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 330.49 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. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

893.50 History: R. S. 1878 s. 4251; Stats. 1898 s. 4251; 1925 c. 4; Stats. 1925 s. 330.50; 1965 c. 66 s. 2; Stats. 1965 s. 893.50.

Sec. 4251, Stats. 1898, cannot be relied upon if it is not pleaded. Stehn v. Hayssen, 124 W 583, 102 NW 1074.

An action for conversion of personal property after a decedent's death, where there is no administrator appointed, comes within sec. 4251. Palmer v. O'Rourke, 130 W 507, 110 NW 389.

893.51 History: R. S. 1858 c. 138 s. 36; R. S. 1878 s. 4252; Stats. 1898 s. 4252; 1925 c. 4; Stats. 1925 s. 330.51; 1965 c. 66 s. 2; Stats. 1965 s. 893.51.

The words "liability created" by law refer to liability created by statute law alone and not to common-law liability. Gores v. Field, 109 W 408, 84 NW 867, 85 NW 411.

The phrase "moneyed corporation or banking association" is used in apposition, or at least as referring to like kinds of institutions, and not to every sort of corporation except nonprofit corporations. Bank of Verona v. Stewart, 223 W 577, 270 NW 534.

893.52 History: 1951 c. 295; Stats. 1951 s. 330.52; 1965 c. 66 s. 2; Stats. 1965 s. 893.52.

330.52 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.

CHAPTER 895.

Miscellaneous General Provisions.

895.01 History: R. S. 1849 c. 96 s. 6; R. S. 1858 c. 135 s. 2; R. S. 1878 s. 4253; 1887 c. 280; Ann. Stats. 1889 s. 4253; Stats. 1898 s. 4253; 1907 c. 353; 1917 c. 56; 1925 c. 4; Stats. 1925 s. 331.01; 1933 c. 53; 1935 c. 213; 1937 c. 189; 1965 c. 66 s. 2; Stats. 1965 s. 895.01.

On limitations of commencement of actions see notes to various sections of ch. 893.

Statutes allowing actions to survive are strictly construed. Woodward v. Chicago & Northwestern R. Co. 23 W 400.

The words "or other damage to the person" were added to sec. 4253, R. S. 1878, by ch. 280, Laws 1887. They do not include a cause of action arising out of a conspiracy to monopolize a business and to drive the plaintiff out of it. Murray v. Buell, 76 W 657, 45 NW 667.

The right of an employe of a corporation to recover compensation for his services against the stockholders personally under sec. 1769, R. S. 1878, survives. Day v. Vinton, 78 W 198, 47 NW 269.

Where a complaint charges the acquisition of property by fraud and seeks to obtain a return of that which the defendant has fraudulently obtained, rather than damages for defendant's deceit, the cause of action survives. Allen v. Frawley, 106 W 638, 82 NW 593.

An action for wrongful conversion of the good will of the corporation is an injury to the personal estate and survives. Lindemann v. Rusk, 125 W 210, 104 NW 119.

A mere fraud or cheat by which one sustains a pecuniary loss is not a deprivation of property so as to give rise to a cause of action which survives. Borchert v. Borchert, 132 W 593, 113 NW 35.

The amendment of Sec. 4253, R. S. 1898, by ch. 353, Laws 1907, did not validate a previous assignment of the then unassignable cause of action. Puffer v. Welch, 144 W 506, 129 NW 525.

When a trust company to which money was intrusted for investment fraudulently invested it in worthless or depreciated securities, a cause of action at once arose in favor of the owner for damages on account of the resulting loss to him. Such cause of action survives to the personal representatives and does not pass by the judgment of the county court to a testamentary trustee. Woodard v. Citizens S. & T. Co. 167 W 435, 167 NW 1054.

An action of waste survives against the estate of a deceased life tenant. Payne v. Meisser, 176 W 432, 187 NW 194.

An action by decedent's representative for the pain and suffering caused decedent is a separate action from one under 331.03, Stats. 1925, and a recovery under both is not a double recovery, but a recovery for a double wrong. Koehler v. Waukesha M. Co. 190 W 52, 208 NW 901.

The negligence of a husband in the care and treatment of an injury to his wife's finger (the wife being free from any negligence in this regard) would not defeat a recovery by the wife's estate for damages for her pain and suffering. Koehler v. Waukesha M. Co. 190 W 52, 208 NW 901.

An action by a wife under 246.07 for the alienation of her husband's affections does not survive the death of the defendant, there being no allegations that plaintiff was deprived of her husband's support; and the words "damage to the person" do not include injury to the feelings. Howard v. Lunaburg, 192 W 507, 213 NW 301.

The word "action" as used in 331.01 means more than a legal proceeding pending in court, and is broad enough to include what is ordinarily meant by the phrase "cause of action." Mesar v. Southern S. Co. 197 W 578, 222 NW 809.

The cause of action of a corporation for breach of warranty of boiler tubes sold to it and negligence in manufacture thereof survived dissolution of the corporation, as an action to recover for "all damages done to property rights or interests of another"; survival of actions in favor of corporations are determined by the statutes applicable to survival of actions in general, and the word "person" in 269.23 confers the right to revive or

continue an action on any person entitled, etc., including a corporation within the rules of 370.01 for construction of the statutes. Such cause of action was assignable, and vested in the sole stockholder of the corporation; hence a corporation owning all the stock of such dissolved corporation was entitled to revive the latter's action for breach of warranty and negligence. Marsh W. P. Co. v. Babcock & Wilcox Co. 207 W 209, 240 NW 392.

A single tortious act which causes injury to a person and his property gives rise to a single cause of action with separate items of damage; and such person may as an incident to recovery have all the damages which proximately flow from the violation of his primary right to be free from damage by the negligent act of others. Booth v. Frankenstein, 209 W 362, 245 NW 191.

Actions which survive are assignable. Lehman v. Farwell, 95 W 185, 70 NW 170; Northern Assur. Co. v. Milwaukee, 227 W 124, 277 NW 149.

An action by a surviving partner for a partnership accounting will lie against the administrator of a deceased managing partner when the partnership assets and business are in charge of the administrator. Caveney v. Caveney, 234 W 637, 291 NW 818.

The survivability of a right of action created by act of the congress must be determined in accordance with federal law. In general, at common law, contract actions survived while tort actions died with the person. In general, a cause of action to enforce the personal liability of an officer of a corporation is regarded as of a penal or personal rather than of a contractual nature, in which event it does not survive, but if the cause of action against the officer is of a remedial or contractual rather than of a personal nature, it survives his death. Wogahn v. Stevens, 236 W 122, 294 NW 503.

Power to rescind a deed which was induced by fraud ends with the death of the grantor, but a cause of action for deceit survives the death of the defrauded party as damages done to property rights. Zartner v. Holzhauer, 204 W 18, 234 NW 508; Krueger v. Hansen, 238 W 638, 300 NW 474.

The right to rescind a deed for fraud of the grantee dies with the grantor, since actions or rights of action to set aside conveyances or to recover real estate for fraud do not survive unless in existence at the time of the death of the person in whom they are vested, and such rights of action do not arise until the person defrauded exercises the right to rescind. Krueger v. Hansen, 238 W 638, 300 NW 474.

An action to recover damages for fraud and deceit in inducing a conveyance of real estate survives the defrauded party's death, and under 287.01 such an action can be maintained by the executor or administrator of the defrauded party. Krueger v. Hansen, 238 W 638, 300 NW 474.

Accurately speaking, "actions" do not survive at common law at all but, rather, it is causes of action which survive, and the term "actions" as used in the prefatory phrase of 331.01, means "causes of action." Markman v. Becker, 6 W (2d) 438, 95 NW (2d) 233.

Where the plaintiff brought a garnishment action in aid of collecting a debt owed to him by the principal defendant on contract, and the liability of garnishee defendant to principal defendant was on contract the causes of action involved. based on contract, were ones which survived at common law and, by virtue of 331.01, still survived the death of the principal defendant, which occurred during pendency of the garnishment action, so that, further, by virtue of 269.13, the garnishment action did not abate, and plaintiff was entitled to funds caught therein, and such funds did not pass into the estate of the deceased principal defendant. Markman v. Becker, 6 W (2d) 438, 95 NW (2d) 233.

An action for breach of contract for support and to set aside a conveyance of real estate survives even though the contract provides that it is to be deemed satisfied on filing of a death certificate and that it should be conclusively presumed that the support was furnished. The contract creates only a true presumption, rebuttable by clear and convincing proof. State Department of Public Welfare v. LeMere, 19 W (2d) 412, 120 NW (2d) 695.

The words "property rights or interest" connote a right or interest of value that could be parted with for some pecuniary consideration, or if lost or impaired would pecuniarily diminish the estate of plaintiff. Nichols v. United States F. & G. Co. 37 W (2d) 238, 155 NW (2d) 104.

The common-law rule followed in Wisconsin is that personal torts do not survive the injured party, but this is modified by 895.01 to permit recovery only for damages to compensate for personal injuries suffered by the decedent prior to his death. Prunty v. Schwantes, 40 W (2d) 418, 162 NW (2d) 34.

An action against a corporation's president for breach of contract to use moneys received for common stock to retire preferred stock survived the president's death and could be revived. Luster v. Martin, 58 F (2d) 537.

Survival of tort actions relating to real property. 15 MLR 232.

895.02 History: R. S. 1849 c. 96 s. 7; R. S. 1858 c. 135 s. 3; R. S. 1878 s. 4254; Stats. 1898 s. 4254; 1925 c. 4; Stats. 1925 s. 331.02; 1965 c. 66 s. 2; Stats. 1965 s. 895.02.

The provision of sec. 4254, R. S. 1878, as to actual damages was not repealed by the amendment made to sec. 4269. Cotter v. Plumer, 72 W 476, 40 NW 379.

895.03 History: 1857 c. 71 s. 1; R. S. 1858 c. 135 s. 12; R. S. 1878 s. 4255; Stats. 1898 s. 4255; 1925 c. 4; Stats. 1925 s. 331.03; 1965 c. 66 ss. 2, 6; Stats. 1965 s. 895.03.

On limitation of commencement of actions (within three years) see notes to 893.205.

If a town fails to perform its duty to keep its highways in proper repair and one passing over a highway, in the exercise of proper care and in consequence of its insufficiency, receives injuries which cause his death, the town is liable to his personal representative under secs. 12 and 13, ch. 135, R. S. 1858. Burns v. Elba, 32 W 605.

A common carrier cannot, by conditions in a contract, wholly exempt itself from liability for an injury resulting from its gross negligence. Lawson v. Chicago, St. P. M. & O. R.

Co. 64 W 447, 24 NW 618. See also Davis v. Chicago, M. & St. P. R. Co. 93 W 470, 67 NW 16.

Sec. 4255, R. S. 1878, is remedial, and should be construed so as to advance the remedy and suppress the wrong and injustice existing previous to its enactment. Rudiger v. Chicago, St. P. M. & O. R. Co. 94 W 191, 68 NW 661.

An action is maintainable here for death occurring in another state as the result of wrongful and negligent acts committed by defendant in this state. Rudiger v. Chicago, St. P. M. & O. R. Co. 94 W 191, 68 NW 661.

The liability created by sec. 4255, Stats. 1898, is for the benefit of the relatives of the decedent mentioned in sec. 4256, and there is no liability where there are no such relatives. Brown v. Chicago & Northwestern R. Co. 102 W 137, 77 NW 748, 78 NW 771.

The right of action given by secs. 4255 and 4256 constitutes no part of a decedent's estate, and a final settlement of the estate cannot bar the right of action. Hubbard v. Chicago & Northwestern R. Co. 104 W 160, 80 NW 454.

An action by the administrator may be joined with an action by the same administrator to recover damages for pain suffered by the intestate as the result of injuries from which he died. Nemecek v. Filer & Stowell Co. 126 W 24, 105 NW 225.

Where a right of action is given under secs. 4255 and 4256, the sole beneficiary may make a valid settlement of such right of action, which will be binding upon the personal representative of the deceased. McKeigue v. Chicago & Northwestern R. Co. 130 W 543, 110 NW 384.

The words "party injured" mean the party whose death is caused, not the relatives of the deceased. Johnson v. Eau Claire, 149 W 194, 135 NW 481.

An action may be maintained where the death resulted from a defective highway, even though the notice required by sec. 1339, Stats. 1898, was not served. Laconte v. Kenosha, 149 W 343, 135 NW 843.

A recovery for the death of a person is not on behalf of his estate but for the benefit of the relative mentioned; and it is only in cases where there was a substantial period of suffering between the injury and the death that both causes of action may coexist. Moyer v. Oshkosh, 151 W 586, 139 NW 378.

A recovery in one action may be had, upon separate counts, for damages accruing to the estate, and for damages accruing to specified relatives; the former including compensation for pain and the cost of burial, and the latter including pecuniary loss only. Herning v. Holt L. Co. 153 W 101, 140 NW 1102.

An allegation that "a few minutes" after plaintiff's decedent was injured "he then and there died from the effect" of such injury sufficiently alleges that there was a substantial period of suffering between the injury and the death which authorized a recovery for pain and suffering. Klann v. Minn, 161 W 517, 154 NW 996.

Sec. 4255 must be construed in harmony with the workmen's compensation act; and when compensation has been paid pursuant to that act by an employer to the dependents of a deceased employe for the wrongful death, the cause of action existing by virtue of this section in favor of the personal representatives of the deceased employe to recover such compensation from any third party is assigned by virtue of 102.29 to the employer. But an application by the widow of such employe for such compensation does not operate as an assignment of a cause of action for such death existing by virtue of the laws of a sister state in favor of such personal representatives, because the widow does not own such cause of action, and because the legislature and courts of one state are without power to interfere with a cause of action created by the laws of another state. Anderson v. Miller S. I. Co. 176 W 521, 182 NW 852, 187 NW 746.

The sum recovered under 331.03 and 331.04 for the death of a decedent by the wrongful act of the defendant is no part of the estate of the deceased. In such action the plaintiff representative acts as an agent and not as an arm of the court or as trustee, and acquires no legal title or interest to the recovery except to the extent of his fees, and the county court has no power to value the services of the attorney of the representative rendered in the action or to declare the amount a lien on the recovery. Estate of Arneberg, 184 W 570, 200 NW 557.

The statute adopts the common-law rule that in case of the splitting up of a cause of action each part is subject to the same defenses. Callies v. Reliance L. Co. 188 W 376, 206 NW 198.

To entitle a party to recovery, the wrongful act charged to have caused such death must have been such as would, if death had not ensued, have entitled the party injured to maintain an action, and the death must have been caused in this state. Koehler v. Waukesha M. Co. 190 W 52, 208 NW 901.

Where a state statute gives a remedy for death by wrongful act and the act is done on navigable waters, courts of admiralty will enforce the liability thus created; but their jurisdiction is not exclusive. Northern C. & D. Co. v. Industrial Comm. 193 W 515, 213 NW 658.

Statutes authorizing a recovery for a wrongful death by specified relatives of the deceased create rights and recognize remedies not known to the common law; and the amount of recovery thereunder is limited to the pecuniary or financial loss as distinguished from injuries to feelings. Keasler v. Milwaukee E. R. & L. Co. 195 W 108, 217 NW 687.

As regards survival of a cause of action assignability and survivability are convertible terms. A widow's action for her husband's death survives the widow's death for the benefit both of an employer and the widow's personal representative. Milwaukee v. Boynton Cab Co. 201 W 581, 231 NW 597.

In order that a husband may recover for the wrongful death of his wife, the circumstances must have been such as to have entitled the wife, had she lived, to maintain an action for her injuries. A mother who sustained physical injuries as a result of the fright or shock of witnessing, from a window of her home, the negligent killing of her child as the child was crossing a highway, could not have recovered for the physical injuries resulting from such fright or shock had she

lived, and hence her husband could not recover for her death from such injuries. Waube v. Warrington, 216 W 603, 258 NW 497.

A person who was killed while driving a car while intoxicated could not have recovered against the vendor of the liquor had he survived the accident, and hence his widow could not recover for his death under 331.03. Demge v. Feierstein, 222 W 199, 268 NW 210.

A motorist involved in a collision when he made a left turn in the path of an oncoming car approaching an intersection was not entitled to recover, under the wrongful death statute, for the death of his wife killed in the collision and for his own injuries and damage to his car, where the collision was attributable more to the motorist's negligence than the negligence of the oncoming driver. Grasser v. Anderson, 224 W 654, 273 NW 63.

In an action against an automobile host for the wrongful death of a guest, actual intent to do the guest bodily harm, so as to deprive the host of defenses which he might otherwise have against liability, will not as a matter of law be imputed to the host from the mere fact that the host was driving while intoxicated. Schubring v. Weggen, 234 W 517, 291 NW 788.

With respect to personal injury sustained by him, an unemancipated minor may not bring an action against his parent's automobile liability insurer grounded on the parent's negligence, since the fact that the parent is insured does not give rise to a cause of action based on the parent's negligence where no cause of action exists against the parent if not insured. Lasecki v. Kabara, 235 W 645, 294 NW 33.

A wife cannot maintain an action against her husband and his liability insurer for the loss of the society of the spouses' infant daughter killed through the father's negligent operation of his car, since the infant could not have maintained an action against her father had she lived, and since the recovery authorized by 331.04 (2) in favor of a parent for the loss of the society of a deceased child is not a different cause of action from that authorized by 331.03 but is only an item of damage recoverable in that action. Cronin v. Cronin, 244 W 372, 12 NW (2d) 677.

The right to recover for death by wrongful act is purely statutory, and the right to recover funeral expenses must be found in the statute, either in direct language or by implication. Schwab v. Nelson, 249 W 563, 25 NW (2d) 445.

In an action brought for the death of a husband, his widow was not entitled to recover damages for her loss resulting from the death, nor for loss of companionship, where the husband (because his contributory negligence was greater than the causal negligence of the defendant) would not have been entitled to recover damages if death had not ensued. Haase v. Employers Mut. Liability Ins. Co. 250 W 422, 27 NW (2d) 468.

The estate of a deceased father cannot maintain an action for damages, against an unemancipated minor son, for the father's death caused by the son's negligence in the operation of the father's automobile while the father was a passenger therein. Fidelity Savings Bank v. Aulik, 252 W 602, 32 NW 613.

Under 331.03, Stats. 1957, "an action for wrongful death may only be brought, regardless by whom, when the injured person would have been entitled to maintain an action for damages had he lived." (Cronin v. Cronin, 244 W 372, cited.) Nichols v. United States F. & G. Co. 13 W (2d) 491, 498, 109 NW (2d) 131, 136.

A viable infant who receives an injury and by reason thereof is still born is a person within the meaning of the wrongful-death statute. Kwaterski v. State Farm Mut. Auto. Ins. Co. 34 W (2d) 14, 148 NW (2d) 107.

The right to bring a survival action under 895.01 is in the representative of the deceased, the damages accruing to the decedent's estate, whereas a wrongful death action under 895.03 and 895.04 is brought by the personal representative of the deceased or by certain enumerated relatives, the damages accruing to the latter. Prunty v. Schwantes, 40 W (2d) 418, 162 NW (2d) 34.

If the provision "that such action shall be brought for a death caused in this state" is construed to deny the right to bring in Wisconsin an action for wrongful death, based on a death occurring in another state, in which state a statutory right of action for such wrongful death exists, the statute violates the full-faith-and-credit clause of the federal constitution. (Hughes v. Fetter, 257 W 35, 42 NW (2d) 452, reversed.) Hughes v. Fetter, 341 US 609.

Release from liability for wrongful death by contract with decedent. 33 MLR 251.

Remarriage and wrongful death. Hendricks, 50 MLR 653.

895.031 History: 1937 c. 189; Stats. 1937 s. 331.031; 1965 c. 66 s. 2; Stats. 1965 s. 895.031.

895.035 History: 1957 c. 208; Stats. 1957 s. 331.035; 1959 c. 562; 1965 c. 66 s. 2; 1965 c. 436; Stats. 1965 s. 895.035; 1967 c. 245; 1969 c. 328.

895.04 History: 1857 c. 71 s. 2; R. S. 1858 c. 135 s. 13; R. S. 1878 s. 4256; Stats. 1898 s. 4256; 1907 c. 164, 581; 1911 c. 226; 1913 c. 186; 1915 c. 35; 1925 c. 4; Stats. 1925 s. 331.04; 1931 c. 263; 1947 c. 247; 1949 c. 439, 548; 1951 c. 634; 1959 c. 194; 1961 c. 285, 649; 1965 c. 66 s. 2; Stats. 1965 s. 895.04; 1967 c. 267; 1969 c. 339 s. 27; 1969 c. 436.

Editor's Note: The following have relevance to the subsection on funeral expenses: Schwab v. Nelson, 249 W 561, 25 NW (2d) 445; Mueller v. Silver Fleet Trucking Co. 254 W 458, 37 NW (2d) 66; ch. 247, Laws 1947; East Wisconsin Trustee Co. v. O'Neil, 255 W 528, 39 NW (2d) 369; ch. 439, Laws 1949; ch. 194, Laws 1959; and ch. 267, Laws 1967.

On motion for new trial (excessive or inadequate damages) see notes to 270.49.

To sustain an action under the statute for injury to the person resulting in death, it must appear by pleading and proof that there is a person in being who is entitled to the money when received. Woodward v. Chicago & Northwestern R. Co. 23 W 400.

Evidence of health and estate of parents of deceased may be given without special allegations in the complaint. Ewen v. Chicago & Northwestern R. Co. 38 W 613.

The recovery is not for the benefit of the administrator but for the relatives mentioned

in the statute who have a pecuniary interest in the life of deceased. Regan v. Chicago, M. & St. P. R. Co. 51 W 599, 8 NW 292.

The complaint should show that the beneficiaries have sustained pecuniary loss by the death in question, including the age and occupation of deceased, his ability to contribute to the support of his family and the fact that there are those entitled to recover. Regan v. Chicago, M. & St. P. R. Co. 51 W 599, 8 NW 292.

Damages for injuries to a minor, resulting in death, are the actual pecuniary damages resulting to his parents. Johnson v. Chicago & Northwestern R. Co. 64 W 425, 25 NW 223.

Allegations that plaintiff's intestate was a widow at the time of her death and that 3 of her children, aged respectively 13, 11 and 9 years, were dependent upon her for support, nurture and education, show that they suffered a pecuniary loss. McKeigue v. Janesville, 68 W 50, 31 NW 298.

The widow of the deceased is entitled to all the damages recovered for his death and may settle therefor. Schmidt v. Deegan, 69 W 300, 34 NW 83.

A complaint in an action to recover for the death of a girl which alleged that the plaintiff was the mother of the intestate, and dependent upon her in a large degree for support, and had suffered pecuniary loss, damage and injury by reason of her death, to an amount stated, is good. Wiltse v. Tilden, 77 W 152, 46 NW 234.

Where children sued to recover for the death of their mother, "the mere fact that the children in the case at bar were all of age at the time of their mother's death did not preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations of their mother, had she not been injured." Tuteur v. Chicago & Northwestern R. Co. 77 W 505, 46 NW 897.

The fact that the deceased husband left children surviving whose support will be thrown on their mother may be considered by the jury; but the damages recoverable are only those which she has sustained. Abbot v. McCadden, 81 W 563, 51 NW 1079; Liermann v. Chicago, M. & St. P. R. Co. 82 W 286, 52 NW 91.

The personal representative of the deceased cannot recover the expenses incurred in consequence of a personal injury which resulted in death, the amount thereof being paid by the adult children of the deceased for him and for his estate. Topping v. St. Lawrence, 86 W 526, 57 NW 365.

A mother whose minor child has been killed may recover such sum as he would have earned during his minority, and if her pecuniary circumstances are such that she might have become dependent upon him after his majority had been attained the jury may consider her reasonable expectation of pecuniary assistance from the continuance of his life thereafter. Thompson v. Johnston Brothers Co. 86 W 576, 57 NW 298.

In an action brought for the parents of an unmarried man of 31 years it was proper to admit evidence that he had said that he did not intend to marry, and that he would take care of them. Bright v. Barnett & Record Co. 88 W 299, 60 NW 418.

To enable the jury to assess the damages which a husband is entitled to recover for the death of his wife, proof may be made of his circumstances and financial conditions. Thoresen v. La Crosse C. R. Co. 94 W 129, 68 NW 548.

A widow who sues as administratrix to recover damages sustained by the death of her husband may recover the value of her support and protection by him during the time he would probably have lived, and also the addition his earnings would probably have made to his possessions and the reasonable expectation she had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs. Rudiger v. Chicago, St. P. M. & O. R. Co. 101 W 292, 77 NW 169.

See note to 895.03, citing Brown v. Chicago & Northwestern R. Co. 102 W 137, 77 NW 748, 78 NW 771.

A right of action does not constitute a part of the estate of the deceased and is not barred by failure of the administrator to commence suit. Hubbard v. Chicago & Northwestern R. Co. 104 W 160, 80 NW 454.

A special administrator may bring an action and if his office terminates by the appointment of a general administrator pending the action, the general administrator may be admitted to prosecute the action to judgment. Swan v. Norvell, 107 W 625, 83 NW 934.

The right of action for the death of a person depends upon the law at the time of the injury. The subsequent extension of the class of persons for whose benefit such an action could be maintained although made before death does not give a right of action in favor of the persons added by the amendment. Quinn v. Chicago, M. & St. P. R. Co. 141 W 497, 124 NW 653.

In an action for wrongful death, an instruction that in fixing damages the jury should allow such sum as will equal the "value" of such support and protection as the deceased husband would have furnished his wife during the time he probably would have lived was not prejudicial because the "present" was not used before the word "value". Maloney v. Wisconsin P., L. & H. Co. 180 W 546, 193 NW 399.

See note to 246.06, citing Fiel v. Racine, 203 W 149, 233 NW 611.

The statute limiting damages for loss of husband's society to $2,500 is a limitation upon recovery, not a measure of adequate compensation. Cameron v. Union A. Ins. Co. 210 W 659, 246 NW 420, 247 NW 453.

In an action under the wrongful death statute, a statement of plaintiff's counsel that the law had fixed the minimum amount of damages which might be allowed should have been corrected by the court, notwithstanding an instruction that damages must be based upon evidence of the case and not in an arbitrary manner. Hoffman v. Regling, 217 W 66, 258 NW 347.

An action commenced by a special administrator against a son in whose automobile a mother sustained injury from which she died, for conscious pain and suffering prior to her death, was not dismissible on the ground that the son as tort-feasor would benefit from his own wrong as heir of his mother, since the cause of action was an asset of the mother during her lifetime and recovery would ul-

timately be distributed according to general laws of descent. Potter v. Potter, 224 W 251, 272 NW 34.

The parents of an unemancipated minor killed by the wrongful act of his unemancipated minor brother may maintain an action for such death against the wrongdoer. Munsert v. Farmers Mut. Auto. Ins. Co. 229 W 581, 281 NW 671.

On the wife's death, the cause of action which she would have had against her husband, had she survived, went to her children since there was no surviving husband (331.03, 331.031 and 331.04) so that the children had a cause of action for the wrongful death of their mother, and a suit against the deceased husband's automobile liability insurer by the guardian ad litem for the children instead of by the personal representative of the deceased mother was therefore permissible (331.04). Lasecki v. Kabara, 235 W 645, 294 NW 33.

The right of parents to recover damages for loss of society and companionship of a child killed by wrongful act is based on the parental relationship, and an award to parents for loss of society and companionship of an 11-year-old son was not improper as to the father on the ground that the father sustained no such loss because the parents were divorced and the legal custody of the children was in the mother. Likewise, an award for pecuniary loss was not improper as to the father on the ground that he sustained no such loss in the circumstances. Straub v. Schadeberg, 243 W 257, 10 NW (2d) 146.

A parent's complaint to recover damages for the wrongful death of a child, which does not allege facts essential to negative any cause of action in favor of the deceased's estate, is subject to demurrer. Johnson v. Larson, 249 W 427, 25 NW (2d) 82.

The provision for damages for loss of society does not create a separate cause of action in a surviving parent for the loss of the society and companionship of a child, but merely provides an additional element of damages recoverable in an action for the wrongful death. Papke v. American Auto. Ins. Co. 248 W 347, 21 NW (2d) 724.

A cause of action for wrongful death in the deceased's widow did not survive the widow's death so as to entitle her administratrix to sue thereon but, when the widow died, a cause of action for the wrongful death of the husband vested in his descendants, which was not the widow's cause of action, but a new one given the husband's descendants. Eleason v. Western Cas. & Surety Co. 254 W 134, 35 NW (2d) 301.

The provision that in a death action the jury may give damages not exceeding $12,500 for pecuniary injury is not a measure of compensation but is a limit on the amount recoverable in such an action, and it should be applied as if it read that "the amount recoverable" in every such action shall not exceed the sum of $12,500; and the provision for not to exceed $2,500 for loss of society and companionship should also be so construed. Mueller v. Silver Fleet Trucking Co. 254 W 458, 37 NW (2d) 66.

It is the common practice of trial courts not to instruct the jury as to the amount which the damages allowed the plaintiff shall, as prescribed by the comparative-negligence statute, 331.045, be diminished in proportion to the amount of negligence attributable to the plaintiff, or in death cases as to the limitations provided for in 331.04, since to do so would inform the jury as to the result of their verdict and therefore, under the rulings of the supreme court, might be erroneous; but if on the basis of the facts found by the jury the trial courts make the necessary mathematical computation, the result is nevertheless the verdict of the jury. Mueller v. Silver Fleet Trucking Co. 254 W 458, 37 NW (2d) 66.

Where the beneficiaries named as entitled to recover for loss of society and companionship are deceased at the time of the commencement of an action for wrongful death, there can be no recovery for loss of society and companionship. Herro v. Steidl, 255 W 65, 37 NW (2d) 874. See also Cincoski v. Rogers, 4 W (2d) 423, 90 NW (2d) 784.

In an action by an administrator to recover for an accident and death which occurred on June 23, 1948, funeral expenses were properly allowed under 331.04 (1) (b), created by ch. 247, Laws 1947, in addition to the maximum of $12,500 for pecuniary loss under 331.04 (1) (a). East Wisconsin Trustee Co. v. O'Neil, 255 W 528, 39 NW (2d) 369.

Where the estate of a deceased injured person had no cause of action under 331.03 and 331.04, relating to actions for wrongful death, such sections gave causes of action to the surviving spouse, and if that spouse died without exercising the right there was no survival of the spouse's right or transfer of it to his or her personal representatives or heirs, but a new right was established in the relative of the injured person next in order as provided by 331.04; and if that beneficiary died in turn without having begun an action, the relative next in order to him obtained his own right to sue, and so on until the chain of statutory beneficiaries came to an end. Under such statutes, each beneficiary in turn was to proceed for himself for the damages he sustained and he did not recover either on the cause of action or for the loss sustained by any preceding beneficiary, whether the claim was for pecuniary loss or for loss of society. Arendt v. Kratz, 258 W 437, 46 NW (2d) 219.

331.04 (3) does not require that an action brought by a husband for the death of his wife in an accident involving an automobile operated by the plaintiff be temporarily abated on the ground that the wife's estate had a separate cause of action for damages to the car because the title to the car was in her name; there being no evidence that the car was damaged or that the wife's estate claimed to have a cause of action therefor, and such a cause of action not being one for wrongful death. Dahl v. Harwood, 263 W 1, 56 NW (2d) 557.

The purpose of 331.04 (1) and (3), as amended so as to provide that an action for wrongful death may be brought by the personal representative of the deceased person or by the deceased's beneficiary or both, but that separate actions for the same death shall be consolidated so that satisfaction of a single judgment shall extinguish all liability therefor, is to alleviate the hardships that were frequently suffered by beneficiaries under the

old procedure and to avoid a multiplicity of suits which might be brought, and thereunder the personal representatives may bring an action in behalf of the relatives for damages due to the death. Where the personal representative brought an action for pain and suffering of a deceased widower fatally injured in an accident, and also for pecuniary loss suffered by the deceased's children, and the personal representative was authorized to bring such action by all of the children except one, and such other child is barred by operation of the statute of limitations from starting an action, a contention of the defendant on appeal, that where only an estate action is commenced there is no protection for the defendant against actions by beneficiaries and that the judgment will not be binding on them since they are not parties, is moot. Swanson v. State Farm Mut. Auto. Ins. Co. 264 W 274, 58 NW (2d) 664.

A cause of action for wrongful death is a single cause of action with ownership thereof vested in "the person to whom the amount recovered belongs", as designated in 331.04 (2), and also as applied to the surviving father and mother of a minor son as the joint beneficiaries under such statute, and such persons were united in interest within the meaning of 260.12, relating to bringing in necessary parties. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

The wrongful-death statute creates a new cause of action, not for the injury to decedent, but for the loss sustained by the beneficiaries because of the death, and such cause of action is distinct from any cause of action which the deceased might have had if he had survived. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

331.04 (5), Stats. 1957, authorizes the recovery of $1,900 funeral expenses, including crypt burial, where the jury found the expenses reasonable and compatible with the financial status of the parents. Gustafson v. Bertschinger, 12 W (2d) 630, 108 NW (2d) 273.

The wrongful death action is not limited to the personal representative if an action for pain and suffering also survives. Recovery for wrongful death belongs to the beneficiary. Nichols v. United States F. & G. Co. 13 W (2d) 491, 109 NW (2d) 131.

The cause of action for wrongful death in favor of deferred beneficiaries under this section is not the cause of action of a surviving spouse as a preferred beneficiary under 331.031, but is a new cause of action given by the statute. On the death of a preferred beneficiary a new right is vested in the deferred beneficiaries to recover for the wrongful death, and it is not the same right that the surviving spouse had during his lifetime. [So far as certain language in Lasecki v. Kabara, 235 W 645, might be considered inconsistent with language in later decisions, it is withdrawn.] Krause v. Home Mut. Ins. Co. 14 W (2d) 666, 112 NW (2d) 134.

Recovery in a wrongful death action is not subject to contribution in favor of the other negligent party. Wurtzinger v. Jacobs, 33 W (2d) 703, 148 NW (2d) 86.

The 1961 amendment did not have the effect of creating a cause of action for wrongful death of a mother in her minor children when the husband survived. The fact that the husband is responsible does not create a new right of action in the children. Cogger v. Trudell, 35 W (2d) 350, 151 NW (2d) 146.

Since 895.04 (2) provides for the bringing of an action for wrongful death by the lineal heirs as determined by 237.01, if no spouse survives, and that section in turn lists "children" of the deceased as first in the order of descent, an illegitimate child has no standing to sue for wrongful death of his father unless it appears that one of the 3 conditions determining heirship as set forth in 237.06 has been met. Krantz v. Harris, 40 W (2d) 709, 162 NW (2d) 628.

Beneficiary's negligence under wrongful death statutes. 1938 WLR 157.

895.045 History: 1931 c. 242; Stats. 1931 s. 331.045; 1949 c. 548; 1965 c. 66 s. 2; Stats. 1965 s. 895.045.

1. General.
2. Comparison of negligence.
3. Negligence of child.
4. Inconsistent findings.

1. General.

Failure to protest at an excessive or dangerous speed is not strictly contributory negligence, but the duty to protest grows out of the host and guest relationship and constitutes an essential element in the question of whether the guest may recover damages resulting from the negligence of the host, within the rule that the host owes to the guest the duty of not increasing the danger or creating a new one naturally resulting from the guest's acceptance of the host's invitation. Haines v. Duffy, 206 W 193, 240 NW 152.

Unless plaintiff was guilty of contributory negligence, the comparative-negligence statute has no application in a case involving joint tort-feasors. Cross-complainants were entitled to a contingent judgment of contribution against impleaded defendants (joint tort-feasors) against whom no judgment was sought by plaintiffs. Brown v. Haertel, 210 W 345, 246 NW 691.

That both drivers were negligent does not require dismissal of the action, the comparative-negligence statute applying, under which, where both parties to a collision are negligent and there is a counterclaim, one of the parties may recover when there is a finding that his negligence is less than that of the other. Paluczak v. Jones, 209 W 640, 245 NW 655; Cameron v. Union Auto. Ins. Co. 210 W 659, 246 NW 420, 247 NW 453.

Where, in situations raising jury questions, total damage has been properly determined, the amount which one guilty of greater negligence is responsible for is arrived at by diminishing the amount of total damage by the proportion one least negligent contributed to the result. Engebrecht v. Bradley, 211 W 1, 247 NW 451.

An action against a city for injuries due to "insufficient" highway, or to highway "in want of repairs," is an "action for negligence" within the comparative-negligence statute. Morley v. Reedsburg, 211 W 504, 248 NW 431.

331.045 is inapplicable where there is no claim that the person for whose injuries re-

covery is sought was contributorily negligent. Zurn v. Whatley, 213 W 365, 252 NW 435.

The causal negligence of the person seeking to recover is to be compared with the causal negligence of all of the other participants in the transaction, and, if the causal negligence of the person seeking to recover was as great as the causal negligence of some one of the tort-feasors against whom recovery is sought there is no right to recover against that particular tort-feasor, but, from every remaining tort-feasor against whom recovery is sought, whose causal negligence was greater than that of the person seeking to recover, there exists a right to recover. The comparative negligence statute does not effect any change in the common-law rule that every joint tort-feasor who is liable at all is individually liable to the injured person for the entire amount of damages recoverable by him, except that the statute requires the damages allowed to be diminished in proportion to the negligence attributable to the person recovering. Walker v. Kroger G. & B. Co. 214 W 519, 252 NW 721.

In an action against a town for damage to the plaintiff's automobile caused by a defect in the highway, where the car was being operated at the time of the accident by the plaintiff's 15-year-old daughter under authority of 85.08 (1a), Stats. 1933, making the parent responsible for negligent operation by the child licensed thereunder, the damages recoverable by the plaintiff parent are subject to diminution in the proportion of negligence attributable to the daughter. Scheibe v. Lincoln, 223 W 425, 271 NW 47.

Reading to the jury the comparative-negligence statute was error as instructing the jury as to the effect of their answers. De Groot v. Van Akkeren, 225 W 105, 273 NW 725.

An instruction that the plaintiff had the burden of proving the percentage of causal negligence attributable to the defendant and that the defendant had the burden of proving the percentage of causal negligence attributable to the plaintiff was not prejudicial to the defendant. Gauthier v. Carbonneau, 226 W 527, 277 NW 135.

In cases in which the comparative-negligence statute is applicable, it is important to have specific findings of ultimate facts on which negligence is predicated in order to enable the jurors to properly compare the negligence of the parties; and to enable the court to pass on the jury's determination in that respect, on the motions after verdict, it is necessary to have the jury's findings as to every set of facts which could constitute causal negligence. Schumacher v. Wolf, 247 W 607, 20 NW (2d) 579.

See note to 270.25, citing Scipior v. Shea, 252 W 185, 31 NW (2d) 199.

See notes to 895.04 citing Mueller v. Silver Fleet Trucking Co. 254 W 458, 37 NW (2d) 66.

See note to 101.06, on safe employment, citing Maus v. Bloss, 265 W 627, 62 NW (2d) 708.

See note to 280.01, citing Schiro v. Oriental Realty Co. 272 W 537, 76 NW (2d) 355.

Where a husband-guest was killed, and his wife-driver sued another driver for wrongful death, her negligence must be added to that of her husband in any comparison with the negligence of another driver. Western Cas. & Surety Co. v. Dairyland Mut. Ins. Co. 273 W 349, 77 NW (2d) 599.

331.045 applies to actions under 81.15. Trobaugh v. Milwaukee, 265 W 475, 61 NW (2d) 866; Hales v. Wauwatosa, 275 W 445, 82 NW (2d) 301.

An assumption, by a plaintiff guest in an automobile, of risks due to the host-driver's negligence does not bar a recovery from another tort-feasor for the results of the latter's negligent use of the highway. The assumption may be under such circumstances that the plaintiff would be guilty of contributory negligence in so assuming, but it is then the plaintiff's contributory negligence, not the plaintiff's assumption of risk of the host's negligence, which affects the plaintiff's recovery against the third person. Veverka v. Metropolitan Cas. Ins. Co. 2 W (2d) 8, 85 NW (2d) 782.

The degree of negligence of a party is not to be measured by its character nor by the number of respects in which he is found to have been at fault; it is the conduct of the parties considered as a whole which should control. Where the negligence of the parties differs in kind and quality, the comparison is for the jury. Mix v. Farmers Mut. Auto. Ins. Co. 6 W (2d) 38, 93 NW (2d) 869.

Even in some instances of so-called intentional nuisance, resulting in injury, contributory negligence may still be a defense. The act of a plaintiff landowner in stepping so close to the defendant landowner's concrete retaining wall and onto an obvious declivity on the plaintiff's lawn that provided insecure footing and was allegedly caused by long-continued disrepair of the retaining wall, was the sort of conduct which should constitute a defense in the plaintiff's nuisance action for injuries sustained when she fell over the retaining wall onto the defendant's concrete driveway below, which defense would be that of contributory negligence and not that of assumption of risk. Schiro v. Oriental Realty Co. 7 W (2d) 556, 97 NW (2d) 385.

In order to invalidate a verdict on comparative negligence on the ground of its being an improper quotient verdict there must be proof that the jurors bound themselves to the quotient method of answering the two subdivisions of the comparative-negligence question before each juror communicated his figure of the percentage to be used in arriving at such result. Schiro v. Oriental Realty Co. 7 W (2d) 556, 97 NW (2d) 385.

The driver of an automobile owes his guest the same duty of ordinary care that he owes to others. A guest's assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard, is no longer a defense separate from contributory negligence. If a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative-negligence statute. McConville v. State Farm Mut. Auto. Ins. Co. 15 W (2d) 374, 113 NW (2d) 14. See also Huntley v. Donlevy, 16 W (2d) 412, 114 NW (2d) 848.

331.37 providing that the abrogation of the defense of assumption of risk shall not apply to farm labor, and 331.045, constituting the comparative-negligence statute, must be construed together, and thereunder any conduct

of a farm laborer, which evinces want of ordinary care for his own safety, constitutes contributory negligence and is subject to comparison under the latter section, thereby having the effect of largely, if not entirely, abrogating in farm-labor cases the defense of assumption of risk as an absolute bar to recovery where the conduct alleged falls short of express consent to assume a particular risk. Colson v. Rule, 15 W (2d) 387, 113 NW (2d) 21.

The doctrine of gross negligence is abolished in negligence cases and in contribution cases. Bielski v. Schulze, 16 W (2d) 1, 114 NW (2d) 105.

On treatment of negligence, causation and comparative negligence questions where a guest is involved, see Theisen v. Milwaukee Auto. Mut. Ins. Co. 18 W (2d) 91, 118 NW (2d) 140, 119 NW (2d) 393.

The element of freedom from contributory negligence is not a requirement for the application of res ipsa loquitur in this state, and if the defendant is found negligent, the plaintiff's contributory negligence, if any, goes to the question of comparison of negligence as between the plaintiff and the defendant. Turk v. H. C. Prange Co. 18 W (2d) 547, 119 NW (2d) 365.

Although what amounted to assumption of risk before that doctrine was abolished may now constitute negligence, denial of recovery as a matter of law cannot be predicated upon the fact alone that plaintiff's contributory negligence in a particular case is in the nature of what was formerly considered assumption of risk. [McConville v. State Farm Mut. Auto. Ins. Co. 15 W (2d) 374, clarified.] Bishop v. Johnson, 36 W (2d) 64, 152 NW (2d) 887.

Under the definition of negligence per se as set forth in Osborne v. Montgomery, 203 W 223, 240, a safety rule can trace its origin to a court decision as well as a statute. The violation of a safety statute can create a condition that constitutes an unreasonable risk of harm to others. Likewise, a defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff. Dippel v. Sciano, 37 W (2d) 443, 155 NW (2d) 55.

To conclude that a jury has placed improper weight on a finding by the trial court, it must appear from all the facts, and the record taken as a whole, that such influence could be the only explanation for the negligence apportionment. Moose v. Milwaukee Mut. Ins. Co. 41 W (2d) 120, 163 NW (2d) 183.

Where plaintiff brought an action for personal injuries and property damage and also as administrator for the death of his wife and the jury found that the plaintiff's failure to yield the right of way contributed 20% of the causal negligence, the plaintiff's recovery as administrator for damages resulting from his wife's death were properly diminished in proportion to the amount of negligence attributable to the plaintiff. Meissner v. Papas, 124 F (2d) 720.

Adoption and interpretation of comparative-negligence doctrine. Padway, 16 MLR 1.

Analysis of the effect of Walker v. Kroger, 214 W 519, on comparison of negligence. 18 MLR 192.

Directed verdicts under the comparative-negligence statute. 27 MLR 219.

Contributory negligence and assumption of risk in host-guest cases. Kluwin, 37 MLR 35.

Apparent injustices in the statute on comparative negligence. Knoeller, 41 MLR 397.

Developments in tort law. Fairchild, 46 MLR 1.

Abolition of assumption-of-risk doctrine. 46 MLR 119.

A descriptive word index of comparative negligence law. Boyle, 33 WBB, No. 4.

Submitting the comparative negligence question in multiple-party cases. Farr, 34 WBB, No. 2.

Wisconsin's comparative-negligence law. Campbell, 7 WLR 222.

Comparative negligence. Campbell, 1941 WLR 289.

Attractive nuisance and contributory negligence doctrines compared. 1960 WLR 692.

Negligence and contributory negligence in dog-bite cases. 1961 WLR 673.

Problems of consolidating assumption of risk and contributory negligence. 1961 WLR 677.

2. Comparison of Negligence.

Whether an oncoming motorist's negligence in failing to see an automobile parked on a highway at night without lights was equal to or greater than negligence in leaving the automobile parked in such fashion was for the jury. Engebrecht v. Bradley, 211 W 1, 247 NW 451.

The question of proportionate negligence of a county inspector, who fell when a plank supporting a rock pile gave way, and of a road construction company which failed to fasten the plank was for the jury. Mullen v. Larson-Morgan Co. 212 W 362, 249 NW 67.

Submitting a verdict which permits the jury to consider the negligence of the plaintiff in only one respect, when the evidence admits of inferences that he was negligent in other respects, constitutes prejudicial error. McGuiggan v. Hiller Bros. 214 W 388, 253 NW 403.

The supreme court will, in a proper case, set aside a jury's finding and order a new trial when the percentages fixed are grossly disproportionate under the evidence. Hammer v. Minneapolis, St. P. & S. S. M. R. Co. 216 W 7, 255 NW 124.

In an automobile collision case, submission of the question of comparative negligence so that the negligence of the plaintiff was compared with that of the defendant driver of the automobile, instead of with the combined negligence of such driver and the driver of the truck in which the plaintiff was riding at the time of the accident, constituted error, but it was not prejudicial to the defendants, since it operated in their favor. Ross v. Koberstein, 220 W 73, 264 NW 642.

In an automobile collision case, inclusion in the special verdict of a question as to comparative negligence which the jury were not to answer unless they first found the plaintiff guilty of contributory negligence, and which they did not answer, was harmless to the defendants. Rashke v. Koberstein, 220 W 75, 264 NW 643.

Where the nature of the work of the shipper's employe in blocking the tractor shovel on the flatcar was such as to make it quite impossible for him to maintain a constant lookout for trains, it was noisy where he was working, and he might reasonably assume that his presence between the flatcar and the main line would be observed and that timely warning of the approach of a train would be given, the evidence authorized the jury's finding that the negligence of the trainmen with respect to lookout and warning constituted 85%, and that the negligence of the shipper's employe with respect to lookout and listening constituted only 15%, of the total causal negligence involved in the accident. Brennan v. Chicago, M. St. P. & P. R. Co. 220 W 316, 265 NW 207.

The comparative negligence of the plaintiff and the defendant owner of the warehouse in which the plaintiff was injured was a question for the jury, and the jury's determination fixing the plaintiff's negligence at 5% and the defendant's negligence at 95% would not be disturbed. Tomlin v. Chicago, M. St. P. & P. R. Co. 220 W 325, 265 NW 72.

The refusal of the trial court to submit a requested question as to whether the driver was negligent in permitting the decedent to ride on the running board of the automobile was not error, since the decedent was negligent, and in such a situation a jury's finding that the negligence of the driver was greater than that of the decedent could not be sustained. Manitowoc Trust Co. v. Bouril, 220 W 627, 265 NW 572.

Where the contractor was negligent because the guardrail of a paving machine was broken off, and the pedestrian was negligent because he did not observe the evident danger, the question of the proportionate negligence was for the jury. Powers v. Cherney Construction Co. 223 W 586, 270 NW 41.

An intelligent milk deliveryman, stepping from the left side of his delivery truck directly into the path of an automobile about 20 feet away, without first looking for traffic, was guilty of negligence as great as that of the automobile driver, as a matter of law, so as to bar recovery from the latter for injury sustained when struck by the automobile. Hustad v. Evetts, 230 W 292, 282 NW 595.

Whether the deceased's negligence was equal to or greater than that of the defendant in a death action is ordinarily for the jury, but where such facts appear as matter of law, the court should so hold. Peters v. Chicago, M., St. P. & P. R. R. Co. 230 W 299, 283 NW 803.

No rule can be laid down with respect to the apportionment of negligence. Under the evidence in the instant case, the jury could apportion the negligence 25% to the plaintiff pedestrian, found negligent in respect to yielding the right of way to the defendant motorist and in respect to maintaining a proper lookout for traffic, and 75% to the defendant, found negligent in respect to speed and in respect to keeping a proper lookout and proper control of her automobile but found not negligent in respect to yielding the right of way. Fronczek v. Sink, 235 W 398, 291 NW 850, 293 NW 153.

The jury's affirmative answer to a question in the special verdict as to whether the plaintiff in walking up the stairway was negligent in respect to his duty to observe the position of his feet immediately prior to his fall, under instructions that the jury should consider what position the plaintiff was in just before he fell and where he placed his feet and whether he used ordinary care in watching his step, was warranted by the evidence, as was the jury's findings that such negligence constituted 20% of the total causal negligence. Burling v. Schroeder Hotel Co. 235 W 403, 291 NW 810.

Even if the allegations of the complaint warranted a deduction that the plaintiff was contributorily negligent as a matter of law, this would not constitute a complete defense to the plaintiff's cause of action unless the plaintiff's negligence was at least as great as the defendant's, a fact not appearing from the pleadings. Ryan v. First Nat. Bank & Trust Co. 236 W 226, 294 NW 832.

The causal negligence of the plaintiff in failing to keep a lookout and in entering the path of an approaching westbound streetcar from behind an eastbound streetcar, which was either standing still or just starting up, was at least equal as a matter of law to the causal negligence of the motorman of the westbound streetcar in failing to ring the bell. Nayes v. Milwaukee E. R. & L. Co. 237 W 141, 294 NW 812.

If the motorman of the streetcar, crossing an intersection, was negligent as to management and control in failing to avoid a collision with an automobile which was crossing the intersection and appeared from behind a passing 2-car train, so was the plaintiff motorist negligent as to management and control, and his causal negligence in such respect was as great as that of the motorman in the same respect, especially where the streetcar had the right of way over the automobile. Where a motorist crossed an intersection with a view of the trolley of a streetcar over the top of a passing 2-car train, but the motorman of the streetcar could not see the automobile through the train, the causal negligence of the plaintiff motorist in respect to lookout was at least as great as that of the motorman in the same respect in relation to the ensuing collision between the automobile and the streetcar. Schmidt v. Milwaukee E. R. & T. Co. 237 W 220, 296 NW 609.

The adoption of the comparative-negligence statute did not require changing the rule that testimony of jurors showing a quotient verdict is not receivable to impeach the verdict, and hence a juror's statement that the apportionment of the negligence of the parties was arrived at by the quotient method was not receivable. (Rule of Gallaway v. Massee, 133 W 638, adhered to.) Jackowska-Peterson v. D. Reik & Sons Co. 240 W 197, 2 NW (2d) 873.

The bus driver was not bound to exercise a higher degree of care toward protecting a crippled passenger in her personal movements than she was bound to exercise herself, and if the driver was negligent in failing to assist the passenger to arise from her seat, the passenger was equally negligent in attempting to arise without requesting assistance, hence could not recover in any event under the comparative-negligence statute. Pazik v. Milwaukee E. R. & T. Co. 245 W 583, 15 NW (2d) 804.

Where a prospective passenger was in a place of safety at the side of the tracks, saw the streetcar approaching, and was familiar with the extent of the overhang of the streetcar, and then stepped toward the streetcar so that she was within the range of the overhang and was struck thereby, her causal negligence in relation to her injuries was as a matter of law at least equal to the causal negligence of the motorman in failing to see her in time to stop the streetcar. Nye v. Milwaukee E. R. & T. Co. 246 W 135, 16 NW (2d) 429.

Where the negligence of both parties is of exactly the same nature and kind, the ruling must be, as a matter of law, that each contributed 50% to the cause of the accident. Langworthy v. Reisinger, 249 W 24, 23 NW (2d) 482.

When it appears as a matter of law that the negligence of the plaintiff is as great as or greater than that of the defendant, it is the duty of the court to so hold, but instances of this kind are rare. Wasikowski v. Chicago & N. W. R. Co. 259 W 522, 49 NW (2d) 481.

The instances in which it can be said as a matter of law that the negligence of the plaintiff is equal to or greater than that of the defendant will ordinarily be limited to cases where the negligence of each is of precisely the same kind and character, but each case must be considered on its peculiar facts. Quady v. Sickl, 260 W 348, 51 NW (2d) 3, 52 NW (2d) 134.

The duty of parents to protect their child is the duty of both parents, and it is not divisible so that either parent has half a duty, or some other fraction, for the breach of which he or she may be penalized, to that extent but no more. In an action by parents against the driver of a truck which ran over and killed the plaintiff's 20-month-old child in a driveway at a cheese factory operated by the father and also used as family living quarters, the evidence required the conclusion that the duty of the parents to protect the child was joint, that the opportunity to protect was equal, and that as a matter of law neither the obligation nor the breach of it was divisible, so that the trial court correctly required the jury to compare the negligence of the truck driver with that of the parents as a unit and not with that of each parent separately. Reber v. Hanson, 260 W 632, 51 NW (2d) 505.

The jury's findings that the plaintiff pedestrian's causal negligence, in respect to lookout, was only 10%, and that the defendant motorist's causal negligence, in respect to lookout and failing to yield the right of way, was 90%, did not fix such grossly disproportionate percentages in the circumstances as to justify the supreme court in substituting its judgment for that of the jury and the trial court. Jankovich v. Arens, 262 W 210, 54 NW (2d) 909.

The evidence supported the jury's findings that both drivers involved in a collision were causally negligent as to management and control and that the causal negligence of the driver-son with whom the plaintiff-mother was riding was as great as the causal negligence of the driver of the other car, so that the driver-son could not recover from the other driver, and hence, since the causal negligence of the driver-son was imputed to the plaintiff-mother because they were engaged in a joint venture in their jointly owned car at the time of the collision, the plaintiff-mother could not recover from such other driver. Johnsen v. Pierce, 262 W 367, 55 NW (2d) 394.

See note to 270.27, on complete special verdicts, citing Topham v. Casey, 262 W 580, 55 NW (2d) 892.

The combined negligence of the plaintiff, who was in the car and was negligent in respect to lookout, and of the plaintiff's wife who was pushing the car and was negligent in respect to her position on the highway when struck by the defendant's car, did not equal or exceed the defendant's negligence in respect to lookout, management and control, and speed, as a matter of law, and the issue of comparative negligence was solely for the jury. Dahl v. Harwood, 263 W 1, 56 NW (2d) 557.

If it is determined that the party inquired about is free from causal negligence as a matter of law and the jury has exonerated him but has also attributed to him some degree of causal negligence, then the trial court should strike the answer to the question on comparison as surplusage and grant judgment accordingly. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

If but one element of negligence is submitted to the jury and the court can find as a matter of law that the party inquired about is guilty of causal negligence and the jury finds that he is not, and in answer to the question on comparative negligence attributes to him some degree of causal negligence, the court should change the answer to the question which inquires as to his conduct from "No" to "Yes" and permit the jury's comparison to stand with judgment accordingly. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

The apportionment of the negligence of parties involved in an automobile collision is ordinarily for the jury, and instances in which a court can rule that their negligences are equal as a matter of law will be extremely rare, and will ordinarily be limited to cases where the negligence of each is of precisely the same kind and character. Kraskey v. Johnson, 266 W 201, 63 NW (2d) 112.

Under proper circumstances, a trial court may decide as a matter of law that the negligence of one party is equal to or exceeds that of another; but, nevertheless, comparison of negligence is peculiarly a jury, not a court, question; and the supreme court cannot approve an alteration by the trial court of less than 7% in the percentages allotted by the jury, when thereby the liability of a party is not affected in any respect except the amount payable. McCauley v. International Trading Co. 268 W 62, 66 NW (2d) 633.

Under the evidence in an action arising out of a collision between a truck and a northbound station wagon just south of a highway intersection, the driver of the truck, killed in the accident, was causally negligent as a matter of law in respect to the manner in which he turned to the left and proceeded across the northbound lane of the highway, and such negligence contributed more to the accident as a matter of law than the negligence, if any, of the northbound driver in respect to lookout.

Donahue v. Western Cas. & Surety Co. 268 W 193, 67 NW (2d) 265.

Where the driver of a tractor-trailer unit attempted to turn his vehicle around at night on an incline in a no-passing zone within 200 feet from the brow of a hill, and the jury determined on conflicting evidence that he was negligent in failing to give adequate warning to the driver of a vehicle which came over the hill, the negligence of the latter driver in colliding with the stalled vehicle was not at least 50% of the total negligence as a matter of law, and the comparison of negligence was properly for the jury to determine. Jennings v. Mueller Transportation Co. 268 W 622, 68 NW (2d) 565.

Where the evidence was sufficient to sustain findings of causal negligence against the plaintiff guest and against the defendant host, but the evidence did not sustain a finding of 10% causal negligence against the defendant driver of the truck involved, a new comparison of negligence must be had between the plaintiff guest and the defendant host. Callan v. Wick, 269 W 68, 68 NW (2d) 438.

In an action for injuries sustained by the plaintiff when his automobile slowed down, with its red brake lights operating as a warning, and turning to the right into a driveway on the side of the road, was struck from the rear by the defendant's overtaking car, the jury's finding that the plaintiff's causal negligence in failing to give a turn signal was as great as the causal negligence of the defendant is deemed so contrary to the facts and circumstances of the case as to require a new trial under 251.09. Bannach v. State Farm Mut. Auto. Ins. Co. 4 W (2d) 194, 90 NW (2d) 121.

In passing on the jury's apportionment of causal negligence at 35% to the plaintiff and 65% to the defendant, the supreme court must resolve conflicts in the evidence in favor of the plaintiff, except in the particulars where the jury's verdict confirms the defendant's version of the accident. Taking into consideration all of the facts and circumstances the plaintiff's causal negligence as to lookout and failing to obey the traffic light was at least as great as a matter of law as the defendant's causal negligence as to lookout only. Matthews v. Schuh, 5 W (2d) 521, 93 NW (2d) 364.

Negligence of plaintiff guest, who had alighted and was passively standing on the highway waiting to re-enter the car, but not observing the progress of a host driver who was turning around in the Y sector of the highway, cannot be said as a matter of law to be equal to that of the host in passing by him very closely and fast. Vanderhei v. Carlson, 6 W (2d) 13, 94 NW (2d) 141.

Plaintiff's found causal negligence as to lookout and management and control was at least equal to the found causal negligence of the operator of the truck in failing to set out flares or fuses as required by statute, where the truck, at night, was engaged in pulling a car out of the ditch, and parked facing east partially on north side of roadway with headlights and spotlight turned on and a red flashlight waving. Vandenack v. Crosby, 6 W (2d) 292, 94 NW (2d) 621.

In almost all instances the issue of contributory negligence of a guest is for the jury to determine. But, on the facts in this case, no jury question as to negligent lookout on the guest's part was presented, and hence the jury's affirmative answers on her negligence as to lookout should be changed to the negative, and the jury's answers comparing her negligence with that of the driver of the other car should be struck out. Lampertius v. Chmielewski, 6 W (2d) 555, 95 NW (2d) 435.

In comparing the negligence of 2 or more persons the jury is to consider both the elements of negligence and of causation, but the supreme court will not attempt to lay down any formula for determining how much weight is to be accorded to the element of negligence and how much to that of causation. Kohler v. Dumke, 13 W (2d) 211, 108 NW (2d) 581.

The comparison of negligence in a multiple-defendant case is required by the comparative-negligence statute to be made between the plaintiff and the individual defendants, and hence the trial court in the instant case erred in combining the negligence of the 2 defendants for purposes of the jury's comparison with that of the plaintiff. Schwenn v. Loraine Hotel Co. 14 W (2d) 601, 111 NW (2d) 495.

See note to 270.49, on verdict contrary to the law or the evidence, citing Barber v. Oshkosh, 35 W (2d) 751, 151 NW (2d) 739, and other cases.

The supreme court will set aside a jury's finding apportioning negligence only if at least one of 3 factors is present: (1) If, as a matter of law, the plaintiff's negligence equals or exceeds that of the defendant; (2) if the percentages attributed to the parties (in light of the facts) are grossly disproportionate; and (3) if there is such a complete failure of proof that the verdict could only be based upon speculation. Ernst v. Greenwald, 35 W (2d) 763, 151 NW (2d) 706. See also: Lautenschlager v. Hamburg, 41 W (2d) 623, 165 NW (2d) 129; Severson v. Beloit, 42 W (2d) 559, 167 NW (2d) 258; and Vanderkarr v. Bergsma, 43 W (2d) 556, 168 NW (2d) 880.

The comparison of negligence is determined not by the kind, or character, or the number of respects of causal negligence but upon the degree of the contribution to the total of such negligence to the occurrence of the accident attributable to the persons involved. Jensen v. Rural Mut. Ins. Co. 41 W (2d) 36, 163 NW (2d) 158.

In an action for the death of the driver of an automobile which, proceeding east from a nonarterial street and entering an intersecting arterial highway, was there struck broadside by defendant's northbound car, a jury finding that the drivers were equally negligent was amply supported by credible evidence which established that the decedent was negligent as to lookout and failure to yield the right-of-way, the arterial driver was negligent as to speed and lookout, and both drivers had been drinking. Boller v. Cofrances, 42 W (2d) 170, 166 NW (2d) 129.

Jury assessment of 75% of the causal negligence to the defendant contractor and 25% to the plaintiff was unreasonably disproportionate as a matter of law and could not be sustained under the evidence revealing that

plaintiff, with full knowledge that construction work was in progress and that a street was barricaded and closed to travel, entered the site on a clear day using a shortcut rather than new sidewalks reasonably accessible affording an alternative safe route, and the record was devoid of any indication that the contractor had acquiesced in permitting residents or other travelers to do so. Skybrock v. Concrete Construction Co. 42 W (2d) 480, 167 NW (2d) 209.

A jury's apportionment of negligence and a trial court's approval of that apportionment will be set aside only when the percentages of negligence are grossly disproportionate. Hillstead v. Smith, 44 W (2d) 560, 171 NW (2d) 315.

The question of comparative negligence is for the jury, and courts are reluctant to change the jury's apportionment. In this case, involving a motorist and a pedestrian crossing a country highway, 50-50 apportionment is sustained. Cherney v. Holmes, 185 F (2d) 718.

Where the evidence shows that an overtaken driver violated 85.16 (2) in not seeing that he could deviate from a lane safely and 85.175 (1) in not seeing that he could turn safely, he was guilty of negligence in management and control and such finding did not duplicate a finding of negligence in lookout. Werner Transfer Co. v. Zimmerman, 201 F (2d) 687.

A highway snow-plow driver who stopped too close to a railroad track and was killed when his plow was hit by a railroad snow plow was guilty of negligence at least as great as that of the train crew. Brunner v. Minneapolis, St. P. & S. S. M. R. Co. 240 F (2d) 608.

3. Negligence of Child.

A child needs only to know the dangers of crossing busy streets between intersections in order to be obligated to yield the right of way to an approaching motor vehicle, but at the same time the driver of such a vehicle is held to a special degree of care where the safety of children is involved. The amount of causal negligence attributable to each party must be such as the competent evidence warrants, but to determine this the jury must determine the negligence of each party under proper instructions. Volkmann v. Fidelity & Casualty Co. 248 W 615, 22 NW (2d) 660.

The fact that the jury found the plaintiff 10-year-old child negligent in 2 respects, and the defendant driver in but one, did not establish that the jury's finding attributing 35 per cent of the total causal negligence to the child and 65 per cent to the driver should have been set aside. Where a jury finds an act or acts of contributory negligence on the part of a minor plaintiff of tender years, such negligence need not be accorded the same weight by the jury in apportioning negligence as would be done if such child were an adult. Brice v. Milwaukee Auto. Ins. Co. 272 W 520, 76 NW (2d) 337.

The amount of a parent's recovery for medical expenses and loss of services of a child, injured by the negligence of a third person, will be reduced by whatever percentage the child is found contributorily negligent. Montalto v. Fond du Lac County, 272 W 552, 76 NW (2d) 279.

In comparing negligence in automobile cases where one of the parties is an infant pedestrian, such fact should be taken into consideration in apportioning the negligence. Bell v. Duesing, 275 W 47, 80 NW (2d) 821.

In an action for injuries sustained by an 11-year-old child who was crossing a street at a point other than a crosswalk when struck by the defendant's automobile, the child's testimony, that another motorist motioned to her and said that she could go, was material on the issue of comparative negligence and was not hearsay as to such issue, so that the granting of the defendant's motion to strike such testimony as hearsay was error; and the error was prejudicial, so as to require a new trial, in view of the jury's determination attributing 60% of the total aggregate causal negligence to the child. The excluded evidence in question should have been admitted and the jury instructed that it could consider the same only in determining what percentage of the total aggregate causal negligence was attributable to the injured child, and for no other purpose. Auseth v. Farmers Mut. Auto. Ins. Co. 8 W (2d) 627, 99 NW (2d) 700.

4. Inconsistent Findings.

Where, in an action by an automobile occupant against the drivers of both automobiles involved in a collision, the jury found the one defendant negligent as to lookout and as to control, but found that such negligence was not causal, and the jury nevertheless apportioned 40% of the combined negligence of both defendants to such defendant, the verdict was inconsistent as to the defendants, requiring a new trial as between them. Wojan v. Igl, 259 W 511, 49 NW (2d) 420.

If the issue of causal negligence is for the jury and the party inquired about is exonerated but the jury in its comparison of negligence erroneously attributes to such party some degree of causal negligence, the verdict is inconsistent, and a new trial must be granted. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

Counsel should request the trial court to send the jury back to resolve an inconsistent verdict, but the failure of counsel to do so does not necessarily waive the inconsistency. Statz v. Pohl, 266 W 23, 62 NW (2d) 556, 63 NW (2d) 711.

Where the jury found that a streetcar motorman was causally negligent, and found that the driver of a stopped automobile was not negligent as to lookout or management and control, and that his negligence in failing to operate his vehicle on the right half of the street was not a cause of the collision, but the jury nevertheless inconsistently apportioned 10% of the total aggregate causal negligence against him, the trial court's action in properly changing the jury's answer on the causal negligence of the driver of the automobile to the affirmative, although correcting the verdict in that respect, could not resolve the inconsistency which existed when the verdict was returned because more than one element of negligence had been submitted; hence a new trial is required as to the issues relating to liability of the transport company for the

damages of such driver. Mayr v. Milwaukee & S. T. Corp. 274 W 616, 80 NW (2d) 761.

Where a special verdict submitted more than one element of causal negligence in submitting questions as to the causal negligence of a defendant motorcyclist both as to speed and as to management and control, and the jury answered both questions in the negative, but nevertheless attributed 30% of the total aggregate causal negligence to such defendant, the verdict was inconsistent, so as to require a new trial, even though the trial court could properly have changed the jury's negative answer to the question as to speed to the affirmative. Veverka v. Metropolitan Cas. Ins. Co. 2 W (2d) 8, 85 NW (2d) 782.

Where the jury found that the plaintiff bus driver's causal negligence was 50%, that the defendant city's was 50 per cent, and that the defendant contractor's was 50%, but this was in response to separate questions submitted because of the trial court's uncertainty as to whether the contractor could be legally liable to the plaintiff, it will not be deemed that the verdict is defective as finding a total causal negligence of 150%, but it will be deemed that the jury properly understood the questions, and meant by its answers that the causal negligence of each of the 3 parties was equal to the causal negligence of each of the others, that is, that each of the 3 parties was responsible for 33 1/3 per cent of the total causal negligence; hence the plaintiff could not recover from either defendant because his contributory negligence was as great as the causal negligence of each. Becker v. Milwaukee, 8 W (2d) 456, 99 NW (2d) 804.

Where the jury found no negligence as to one party but still in the apportionment question attributed 5% to that party, a new trial is not necessary if the party prefers to take judgment for the lesser amount which the verdict will support if the inconsistency is resolved against her. Erdmann v. Wolfe, 9 W (2d) 307, 101 NW (2d) 44.

895.048 History: 1957 c. 479; Stats. 1957 s. 331.048; 1959 c. 413, 505, 641; 1965 c. 66 s. 2; Stats. 1965 s. 895.048.

Revisor's Note, 1959: This preserves the amendment made by both acts and makes it clear that the limitation on recovery proportionate to the operator's negligence (added by Chapter 413 (569, A)) applies to owners of motor boats as well as to owners of motor vehicles. This amendment approved by Senator Trinke and Mr. McEssy, who were interested in the two bills involved. [Bill 685-S]

895.05 History: 1897 c. 298; Stats. 1898 s. 4256a; 1925 c. 4; Stats. 1925 s. 331.05; 1945 c. 262; 1951 c. 651; 1965 c. 66 s. 2; Stats. 1965 s. 895.05.

Editor's Note: The rule at common law was applied in Buckstaff v. Hicks, 94 W 34, 68 NW 403, decided in 1896.

An article charging that certain persons have obtained absolute control of the mayor and a majority of the council, and making other charges against these persons, is not a report of an official proceeding within sec. 4256a, Stats. 1898. Pfister v. Sentinel Co. 108 W 572, 84 NW 887.

The privilege granted by sec. 4256a does not extend to a mere pleading filed in the court but not in any way presented to any judicial officer as a basis for any action by him. Ilsley v. Sentinel Co. 133 W 20, 113 NW 425.

A published statement that a candidate for office has endeavored to "fatten upon the estates of the dead and rob lawful heirs" and charging specifically a falsification of accounts in connection with 2 certain estates was not privileged as matter of law under sec. 4256a. Ingalls v. Morrissey, 154 W 632, 143 NW 681.

A newspaper publication stating that the plaintiff had been tried before a justice of the peace for the theft of a harness, and had been found guilty and fined was, if true in fact, "a true and fair report" of a judicial proceeding within sec. 4256a and not actionable, although the judgment was void for want of jurisdiction because no complaint had been filed as required by law. Hahn v. Holum, 165 W 425, 162 NW 432.

The immunity for publication in any newspaper of a true and fair report of judicial or other official public proceedings is unconditional. Lehner v. Berlin P. Co. 209 W 536, 245 NW 685.

A newspaper article was unconditionally privileged so far as it was a true and fair report of a statement in a grand jury's report which remained on file after the date of publication, notwithstanding it was subsequently stricken as unauthorized. Williams v. Journal Co. 211 W 362, 247 NW 435.

The publication of an untrue statement that the supreme court had held that a trial judge was justified in setting aside a divorce decree, after the woman involved had filed an affidavit that a named attorney had fraudulently induced her to sign certain documents, was libelous per se. The sending by the news corporation to its members of the libelous form of article for publication in case a subsequent decision of the supreme court made the article no longer untrue was conditionally privileged, and actionable only if actuated by malice. Lehner v. Associated Press, 215 W 254, 254 NW 664.

The original publisher of a libelous newspaper article was not liable either upon a separate cause of action or by way of aggravation of damages for the voluntary and unjustifiable repetition of the original libel by the defendants in this case; and therefore the plaintiff's settlement with the original publisher did not bar the plaintiff's cause of action against the defendants. Lehner v. Kelley, 215 W 265, 254 NW 634.

If a statement is untrue and is in fact libelous, it will nevertheless be privileged if it is a truthful report of a judicial proceeding, but if it is not a truthful report the statute affords the publisher no protection. Schneider v. Kenosha News Pub. Co. 247 W 382, 20 NW (2d) 568.

895.052 History: 1957 c. 497; Stats. 1957 s. 331.052; 1965 c. 66 s. 2; Stats. 1965 s. 895.052.

Liability of station owners for political broadcasts. 42 MLR 417.

895.055 History: R. S. 1858 p. 970; 1858 c. 117 s. 6; R. S. 1878 s. 4538; Stats. 1898 s. 4538; 1925 c. 4; Stats. 1925 s. 348.16; 1955 c. 696 s.

198; Stats. 1955 s. 331.055; 1965 c. 66 s. 2; Stats. 1965 s. 895.055.

To uphold a contract in writing for the sale and delivery of grain at a future day, for a price certain, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. Barnard v. Backhaus, 52 W 593, 6 NW 252. Accord: Everingham v. Meigham, 55 W 354, 13 NW 269; and Bartlett v. Collins, 109 W 477, 85 NW 703. Compare: Sheffield-King M. Co. v. Jacobs, 170 W 389, 175 NW 796; and W. M. Bell Co. v. Emberson, 182 W 433, 196 NW 861. See also definitions relating to gambling in 945.01.

The manifest purpose of the statute is to make all gambling unlawful and punishable; to nullify all transactions based thereon; and to prevent any person from acquiring any legal right to any property of another by gambling. They entirely remove the disability of the loser which existed at common law by reason of the parties being in pari delicto, and clothe him with the role of innocence so far as to enable him to retake and reclaim the specific property he has lost while the same may be identified in the possession of the stakeholder or winner, or, in case the winner has converted the same, to recover from him the value thereof. An action to recover money lost is not in contract, and the defendant therein may be arrested under sec. 2689, R. S. 1878. Stoddard v. Burt, 75 W 107, 43 NW 737.

An action to recover money paid at plaintiff's request to settle his gambling losses in another state does not come within sec. 4538, Stats. 1898. The agreement sued on was based on an illegal consideration, and therefore void. The presumption that in certain classes of cases the statute of another state is the same as that of Wisconsin does not apply to penal statutes. Schoenberg v. Adler, 105 W 645, 81 NW 1055.

An agreement to pay losses and gains at gambling out of a store is contrary to the statute and void. Olson v. Sawyer-Goodman Co. 110 W 149, 85 NW 640.

A contract governing a "trade-increasing contest" was not illegal or void under sec. 4538, Stats. 1913, as being a gambling or wagering transaction; and a note given by the defendants to the promoter was therefore valid and enforceable by a holder in due course. Stevens v. Freund, 169 W 68, 171 NW 300.

Participants in a wager may not use a court to settle their dispute. Cudahy Junior Chamber of Commerce v. Quirk, 41 W (2d) 698, 165 NW (2d) 116.

895.056 History: R. S. 1858 c. 169 s. 17; 1858 c. 117 s. 7, 8; R. S. 1878 s. 4532; Stats. 1898 s. 4532; 1925 c. 4; Stats. 1925 s. 348.10; 1955 c. 696 s. 196; Stats. 1955 s. 331.056; 1965 c. 66 s. 2; Stats. 1965 s. 895.056.

The winner of a bet who deposited money wagered with a stakeholder might recover it. Simmons v. Bradley, 27 W 689. Compare Murdock v. Kilbourn, 6 W 468.

The mere racing of horses is not illegal or against public policy, and the offering of a premium or reward by a third party to those whose horses compete in such races, when such rewards or premiums are not a mere cover or disguise for betting on such races, is not illegal. Porter v. Day, 71 W 296, 37 NW 259.

One who brings suit in the name of the depositor can recover only the sum which the latter actually contributed to the fund wagered, although the whole amount was deposited in plaintiff's name. Harnden v. Melby, 90 W 5, 62 NW 535.

Where an action was brought to recover money under sec. 4532, Stats. 1898, and it was charged that a particular form of gambling was resorted to on certain dates, the variance of proof showing that money was lost by another form of gambling and on other dates was waived for failure to object to the testimony. Clark v. Slaughter, 129 W 642, 109 NW 556.

895.057 History: 1955 c. 696 s. 61; Stats. 1955 s. 331.057; 1965 c. 66 s. 2; Stats. 1965 s. 895.057.

895.06 History: 1858 c. 56 s. 1; R. S. 1858 p. 837; R. S. 1878 s. 4257; Stats. 1898 s. 4257; 1925 c. 4; Stats. 1925 s. 331.06; 1965 c. 66 s. 2; Stats. 1965 s. 895.06.

The answer to an action brought to recover one-half of a lot of logs alleged that plaintiff had legal title to an undivided half of the land from which they were cut, but that his interest therein was merely a mortgage interest; and also that defendant claimed the logs by virtue of a sale by the equitable mortgagors of the land who had cut them therefrom under an agreement with plaintiff, the proceeds thereof to be applied on the mortgage debt, which in that way was fully paid; and that the timber yet standing on the land was full security for that debt. These facts constituted a good defense. Burr v. C. C. Thompson & Walkup Co. 78 W 227, 47 NW 277.

If an action by one of several tenants in common against their common bailee of all to recover his share of personal property, can be maintained under sec. 4257, R. S. 1878, there must be a previous written demand. George v. McGovern, 83 W 555, 53 NW 899.

Where plaintiff's farm was cultivated for one year for one-half the crops grown thereon, which were to be divided by the defendant when they were ready for the market, the right to claim one-half the straw was not lost because it remained on the farm undivided until after the expiration of the year and after the defendant had left the farm. Wood v. Noack, 84 W 398, 54 NW 785.

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

895.07 History: R. S. 1849 c. 94 s. 1; R. S. 1858 c. 126 s. 1; R. S. 1878 s. 4258; Stats. 1898 s. 4258; 1925 c. 4, 67; Stats. 1925 s. 331.07; 1965 c. 66 s. 2; Stats. 1965 s. 895.07.

Revisers' Note, 1878: Section 1, chapter 126, R. S. 1858, omitting the last clause, amending the fifth and sixth paragraphs so as to clearly admit a set-off by a party plaintiff against a defendant as well as by a defendant. Cases happen where the plaintiff may have a set-off to a counterclaim which he could not plead as a cause of action against the defendant; and

it might happen that a set-off would be proper to a counterclaim which was not pleaded as a cause of action, although it might be. There was some mistake in the reading of these paragraphs, requiring verbal amendments.

Money paid by a vendee of chattels to clear his title may be set off against a note given for the purchase price or suit may be maintained against the vendor as for money paid to his use. Lane v. Romer, 2 Pin. 404.

Unliquidated damages are not subject to set-off against certain demand, but may be given in evidence to reduce plaintiff's damages. Norton v. Rooker, 1 Pin. 195; Manville v. Gay, 1 W 250.

The value of services and materials, when the amount is uncertain and unliquidated, is a proper subject of set-off. Manville v. Gay, 1 W 250.

The creditor of a decedent cannot set off a debt which was not matured at the time of death against a claim the estate held against him as one of its assets. To allow that to be done would affect the equal distribution of the assets of the estate and tend to prejudice the claims of other creditors. Armstrong v. Pratt, 2 W 299.

County orders and jurors' certificates could not be set off against taxes returned unpaid. Keep v. Frazier, 4 W 224.

A claim for moneys or goods embezzled or stolen is not the subject of set-off. Pierce v. Hoffman, 4 W 277.

The defendant in an action to foreclose a mortgage alleged that he purchased plaintiff's interest in the property mortgaged at a consideration not to exceed $1,600, of which $450 were paid and the balance was secured by notes. He also gave a bond conditioned to pay one-half the indebtedness of the firm of which he became a member by such purchase, which was represented to him not to exceed $800. It was in fact much more than that, and he paid thereon $1,300. Such indebtedness was not a lien upon the property. The amount paid in excess of $400 could not be set off. Spear v. Dey, 5 W 193.

One of several defendants cannot set off a debt due him from plaintiff against a joint debt sued upon. Dart v. Sherwood, 7 W 523.

Usury paid may be set off in an action to recover the principal sum due. Dole v. Northrop, 19 W 249.

In an action for the purchase money of land, a breach of covenant in plaintiff's deed may be set off or counterclaimed. Akerly v. Vilas, 21 W 377.

Indebtedness of plaintiff to defendant's wife cannot be set off against defendant's note received in satisfaction or forbearance of a debt of the wife to plaintiff. Dolph v. Rice, 21 W 590.

In an action on contract, defendant may set off a demand for trespass by plaintiff's cattle. As he may waive the tort and sue in contract, such demand is the subject of set-off. Norden v. Jones, 33 W 600.

Defendants in an action on a promissory note in the firm name and for a firm debt cannot offset an account against plaintiff in favor of another firm now owned by one of them. Wilson v. Runkel, 38 W 526.

An account which does not draw interest before commencement of an action cannot be offset as of an earlier date against obligations drawing interest. Yates v. Shephardson, 39 W 173.

In a suit for the contract price of machinery, where defendants claimed damages for imperfections, if such damages were greater than the amount of the note sued (being one of several, the others not due), they could not have judgment in that action for the excess. Aultman v. Jett, 42 W 488; Aultman v. Hetherington, 42 W 622.

One who has paid taxes on land which it was plaintiff's duty to pay may, it seems, offset the amount so paid against a claim for money judgment. Durkee v. Felton, 44 W 467.

Set-off against the payee of a note cannot be claimed against a bona fide purchaser of it before it was due though he bought with knowledge of the claim. Patterson v. Wright 64 W 289, 25 NW 10.

The debtor of an insolvent estate cannot purchase a claim against it and make it available as a set-off. Union Nat. Bank v. Hicks, 67 W 189, 30 NW 234.

On the foreclosure of a mortgage by an assignee possessed of it as collateral security for a debt larger than its value, the mortgagee not being a party, the mortgagor cannot set off or counterclaim the amount of a note against the mortgagee which he purchased after the assignment of the mortgage. Blakely v. Twining, 69 W 238, 34 NW 132.

In an action by a married woman for the use of and injury to property which she alleges she bought from her husband, the defendant cannot counterclaim or set off a demand against the husband because he had no notice of the sale, if it does not appear that he acted on the belief that the property was owned by the husband. Sloteman v. Thomas & Wentworth M. Co. 69 W 499, 34 NW 225.

If execution of a judgment is stayed another judgment cannot be set off against it during such stay. Treat v. Hiles, 77 W 475, 46 NW 810.

A bank cannot set off, against a deposit to the credit of one who has made an assignment for the benefit of creditors, a note held by it against him but which was not due at the time the assignment was made. Oatman v. Batavian Bank, 77 W 501, 46 NW 881.

A debtor of a banker may purchase his certificates of deposit and be the owner thereof in good faith although the bank had closed its doors at the time the purchase was made; and this being done before the banker made an assignment, such certificates are a good set-off. Johnston v. Humphrey, 91 W 76, 64 NW 317.

Equity will, in assignment proceedings, allow a statutory right of set-off. Johnston v. Humphrey, 91 W 76, 64 NW 317.

Except for causes of equitable consideration the right of statutory set-off must exist between all the parties plaintiff and all the parties defendant, and from and to those persons only who are parties to the action. Carpenter v. Fulmer, 118 W 454, 95 NW 403.

It was error for the court to rule that a counterclaim on a judgment indebtedness could not be considered because the defendant possessed the right to have it applied to any judgment rendered in the action. Hart v. Godkin, 122 W 646, 100 NW 1057.

In an action by a waterworks company against a city, upon a contract for hydrant rentals, made by a town for the benefit of an unincorporated village, and to the obligations of which contract the city has succeeded, a judgment in favor of the town against the company cannot be set off. Washburn W. W. Co. v. Washburn, 129 W 73, 108 NW 194.

The right of a depositor to set off its deposit against its liability on its note to a bank became vested when the bank committed an act of insolvency by closing its doors, although the application was not made as of that day but by the court as of the day when the bank was reopened pursuant to a stabilization agreement. Shawano Oil Co. v. Citizens State Bank, 223 W 100, 269 NW 675.

The law of set-off relates to the remedy, and therefore set-off is governed by the law of the forum. A Wisconsin indorsee's failure to bring an action on a note against the deceased maker's heir within 2 years after final settlement of the maker's estate, probated in Indiana, requires disallowance of the amount due on the note as a set-off against the heir's claim against the deceased indorsee's estate, probated in Wisconsin. The Indiana statute, providing that an action on a nonresident creditor's claim against a decedent's heirs, devisees or distributees must be brought within 2 years after final settlement of the estate, is not a statute of limitations, but a statute creating a cause of action for a limited time only, and therefore the demand asserted as a set-off had no legal existence, and was not pleadable as a set-off. Estate of Seybold, 223 W 192, 270 NW 87.

A right of set-off attaches where mutual demands exist, where insolvency has intervened, even though one of the demands has not matured, and where no equities of other claimants are shown to exist. In re Milwaukee Commercial Bank, 236 W 105, 294 NW 538.

The general rule is that a claim or demand, to be available as a set-off, counterclaim, or recoupment to an action, must be due and owing at the time of the commencement of the action. Generally, an obligation which is absolutely due from the principal defendant in a garnishment action to the garnishee and which is in no manner due on a contingency, but which is payable in the future at a time subsequent to the service of garnishee process, is not a proper set-off against the liability of the garnishee to the principal defendant. Mattek v. Hoffmann, 272 W 503, 76 NW (2d) 300.

331.07 (6) does not apply where the note sued on was transferred before it was due. Peoples T. & S. Bank v. Standard Printing Co. 19 W (2d) 27, 119 NW (2d) 378.

The impact of the set-off and assignment statute upon negotiable instruments law. Bichler, 47 MLR 379.

895.08 History: R. S. 1849 c. 94 s. 1; R. S. 1858 c. 126 s. 1; R. S. 1878 s. 4259; Stats. 1898 s. 4259; 1925 c. 4; Stats. 1925 s. 331.08; 1965 c. 66 s. 2; Stats. 1965 s. 895.08.

Where the commissioner of banking in possession of the business and property of a bank and occupying the premises held by the bank as lessee filed a claim on open account against the trustee in bankruptcy of the lessor, and stated in his proof of claim that the sum was due over and above all set-offs, he thereby waived his right to offset such claim against the claim for rent presented by the trustee of the lessor against such commissioner; but he might offset against such rents accruing up to the time of the lessor's bankruptcy, and no longer, the interest accrued upon a mortgage given by the lessor to the bank, if not included in the claim on open account. Citizens S. & T. Co. v. Rogers, 162 W 216, 155 NW 155.

895.09 History: R. S. 1849 c. 94 s. 6; R. S. 1858 c. 126 s. 4; R. S. 1878 s. 4260; Stats. 1898 s. 4260; 1925 c. 4; Stats. 1925 s. 331.09; 1965 c. 66 s. 2; Stats. 1965 s. 895.09.

The provisions of sec. 4260, R. S. 1878, are subject to the modifications, restrictions and limitations in particular classes of actions by the specific provisions of other chapters. Carpenter v. Murphey, 57 W 541, 15 NW 798.

In an action by an administrator upon a contract to which he is a party as such or to recover assets belonging to the estate the defendant cannot set off or counterclaim a debt due him from the deceased. McLaughlin v. Winner, 63 W 120, 23 NW 402.

Sec. 4260, R. S. 1878, goes to the rights of parties and is not merely dependent upon a suit being brought by the administrator. But a claim cannot be interposed as a set-off unless the person who offers it was the owner of it at the time of decedent's death. Union Nat. Bank v. Hicks, 67 W 189, 30 NW 234.

895.10 History: R. S. 1849 c. 93 s. 1; R. S. 1849 c. 94 s. 8; R. S. 1858 c. 126 s. 6; R. S. 1878 s. 4261; Stats. 1898 s. 4261; 1925 c. 4; Stats. 1925 s. 331.10; 1965 c. 66 s. 2; Stats. 1965 s. 895.10.

895.11 History: R. S. 1849 c. 94 s. 4; R. S. 1858 c. 126 s. 2; R. S. 1878 s. 4262; Stats. 1898 s. 4262; 1925 c. 4; Stats. 1925 s. 331.11; 1965 c. 66 s. 2; Stats. 1965 s. 895.11.

895.12 History: R. S. 1849 c. 94 s. 5; R. S. 1858 c. 126 s. 3; R. S. 1878 s. 4263; Stats. 1898 s. 4263; 1925 c. 4; Stats. 1925 s. 331.12; 1965 c. 66 s. 2; Stats. 1965 s. 895.12.

895.13 History: 1859 c. 154 s. 2; R. S. 1878 s. 4264; Stats. 1898 s. 4264; 1925 c. 4; Stats. 1925 s. 331.13; 1965 c. 66 s. 2; Stats. 1965 s. 895.13.

A counterclaim alleging facts which constitute a valid set-off, but which do not constitute a cause of action against the plaintiff, is not demurrable although it demands an affirmative judgment. Schumacher v. Seeger, 65 W 394, 27 NW 30.

In an action on a joint and several liability against several defendants any defendant may plead any proper matter that is the subject of set-off or counterclaim. Piotrowski v. Czerwinski, 138 W 396, 120 NW 268.

The pleadings and affidavits on the plaintiff's motion for summary judgment in an action to recover on a promissory note presented issues of fact which could not be determined on such a motion. The sufficiency of a pleading is not determined on a motion for summary judgment where it appears that

issues of fact are presented. Schneeberger v. Dugan, 261 W 177, 52 NW (2d) 150.

In an equitable action for an accounting, the defendant, to have the advantage of any balance that may be found in his favor, need not plead a set-off or counterclaim. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

See note to 263.15, citing Essock v. Mawhinney, 3 W (2d) 253, 88 NW (2d) 659.

895.14 History: R. S. 1849 c. 93 s. 1; R. S. 1858 c. 126 s. 7; R. S. 1878 s. 4265; Stats. 1898 s. 4265; 1925 c. 4; Stats. 1925 s. 331.14; 1965 c. 66 s. 2; Stats. 1965 s. 895.14.

A mere offer to pay is not sufficient. Babcock v. Perry, 8 W 277.

Where a party relies upon tender it is sufficient to keep the tender good that he offers to bring the money into court. Breitenbach v. Turner, 18 W 140.

Depositing with the court, after issue joined, a check for the sum due, with costs, is not a good tender. Lewis v. Larson, 45 W 353.

A tender must be unconditional, not a mere offer of compromise. Elderkin v. Fellows, 60 W 339, 19 NW 101; Hoffman v. Van Diemen, 62 W 362, 21 NW 542.

One who holds the title to land as security for a loan and who is bound to reconvey it upon payment of the sum due, on or before a fixed date, is bound to receive the entire amount when tendered at his residence and to execute a deed of the premises. The person making the tender need not take any person with him to prepare the deed; nor will his tender be impaired because he demands a deed. Mankel v. Belscamper, 84 W 218, 54 NW 500.

895.15 History: R. S. 1849 c. 93 s. 3, 4; R. S. 1858 c. 126 s. 9, 10; R. S. 1878 s. 4266; Stats. 1898 s. 4266; 1925 c. 4; Stats. 1925 s. 331.15; 1965 c. 66 s. 2; Stats. 1965 s. 895.15.

Revisers' Note, 1878: Sections 9 and 10, chapter 126, R. S. 1858, combined and amended to permit a tender at any time before the case is called for trial. This section is, however, practically of little value, since offers of judgment may be made, without payment of money, with a substantially similar effect.

Though a tender is made and the money paid into court the plaintiff may contest the sufficiency of the tender. Lewis v. Larson, 45 W 353.

If in an action for trespass to personalty a tender is made in the answer of a judgment for nominal damages and costs and a release of the property, which tender is refused, the defendant is not estopped from denying plaintiff's title. Auley v. Osterman, 65 W 118, 25 NW 657.

A tender of an amount less than is admitted to be due, without notice as to where the money might be obtained if the other party should conclude to accept it, is not sufficient. Warden v. Sweeney, 86 W 161, 56 NW 647.

If plaintiff tenders and pays money into court he conclusively admits that it is due the tenderee, regardless of the result of the action and of the fact that his right to relief did not depend upon the tender. Fox v. Williams, 92 W 320, 66 NW 357.

Where an action was pending on appeal from justice court, a tender must include the costs provided under sec. 2925, Stats. 1898. Chalutz v. Wisconsin C. R. Co. 143 W 623, 128 NW 425.

The tender of a check for the full amount due is a good tender and stops interest, if no objection be made at the time that the check is not legal tender, but is refused on some other ground. Kiefert v. Maple Valley M. H. F. Co. 158 W 340, 148 NW 864.

895.16 History: R. S. 1849 c. 93 s. 5; R. S. 1858 c. 126 s. 11; R. S. 1878 s. 4267; Stats. 1898 s. 4267; 1925 c. 4; Stats. 1925 s. 331.16; 1965 c. 66 s. 2; Stats. 1965 s. 895.16.

895.17 History: 1853 c. 67 s. 1; R. S. 1858 c. 126 s. 12; R. S. 1878 s. 4268; Stats. 1898 s. 4268; 1925 c. 4; Stats. 1925 s. 331.17; 1949 c. 252; 1965 c. 66 s. 2; Stats. 1965 s. 895.17.

895.171 History: Court Rule XV; Sup. Ct. Order, 212 W xxii; Stats. 1933 s. 331.171; 1965 c. 66 s. 2; Stats. 1965 s. 895.171.

Denial of interest on the amount of a judgment in a mortgage foreclosure suit for the balance due on a note secured by a mortgage from the time of defendants' tender of such amount until the time of trial was erroneous, where defendants did not pay the amount tendered into court before commencement of the trial. Rosecky v. Tomaszewski, 225 W 438, 274 NW 259.

Where, on the trial, the defendant's attorney stated that "defendant tenders the sum of $90" but no money was offered and the plaintiff's attorney replied "That tender is not accepted," the trial court erred in dismissing the complaint as to such item, since a valid tender, if there was one, would not discharge the defendant's liability for the $90 and would entitle him at most to a remission of costs accruing after the tender. James Talcott, Inc. v. Cohen, 226 W 418, 275 NW 906.

The defendant, in order to keep good a tender made before trial, should have paid the full amount into court, and hence, where the defendant paid in a less amount, the plaintiff, although recovering only the less amount in the action, was entitled to both interest and costs. Stiles v. Dahlke, 254 W 149, 35 NW (2d) 298.

895.28 History: 1856 c. 120 s. 7; R. S. 1858 c. 122 s. 7; R. S. 1878 s. 4277; Stats. 1898 s. 4277; 1925 c. 4; Stats. 1925 s. 331.28; 1965 c. 66 s. 2; Stats. 1965 s. 895.28.

895.29 History: R. S. 1849 c. 139 s. 23; R. S. 1858 c. 170 s. 19; R. S. 1878 s. 4278; Stats. 1898 s. 4278; 1925 c. 4; Stats. 1925 s. 331.29; 1965 c. 66 s. 2; Stats. 1965 s. 895.29.

895.30 History: 1852 c. 109 s. 1, 2; R. S. 1858 c. 134 s. 43; R. S. 1878 s. 4279; Stats. 1898 s. 4279; 1925 c. 4; Stats. 1925 s. 331.30; 1965 c. 66 s. 2; Stats. 1965 s. 895.30.

895.33 History: 1897 c. 79; Stats. 1898 s. 4281a; 1917 c. 152 s. 10; 1925 c. 4; Stats. 1925 s. 331.33; 1965 c. 66 s. 2; Stats. 1965 s. 895.33.

Fidelity and surety bonds. Luick, 1 MLR 149.

895.34 History: 1907 c. 213; Stats. 1911 s. 4281m; 1925 c. 4; Stats. 1925 s. 331.34; 1965 c. 66 s. 2; Stats. 1965 s. 895.34; 1967 c. 276 s. 39.

If the penal sum named in an appeal bond appears at any time to be less than the costs probably recoverable, the appellate court may require a further bond. American C. M. Co. v. Madison, 153 W 444, 141 NW 246.

The power of the circuit court to increase the bail exists independently of the statute. State ex rel. Ryan v. Kjelstad, 230 W 579, 284 NW 554.

895.345 History: 1943 c. 520; Stats. 1943 s. 331.345; 1965 c. 66 s. 2; Stats. 1965 s. 895.345.

895.346 History: 1949 c. 301; Stats. 1949 s. 331.346; 1965 c. 66 s. 2; Stats. 1965 s. 895.346; 1967 c. 184.

Comment of Advisory Committee, 1949: There is need of a rule to permit the deposit of cash or its equivalent in lieu of a bail bond. [Bill 30-S]

895.35 History: 1913 c. 333; Stats. 1913 s. 4281n; 1921 c. 313; 1925 c. 4; Stats. 1925 s. 331.35; 1939 c. 513 s. 56; 1965 c. 66 s. 2; 1965 c. 99; Stats. 1965 s. 895.35.

In defending his right to the office, the officer acts not only for himself but for the citizens who have chosen him. The municipality may pay his expenses if it will but the statute does not compel it to do so. Page v. Milwaukee County, 230 W 331, 283 NW 833.

Members of the county board, the county clerk and the county treasurer may be reimbursed by the county for legal expenses incurred in successfully resisting proceedings to subject them to personal liability growing out of performance of their official duties. A county board member may not be reimbursed by the county for legal expenses incurred in successfully defending a quo warranto action based on alleged ineligibility to hold such office. The district attorney may be reimbursed by the county for legal expenses incurred in successfully defending ouster proceedings based on alleged misconduct in office. 26 Atty. Gen. 243.

It is not necessary that a municipal officer be compensated on a salary basis in order to receive reimbursement for expenses incurred in defending himself against a criminal charge. 30 Atty. Gen. 318.

A county traffic patrolman is an officer of the county within the meaning of 331.35, Stats. 1953, and the county board is authorized to pay reasonable expenses incurred by him in a successful defense of a criminal action brought against him by reason of acts done in the performance of his official duties. (16 Atty. Gen. 593 overruled.) 43 Atty. Gen. 230.

A trial judge's certificate, when required, may be issued subsequent to a county board resolution authorizing payment of reasonable expenses incurred within the purview of the statute. 53 Atty. Gen. 42.

A county board may reimburse a county probation officer for expenses incurred in defense of a suspension order. 55 Atty. Gen. 85.

895.36 History: 1889 c. 326 s. 256; Ann. Stats. 1889 s. 925x sub. 256; Stats. 1898 s. 925—256; 1921 c. 396 s. 86; Stats. 1921 s. 66.11 (3); 1953 c. 540 s. 26; Stats. 1953 s. 331.36; 1965 c. 66 s. 2; Stats. 1965 s. 895.36.

895.37 History: 1911 c. 50; 1911 c. 664 s. 4; Stats. 1911 s. 2394—1, 2394—2; 1913 c. 599; 1915 c. 316; 1917 c. 624; 1919 c. 457 s. 1; 1923 c. 291 s. 3; 1923 c. 437 s. 2; 1923 c. 449 s. 56; Stats. 1923 s. 102.01, 102.02; 1931 c. 403 s. 3, 4; Stats. 1931 s. 331.37; 1939 c. 513 s. 57; 1947 c. 456; 1961 c. 387; 1965 c. 66 s. 2; Stats. 1965 s. 895.37.

Editor's Note: Section 2391-1, Stats. 1911, which was created by the statute which enacted the workmen's compensation act, abolished the defense of assumption of risk and the defense that injury or death was caused in whole or in part by the want of ordinary care of a fellow servant. The amendment of sec. 2394-1 by ch. 599, Laws 1913, had the effect of abolishing the defense of contributory negligence in cases covered by the statute. See Besnys v. Herman Zohrlaut L. Co. 157 W 203, 147 NW 37, Salus v. Great Northern R. Co. 157 W 546, 47 NW 1070, and Fandek v. Barnett & Record Co. 161 W 55, 150 NW 537.

See note to sec. 12, art. I, citing Borgnis v. Falk Co. 147 W 327, 133 NW 209.

The defense of assumption of risk being unavailable to the defendant, the inconsistency of findings that in the exercise of ordinary care defendant ought to have known, but plaintiff ought not to have known, that plaintiff's working place was unsafe, is immaterial. Rosholt v. Worden-Allen Co. 155 W 168, 144 NW 650.

The abrogation of the defense of assumption of risk and in certain cases that of contributory negligence makes it more necessary than formerly to distinguish between assumption of risk and contributory negligence. Puza v. C. Hennecke Co. 158 W 482, 149 NW 223. See also Fandek v. Barnett & Record Co. 161 W 55, 150 NW 537.

An employer operating under the workmen's compensation law is entitled to the common-law defenses of assumption of risk, negligence of fellow servant, and contributory negligence, against an employe who has not elected to come under that law. Karny v. Northwestern M. I. Co. 160 W 316, 151 NW 786.

As between an employer and his employes the remedies provided in the workmen's compensation law are exclusive when both are subject to that law; but such act does not abridge any remedies of an employe against a third person for torts committed, unless it be a case such as is provided for by sec. 2394-6, Stats. 1913. Smale v. Wrought W. M. Co. 160 W 331, 151 NW 803.

On gross negligence, see note to 895.045, (general), citing Tomasik v. Lanferman, 206 W 94, 238 NW 857.

A farmer who was injured when his foot was caught in a silo filler, and the owner of the silo filler, also a farmer, who were assisting a neighbor in filling a silo pursuant to an arrangement of a community of farmers for an exchange of work, were engaged in "farm labor" within 331.37 (3), so that the injured farmer could not recover if his contributory

negligence amounted to 50% or more. Schuster v. Bridgeman, 225 W 547, 275 NW 440.

331.37 does not abrogate the defenses of assumption of risk and contributory negligence in farm-labor cases. Haile v. Ellis, 5 W (2d) 221, 92 NW (2d) 863.

See note to 895.045, citing Colson v. Rule, 15 W (2d) 387, 113 NW (2d) 21.

895.375 History: 1953 c. 293; Stats. 1953 s. 331.375; 1965 c. 66 s. 2; Stats. 1965 s. 895.375.

Where a full assignment of causes of action of an injured party and his workmen's compensation insurer, against an insured and its automobile liability insurer, for the alleged negligence of an employe of the insured in using insured trucks, was made to the insured's comprehensive liability insurer which had paid the injured party $120,000, such assignment was not champertous, but public policy prevents the enforcement of the assignee's rights under such assignment for any amount above the $120,000, and the assignment is void for any amount in excess of $120,000, but good to the extent of $120,000. D'Angelo v. Cornell P. P. Co. 19 W (2d) 390, 120 NW (2d) 70.

895.38 History: 1919 c. 655 s. 1; Stats. 1919 s. 1966-33n; 1923 c. 291 s. 3; Stats. 1923 s. 204.15; 1933 c. 487 s. 145; Stats. 1933 s. 331.38; 1965 c. 66 s. 2; Stats. 1965 s. 895.38; 1969 c. 339 s. 27.

Fidelity and surety bonds. Luick, 1 MLR 149.

895.39 History: Sup. Ct. Order, 221 W vii; Stats. 1937 s. 331.39; 1965 c. 66 s. 2; Stats. 1965 s. 895.39.

895.40 History: Sup. Ct. Order, 221 W vii; Stats. 1937 s. 331.40; 1965 c. 66 s. 2; Stats. 1965 s. 895.40.

895.41 History: 1937 c. 117; Stats. 1937 s. 331.41; 1939 c. 60; 1953 c. 613; 1965 c. 66 ss. 2, 6; Stats. 1965 s. 895.41; 1969 c. 339 s. 27.

Funds deposited by an employer under 331.41 (1), Stats. 1937, are trust funds. The dollar limitation is without reference to the employer's individual account and is a limitation only upon the amount which may be deposited with respect to any one trust or individual employe. 27 Atty. Gen. 525.

331.41 is not retroactive in effect and does not apply to moneys deposited by employes prior to its effective date. 27 Atty. Gen. 721.

895.42 History: 1943 c. 446; Stats. 1943 s. 331.42; 1965 c. 66 s. 2; Stats. 1965 s. 895.42; 1969 c. 339 s. 27.

895.43 History: 1963 c. 198; Stats. 1963 s. 331.43; 1965 c. 66 s. 2; Stats. 1965 s. 895.43.

895.43 provides for a notice of injury; it does not repeal by implication 62.25 which provides for a notice of claim. Both must be complied with. Pattermann v. Whitewater, 32 W (2d) 350, 145 NW (2d) 705.

See note to 81.15, on notice of injury, citing Raisanen v. Milwaukee, 35 W (2d) 504, 151 NW (2d) 129.

895.43, Stats. 1965, enacted in response to Holytz v. Milwaukee, 17 W (2d) 26 (1962), by its express terms precludes suit for intentional torts of officers, agents, or employes of political corporations, governmental subdivisions or agencies. Moreover, 270.58 may not be construed to allow a plaintiff to accomplish that which is expressly prohibited by 895.43. Strong v. Milwaukee, 38 W (2d) 564, 157 NW (2d) 619.

So much of 895.43 as provides that the failure to give the notice of injury required is no bar to a claim if the defendant has actual notice of the damage or injury and the injured party shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to defendant is construed as requiring the pleading of lack of compliance with the section as a defense. Majerus v. Milwaukee County, 39 W (2d) 311, 159 NW (2d) 86.

895.43, Stats. 1963, is applicable to acts of common-law negligence by a municipality that are not embraced within the terms "insufficiency" and "want of repairs", as those terms are used in 81.15, provided the defendant has actual notice and has not been prejudiced by the plaintiff's failure. Dusek v. Pierce County, 42 W (2d) 498, 167 NW (2d) 246.

See notes to 81.15, on municipality liable, citing Schwartz v. Milwaukee, 43 W (2d) 119, 168 NW (2d) 107.

895.44 History: 1965 c. 375; Stats. 1965 s. 895.44.

CHAPTER 898.

Persons in Jail on Civil Process.

898.01 History: R. S. 1849 c. 129 s. 1; R. S. 1858 c. 162 s. 1; R. S. 1878 s. 4307; Stats. 1898 s. 4307; 1925 c. 4; Stats. 1925 s. 336.01; 1959 c. 560; 1965 c. 66 s. 4; Stats. 1965 s. 898.01.

898.02 History: R. S. 1849 c. 129 s. 2; R. S. 1858 c. 162 s. 2; 1864 c. 50 s. 1; R. S. 1878 s. 4308; Stats. 1898 s. 4308; 1925 c. 4; Stats. 1925 s. 336.02; 1965 c. 66 s. 4; Stats. 1965 s. 898.02.

898.03 History: R. S. 1849 c. 129 s. 3; R. S. 1858 c. 162 s. 3; R. S. 1878 s. 4309; Stats. 1898 s. 4309; 1925 c. 4; Stats. 1925 s. 336.03; 1965 c. 66 s. 4; Stats. 1965 s. 898.03.

898.04 History: R. S. 1849 c. 129 s. 4; R. S. 1858 c. 162 s. 4; 1864 c. 50 s. 2; R. S. 1878 s. 4310; Stats. 1898 s. 4310; 1925 c. 4; Stats. 1925 s. 336.04; 1965 c. 66 s. 4; Stats. 1965 s. 898.04.

898.05 History: R. S. 1849 c. 129 s. 5; R. S. 1858 c. 162 s. 5; 1864 c. 50 s. 3; R. S. 1878 s. 4311; Stats. 1898 s. 4311; 1925 c. 4; Stats. 1925 s. 336.05; 1965 c. 66 s. 4; Stats. 1965 s. 898.05.

898.06 History: R. S. 1849 c. 129 s. 6; R. S. 1858 c. 162 s. 6; 1864 c. 50 s. 4; R. S. 1878 s. 4312; Stats. 1898 s. 4312; 1925 c. 4; Stats. 1925 s. 336.06; 1965 c. 66 s. 4; Stats. 1965 s. 898.06.

898.07 History: R. S. 1849 c. 129 s. 7; R. S. 1858 c. 162 s. 7; 8; 1864 c. 50 s. 5; R. S. 1878 s. 4313; Stats. 1898 s. 4313; 1925 c. 4; Stats. 1925 s. 336.07; 1965 c. 66 s. 4; Stats. 1965 s. 898.07.