CHAPTER 330.

LIMITATIONS OF COMMENCEMENT OF ACTIONS AND PROCEEDINGS.

330.01 Civil actions; objection as to time of commencing. Civil actions can only be commenced within the periods prescribed in this chapter, except when, in special cases, a different limitation is provided by statute. But the objection that the action was not commenced within the time limited can only be taken by answer or demurrer in proper cases.

The defense of the statute of limitations must be pleaded specially in the answer, and the failure to plead the statute is a waiver of the defense. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

When the limitation for any action is reduced the bar does not act retrospectively in the absence of provision therefor, in view of 370.06 and 371.07. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

330.02 Realty, seizin and possession of. No action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

330.03 Defense or counterclaim, when effectual. No defense or counterclaim, founded upon the title to real property or to rents or services out of the same, shall be effectual unless the person making it or under whose title it is made, or his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the committing of the act with respect to which it is made.

330.04 Entry upon realty, when valid. No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry descended or accrued; and when held adversely under the provisions of section 330.07, within ten years from the time when such adverse possession begun.

330.05 Presumption from legal title. In every action to recover real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by another person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years, under the provisions of section 330.06, or twenty years under the provisions of section 330.08, before the commencement of such action.

See note to 275.01, citing Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

330.06 Presumption on adverse holding under conveyance or judgment. Where the occupant or those under whom he claims entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed the possession of any other lot of the same tract.

330.07 Adverse possession defined. For the purpose of constituting an adverse possession by any person claiming a title founded upon some written instrument or some judgment land shall be deemed to have been possessed and occupied in the following cases:

(1) Where it has been usually cultivated or improved;

(2) Where it has been protected by a substantial inclosure;

(3) Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purpose of husbandry or for the ordinary use of the occupant;

(4) Where a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

330.08 Extent of possession not founded on writing, judgment, etc. When there has been an actual continued occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

Where defendant has acquired an easement by prescription across a narrow strip of plaintiff's land by maintaining a cinder driveway thereon, the construction of a concrete driveway does not increase the burden on the servient estate. Knuth v. Vogels, 265 W 341, 61 NW (2d) 301.

Long acquiescence by the parties in considering a fence as the true boundary line between their properties, with undisputed possession up to the fence for more than 20 years, raises a strong presumption that the line so recognized is the true line; and such presumption is not overcome by the mere fact that a survey, made long after government monuments have been obliterated or lost, reveals another line. Rosen v. Ihler, 267 W 220, 64 NW (2d) 845.

The fact that the plaintiff's continuous and exclusive possession by use of a narrow sloping strip of lawn may have occurred as a result of the mistaken belief that the west surface of a retaining wall constituted the true boundary line between the plaintiff's and the defendant's property, did not prevent such acts of continuous and exclusive possession extending for more than 20 years from ripening into a good title by adverse possession. Schiro v. Oriental Realty Co. 272 W 537, 76 NW (2d) 355.

330.09 Adverse possession, what is. For the purpose of constituting an adverse possession by a person claiming title, not founded upon some written instrument or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

(1) When it has been protected by a substantial inclosure.

(2) When it has been usually cultivated or improved.

When it is shown that there has been the use of an easement for 20 years unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription and to authorize the presumption of a grant, unless contradicted or explained; and such rule applies to property which is either improved or in the process of being improved, whether for use as agricultural land or city property, even if unenclosed; but such rule does not apply to unenclosed, unimproved property largely in a state of nature. (See 331.12 (2)) Carlson v. Craig, 264 W 632, 60 NW (2d) 395.

One in possession of land up to a supposed line, with an absolute claim of title thereto, is deemed to hold adversely, although his claim of title may have originated in a mistaken belief that the supposed line was the true line. Wiese v. Swersinske, 265 W 258, 61 NW (2d) 312.

330.10 Action barred by adverse possession, when. An adverse possession of 10 years under ss. 330.06 and 330.07 or of 20 years under ss. 330.08 and 330.09 shall constitute a bar to an action for the recovery of such real estate so held adversely or of the possession thereof. No title to real property belonging to the state shall be obtained by adverse possession, prescription or user unless such adverse possession, prescription or user has been continued uninterruptedly for more than 40 years. No title to real property held in trust by the state under s. 24.01 (2) to (6) shall be obtained by adverse possession, prescription or user.

History: 1957 c. 192.

330.11 Tenant's possession that of landlord. Whenever the relation of landlord and tenant shall have existed between any persons the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy; or where there has been no written lease until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired an-

other title or may have claimed to hold adversely to his landlord; but such presumption shall not be made after the periods herein limited.

330.12 What use not adverse. (1) No presumption of the right to maintain any wire or cable used for telegraph, telephone, electric light or any other electrical use or purpose whatever shall arise from the lapse of time during which the same has been or shall be attached to or extended over any building or land; nor shall any prescriptive right to maintain the same result from the continued maintenance thereof.

(2) The mere use of a way over uninclosed land shall be presumed to be permissive and not adverse.

Cross Reference: See 182.017 (5) relating to right to condemn for easement for transmission lines.

Regardless of the subject matter to which it may apply, (2), providing that the mere use of a way over unenclosed land shall be presumed to be permissive and not adverse, cannot in any event affect prescriptive rights acquired by an adverse user prior to its enactment. Carlson v. Craig, 264 W 632, 60 NW (2d) 395.

330.13 Rights not impaired. The right of any person to the possession of any real estate shall not be impaired or affected by a descent being cast in consequence of the death of any person in possession of such estate.

330.135 Limitation if disability exists; temporary. (1) If a person entitled to commence any action for the recovery of real property or to make an entry or defense founded on the title to real property or to rents or services out of the same be, at the time such title shall first descend or accrue, either (a) within the age of 21 years; or (b) insane; or (c) imprisoned on a criminal charge or in execution upon conviction of a criminal offiense, for a term less than for life, the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense; but such action may be commenced or entry or defense made, after the time limited and within 5 years after the disability shall cease or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced or entry or defense made after that period.

(2) After December 31, 1945, the provisions of this section shall not operate to extend the time for commencing any action with respect to which the 30-year or the 60-year limitation period established in section 330.15 shall have expired, whether the cause of action shall have arisen prior or subsequent to the enactment of this subsection.

330.14 Actions, time for commencing. The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued except that the period shall not be considered to have expired when the court before which the action is pending shall be satisfied that the person originally served knowingly gave false information to the officer with intent to mislead him in the performance of his duty in the service of any summons or civil process. In the event the court so finds the period of limitation shall be extended for one year.

History: 1957 c. 242.

A statute shortening an existing limitation, and making the same retroactive to existing causes of action, would be unconstitutional unless a reasonable grace period was granted within which to commence actions. [Whether the 49-day grace period, for the commencement of actions to recover lands sold for delinquent taxes, afforded to minors by ch. 391, Laws 1949, as amended by ch. 634, s. 25a, Laws 1949, constituted a reasonable time for the purpose intended, is not determined.] Swanke v. Oneida County, 265 W 92, 60 NW (2d) 756, 62 NW (2d) 7.

330.15 Action concerning real estate. (1) Except as provided in subsection (5), no action affecting the possession or title of any real estate shall be commenced by any person, the state, or any subdivision thereof after January 1, 1943, which is founded upon any unrecorded instrument executed more than 30 years prior to the date of commencement of such action, or upon any instrument recorded more than 30 years prior to the date of commencement of the action, or upon any transaction or event occurring more than 30 years prior to the date of commencement of the action, unless within 30 years after the execution of such unrecorded instrument or within 30 years after the date of recording of such recorded instrument, or within 30 years after the date of such transaction or event there is recorded in the office of the register of deeds of the county in which the real estate is located, some instrument expressly referring to the existence of such claim, or a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction or event on which such claim is founded, with its date and the volume and page of its recording, if it be recorded, and a statement of the claims made. This notice may be discharged the same as a notice of pendency of action. Such notice or instrument recorded after the expiration of 30 years shall be likewise effective, except as to the rights of a purchaser for value of the real estate or any interest therein which may have arisen prior to such recording.

(2) The recording of such notice, or of an instrument expressly referring to the existence of the claim, shall extend for 30 years from the date of recording (whether such

recording occurred before or after the enactment of this section), the time in which any action founded upon the written instrument or transaction or event referred to in the notice or recorded instrument may be commenced; and like notices or instruments may thereafter be recorded with like effect before the expiration of each successive 30-year period.

(3) This section does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute.

(4) This section shall be construed to effect the legislative purpose of barring all claims to an interest in real property, whether dower (which for the purpose of this section shall be considered as based on the title of the husband without regard to the date of marriage) inchoate or consummate, curtesy, remainders, reversions and reverter clauses in covenants restricting the use of real estate, mortgage liens, old tax deeds, inheritance, gift and income tax liens, rights as heirs or under wills, or any claim of any nature whatsoever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within such 30-year period there has been recorded in the office of the register of deeds some instrument expressly referring to the existence of such claim, or a notice pursuant to this section. This section does not apply to any action commenced by any person who is in possession of the real estate involved as owner at the time the action is commenced, nor does this section apply to any real estate or interest therein while the record title thereto remains in a railroad corporation or a public service corporation as defined in s. 184.01, or any trustee or receiver thereof, or to claims or actions founded upon mortgages or trust deeds executed by such corporations, or trustees or receivers thereof; nor does this section apply to any real estate or interest therein while the record title thereto remains in the state or any political subdivision or municipal corporation thereof.

(5) Actions to enforce easements, or covenants restricting the use of real estate set forth in any instrument of public record shall not be barred by this section for a period of 60 years after the date of recording such instrument, and the timely recording of instruments expressly referring to such easements or covenants or of notices pursuant to this section shall extend such time for 60-year periods from such recording.

(6) The word "purchaser" as used in this section shall be construed to embrace every person to whom any estate or interest in real estate shall be conveyed for a valuable consideration and also every assignee of a mortgage or lease or other conditional estate.

History: 1953 c. 496.

The evidence supported findings that an easement acquired by the defendants in an alleyway was appurtenant only to a certain lot, on which they operated an appliance store, and not to adjoining lots owned by the defendants, on which they operated a department store and a men's store, but that the defendants had made regular and substantial use of the easement for the transportation of merchandise for the other stores, and that such use was not within the contemplation of the owners of the premises at the time the easement was acquired by prescription, and that such unauthorized use was an added burden on the servient estate owned by the plaintiff, warranting a judgment enjoining such unauthorized use. S. S. Kresge Co. v. Winkelman Realty Co. 260 W 372, 50 NW (2d) 920.

The words "inheritance, gift and income tax liens," were inserted in 330.15 (4), in 1945, solely because of the position taken in the supreme court in Estate of Frederick (1945), 247 W 268, 19 NW (2d) 248, that statutes of limitation do not apply to the state unless specifically so provided. 42 Atty. Gen. 115.

330.16 Within twenty years. Within twenty years:

(1) An action upon a judgment or decree of any court of record of this state or of the United States sitting within this state.

(2) An action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in sections 19.015, 321.02 and 330.19 and subsection (2) of section 330.20.

A provision "Witnesseth our hands and seals" was not sufficient to constitute a contract an instrument under seal. Skelly Oil Co. v. Peterson, 257 W 300, 43 NW (2d) 449.

Evidence insufficient to establish an easement by 20 years' use discussed. Carlson v. Dorsch, 274 W 22, 79 NW (2d) 99.

Where a stipulation in a divorce action was incorporated in the judgment and required the husband to continue to pay premiums on an insurance policy which had already lapsed, the beneficiary's claim against his estate for the face amount of the policy was subject to the 20 year statute of limitations. Estate of Zellmer, 1 W (2d) 46, 82 NW (2d) 891.

330.17 Within twenty years, against railroads and utilities for entry on lands. Whenever any land or any interest therein has been or shall hereafter be taken, entered upon or appropriated for the purpose of its business by any railroad corporation, electric railroad or power company, telephone company or telegraph company without said corporation or company having first acquired title thereto by purchase or condemnation, as by statute provided, the owner of any such land, his heirs, assigns and legal representatives shall have and are hereby given the right to at any time within twenty years from the date of such taking, entry or appropriation, sue for damages sustained because of such

taking, from the corporation or company so taking, entering upon or appropriating said lands or its successors in title, in the circuit court of the county in which said land is situated.

A land-owner, who has been injured by reason of flowing his land by a power company, may sue for damages under this section or condemn under ch. 32. Peterson v. Wisconsin River Power Co. 264 W 84, 58 NW (2d) 287, overruled. Zombkowski v. Wisconsin River Power Co. 267 W 77, 64 NW (2d) 236.

330.18 Within ten years. Within ten years:

(1) An action upon a judgment or decree of any court of record of any other state or territory of the United States or of any court of the United States sitting without this state.

(2) An action upon a sealed instrument when the cause of action accrued without this state, except those mentioned in section 330.19.

(3) An action for the recovery of damages for flowing lands, when such lands have been flowed by reason of the construction or maintenance of any milldam.

(4) An action which, on and before February 28, 1857, was cognizable by the court of chancery, when no other limitation is prescribed in this chapter.

(5) An action for the recovery of damages for flowing lands when such lands shall have been flowed by reason of the construction or maintenance of any flooding dam or other dams constructed, used or maintained for the purpose of facilitating the driving or handling of saw logs on the Chippewa, Menomonee, or Eau Claire rivers or any tributary of either of them.

(6) Any action in favor of the state when no other limitation is prescribed in this chapter. No cause of action in favor of the state for relief on the ground of fraud shall be deemed to have accrued until discovery on the part of the state of the facts constituting the fraud.

(7) (a) No action or proceeding affecting the title to or possession of any real estate which is founded on a defect in jurisdiction over a person named as a party defendant in a judgment entered in a court of record of this state shall be commenced after 10 years from the filing of such judgment with the clerk of the said court, provided that during such time a lis pendens or such judgment or a certified copy thereof, naming such person as a party defendant, has been of record in the office of the register of deeds of the county in which such real estate is located, unless within 10 years after the date of the filing of such judgment with the said clerk there is filed in the office of such register of deeds some instrument or notice giving the name of the person claiming to have been affected thereby, describing such defect, and the real estate affected. Any such instrument or notice filed after the expiration of such 10 years shall be likewise effective, except as to the rights of a purchaser, without notice and for value, of such real estate or interest therein which may have arisen prior to such filing. Such instrument or notice may be discharged in the same manner as a lis pendens.

(b) Paragraph (a) shall have no application to judgments in estates of decedents.

History: 1951 c. 321; 1953 c. 61.

(4) does not apply in all cases where equitable relief is sought, but only in controversies between trustee and beneficiary as to the establishment, enforcement, protection and perservation of trusts of which controveries the court of chancery had sole and exclusive jurisdiction. (4) does not apply to an ordinary action by a corporation against its former general manager for an accounting of corporate funds. Haueter v. Budlow, 256 W 561, 42 NW (2d) 261.

An action to reform a correction deed by eliminating therefrom a certain provision, also contained in the original deed, was properly dismissed on the ground that the alleged cause of action accrued under the original deed, more than 10 years before the commencement of the action to reform, and hence was barred by (4). Milwaukee County v. City of Milwaukee, 259 W 560, 49 NW (2d) 902.

An action to reform a written instrument, in the instant case the description in a lease, is an action in equity which was cognizable by a court of chancery prior to the year 1857, so that the 10-year statute of limitations, 330.18 (4) applies thereto, rather than the 6-year statute, 330.19 (3). Langer v. Stegerwald Lumber Co. 262 W 383, 55 NW (2d) 389, 56 NW (2d) 512.

Actions for annulment of marriage were triable in our circuit courts sitting as courts of chancery prior to March 1, 1857, so that the 10-year statute of limitations imposed by (4) applies to an action for annulment of marriage based on the alleged insanity of one of the parties at the time of the marriage. A cause of action for annulment on the ground of insanity of the wife at the time of the marriage arose on the date of the marriage, so that the statute started to run from that date. Witt v. Witt, 271 W 93, 72 NW (2d) 748.

Neither 330.18 (6) nor 330.19 (7) bar an action by the state to revoke a physician's license procured through fraud. State v. Josefsberg, 275 W 142, 81 NW (2d) 735.

330.19 Within 6 years; one year notice of damage by railroad. Within 6 years:

(1) An action upon a judgment of a court not of record.

(2) An action upon any bond, coupon, interest warrant or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this state.

(3) An action upon any other contract, obligation or liability, express or implied, except those mentioned in sections 330.16 and 330.18.

(4) An action upon a liability created by statute when a different limitation is not prescribed by law.

(5) An action to recover damages for an injury to property, real or personal, or for an injury to the character or rights of another, not arising on contract, except in case where a different period is expressly prescribed.

Revisor's Note: 330.19 (5) is printed above as amended by ch. 435, Laws 1957. The following is the old text of 330.19 (5) as amended by ch. 260, Laws 1957. It is so printed with the thought that it may be useful in construing the provision. See also 330.205 and see 990.06 as to the effect of the repeal. Ch. 435, Laws 1957, was published July 31, 1957.

(5) An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action is barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured, at the time of such injury, was a resident of this state. No action to recover damages for an injury to the person shall be maintained unless, within 2 years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, is served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record, including service upon the commissioner of motor vehicles when authorized by law. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating or omitting any detail, provided it appears that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. It is declared that the purpose of this statute is to prevent the prosecution of claims after the investigation of the facts upon which they are based have become difficult and no notice which advises the person to whom it is addressed of the principal facts upon which the claim is based shall be deemed insufficient if it substantially meets the requirements hereof. When an action is brought and a complaint actually served within 2 years after the happening of the event causing such damages, the notice herein provided for need not be served.

(6) An action to recover personal property or damages for the wrongful taking or detention thereof.

(7) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.

(8) No action against any railroad corporation for damages to property occasioned by fire set from a locomotive or for stock killed or injured by such corporation shall be maintained unless within one year after the happening of the event causing such damage the complaint be served or a notice in writing, signed by the party owning such property or stock, his agent or attorney, shall be given to the corporation in the manner provided for service of a circuit court summons, stating the time and place such damage occurred and that satisfaction therefor is claimed of such corporation. No such notice shall be deemed insufficient solely because of any inaccuracy or failure therein in stating the time when or describing the place where such damages occurred if it shall appear that there was no intention on the part of the claimant to mislead said corporation and that the latter was not in fact misled thereby.

(9) An action upon a claim, whether arising on contract or otherwise, against a decedent or against his estate, unless probate of his estate in this state shall have been commenced within 6 years after his death.

History: 1953 c. 61, 444, 631; 1955 c. 10; 1957 c. 84, 260, 435, 674.

Cross References: See 81.15 as to notice of injury caused by defective highway or street. See 316.01 (2) for statute of limitation of lien on lands of a decedent for payment of his debts. See 330.25 for limitation of an action on a "mutual and open account." See 321.02 (3) for 4-year limitation on action against sureties on bonds in county court.

See note to 102.17, citing Fossman v. Industrial Comm. 257 W 540, 44 NW (2d) 266.

A motion to amend a complaint based on express contract, by setting forth an alternative cause of action in quantum meruit, should have been denied as too late for the commencement of an action on such alternative cause of action, the statute of limitations, (3), having run thereon. Halvorson v. Tarnow, 258 W 11, 44 NW (2d) 577.

In the absence of actual service of a complaint, the service of notice of injury within the 2-year period required by (5) is a condition precedent to the right to maintain an action for the injury, so that a failure in that respect leaves a plaintiff in a position where the courts cannot assist him. Martin v. Lindner, 258 W 29, 44 NW (2d) 558.

See also note to 269.38, citing Martin v. Lindner, 258 W 29, 44 NW (2d) 558.

The requirement of notice of injury, contained in the 6-year statute of limitations, (5), relating generally to actions for personal injuries, does not apply to an action for assault and battery, which latter action is expressly governed by the 2-year limitation of 330.21 (2). Asplund v. Palmer, 258 W 34, 44 NW (2d) 624.

Where the first item in the plaintiff's account for fees earned in reporting hearings was $11.60 earned in 1940, and his action for such fees was not brought until 1948, the statute of limitations had run as to such item. O'Leary v. Hannaford, 258 W 146, 44 NW (2d) 908.

A complaint alleging that, because of fraudulent representations made by the defendants, the plaintiff signed a release of his cause of action for personal injuries, not knowing it to be a release, but failing to allege that thereby he was prevented from serving notice of his claim under (5), or was delayed in bringing action on account of his injuries until the time had run when he could no longer do so, and hence failing to plead a causal connection between his fraudulently induced act or failure to act and the damage sustained in the loss of his right to sue for his personal injuries, did not state a cause of action in deceit. (Krestich v. Stefanez, 243 W 1, distinguished.) Gerke v. Johnson, 258 W 583, 46 NW (2d) 829.

A motorist's liability insurer, which had made settlements of claims for personal injuries with guest occupants of the other car involved in a collision, within 2 years after

the happening of the accident, was not precluded from maintaining an action for contribution against the liability insurer of the driver of the other car more than 2 years after the happening of the accident by the fact that no notice of claim for injuries had been served within 2 years, as would have been required of the injured guests, if they had been seeking to maintain an action against their host-driver or his insurer more than 2 years after the happening of the accident. (Ainsworth v. Berg, 253 W 438, followed and applied.) American Casualty Co. v. American Auto. Ins. Co. 259 W 201, 47 NW (2d) 898.

The service of a written notice of claim for injury personally on the defendant in Missouri by a deputy sheriff of Missouri, was a sufficient compliance with the requirement in (5) that such a notice "shall be given in the manner required for the service of summons in courts of record." Trapino v. Trapino, 260 W 137, 50 NW (2d) 467.

See note to 102.17, citing Metropolitan Casualty Ins. Co. v. Industrial Comm. 260 W 298, 50 NW (2d) 399.

The provision in (5), requiring that written notice of claim for damages "for an injury to the person" be served within 2 years, applied to a husband's alleged cause of action, for loss of his wife's consortium, against an employer in whose employment the wife had been injured and from whom she had received compensation under the workmen's compensation act. Guse v. A. O. Smith Corp. 260 W 403, 51 NW (2d) 24.

That portion of (5), requiring that a notice of claim for injury be served within 2 years after the accident, is not a statute of limitations but imposes a condition precedent to the right to maintain an action; under the terms of the statute, when the condition is satisfied, the injured person has 6 years from the date of the accident before the statute of limitations deprives him of his remedy, and bringing an action and actually serving a complaint within 2 years after the accident satisfies the condition and dispenses with the otherwise indispensable notice. The bringing of an action and the serving of a complaint, alleging ordinary negligence, within 2 years after the accident, dispensed with the notice, and that requirement went out of the case so that it did not preclude the plaintiff from amending the complaint, so as to charge gross negligence, after the 2-year period and within 6 years after the accident, without having served a notice claiming gross negligence, within the 2-year period. The purpose of the notice is to warn the wrongdoer that a claim for damages may be made and to give him opportunity to collect and preserve his evidence. Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

Considering the first complaint in the action, served within 2 years after the accident, as a notice of claim for injury within (5), it gave to the defendant the information which the statute requires the plaintiff to give to him and served the purpose of the statute in informing him that his negligent driving was claimed to be the cause of the injuries; and the fact that such first complaint alleged only ordinary negligence did not necessarily make it insufficient as a notice in relation to allegations of gross negligence in the complaint as amended after the 2-year period for service of notice, since the statute provides that a notice shall not be deemed insufficient or invalid for inaccuracy or failure in stating the grounds on which the claim is made if it appears that there was no intent to mislead or misleading in fact. Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

Although (5) provides that one of the matters to be stated in a notice of claim for injury is the date of the accident, a notice which failed to state the date of the accident was nevertheless a sufficient compliance with the statute, where such date was easily ascertainable under the facts of the case, and there was no intention on the part of the claimant to mislead the defendants, and the defendants did not claim to have been misled by such omission. Where no notice of claim for injury has been served and no attempt has been made to comply with the statutory provisions governing the giving of such notice, knowledge of the facts by the defendant from other sources is not a compliance with the statute; and something else may not be substituted for the notice. Ullman v. Freye, 263 W 199, 56 NW (2d) 821.

A complaint in an action against the liability insurer of an alleged tort-feasor for injuries sustained by a minor was not a notice of claim for damages sustained by the minor's parents and, even if considered as notice, it was not a sufficient compliance with the requirements of (5), Stats. 1951, in that it was not signed by the parties (parents) now seeking recovery, and was served on the insurer and not on the person by whom it is claimed the damages sustained by the parents were caused. (5) applies to a parents' action to recover expenses incurred by them in the treatment of their minor child for injuries sustained by her through the defendant's alleged negligence. Ylen v. Mutual Service Casualty Ins. Co. 263 W 270, 57 NW (2d) 391.

An action for the wrongful death of a person against whom the defendant had obtained a judgment on a note was barred by (5), in that it was commenced more than 2 years after the alleged wrongful act, namely, the alteration of the note without service of any notice of claim for injury. O'Brien v. Hessman, 265 W 63, 60 NW (2d) 719.

If the plaintiff Red Cross chapter was without authority to transfer its fund in trust, its remedy to recover the same was an action for money had and received, but in such case the plaintiff's claim was barred by (3), covering implied contracts. American Nat. Red Cross v. Banks, 265 W 66, 60 NW (2d) 738.

The statutes of limitations embraced in ch. 330 do not apply to special proceedings, such as certiorari and mandamus. Unexplained delay of approximately 8 years in instituting certiorari proceedings to review acts of state bar commissioners in correcting bar examination papers, constituted such laches as to bar maintenance of proceeding. Wurth v. Affeldt, 265 W 119, 60 NW (2d) 708.

The notice of claim for injury under (5) is not a "legal process," and it cannot be effectively served on the commissioner of the state motor vehicle department as the attorney for a nonresident operator of a motor vehicle. Oldenburg v. Hartford Accident & Indemnity Co. 266 W 68, 62 NW (2d) 574.

The service of a summons and complaint for personal injuries on an individual solely as an officer of a supposed corporation which was named as the defendant and against which the claim was made, when such individual was a member of a partnership which was not named as a defendant and against which, or the members of which, no claim was asserted, was not a service of process under which the court obtained jurisdiction of the person of the partners, and was not the commencement of an action against the partners which would obviate the necessity of serving a notice of claim nor did it amount to the service of a notice of claim for injury under (5). Ausen v. Moriarty, 268 W 167, 67 NW (2d) 358.

Under (7) a cause of action for fraud is barred if the aggrieved person was placed in possession of facts which, if followed by diligent inquiry, would have disclosed the fraud. Hinkson v. Sauthoff, 272 W 33, 74 NW (2d) 620.

Even though delivery of a summons and complaint to the sheriff is deemed the commencement of an action under 330.40, the complaint must be actually served within 2 years to avoid the requirement of 330.19 (5) that a notice of injury be served. Dostal v. Magee, 273 W 228, 77 NW (2d) 604.

In relation to a cause of action for personal injuries sustained in an accident occurring on December 9, 1953, the service of the summons and complaint on December

9, 1955, complied with (5). Hale v. Hale, 275 W 369, 82 NW (2d) 305.

Plaintiff Michigan administrator's intestate died after explosion in Michigan of oil stove manufactured by defendant. Whether action in federal court for Wisconsin is for personal injuries or for wrongful death must be determined by Michigan law. 330.19 (5) does not apply since under Michigan law action is for wrongful death. Wisconsin law on limitation of actions applies —330.21 (3). Drinan v. A. J. Lindemann & Hoverson Co. 202 F (2d) 271, 238 F (2d) 72.

Service of a notice of injury within 2 years by plaintiff personally does not comply with (5). Morrissey v. Murphy, 137 F. Supp. 377.

330.195 Within 5 years. Within 5 years of date of birth of child: An action under ch. 52 for the establishment of the paternity of the child, except that this limitation shall not apply where the parties thereto enter into an agreement for the support of the child in accordance with s. 52.28 or where a second proceeding is had pursuant to s. 52.31 (2). Where a warrant or summons under ch. 52 has been issued within such 5 years, the provisions of ss. 330.30 and 939.74 (3) shall both be applicable in computing time under this section.

History: 1957 c. 296.

330.20 Within three years. Within three years:

(1) An action against a sheriff, coroner, town clerk, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon execution; but this subsection shall not apply to an action for an escape.

(2) An action by the state or any of its departments or agencies or by any county, town, village, city, school district or other municipal unit to recover any sum of money by reason of the breach of an official bond or the breach of a bond of any nature whatsoever, whether required by law or not, given by a public officer or any agent or employe of a governmental unit; such period to commence running when such governmental unit receives knowledge of the fact that a default has occurred in some of the conditions of such bond and that it was damaged because thereof.

(3) An action or proceeding to test the validity of a change of any county seat, within three years after the date of the publication of the governor's proclamation of such change; and every defense founded upon the invalidity of any such change must be interposed within three years after the date of the aforesaid publication, and the time of commencement of the action or proceeding to which any such defense is made shall be deemed the time when such defense is interposed.

Cross Reference: For 3-year statute of limitation of lien on lands of a decedent for payment of his debts, see 316.01 (2).

The 3-year limitation in (1) does not apply to a taxpayer's action to recover from a town chairman for the illegal disbursement of town funds caused by him to be made; and likewise, (2), so far as relating to an action by a town to recover money by reason of breach of official bond, does not apply to such taxpayer's action. Pugnier v. Ramharter, 275 W 70, 81 NW (2d) 38.

330.205 Within 3 years. Within 3 years: An action to recover damages for injuries to the person for such injuries sustained on and after July 1, 1957. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action shall be barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state. This section shall be subject to s. 990.06.

History: 1957 c. 435.

Revisor's Note: See 330.19 (5) and the revisor's note under it.

330.21 Within two years. Within two years:

(1) An action by a private party upon a statute penalty or forfeiture when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation.

(2) An action to recover damages for libel, slander, assault, battery or false imprisonment.

(3) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.

(4) An action to recover a forfeiture or penalty imposed by any by-law, ordinance or regulation of any town, county, city or village or of any corporation organized under the laws of this state, when no other limitation is prescribed by law.

(5) Any action to recover unpaid salary, wages or other compensation for personal services, except fees for professional services.

History: 1951 c. 727; 1953 c. 61.

(5) prescribing a 2-year limitation on actions to recover compensation for personal services "except fees for professional services" is not rendered wholly void by such exception even though that may have created an unconstitutional classification, it being considered that the exception, inserted by an amendment enacted in 1947, is severable and that its elimination would leave a complete workable law remaining, consis-

tent with the intention of the legislature, to require claims for compensation for personal services to be made within 2 years. Estate of Zeimet, 259 W 619, 49 NW (2d) 824.

(5) limited the compensation which a claimant against the estate of a decedent might recover on quantum meruit, for personal services rendered to the decedent, to the last 2 years before the death of the decedent. Estate of Tulloch, 260 W 378, 50 NW (2d) 671.

Where the agreement established was that after the decedent's death the claimants should be paid for their services, their causes of action did not accrue until the death, and hence, their claims having been filed with the county court within 2 years thereafter, (5) did not apply to reduce the period for which compensation was allowable to these claimants. Estate of Schaefer, 261 W 431, 53 NW (2d) 427.

Where personal services were rendered without agreement as to amount and time of payment, and the implication was that payment was not due until the employment ended, the statute did not begin to run until employment ended. Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

Where the contract of employment is for no definite period and the salary is due monthly, there is an accrual of salary at the end of each month, and the claim therefor constitutes a distinct and separate cause of action on which the statute of limitation begins to run from the date thereof. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

A claim against the estate of a decedent for board, room, and laundry furnished to the decedent during a period of years, at the home of the claimants, was not subject to the 2-year statute of limitations, but under an implied contract, the claim was subject to the 6-year statute of limitations. Estate of Fredericksen, 273 W 479, 78 NW (2d) 878.

(1) is to be read as though there was a comma after "penalty", since the comma was apparently omitted by mistake in the 1878 revision, and therefore the 2 year limit applies to all statutory penalties. Grengs v. Twentieth Century Fox Film Corp., 232 F. (2d) 325.

See note to 330.19, citing Drinan v. A. J. Lindemann & Hoverson Co. 202 F (2d) 271, 238 F (2d) 72.

330.22 Within one year. Within one year:

(1) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

(2) All actions for damages for seduction or alienation of affections.

(3) Any action to recover possession of, or to avoid the title to, any property real or personal acquired by the defendant or his predecessors in title, from a foreign corporation because such property was acquired by such corporation before complying with the terms of sections 180.801, 180.813 to 180.821 and 180.845.

(4) Any action to recover the possession of, or avoid the title to, any property real or personal because such property was acquired by a corporation before complying with the terms of said sections brought against any foreign corporation which shall before the commencement of the action have complied with the terms of said sections, such year to be computed from the date of compliance with said sections.

History: 1953 c. 61.

Cross References: See 330.19 (8) for one-year notice provision as to actions against railroad companies. See 180.847 (2) for provision to effect that a failure of a foreign corporation to qualify does not make its title to real estate defective.

The basis of a right of action for damages for alienation of affections is loss of consortium. The one-year statute of limitations began to run on the date when the loss of consortium occurred, when the wife was induced to leave the home, and not on a later date when judgment of divorce was entered, and it was immaterial whether a possibility of reconciliation existed after the loss of consortium or whether the defendant committed further acts of wrongdoing by inducing the wife to stay away from her husband. Kasper v. Enich, 265 W 318, 61 NW (2d) 315.

330.23 Within thirty days. Within thirty days: An action to contest the validity of any state or municipal bond which has been certified by the attorney-general, as provided in subsection (5a) of section 14.53, for other than constitutional reasons, must be commenced within thirty days after such certification in the case of a state bond, and within thirty days after the recording of such certificate as provided by subsection (3) of section 67.02, in the case of a municipal bond.

330.24 Within 9 months. Every action or proceeding to avoid any special assessment, or taxes levied pursuant to the same, or to restrain the levy of such taxes or the sale of lands for the nonpayment of such taxes, shall be brought within 9 months from the notice thereof, and not thereafter. This limitation shall cure all defects in the proceedings, and defects of power on the part of the officers making the assessment, except in cases where the lands are not liable to the assessment, or the city has no power to make any such assessment, or the amount of the assessment has been paid or a redemption made.

History: 1953 c. 245.

330.25 Actions upon accounts. In actions brought to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

Where each of successive contracts provided that it canceled all prior contracts between the parties, any cause of action which a distributor had for the return of his deposits under any particular contract commenced with the termination of that contract, and the 6-year statute of limitations applied as to each such separate contract. Skelly Oil Co. v. Pederson, 257 W 300, 43 NW (2d) 449.

A "mutual and open account current" is one that is made up of a series of reciprocal charges and allowances by both parties. Mere money payment on an account does not make it a mutual and open current account. Estate of Vicen, 1 W (2d) 193, 83 NW (2d) 664.

330.26 Other personal actions. All personal actions on any contract not limited by this chapter or any other law of this state shall be brought within ten years after the accruing of the cause of action.

330.27 Defenses barred. A cause of action upon which an action cannot be maintained, as prescribed in this chapter, cannot be effectually interposed as a defense, counterclaim or set-off.

330.29 Bank bills not affected. None of the provisions of this chapter shall apply to any action brought upon any bills, notes or other evidences of debt issued by any bank or issued or put into circulation as money.

330.30 Limitation when person out of state. If when the cause of action shall accrue against any person he shall be out of this state such action may be commenced within the terms herein respectively limited after such person shall return or remove to this state. But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue is a resident of this state; and if, after a cause of action shall have accrued against any person, he shall depart from and reside out of this state the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action; provided, that no foreign corporation which shall have filed with the secretary of state, or any other state official or body, pursuant to the requirements of any applicable statute of this state, an instrument appointing a registered agent as provided in chapter 180, a resident or any state official or body of this state, its attorney or agent, on whom, pursuant to such instrument or any applicable statute, service of process may be made in connection with such cause of action, shall be deemed a person out of this state within the meaning of this section for the period during which such appointment is effective, excluding from such period the time of absence from this state of any registered agent, resident agent or attorney so appointed who shall have departed from and resided outside of this state.

History: 1951 c. 731 s. 9.

Note: The amendment made by ch. 731, Laws 1951, applies to all causes of action, whether arising before or after August 19, 1951, except that such amendment shall not have the effect of barring prior to July 1, 1952 any cause of action which would not have been barred prior to July 1, 1952 under 330.30 as it existed prior to such amendment. (Sec. 10, ch. 731, Laws 1951)

Revision Committee Note, 1951: 330.30 (1949) requires amendment to make its reference to the instrument appointing an agent for service, conform to the form of the appointments under such sections as 180.813 (1) (d), 180.823, 180.837, 180.845 (2), 180.801 (2) and 180.68, and the effect given under section 180.825 to the appointment of a registered agent. In addition, this revision eliminates the present provision that a qualified foreign corporation does not have the benefit of the statutes of limitation unless it has a manufacturing plant in the state. There appears no defensible reason why the benefit of the statutes of limitation should not be extended to a foreign corporation with a retail store, sales office, warehouse, or truck fleet, for example, or in fact to any foreign corporation (including an insurance company), which has fully complied with all statutory requirements to do business in this state and by statutory requirement has expressly appointed a resident or state official to accept service of process. If the effect of the present provision were generally understood, it it believed that it would be a serious deterrent to the conduct by foreign corporations of business in this state. (Bill 763-S)

See note to 272.04, citing Stanley C. Hanks Co. v. Scherer, 259 W 148, 47 NW (2d) 905.

330.31 Application to alien enemy. When a person shall be an alien subject or citizen of a country at war with the United States the time of the continuance of the war shall not be a part of the time limited for the commencement of the action.

330.32 Effect of military exemption from civil process. The time during which any resident of this state has been exempt from the service of civil process on account of being in the military service of the United States or of this state, shall not be taken as any part of the time limited by law for the commencement of any civil action in favor of or against such person.

330.33 Persons under disability. (1) If a person entitled to bring an action mentioned in this chapter, except actions for the recovery of a penalty or forfeiture or against a sheriff or other officer for an escape, or for the recovery of real property or the possession thereof be, at the time the cause of action accrued, either

(a) Within the age of twenty-one years; or

(b) Insane; or

(c) Imprisoned on a criminal charge or in execution under sentence of a criminal court for a term less than his natural life.

(2) The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases.

Minority does not excuse the failure to give the notice of injury required by 330.19 (5). Hoffman v. Milwaukee E. R. & L. Co. 127 W 76, 106 NW 808.

An action for assault and battery was not barred by the 2-year limitation of 330.21 (2), where the plaintiff was an infant when the assault took place, and the disability of infancy still existed when the summons and complaint were served. Asplund v. Palmer, 258 W 34, 44 NW (2d) 624.

330.34 Limitation in case of death. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced after the expiration of that time and within one year after the issuing, within this state, of letters testamentary or of administration.

330.35 Appeals; if judgment for defendant reversed, new action for plaintiff. If an action shall be commenced within the time prescribed therefor and a judgment therein for the plaintiff, or the defendant, be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

330.36 When action stayed. When the commencement of an action shall be stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

330.37 Disability. No person shall avail himself of a disability unless it existed when his right of action accrued.

330.38 More than one disability. When two or more disabilities shall coexist at the time the right of action accrued the limitation shall not attach until they all be removed.

330.39 Action, when commenced. An action shall be deemed commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons is served on him or on a codefendant who is a joint contractor or otherwise united in interest with him.

330.40 Attempt to commence action. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law which limits the time for the commencement of an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which the defendants or one of them usually or last resided; or if a corporation organized under the laws of this state be defendant to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served resides or has his office; or if such corporation has no such place of business or any officer or other person upon whom the summons may by law be served known to the plaintiff, or if such defendant be a nonresident, or a nonresident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons or the service thereof within sixty days. If the action be in a court not of record the service thereof must be made with due diligence.

See note to 330.19, citing Dostal v. Magee, 273 W 228, 77 NW (2d) 604.

This section relates solely to an attempt to commence an action as an ordinary court proceeding and not to proceedings before boards, commissions, or other administrative agencies. State ex rel. McIntyre v. Board of Election Comm. 273 W 395, 78 NW (2d) 752.

330.41 Presenting claims. The presentation of any claim, in cases where by law such presentment is required, to the county court shall be deemed the commencement of an action within the meaning of any law limiting the time for the commencement of an action thereon.

The filing of a claim in probate court against the estate of a deceased stockholder, based on the stockholder's liability under 180.40 was not required by law, and did not constitute the commencement of an action for the purpose of determining whether an action in the circuit court to enforce the stockholder's liability had been commenced before the statute of limitations had run thereon. Casey v. Trecker, 268 W 87, 66 NW (2d) 724.

330.42 Acknowledgment or new promise. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby.

In an action to recover on a promissory note, the evidence warranted findings that the note was given as a renewal of previous notes and obligations owed by the defendant to the plaintiff, and hence constituted a sufficient written acknowledgment or promise to

pay the past-due obligations to the extent of the amount of the renewal note, so as to take the cause of action for the recovery of that amount out of the operation of the statute of limitations. Hessman v. O'Brien, 258 W 243, 45 NW (2d) 730.

This section, although applying to a claim depending on the revival of a debt against which the statute of limitation has run, does not apply to a claim which rests on the promissor's recognition of a moral obligation to pay for services previously rendered and as to which he never was legally indebted and as to which, therefore, there never was a debt for the statute of limitations to extinguish. Estate of Gerke, 271 W 297, 73 NW (2d) 506.

330.43 Acknowledgment, who not bound by. If there are two or more joint contractors or joint administrators of any contractor no such joint contractor, executor or administrator shall lose the benefit of the provisions of this chapter so as to be chargeable by reason only of any acknowledgment or promise made by any other or others of them.

330.44 Actions against parties jointly liable. In actions commenced against two or more joint contractors or joint executors or administrators of any contractors, if it shall appear, on the trial or otherwise, that the plaintiff is barred by the provisions of this chapter as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover and for the other defendant or defendants against the plaintiff.

330.45 Parties need not be joined, when. If in any action on contract the defendant shall answer that any other person ought to have been jointly sued and shall verify such answer by his oath or affirmation, and issue shall be joined thereon, and it shall appear on the trial that the action is barred against the person so named in such answer by reason of the provisions of this chapter, the issue shall be found for the plaintiff.

330.46 Payment, effect of, not altered. Nothing contained in sections 330.42 to 330.45 shall alter, take away or lessen the effect of a payment of any principal or interest made by any person, but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made or purport to be made, shall be deemed sufficient proof of the payment so as to take the case out of the operation of the provisions of this chapter.

330.47 Payment by one not to affect others. If there are two or more joint contractors or joint executors or administrators of any contractor no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable, by reason only of any payment made by any other or others of them.

330.48 Computation of time, basis for. The periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or defendant in the particular action or special proceeding, except that as to a defense, set-off or counterclaim the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief as to such defense, set-off or counterclaim is interposed.

330.49 Dismissal of suit after answer. When a defendant in an action has interposed an answer as a defense, set-off or counterclaim upon which he would be entitled to rely in such action the remedy upon which, at the time of the commencement of such action, was not barred by law, and such complaint is dismissed or the action is discontinued the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencment of an action by the defendant to recover for the cause of action so interposed as a defense, set-off or counterclaim.

A former action, which involved, among other things, a contract and certain notes of which the plaintiff therein was maker and the defendant therein was payee, and which action was ultimately dismissed, was in effect an equitable action for an accounting; and in such action the rule that affirmative relief will not be granted to a defendant unless he demands the same by setoff or counterclaim did not apply, but the complaint itself and allegations in the answer that the plaintiff failed to pay his obligations under the contract sufficiently raised the issue of the plaintiff's indebtedness to the defendant, so that, by virtue of this section, the time during which the former action was pending was not to be deemed a part of the time limited for the commencement of an action by the defendant to recover on his cause of action on the notes. This section should be liberally construed to effect the purpose intended. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

330.50 Extension of time if no person to sue. There being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues shall not extend the time within which, according to the provisions of this chapter, an action can be commenced upon such cause of action to more than double the period otherwise prescribed by law.

330.51 What actions not affected. This chapter shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party of the facts upon which the forfeiture attached or the liability was created.

330.52 County court; insufficient service. No action or proceeding to set aside any judgment, order or decree entered before June 10, 1951, by any county court after notice of the application for such judgment, order or decree has been given in accordance with the requirements of the then existing applicable statutes, shall be commenced after one year from said date, based solely on the ground of failure to give other or additional notice of the application therefor; and no such judgment, order or decree shall be subject to direct or collateral attack in any action or proceeding based solely on such ground, after one year from said date.

History: 1951 c. 295.

This section does not apply to a proceeding involving a question of whether a final judgment was res adjudicata so as to bar grandchildren born after a testator's death and after such judgment from asserting their rights under a testamentary trust. Estate of Evans, 274 W 459, 80 NW (2d) 408, 81 NW (2d) 489.