensed with.
269.07	Refusal to deliver property; title passed by judgment.	269.39	Process not included.
269.08	Summons to joint debtors not originally summoned.	269.41	Sheriff's certificate as evidence; proof of service.
269.09	Parties may defend.	269.42	Papers, where filed.
269.10	Pleadings and trial.	269.43	Mistakes and omissions.
269.12	Summons where no jurisdiction.	269.44	Amendments of processes, pleadings and proceedings.
269.13	When action not to abate.	269.45	Enlargement of time.
269.14	Continuance if interest transferred, etc.	269.46	Relief from judgments, orders and stipulations.
269.15	Action by officer, receiver, etc., not to abate.	269.465	Affidavit of advice of counsel.
269.16	Death or disability of party.	269.47	Defense where service by publication.
269.17	Joint actions not abated by death; liability of estate.	269.48	Adding new defendants.
269.18	Death of parties; effect on action.	269.49	Copy of paper may be used, when affidavits need not be entitled.
269.19	Action to recover real property.	269.50	Irregularities and lack of jurisdiction waived on appeal; jurisdiction exercised; transfer to proper court.
269.20	Same.	269.51	Mistaken remedy or action; no dismissal; amendment; transfer to court having jurisdiction.
269.22	Death after verdict or findings; practice.	269.52	Release of joint debtor; effect.
269.23	Proceedings to revive action.	269.53	Interpreters for deaf mutes.
269.24	Action dismissed if not revived.	269.55	Declaratory judgments act.
269.25	Dismissal for delay.	269.56	Inspection of documents and property; physical examination of claimant.
269.27	Motion defined; when and where made; stay of proceedings.	269.57	Consolidation of actions.
269.28	Orders, how vacated and modified.	269.59	Borrowing court files regulated.
269.29	Restriction as to making orders; review by court.	269.60	Pre-trial procedure.
269.30	Motions, how heard if judge disqualified.	269.65	
269.31	Time of notice of motion.		

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

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

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

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

269.04 Offer of damages not accepted. If the plaintiff does not accept the offer made under 269.03 he shall not be permitted to give it in evidence, and if the damages assessed in his favor do not exceed the damages offered, the defendant shall recover his expenses incurred in consequence of any necessary preparations or defense in respect to the question of damages; such expenses shall be determined by the presiding judge and carried into the judgment.

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

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

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

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

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

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

[269.11 *Stats. 1933 repealed by Supreme Court Order, effective Jan. 1, 1936*]

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

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

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

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

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

269.17 Joint actions not abated by death; liability of estate. Where there are several plaintiffs or defendants in any action, if any of them shall die and the cause of action survives to or against the others the action may proceed, without interruption, in favor of or against the survivors. If all the plaintiffs or defendants shall die before judgment the action may be prosecuted or defended by the executor or administrator of the last surviving plaintiff or defendant, as the case may be. But the estate of a party jointly liable upon

contract with others shall not be discharged by his death, and the court may, by order, bring in the proper representative of the deceased defendant, when it is necessary so to do, for the proper disposition of the matter; and where the liability is several as well as joint may order a severance of the action so that it may proceed separately against the representative of the decedent and against the surviving defendants.

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

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

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

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

[269.21 Stats. 1933 renumbered section 269.19 (2) by 1935 c. 541 s. 137]

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

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

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

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

The denial of a plaintiff's motion of 1949 to reinstate an action dismissed without notice in 1943, for failure to bring the action to trial within 5 years after its commencement, was not an abuse of discretion where the plaintiff, although claiming to have been misled by reliance on her attorney, had caused him to withdraw from the case in 1940, and the plaintiff had been advised by another attorney in 1940 concerning this section, but she did not engage new counsel in the interim from 1940 to 1949. *Schleif v. Defnet*, 257 W 170, 42 NW (2d) 926.

Where, in addition to other extenuating circumstances, it appeared that some portion

of the delay in bringing to trial in the circuit court an appeal taken by a city policeman under 62.13 (5) (h), from a suspension order of the board of fire and police commissioners, was due to a stipulation to hold the case in abeyance pending the disposition of a companion case, and that thereafter the attorneys for the appealing party had made sufficient application to 2 separate judges at various times to fix a date of trial, the dismissal of the appeal for want of prosecution within 5 years was an abuse of discretion. *Ford v. James*, 253 W 602, 46 NW (2d) 859.

[269.26 Stats. 1933 renumbered section 270.53 (2) by 1935 c. 541 s. 140]

269.27 Motion defined; when and where made; stay of proceedings. An application for an order is a motion. Motions in actions or proceedings in the circuit court must be

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

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

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

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

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

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

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

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

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

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

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

(2) Service upon an attorney may be made during his absence from his office by leaving such copy with his clerk therein or with a person having charge thereof; or, when there is no person in the office, by leaving it in a conspicuous place in the office; or, if it

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

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

(4) Service may be made by mailing such copy where the person making the service and the person on whom it is made reside in different places between which there is a communication by mail. The copy of the paper to be served must be properly inclosed in a postpaid wrapper (which may bear the sender's name and address) and must be addressed to the person on whom it is to be served at his proper post-office address, but without any request to the postal officers upon the wrapper for the return thereof in case of nondelivery to the person addressed.

[269.35 Stats. 1933 renumbered section 269.34 by Supreme Court Order, effective Jan. 1, 1936]

269.36 Mail service doubles time allowed. Where a certain time before an act to be done is required for the service of any paper and where, after service of any paper, a specified time is allowed a party to do an act in answer to or in consequence of such service, if service be made by mail, the time shall be double the time required or allowed in case of personal service.

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

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

Where a plaintiff failed to serve a notice of injury, or actually serve a complaint, within the 2-year period required by 330.19 (5), but merely delivered a complaint to the sheriff for service on a defendant whose residence and post office in this state were known but who was absent from the state without leaving a forwarding address, such absence did not dispense with the required service of notice or complaint under provi-

sions in 269.38 dispensing with service of notice and other papers when a "party's" residence and post office are not known and he has designated no place for service of papers on him, since "party" means one who has become a party in pending litigation, and such section does not apply in any event unless the party's residence and post office are not known. *Martin v. Lindner*, 258 W 29, 44 NW (2d) 558.

269.39 Process not included. The provisions of this chapter shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

[269.40 Stats. 1933 renumbered section 59.23 (9) by 1935 c. 541 s. 144]

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

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

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

269.44 Amendments of processes, pleadings and proceedings. The court may, at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding, notwithstanding it may change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa; provided, the amended pleading states a cause of ac-

tion arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based.

The plaintiff sought to recover only for permanent injuries and pain and suffering, and the case was submitted by a special verdict asking as to damages only in those respects. There was proof only of injuries of a temporary nature other than pain and suffering. This section does not authorize striking the amount assessed by the jury for permanent injuries and entering judgment for pain and suffering only, but in such case a new trial should be had as to damages. *Lofgren v. Preferred Accident Ins. Co.* 256

W 492, 41 NW (2d) 599.

In a mandamus action to compel a building inspector to issue building permits to the relator, overruling the defendant's demurrer *ore tenus* and permitting the relator to amend his petition so as to set out that the village ordinance, which was set out in the answer, imposed a duty on the building inspector to issue such permits, was within the discretion of the trial court. *State ex rel. Schroedel v. Pagels*, 257 W 376, 43 NW (2d) 349.

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

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

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

cise of its discretion could order an extension of the time for serving the bill of exceptions. *Ernst v. Ernst*, 259 W 26, 47 NW (2d) 296.

Judgment was entered against the defendant on June 15th; the defendant then went into bankruptcy and did not serve, nor apply for an extension of the time for serving, a proposed bill of exceptions within the statutory 90-day period; on November 14 he applied for an extension of the time for taking an appeal under authority from the referee in bankruptcy. On the facts as to the intervening bankruptcy proceedings, and the necessity of the consent of the referee to taking an appeal, the trial court, in the exer-

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

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

(2) No agreement, stipulation or consent, between the parties or their attorneys, in respect to the proceedings in an action or special proceeding, shall be binding unless made in court and entered in the minutes or made in writing and subscribed by the party to be bound thereby or by his attorney.

Motions to reopen a divorce case in respect to division of property on the ground of mistake, inadvertence, surprise or neglect were addressed to the discretion of the trial court, whose decisions thereon will not be reversed where there does not appear to have been any abuse of discretion. *Newman v. Newman*, 257 W 385, 43 NW (2d) 453.

trial court properly sustained a demurrer to the counterclaim and directed a final judgment dismissing the counterclaim and confirming title to the premises in the plaintiff, instead of permitting the defendant to plead over. *Kehl v. Britzman*, 258 W 513, 46 NW (2d) 841.

After the time has expired within which the trial court can modify its judgment or appeal can be taken, provisions disposing of property can be reached only by an attack on the judgment itself. Equitable relief against a judgment, although not regarded with favor by the courts, may nevertheless be had where sufficient grounds appear; such relief may be had, not of right, but in the exercise of a sound legal discretion. *Dunn v. Dunn*, 258 W 183, 45 NW (2d) 727.

A valid judgment is not subject to collateral attack. On collateral attack, the question is not whether a judgment was obtained by fraud but whether it was rendered without jurisdiction. *Kehl v. Britzman*, 258 W 513, 46 NW (2d) 841.

Where a wife had brought divorce proceedings in which the husband acted without an attorney and conveyed to the wife by quitclaim deed their homestead owned in joint tenancy and was served with notice of entry of the divorce judgment confirming such conveyance, the husband, in an action of ejectment by the executrix of the estate of the former wife, could not by counterclaim obtain a vacation of the divorce judgment and a cancellation of the quitclaim deed on the ground that he and the wife continued to live together until her death and that he believed that the divorce judgment had been vacated; and, in the absence of any charge of fraud perpetrated on the defendant, the

In an action wherein the defendant's attorney signed a stipulation of settlement in court and the defendant, who had not been present in court and did not sign the stipulation, refused to go through with the settlement, but he neither appeared in person nor filed any affidavit in response to an order to show cause served on him personally as well as on his attorney, the record sustained the trial court's conclusion that the stipulation was authorized by the defendant, warranting the entry of judgment pursuant thereto. *Balzer v. Weisensel*, 258 W 566, 46 NW (2d) 763.

Relief may be had only on notice, and not only the motion but also the order itself must be made within one year after the moving party has notice of the judgment. The court has full control of its judgment for one year, but thereafter it is limited to making corrections to make the judgment conform to the actual pronouncement of the

court, and it cannot modify or amend the judgment to make it conform to what the court ought to have adjudged or even intended to adjudge. A nunc pro tunc order, entered 5 years after the entry of a divorce decree made a judicial alteration of the decree, and hence was void because the court had no jurisdiction over the subject matter so as thus to revise its decree after 5 years had elapsed. *State ex rel. Hall v. Cowie*, 259 W 123, 47 NW (2d) 309.

On an application to vacate a judgment entered without process on a judgment note, and to be allowed to present a defense, the verified proposed answer, alleging that the note was made as part of an oral agreement

whereby the maker promised to maintain and care for the payee and his wife during their lifetime and the payee was to leave all his property to the maker, and that the note was given as security for performance of the promise to support, that the support had been furnished and operated as payment of the note but that the payee had willed his property to others so that there was a failure of consideration, together with an affidavit conforming to 269.465, alleged a meritorious defense in sufficient detail to enable the trial court without abuse of discretion to vacate the judgment. *Adams v. Congdon*, 259 W 278, 48 NW (2d) 469.

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

269.47 Defense where service by publication. When service of the summons shall have been made by publication, if the summons shall not have been personally served on a defendant nor received by such defendant through the post office, he or his representative shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected.

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

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

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

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

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

A respondent's unqualified acceptance and retention of the appellant's briefs, before motion made to dismiss the appeal, constituted such participation in proceedings in the supreme court, as to waive objection to jurisdiction on the ground of late service of notice of appeal. *Estate of White*, 256 W 467, 41 NW (2d) 776.

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

Where the impleaded defendants would have had the right to set up the defense of contributory negligence on the part of one plaintiff and to implead such plaintiff for purposes of contribution if the plaintiffs had amended their complaint to seek relief against the impleaded defendants, but the plaintiffs made no claim of negligence against the impleaded defendants in the en-

tire action, the granting of plaintiffs' motion after verdict for amendment of the pleadings or proceedings to conform to the facts as found by the jury, and ordering judgment in favor of the plaintiffs against the impleaded defendants, constituted prejudicial error requiring a new trial as to all parties. *Rhodes v. Shawano Transfer Co.* 256 W 291, 41 NW (2d) 288.

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

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

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

[269.54 Stats. 1933 renumbered section 269.53 by 1935 c. 541 s. 147]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

History: 1951 c. 20.

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

The trial court by declaratory judgment,

and the supreme court on appeal, had determined that a union had acted arbitrarily, unfairly, and capriciously toward the plaintiff employes in changing a 1937 seniority agreement by a 1947 collective-bargaining contract with the employer bus company, and that the 1947 bargaining contract was invalid in such respect, but that a seniority agreement could be changed by valid negotiations between the union and the employer. The trial court, on the plaintiff's application for supplemental relief based on such declaratory judgment, rightly concluded that it should not pass on the validity of a subsequent bargaining contract which was not in existence and not the subject of litigation when the case was tried. *Belanger v. Local Division No. 1128, 256 W 479, 41 NW (2d) 607.*

The city of Milwaukee and its chief of police brought an action for a declaratory judgment that the city police department had no legal obligation to respond to a demand of the county sheriff that city police

assist in preserving order at a strike-bound plant outside the city. Plaintiffs moved for summary judgment 12 months after the sheriff had made his demand; the term of office of the sheriff who had made such demand had terminated several months prior to the hearing on the motion, so there did not exist a justiciable controversy because of which the plaintiffs were still entitled to a judicial determination, and the case had become moot, warranting the denial of the motion. *City of Milwaukee v. Milwaukee County*, 256 W 580, 42 NW (2d) 276.

An action against the commissioner of taxation, the director of the state department of budget and accounts and the state treasurer for a declaratory judgment construing 71.14 (2), relating to the apportionment and distribution of income taxes collected and transmitted to the state treasurer, was not a suit against the state and was, therefore, a proper action against the named defendants for declaratory relief. *Milwaukee v. Wegner*, 253 W 235, 45 NW (2d) 699.

Judicial constructions of the uniform declaratory judgments act in other states prior to its enactment in Wisconsin came with it. The section does not compel or permit the courts to give advisory opinions, and they properly refuse declaratory judgments

thereunder unless the pleadings present a justiciable controversy ripe for judicial determination. *Skowron v. Skowron*, 259 W 17, 47 NW (2d) 326.

A wife's complaint against a husband for a judgment declaring void an antenuptial contract stating that the husband would provide a home for the wife during the marriage, and settling the amount she would receive at his death if she survived him and also what she would receive if they were divorced, did not present a justiciable controversy ripe for judicial determination, in that the contract was concerned with future and contingent rights except as to the provision for a home for the wife, and the complaint raised no issue as to that nor any other issue warranting a present adjudication concerning the antenuptial contract. A judgment concerning the contract in question could not settle the controversy presented by the allegations of the wife's complaint that by reason of the antenuptial contract the husband was refusing to share his title to his property or his control of his financial affairs with the wife, since he had a right to retain such ownership and control, and no judgment concerning the antenuptial contract could alter such right. *Skowron v. Skowron*, 259 W 17, 47 NW (2d) 326.

269.57 Inspection of documents and property; physical examination of claimant.

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

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

[269.58 Stats. 1941 repealed by 1949 c. 262]

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

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

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

(a) The simplification of the issues;

- (b) The necessity or desirability of amendments to the pleadings;
- (c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (d) The limitation of the number of expert witnesses;
- (e) The advisability of a preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;
- (f) Such other matters as may aid in the disposition of the action.

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