s. 2910; 1925 c. 4; Stats. 1925 s. 270.89; 1935 c. 541 s. 182.

270.90 History: 1869 c. 63 s. 1; R. S. 1878 s. 2911; Stats. 1898 s. 2911; 1925 c. 4; Stats. 1925 s. 270.90; 1935 c. 541 s. 183.

Where defendant in replevin had judgment for a return of the property, or if return could not be had for the value, and an execution had been issued the plaintiff cannot have the judgment satisfied under the practice authorized by sec. 2911, R. S. 1878, except upon satisfactory proof that the judgment has been fully satisfied by a return of all the property in suit or by a tender of such return, and if such tender was made before execution issued, that such tender was kept good. The return of the sheriff that a return could not be had cannot be contradicted by the parties. Irvin v. Smith, 66 W 113, 27 NW 28, 28 NW 351.

If a judgment has been paid the debtor has a remedy by motion in the court which rendered it. One circuit court has no jurisdiction to restrain the enforcement of a judgment rendered in another. Cardinal v. Eau Claire L. Co. 75 W 404, 44 NW 761.

270.91 History: 1853 c. 82 s. 1, 2; R. S. 1858 c. 132 s. 45, 46; R. S. 1878 s. 2912; Stats. 1898 s. 2912; 1925 c. 4; Stats. 1925 s. 270.91; 1935 c. 541 s. 184; 1943 c. 355.

Revisor's Note, 1935: The face of the execution should state who is liable and for how much. [Bill 50-S, s. 184]

A judgment against an administrator of an estate based upon his failure to withdraw estate funds from a bank of which he was an officer and director before it failed in 1935 was discharged in bankruptcy since he was guilty of no more than negligence, despite the conclusion in the judgment that he was guilty of a defalcation. Aetna Casualty & Surety Co. v. Lauerman, 12 W (2d) 387, 107 NW (2d) 605.

Where a bankrupt, pursuant to 270.91 (2), filed a petition praying that a certain outstanding judgment be satisfied, and placed in evidence the order of discharge in bankruptcy, the objecting judgment creditor then had the burden of producing evidence in avoidance of the discharge. In determining whether the liability of a judgment debtor is dischargeable in bankruptcy under 17 (a) of the Bankruptcy Act (11 USCA, sec. 35), Wisconsin follows the liberal practice of permitting a court to look behind a judgment and to consider the entire record, and the actual fact disclosed thereby as the basis for the adjudged liability will govern. Bastian v. LeRoy, 20 W (2d) 470, 122 NW (2d) 386.

270.91 (2) does not apply where a cognovit note was listed and discharged in bankruptcy but where the judgment was taken after the discharge and plaintiff took no action for more than one year after knowledge of its entry; nevertheless the judgment will be vacated as being a constructive fraud on the court which entered it. State Central Credit Union v. Bayley, 33 W (2d) 367, 147 NW (2d) 265.

270.92 History: 1870 c. 10 s. 1; R. S. 1878 s. 2913; Stats. 1898 s. 2913; 1925 c. 4; Stats. 1925 s. 270.92; 1935 c. 541 s. 185.

270.93 History: Sup. Ct. Order, 229 W vii; Stats. 1939 s. 270.93.

270.94 History: R. S. 1849 c. 102 s. 23; R. S. 1858 c. 132 s. 44; R. S. 1878 s. 2915; Stats. 1898 s. 2915; 1925 c. 4; Stats. 1925 s. 270.94; 1935 c. 541 s. 187.

A penalty is not recoverable where there was no intentional wrong in refusing but a reliance in good faith upon some supposed legal right. Johnson v. Huber, 117 W 58, 93 NW 826.

270.95 History: 1856 c. 120 s. 13; R. S. 1858 c. 122 s. 10; R. S. 1878 s. 2916; Stats. 1898 s. 2916; 1925 c. 4; Stats. 1925 s. 270.95; 1967 c. 276 s. 39; 1969 c. 87.

Legislative Council Note, 1969: Since this bill adopts the execution procedure in courts of record, this section is amended to make this procedure uniform in all courts. (Bill 9-A)

An order granting leave to bring an action upon a judgment is not void for want of jurisdiction because less than 8 days intervened between the notice of the motion and the granting of the order. Cole v. Mitchell, 77 W 131, 65 NW 948.

Sec. 2916, R. S. 1878, does not authorize an order which directs that an existing judgment be renewed and revived. The effect of such order was a new judgment on the former one. That could only be obtained by an action. Ingraham v. Champion, 84 W 235, 54 NW 398.

The assignee of the judgment is the same party as the assignor in the contemplation of the statute so that the assignee must obtain leave to bring an action. Gould v. Jackson, 257 W 110, 42 NW (2d) 489.

A judgment creditor was properly granted leave to bring an action on his judgment on a showing that the 20-year period of limitations subsequent to the rendition of the judgment was about to expire, and that the plaintiff thereafter would be barred from obtaining execution or bringing an action on the judgment. First Wisconsin Nat. Bank v. Rische, 15 W (2d) 564, 113 NW (2d) 416.

270.96 History: 1949 c. 257; Stats. 1949 s. 270.96; 1951 c. 247; 1965 c. 379.

Editor's Note: For foreign decisions construing the "Uniform Enforcement of Foreign Judgments Act" consult Uniform Laws, Annotated.

CHAPTER 271.

Costs and Fees in Courts of Record.

271.01 History: 1856 c. 120 s. 215; R. S. 1858 c. 133 s. 38; 1859 c. 35; 1862 c. 60; R. S. 1878 s. 2918; 1881 c. 52; Ann. Stats. 1889 s. 2918; Stats. 1898 s. 2918; 1925 c. 4; Stats. 1925 s. 271.01; 1935 c. 541 s. 188; 1949 c. 301; 1967 c. 276 s. 40; 1969 c. 87.

Comment of Advisory Committee, 1949: Section 271.01 is very complex. It had 7 subsections which overlap. It has caused much litigation. The proposed amendment simplifies 271.01. The necessity for some action is illustrated by the following cases: Field v. Elroy, 99 W 412; Olson v. U. S. Sugar Co., 140 W 309; Rusch v. Noack, 205 W 660. Old subsection (7) covers "an action believed to be

beyond the jurisdiction of the justice of the peace, but on trial found to fall within it" (140 W 310). That is not a satisfactory test. The test of jurisdiction should be applied at the outset—not at the end of the litigation. In courts of record the test is applied to the complaint. If the complaint shows "(1) That the court has no jurisdiction of the person of the defendant or the subject of the action," the complaint is demurrable, 263.06. That principle is carried into new 271.01. New subsection (2) is limited to an action "which the complaint shows is within justice court jurisdiction." New 271.01 (1) states the general rule for costs in favor of the plaintiff; (2) and (3) are limitations on the general rule. [Bill 30-S]

Editor's Note: See address of Winslow, C. J. at bar meeting of 1915 and Vol. 26, Journal of Am. Jud. Soc. p. 158.

The costs belong to the party, but an order directing them to be paid to the attorney will not be reversed at the instance of the opposing party. Porter v. Vandercook, 11 W 70.

The verification of the original complaint is sufficient for the discretion of the circuit court to rest upon. Power v. Rockwell, 39 W 585.

An action for damages for breach of warranty, no fraud or deceit being charged, is on contract, and when brought in circuit court, over $200 being claimed and less than $50 being recovered, plaintiff may recover costs. White v. Hale, 47 W 424, 2 NW 565.

Courts of equity and the higher courts of law have inherent power to dismiss an action without costs against defendant when such action was commenced for the purpose of oppressing him. Schroeder v. Laubenheimer, 50 W 480, 7 NW 427.

"Costs" include disbursements. Emerick v. Krause, 52 W 358, 9 NW 16.

The obligors in a bond conditioned for the payment of the debts of a third party are not liable for the costs of an action against such party upon one of the debts, no notice of the action having been given them nor a defense tendered to them. Brinker v. Meyer, 81 W 33, 50 NW 782.

Costs may be awarded against a city clerk to whom a writ of certiorari has been directed where the assessment of property for taxation has been held unlawful. State ex rel. Holt L. Co. v. Bellew, 86 W 189, 56 NW 782.

Plaintiff's right to costs is not affected by the fact that they were incurred in an attempt to establish several claims, only one of which was established, the evidence as to the others being proper to establish that one. John V. Farwell Co. v. Wolf, 96 W 10, 71 NW 109.

In an action at law where plaintiff prevails the court has no discretion as to allowance of costs. The fact that the court included in the judgment some equitable relief does not deprive plaintiff of his right. Evans v. Kemp, 104 W 87, 80 NW 98.

Where plaintiff recovered $50 damages in an action for trespass to real estate he was entitled to his costs. Trimborn v. Reimer, 112 W 437, 88 NW 222.

Although there is an equitable counterclaim in an action on contract, plaintiff can recover only costs allowable in actions on contract. Ward v. American H. F. Co. 119 W 12, 96 NW 388.

Except in case of some express statutory provision, an extinguishment of the entire cause of action by settlement pending the action with no mention of costs extinguishes the right to costs. Dr. Shoop F. M. Co. v. Schowalter, 120 W 663, 98 NW 940.

A proceeding by mandamus to compel performance of public duty by officers is an action within sec. 2918, Stats. 1898. State ex rel. Risch v. Board of Trustees, 121 W 44, 98 NW 954.

Where the plaintiffs were compelled to invoke judicial assistance to establish the nature of an association agreement against the opposition of other parties to the agreement and to obtain a settlement of the business, they were entitled to their disbursements and taxable costs and reasonable attorneys' fees. Briere v. Searls, 126 W 357, 105 NW 817.

Where an action is brought for breach of the agreement to collect or return a note and the amount due on the note is claimed as damages being over $200, the plaintiff is entitled to costs upon the recovery of nominal damages. Kiblinger v. Sauk Bank, 131 W 595, 111 NW 709.

No costs are recoverable in any judicial proceeding except as clearly authorized by statute. In re Reeseville D. Dist. 156 W 238, 145 NW 671.

The word "recovery" in sec. 2918 refers to the judgment and not to the verdict. Hartwig v. Eliason, 164 W 331, 159 NW 943.

In a minor's action for damages for a personal injury and for wages, the employer successfully defended the claim for damages but on the trial consented to a recovery for wages upon the father's relinquishment of his right to such wages. The minor's recovery should be with costs because there could be no apportionment of costs. Squires v. Brown, 170 W 165, 174 NW 548.

Costs cannot be taxed against the state unless they are expressly authorized by statute. State v. Gether Co. 203 W 311, 234 NW 331.

See note to 270.57, citing Petlock v. Kickhafer, 3 W (2d) 74, 87 NW (2d) 857, 89 NW (2d) 231.

The rule that costs may not be taxed against the state, unless authorized by statute, is equally applicable to state administrative agencies. Frankenthal v. Wisconsin R. E. Brokers' Board, 3 W (2d) 249, 88 NW (2d) 352, 89 NW (2d) 825.

271.02 History: 1856 c. 120 s. 215; R. S. 1858 c. 133 s. 38; R. S. 1878 s. 2919; Stats. 1898 s. 2919; 1925 c. 4; Stats. 1925 s. 271.02; 1935 c. 541 s. 189; 1937 c. 145; Sup. Ct. Order, 241 W v.

Revisor's Note, 1935: (2) is from the last clause of old 271.01. The change of location avoids conflict between 271.01 and 271.03. [Bill 50-S, s. 189]

Comment of Advisory Committee: The amendment to 271.02 (2), effective July 1, 1943, conforms closely to the opinion by Paine, J., in Boyd v. Sumner, 10 W 41. [Re Order effective July 1, 1943.]

Where there are several defendants, so far as one proceeding can properly serve for all, they are regarded as joint and the items are to be taxed but once. Terry v. Chandler, 23 W 456.

In an action to enforce an absolute right to

land, where defendant had a right to redeem but had not tendered the sum due, judgment affirming a right to redemption should be without costs to either party. Fisk v. Brunette, 30 W 102.

In account actions, costs are discretionary. Carrier v. Atwood, 63 W 301, 24 NW 82.

The plaintiff has costs when he has succeeded in an action for the specific performance of a contract for the sale of realty, defendant having denied that plaintiff had any rights in the property. Benson v. Cutler, 66 W 305, 28 NW 134.

Costs may be allowed plaintiff when, before suit, he demanded an accounting which was refused and all liability denied, and on the trial recovered a considerable amount. Clinton v. Webster, 66 W 322, 28 NW 349.

In an action to redeem from a mortgage or for an accounting of the proceeds of a foreclosure sale, if defendant has denied the right to redeem and all liability, plaintiff should be allowed costs. Mowry v. First Nat. Bank, 66 W 539, 29 NW 559.

Upon making an interlocutory order for the rescission of a sale and the statement of an account between the parties the defendant may be ordered to pay the costs up to that time. Paetz v. Stoppleman, 75 W 510, 44 NW 834.

"Costs" as used in sec. 2918, R. S. 1878, include the solicitor's fees stipulated for in a mortgage. Spengler v. Hahn, 95 W 472, 70 NW 466. Compare Boyd v. Sumner, 10 W 41.

Where a tender of money is essential and plaintiff does not make it before action his right to recover costs is generally defeated. This rule applies to the tender of a deed in an action to rescind a conveyance. Ingalls v. Merriman, 96 W 400, 71 NW 367.

In an action to rescind an executed contract for the exchange of land and one defendant was joined as a purchaser from the other with notice of the fraud, and the court found that such fraud existed as to the first defendant but not as to the purchaser it was error to award costs against the first defendant. Menz v. Beebe, 102 W 342, 77 NW 913, 78 NW 601.

A proceeding for the appointment of a guardian is a special proceeding in which costs may be awarded against petitioners. In re Welch, 108 W 387, 84 NW 550.

The exercise of discretion by the court in regard to the allowance of costs in an equity case will be reversed on appeal only when an abuse clearly appears. Malone v. Waukesha E. L. Co. 120 W 485, 98 NW 247.

Two equitable actions were brought by the original owner of lands, one to quiet title under 281.01, and the other to bar tax claimants under 75.26. The tax titles were held void, and an interlocutory decree entered that defendants should recover unless plaintiff paid the taxes and interest, in which case plaintiff's title was established; the suits having been consolidated. In such circumstances it was error to adjudge costs against plaintiff. Maxcy v. Simonson, 130 W 650, 110 NW 803.

The statute allowing discretion in costs applies to mechanic's lien actions. Boesen v. Peterson, 130 W 418, 110 NW 208.

In foreclosure where both parties claimed too much, a judgment was rendered for a smaller amount than was claimed and also denied defendant's counterclaim, the withholding of costs from both parties was a proper exercise of the court's discretion. Hammond v. Erickson, 135 W 570, 116 NW 173.

In a suit for the redemption of mortgaged premises, even though the plaintiff recovered, the defendants should be allowed costs. In case of an unwarranted defense, however, especially of a denial of the writ of redemption in toto causing delay and expense in issuing such writ, the defendant may not only be denied costs but the plaintiff may be allowed costs. Lynch v. Ryan, 137 W 13, 118 NW 174.

2919, Stats. 1913, [now (1)] does not govern as to costs a consolidation of several actions to foreclose mechanics' liens. Sterling E. & C. Co. v. Berg, 161 W 280, 152 NW 851.

A plaintiff was charged with costs although he succeeded in recovering a trifling sum on appeal from a refusal of a county board to make a refund of illegal taxes exacted and paid. Borgman v. Langlade County, 165 W 442, 162 NW 431.

Several actions brought by 2 plaintiffs against several defendants to enforce specific performance of a single contract to which all were parties, but in which the relief to the plaintiffs differed in amount and the relief against the defendants differed in amount, were prosecuted to judgment separately and separate bills of costs were taxed. Held, that such allowance of costs was proper and that the cases did not come within the terms of (1). Hoberg v. McNevins, 169 W 486, 173 NW 221.

A defendant, a junior lien holder, who merely appears in an action to foreclose a land contract but makes no defense, is not liable for any of the costs. Although courts of equity have discretion as to costs, it must not be exercised arbitrarily or in violation of statute. Doolittle v. Keller, 184 W 625, 200 NW 381.

An action to enjoin defendants from denying the use of a silo filler to plaintiffs as coowners and for damages was for equitable relief, not within the jurisdiction of a justice of the peace, and hence the plaintiffs, who recovered less than $100, were entitled to costs. Kuenzi v. Leisten, 227 W 506, 279 NW 68.

Where 4 separate actions arising out of the same automobile collision were consolidated and tried together and there was a verdict in each action against the defendant, the allowance of separate costs in each action was proper. Hansberry v. Dunn, 230 W 626, 284 NW 556.

In an action for an accounting against the trustees the allowance of costs to a party was in the discretion of the trial court under (2) and the refusal of the court to award the unsuccessful plaintiffs their costs and disbursements was not error on a record not disclosing abuse of discretion. Welch v. Welch, 235 W 282, 290 NW 758, 293 NW 150.

The action being equitable, costs were taxable pursuant to 271.02 (2), Stats. 1941, and the court might allow costs up to $100 and disbursements, and hence, where the court allowed $75 costs but no disbursements, there was no need to tax costs or serve a cost bill. Doherty v. Rice, 240 W 389, 3 NW (2d) 734.

Where, although alleging that all of the defendants entered into a conspiracy with the fraudulent purpose of defrauding creditors of a corporation, the purpose of the action was

to set aside alleged fraudulent conveyances and obligations, and the action applied to each defendant only as his interests appeared, and was in fact a joinder of several causes of action to avoid multiplicity of suits, and involved separate issues to be tried as to each defendant, the trial court had authority in its discretion to tax costs in favor of each defendant. Angers v. Sabatinelli, 246 W 374, 17 NW (2d) 282.

In a special proceeding, such as is authorized by 176.90, costs are discretionary and the court may deny costs, including disbursements. State v. Coubal, 248 W 247, 21 NW (2d) 381.

See note to 260.03, citing Baker v. Dept. of Taxation, 250 W 439, 27 NW (2d) 467.

See note to 271.10, citing Janesville v. Chicago & N. W. R. Co. 258 W 547, 46 NW (2d) 847.

The provision in 271.02 (2) that in equitable actions and special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court, and that in any such case the court may award to the successful party such costs, does not permit the allowance of any portion of the costs to unsuccessful parties. Jonas v. State, 19 W (2d) 638, 121 NW (2d) 235.

271.03 History: 1856 c. 120 s. 215, 216; R. S. 1858 c. 133 s. 38, 39; R. S. 1878 s. 2920; Stats. 1898 s. 2920; 1925 c. 4; Stats. 1925 s. 271.03; 1935 c. 541 s. 190; 1937 c. 145; 1949 c. 301; 1969 c. 87.

Comment of Advisory Committee, 1949: The amendments to 271.01 and 271.03 are companions. Particular attention is called to the application of new 271.03 to new 271.01 (2). If a claim which falls within 271.01 (2) issued on in circuit court the plaintiff is sure of costs only when he recovers $100. If he recovers less than $100, costs are discretionary. The court may deny him costs in whole or in part. If costs are denied in toto, the defendant thereby becomes entitled to costs. The object of this added penalty is to deter a claimant from suing in circuit court upon a claim which is within justice court jurisdiction and to encourage him to bring his action in justice court. If he feels that he did not get justice in justice court, the circuit court is still open to him. [Bill 30-S]

If a proceeding against a private corporation is dismissed on the ground that its existence has been terminated costs cannot be awarded to it. Combes v. Keyes, 89 W 297, 62 NW 89.

Defendant in garnishment is entitled to costs where an action is dismissed. Cotzhausen v. Johns M. Co. 107 W 59, 82 NW 716.

Where a minor plaintiff is liable to costs under sec. 2920, Stats. 1898, the same as an adult, judgment should be rendered against him for such costs the same as against an adult. Burbach v. Milwaukee E. R. & L. Co. 119 W 384, 96 NW 829.

Where an action is brought against husband and wife as holders of a tax deed, and it is alleged that the wife withheld possession she is not entitled to costs where the plaintiff prevails against the husband. Stephenson v. Doolittle, 123 W 36, 100 NW 1041.

In an action of ejectment a former owner of the land was brought in as defendant and after his death his heirs were joined. They appeared by a separate attorney and were entitled to costs but the items should not be unnecessarily duplicated, and the trial court correctly disallowed 2 of the heirs all items common to both issues. Wegge v. Madler, 129 W 412, 109 NW 223.

Where judgment was given for defendant, witness fees for a term of court at which the venue of the suit was changed are properly taxed as costs, where no previous continuance had been had. American F. Co. v. Board of Education, 131 W 220, 110 NW 403.

In an action of slander the defendant counterclaimed for libel, and the jury found both the slander and the libel, and assessed 6 cents damages for each. Making the necessary offset there was no recovery by the plaintiff and the defendant was entitled to costs. Hartwig v. Eliason, 164 W 331, 159 NW 943.

In separate actions, tried together, for personal injuries by bus passengers against a bus company and the liability insurer of the owner of an auto with which a bus in which the plaintiffs were riding collided, the defendant automobile insurer, not united in interest with the defendant bus company and making separate defense by separate answers, was, in respect to its cross complaint against the defendant bus company for contribution, a "plaintiff" as to the bus company, and where recovery was had by the plaintiff bus passengers only against the auto insurer, and judgments of dismissal were entered in favor of the bus company, costs should have been allowed to the bus company against the cross-complaining auto insurer as well as against the other plaintiffs, instead of only against the other plaintiffs. DeKeyser v. Milwaukee Auto. Ins. Co. 236 W 419, 295 NW 755.

Where the interests of all defendants are identical, the fact that the defendants appear and answer through separate attorneys, who participate in the defense of the action, does not entitle the prevailing parties to separately tax attorney fees. Rheingans v. Hepfler, 243 W 126, 9 NW (2d) 585.

On the granting of the defendant's motion (based on a plea that the action is prematurely brought) for summary judgment, dismissing the complaint without prejudice, the defendant is entitled to costs and disbursements. Binsfeld v. Home Mut. Ins. Co. 247 W 273, 19 NW (2d) 240.

Where 2 of the 3 defendants in an action to recover a share of the commission on a sale of real estate were concerned only with an issue as to the existence of a partnership, and all 3 were united in interest on that issue and made the same defense by the same counsel, they were not entitled to 3 sets of costs for attorney fees. Leuch v. Campbell, 250 W 272, 26 NW (2d) 538.

Five plaintiffs united in a single complaint to recover on notes; their causes of action were identical except as to amount, every issue that affected any of them affected each, one firm of attorneys represented them all, but each plaintiff could have begun its own separate action on its own note with separate right of recovery, and if successful could have taxed costs. Each plaintiff when unsuccessful was liable for costs to the defendant. (Gos-

podar v. Milwaukee Auto. Ins. Co. 249 W 332, applied.) B. F. Goodrich Co. v. Wisconsin Auto Sales, Inc. 256 W 11, 39 NW (2d) 678.

Where the 3 defendants in an action by one plaintiff for injuries sustained by him in an automobile collision filed no separate answers, the refusal of the trial court to grant costs to a defendant as to whom the action was dismissed was not error but was within the discretion of the court. Derenne v. Vlies, 258 W 424, 46 NW (2d) 226.

Where a judgment dismissing the complaint was granted on the defendants' motion for summary judgment, judgment costs, not mere motion costs, should have been allowed to the defendants. Christie v. Lueth, 265 W 326, 61 NW (2d) 338.

Costs may not be taxed against state administrative agencies unless authorized by statute. Frankenthal v. Wisconsin R. E. Brokers' Board, 3 W (2d) 249, 88 NW (2d) 352, 89 NW (2d) 825.

271.035 History: 1949 c. 301; Stats. 1949 s. 271.035.

Comment of Advisory Committee, 1949: The presence of a counterclaim means that there could have been two actions where, in fact, there is but one. The counterclaim is in substance an action by the defendant against the plaintiff. Grignon v. Black, 76 W 674. So why not tax costs as though there were two actions? If there were two actions and the plaintiff recovered in each action the judgments could be offset. And the actions could be ordered tried together, Hansberry v. Dunn, 230 W 626. The same principle should govern if the two causes were tried in a single action. This rule encourages contending parties to litigate their existing contentions in a single action. It is in harmony with the decision in Gospodar v. Milwaukee Auto Ins. Co., 249 W 332. There the court held that where 6 plaintiffs joined 6 causes of action in one complaint for damages sustained in the same accident and each was awarded damages, each plaintiff was entitled to tax costs, including attorney's fees.

Example: A sues B and B counterclaims. These results are possible: (1) A and B recover on their respective claims; (2) neither A nor B recovers; (3) A recovers but B does not; (4) B recovers but A does not.

Taxation of Costs Should Be: Under (1) A taxes costs including the attorney's fees. B taxes costs including the attorney's fees. The difference between A's and B's costs goes into the judgment in favor of whichever recovers most. Under (2) costs are offset and judgment is given for the difference. Under (3) A taxes costs on what he recovers and also on the counterclaim which he defeated; and under (4) B taxes costs on what he recovers and also on the claim which he defeated. Hence the result, so far as attorney's fees go, is the same as though two actions had been tried. [Bill 30-S]

A defendant and his insurer were not entitled as a matter of right to statutory costs on the dismissal of another defendant's complaint for contribution and, in addition, to statutory costs on the dismissal of a claim for damages for personal injuries, since there was only one cross complaint between the parties, and the cause of action pleaded arose out of the same occurrence, and it was discretionary with the trial court in such a case whether it should allow costs under 271.035 (2). Dickman v. Schaeffer, 10 W (2d) 610, 103 NW (2d) 922.

It was an abuse of discretion to allow $100 attorney fees to the insured and insurer, where the actions were tried together, the interests of each were identical and the same attorney represented both. Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446.

Where the plaintiff's complaint and the defendant's counterclaim were dismissed on the merits, there was no "prevailing party" to whom an allowance of costs and attorney fees could be awarded, and in such situation each party should pay his own costs and attorney fees, in the absence of any stipulation effectively authorizing a disposition otherwise in respect thereto. Witt v. Realist, Inc. 18 W (2d) 282, 118 NW (2d) 85.

271.036 History: 1949 c. 301; Stats. 1949 s. 271.036.

Comment of Advisory Committee, 1949: This section, as its name implies, is to cover possible situations which are not specifically covered by the rules. [Bill 30-S]

One who is made a defendant is not necessarily to be subjected to costs when a verdict is set aside and a new trial granted because there is a defect of parties. Shove v. Shove, 69 W 425, 34 NW 392.

The taxation of costs of a first trial in a judgment entered in a second trial where the trial court did not order payment of costs as a condition of granting the new trial is permissible. Wendt v. Fintch, 235 W 220, 292 NW 890.

An ordinary order sustaining a demurrer would not carry costs with it except as a condition of pleading over, but an order which properly denies to the plaintiff the opportunity to plead over, and dismisses the action, carries costs with it, in the discretion of the trial court. Pedrick v. First Nat. Bank of Ripon, 267 W 436, 66 NW (2d) 154.

271.04 History: 1856 c. 120 s. 218, 221; R. S. 1858 c. 133 s. 41, 43; R. S. 1858 c. 140 s. 15; 1864 c. 402 s. 1; 1870 c. 21; 1874 c. 101; R. S. 1878 s. 2921, 2922; 1880 c. 147; Ann. Stats. 1889 s. 2921, 2922; Stats. 1898 s. 2921, 2922; 1917 c. 349; 1917 c. 566 s. 43; 1917 c. 678 s. 6; 1919 c. 689; 1925 c. 4; Stats. 1925 s. 271.04, 271.05; 1935 c. 541 s. 191, 192; Stats. 1935 s. 271.04; 1937 c. 145; 1943 c. 452; 1955 c. 159, 188; 1959 c. 465; 1961 c. 326; 1963 c. 288.

If a judgment allows an excessive rate of interest and is modified after notice of appeal, while the record remains in the trial court, the reversal by the supreme court of such part will only affect the costs. German M. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

Where judgment for plaintiff has been reversed because of excessive damages, and the court has ordered that a part shall be remitted and judgment be rendered on the verdict and such remission, interest on the amount indicated may be added from the date of verdict. Waterman v. Chicago & A. R. Co. 82 W 613, 52 NW 247 and 1136.

Where interest is recoverable as damages the rate is determined by the law in force during the period of default; if that is varied by legislation the computation must be made accordingly. State v. Guenther, 87 W 673, 58 NW 1105.

Upon the foreclosure of a mortgage for $5,500 and $364 interest, an allowance of $100 for solicitor's fee, as stipulated in the mortgage, is not unreasonable. Gibson v. Southwestern L. Co. 89 W 49, 61 NW 282.

The state suit tax cannot be included in the defendant's cost bill. Keith Brothers & Co. v. Stiles, 92 W 15, 64 NW 860, 65 NW 860.

Witness' fees for a nominal party to the action who has but slight, if any, interest in it may be taxed. Keith Brothers & Co. v. Stiles, 92 W 15, 64 NW 860, 65 NW 860.

The cost of the exemplification of a foreign judgment, important in the case, may be taxed. Keith Brothers & Co. v. Stiles, 92 W 15, 64 NW 860, 65 NW 860.

If a verdict in a former trial has been set aside and a new trial granted on condition that defendant pay plaintiff's costs on such trial the defendant may tax such costs at the close of a second trial resulting in his favor. Steinhofel v. Chicago, M. & St. P. R. Co. 92 W 123, 65 NW 852.

Where the judgment of the supreme court allows interest on a given sum for a specified time no other interest can be included in the judgment. John V. Farwell Co. v. Wolf, 96 W 10, 71 NW 109.

Allowances to guardians ad litem can only be made payable out of the infant's property under the control of the court, giving a lien thereon if necessary. (Ford v. Ford, 81 W 122, 59 NW 464, insofar as it holds to the contrary, overruled.) Tyson v. Richardson, 103 W 397, 79 NW 439.

Where action is brought to construe a will the court has no authority to allow attorney's fees out of the estate in addition to the taxable costs. Kronshage v. Varrell, 127 W 597, 107 NW 342.

The successful appellant was improperly allowed costs for draft of a proposed bill of exceptions and notice and certificates thereof, but could recover only the amount actually expended for a transcript. Flies v. Fox Brothers B. Co. 198 W 496, 224 NW 705.

The witness is entitled to the statutory fee and mileage, notwithstanding the witness is the plaintiff's wife, son or other relative. A plaintiff testifying in his own case is not entitled to a fee. Leonard v. Bottomley, 210 W 411, 245 NW 849.

The allowance of 10% attorney's fees was proper under a provision in the notes for the payment of all costs and expenses, including 10% attorney's fees, paid or incurred in collecting the notes, the contractual obligation incurred by the maker being controlling. Estate of McAskill, 216 W 276, 257 NW 177.

Addition by a clerk of interest on a judgment from commencement of action until entry of judgment, without court order, was error. Malliet v. Super Products Co. 218 W 145, 259 NW 106.

Where 2 actions were consolidated with the consent of the plaintiffs, the taxation of costs in each action for the attendance of the same witnesses on the same days at a single trial was improper. McCaffrey v. Minneapolis, St. P. & S. S. M. R. Co. 222 W 311, 267 NW 326, 268 NW 872.

In an action for $5,000, where summary judgment dismissing the complaint was granted, the allowance of costs to the defendant was governed by 271.04 (1) not by 271.07 restricting the allowance of costs on a motion to $10. French v. Continental Assur. Co. 227 W 203, 278 NW 388.

Although the recovery was actually for the instalments presently due on an insurance policy, amounting only to $197.04, the case determined the liability of the insurer on the entire policy, so that the recovery in legal effect was for the full amount payable under the policy, which was in excess of $1,000, and hence attorney fees of $100 were properly allowed to the plaintiff. Tully v. Prudential Ins. Co. 234 W 549, 291 NW 804.

Where the court granted a new trial on the ground of excessive damages, and this was the gist of the controversy on an appeal from the order granting a new trial, and the order was affirmed, the damages were not "liquidated" by the verdict in the first trial, and the trial court did not err, under 271.04 (4), in denying the plaintiff interest on the verdict in the second trial from the date of the first verdict. (Zeidler v. Goelzer, 191 W 378, distinguished.) Wendt v. Fintch, 235 W 220, 292 NW 890.

The matter of the amount of dividends improperly distributed by the trustees as income being left for the determination of the trial court on remand of the cause, the matter of additional attorneys' fees should also be determined by the trial court, which in its discretion may properly allow additional attorneys' fees based on the additional recovery, and may order the payment of a reasonable amount to the accountants for additional services to be rendered in assisting the trial court in determining the correct amount of the dividends. Welch v. Welch, 235 W 282, 290 NW 758, 293 NW 150.

The allowance of a disbursement for stenographer's fees for "transcript" was improper where there was nothing to show what the transcript was of or for, or why it was necessary, although the general affidavit of plaintiff's counsel stated that the items of the cost bill for disbursements were necessarily incurred. Morse Chain Co. v. T. W. Meiklejohn, Inc. 241 W 45, 4 NW (2d) 162.

271.04 does not authorize the allowance of more than one $100 item of costs where there is more than one trial. Morse Chain Co. v. T. W. Meiklejohn, Inc. 241 W 45, 4 NW (2d) 162.

Where his complaint demanded judgment for $475.14 with interest thereon which amounted to $31.60 to the date of the trial, the plaintiff's recovery, if the demands of his complaint had been established, would have been in excess of $500, and hence the defendant, on prevailing, was entitled to tax attorney fees of $50. North American Seed Co. v. Cedarburg Supply Co. 247 W 31, 18 NW (2d) 466.

Where 6 plaintiffs joined 6 causes of action in one complaint for damages sustained in the same automobile accident, and each was

awarded damages against the defendant, each was properly allowed to tax costs. Gospodar v. Milwaukee Auto. Ins. Co. 249 W 332, 24 NW (2d) 676, 25 NW (2d) 257.

Under the fair labor standards act, 29 USC, sec. 216 (b), that a reasonable attorney's fee shall be allowed in addition to costs, an allowance to a suing employe, in addition to such attorney's fee, of costs and disbursements which included a $100 attorney's fee under 271.04 was proper, in that the costs are fixed by state statute and the attorney's fee contemplated by the federal act is in addition to costs. Katchel v. Northern E. & M. Co. 249 W 578, 25 NW (2d) 431.

The allowance of a total of $297.09 for costs and disbursements to the prevailing party in an action to quiet title, including $34 for abstract, $39.75 for transcript of testimony, and $100 for attorney fees, was within the discretion of the trial court. Hunter v. Neuville, 255 W 423, 39 NW (2d) 468.

A successful plaintiff in an action for an injunction is entitled to include the premium paid on a surety bond filed by it in connection with the issuance of a temporary restraining order. Skelly Oil Co. v. Peterson, 257 W 300, 43 NW (2d) 449.

Plaintiff, prevailing in a replevin action, is entitled to tax the premium paid by him on a surety bond which he was obliged to furnish. Confidential L. & M. Co. v. Hardgrove, 259 W 346, 48 NW (2d) 466.

Where the amount of damages in a verdict is reduced, the plaintiff is entitled to interest from the time of verdict until judgment is entered, on that part of the verdict for which judgment is entered, unless the order granting an option to take a reduced amount clearly excluded the right to interest. Rasmussen v. Milwaukee E. R. & T. Co. 261 W 579, 53 NW (2d) 442.

Where defendant, in an action for personal injuries in which separate causes of action in favor of 2 plaintiffs were alleged, prevailed on motion for summary judgment dismissing the complaint, defendant was entitled to tax costs against each plaintiff. Baldwin v. St. Peter's Congregation, 264 W 626, 60 NW (2d) 349.

Where insured brought 2 actions against its insurer to determine liability under the policy to 2 injured persons, and the liability claimed in each action exceeded $1,000, the insurer is entitled to $100 costs in each action under 271.04 (1) when its motion for summary judgment is granted. Al Shallock, Inc. v. Zurich General A. & L. Ins. Co. 266 W 265, 63 NW (2d) 89.

Where the property liability insurer refused to accept liability under the policy, and the insured was thereby obliged to engage the services of attorneys to negotiate a settlement of the damage claim of a third party, and to bring the instant action establishing the liability of the insurer under the policy, and also establishing its obligation to defend the insured against claims, the insurer was liable in a reasonable amount for attorney fees incurred by the insured in the matter, not limited to the attorney fees fixed by statute. Meiser v. Aetna Casualty & Surety Co. 8 W (2d) 233, 98 NW (2d) 919.

A so-called ownership report, which is a specialized or limited abstract, comes within the meaning of an abstract of title for the purpose of taxing costs under 271.04 (2), in suits where they are admitted in evidence. Shellow v. Hagen, 9 W (2d) 506, 101 NW (2d) 694.

Whether interest is allowed against an insurer on the whole judgment or only on the part for which the insurer is liable depends on the language of the policy. Nichols v. United States F. & G. Co. 13 W (2d) 491, 109 NW (2d) 131.

Where cases by a husband and wife are consolidated for trial, the disbursements for items used in common can be allocated equally between the cases. Keplin v. Hardware Mut. Cas. Co. 24 W (2d) 319, 129 NW (2d) 321, 130 NW (2d) 3.

271.04 (4) is construed as entitling the prevailing party on retrial, although unsuccessful at the first trial, to include interest in his bill of costs dating back to the verdict of the first trial if the damages became liquidated at that time. Fehrman v. Smirl, 25 W (2d) 645, 131 NW (2d) 314.

Where there was no contest or issue of any kind in the garnishment action, the successful party cannot tax a 2nd fee under 271.04 (1) in the principal action. De Toro v. DI-LA-CH, Inc. 31 W (2d) 29, 142 NW (2d) 192.

A plaintiff who exercises an option given under the Powers rule to accept a reduced amount of damages in lieu of a new trial is entitled to interest from the date of the verdict on such reduced amount. Moldenhauer v. Faschingbauer, 33 W (2d) 617, 148 NW (2d) 112.

The trial court did not err when it limited allowance of statutory fees to $600, where there were but 2 plaintiffs and in legal effect but 3 defendants (treating each defendant driver and his insurer as being one defendant), and pursuant to the statute allowing only one fee for each such defendant. Schemenauer v. Travelers Ind. Co. 34 W (2d) 299, 149 NW (2d) 644.

271.04 (2) makes no provision for taxing the fees of a court commissioner for taking depositions used at the trial. Gustin v. Johannes, 36 W (2d) 195, 153 NW (2d) 70.

Where the federal circuit court made a finding from which the sum then due plaintiff could be computed, but gave defendant a judgment, which the supreme court reversed, and directed that judgment should be given for the plaintiff on the finding, sec. 2922, R. S. 1878, entitled him to interest, computed to the time his judgment was entered, upon the whole sum due him for principal and interest at the time the finding was made. Metcalf v. Watertown, 68 F 859.

Plaintiff's guardian ad litem fees are to be taxed as costs against the losing defendant, even though the auto accident out of which the action arose occurred outside Wisconsin. The statute in effect at time of taxing costs is applicable whether or not such statute was in effect at the time the action was commenced. Gandall v. Fidelity & Cas. Co. of New York, 158 F Supp. 879.

271.07 History: 1856 c. 120 s. 225; R. S. 1858 c. 133 s. 47; R. S. 1878 s. 2924; Stats. 1898 s. 2924; 1925 c. 4; Stats. 1925 s. 271.07; Sup. Ct. Order, 20 W (2d) vi.

Costs on motion to discharge from imprisonment, where there is no evidence of malice in suing out the process, should be denied unless the party imprisoned agrees not to bring an action for the illegal arrest. Bonesteel v. Bonesteel, 30 W 511.

Under an order granting leave to file a supplementary answer and requiring defendant to pay costs to that time within 10 days after taxation thereof and giving plaintiff 30 days after such payment to reply or demur, by taking the benefit of the order defendant became liable for the costs. Damp v. Dane, 33 W 430.

When a demurrer is stricken out on motion costs may be absolute. Straka v. Lander, 60 W 115, 18 NW 641.

On denying a motion to strike out a demurrer $10 costs may be allowed to the prevailing party. Lander v. Hall, 69 W 326, 34 NW 80.

If the plaintiff asks a modification of his judgment and the defendant, after having given notice of appeal, resists the modification, the court cannot require the latter to dismiss his appeal or pay the costs of the hearing. German M. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

The defendant's right to costs against a plaintiff whose name has been ordered stricken from the complaint should be determined in the order. Day v. Buckingham, 87 W 215, 58 NW 254.

It is not unusual to impose costs on denial of a motion to set aside a verdict and for a new trial, but this matter is discretionary and costs of $10 may be so imposed. Kosloski v. Kelly, 122 W 665, 100 NW 1037.

It was not an abuse of discretion to allow $10 costs of motion on granting a new trial on an appeal from the Milwaukee civil court, although it would be better not to impose such costs. Pennsylvania C. & S. Co. v. Schmidt, 155 W 242, 144 NW 283.

No costs should be imposed on overruling the demurrer to an answer, there being no right to plead over Cook v. Chamberlain, 199 W 42, 225 NW 141. See also: Curtis v. Moore, 15 W 134; Schoenleber v. Burkhardt, 94 W 575; Schroeder v. Richardson, 101 W 529; and State ex rel. Rice v. Chittenden, 107 W 354.

See note to 271.04 citing French v. Continental Assur. Co. 227 W 203, 278 NW 388.

Where a motion to be joined as a party to an action is denied, costs of the motion may be imposed on the mover but he cannot be taxed the cost of the action. Anheuser v. West Lawn Cemetery Co. 230 W 262, 282 NW 577.

An order granting the plaintiff leave to amend his complaint on condition of paying motion costs of $10 to each of the demurrants was authorized where, although there was only one complaint, the plaintiff attempted to state several causes of action against different defendants, and there were 5 separate demurrers and 5 separate orders disposing of them, and plaintiff's leave to amend was granted as to each of the 5 demurrants. Angers v. Sabatinelli, 235 W 422, 293 NW 173.

Motion costs cannot be taxed against the state. Klingseisen v. State Highway Comm. 22 W (2d) 364, 126 NW (2d) 40.

271.08 History: 1856 c. 120 s. 270, 273, 274; R. S. 1858 c. 133 s. 52, 55, 56; 1875 c. 140, 189; R. S. 1878 s. 2925, 2926; 1881 c. 22; Ann. Stats. 1889 s. 2925, 2926; Stats. 1898 s. 2925, 2926; 1925 c. 4; Stats. 1925 s. 271.08, 271.09; 1935 c. 541 s. 193; Stats. 1935 s. 271.08; 1967 c. 276 s. 40.

A defendant found guilty in justice's court of violating a city ordinance, but found not guilty on appeal, is entitled to tax the attorney's fee to which he would have been entitled if successful below. Oshkosh v. Schwartz, 55 W 483, 13 NW 552.

A judgment affirming a justice's judgment was set aside and a new judgment of affirmance was rendered which included costs to the amount of $9.69 in addition to the costs allowed in the first judgment. No specific objection to the allowance of such costs was made in the circuit. The judgment was affirmed. Wold v. Ordway, 68 W 176, 31 NW 759.

Actions brought in justice's court and taken to circuit court on an appeal are governed by sec. 2925, Stats. 1898, and not by sec. 2918. Trimborn v. Reimer, 112 W 437, 88 NW 222.

Where the circuit court dismisses the action on appeal because the justice had no jurisdiction, costs in favor of the defendant may be awarded. Miltimore v. Hoffman, 125 W 558, 104 NW 841.

Costs are taxable in favor of the plaintiff on defendant's appeal from justice's court although he recovers only nominal damages, and less than in such court. Cronemiller v. Duluth-Superior M. Co. 134 W 248, 114 NW 432.

Failure by a plaintiff upon appeal to the circuit court from a justice's court to obtain a more favorable judgment than he obtained in the lower court subjects him to costs. Diana S. Club v. Kohl, 156 W 257, 145 NW 815.

271.10 History: 1856 c. 120 s. 222; R. S. 1858 c. 133 s. 44; R. S. 1878 s. 2927; Stats. 1898 s. 2927; 1919 c. 127; 1925 c. 4; Stats. 1925 s. 271.10; Court Rule XXXII except s. 4; Sup. Ct. Order, 212 W xvii.

If, after notice, a party fails to appear before the taxing officer he loses all benefit of objection to any item which might be lawfully taxed; but he would not be concluded if the clerk exceeded his jurisdiction. Cord v. Southwell, 15 W 211.

A motion to review the clerk's taxation is in the nature of an appeal from the taxing officer to the court, and cannot be entertained by the judge at chambers or by a county judge or court commissioner. Schauble v. Tietgen, 31 W 695.

Objection that no costs could be lawfully taxed may be made on appeal from the taxation. Kirst v. Wells, 47 W 56, 1 NW 357.

An order for the taxation of costs cannot be reviewed in the supreme court unless excepted to, and the exception and the order incorporated in the bill of exceptions. Diggle v. Boulden, 48 W 477, 4 NW 678.

Where taxation of costs is made upon insufficient notice and there was no appearance an appeal will lie from the order denying a motion to set aside such judgment. Johnson v. Curtis, 51 W 595, 8 NW 489.

Taxation must be on application of the prevailing party, otherwise the action is void. The court may compel such party to perfect

his judgment on application. Ballou v. Chicago & N. W. R. Co. 53 W 150, 10 NW 87.

Action or nonaction of the clerk in taxing costs may be reviewed. Irregularity in an order referring the question of costs to the clerk for retaxation is waived by appearing and not objecting thereto. If the clerk, in disregard of such order, fills in the amount of costs and disbursements from his recollection of the contents of lost papers an execution for the collection thereof may be stayed. Ross v. Heathcock, 57 W 89, 15 NW 9.

After taxation without notice plaintiff moved to set aside the judgment and defendant consented to a retaxation at any time plaintiff might fix, and offered to remit from the judgment any improper or nontaxable costs. Plaintiff did not accept the offer and the court refused to reverse the judgment because of the irregularity in the taxation. Joint School Dist. v. Kemen, 72 W 179, 39 NW 131.

If costs are taxed too high the remedy is to retax them. Pormann v. Frede, 72 W 226, 39 NW 385.

The costs against a county from which the venue of an action has been changed should be taxed only after notice to its district attorney. Waushara County v. Portage County, 83 W 5, 52 NW 1135.

An error in taxing costs must be corrected on motion. The failure to so correct it affects only that part of the judgment relating to costs and is not ground for setting aside the whole judgment. Day v. Mertlock, 87 W 577, 58 NW 1037.

A motion for the review of the clerk's taxation which fails to point out in what respect the party is aggrieved is insufficient. Turner v. Scheiber, 89 W 1, 61 NW 280.

Until sec. 2927, R. S. 1878, is complied with a judgment is not so perfected as to be subject to appeal. Wheeler v. Russell, 93 W 135, 67 NW 43.

On appeal from taxation of costs the function of the court is simply to review the conclusion of the clerk and not to try the action de novo. Dunbar v. Montreal River L. Co. 127 W 130, 106 NW 389.

An order retaxing costs is not appealable and is only reviewable on appeal from the judgment. Feske v. Adam, 132 W 365, 112 NW 456.

On appeal from a judgment in plaintiff's favor on a second trial the supreme court may consider the trial court's refusal to allow the defendant costs on his successful defense of the first trial which had proceeded upon a mistake of plaintiff's remedy, even though defendant had not asked for a review of the clerk's taxation of costs. Dekowski v. Strachura, 181 W 403, 195 NW 403.

Costs which were inserted in the judgment without notice to the adverse party and without a cost bill should be stricken from the judgment. Luebke v. Watertown, 230 W 512, 284 NW 519.

The trial court, on review of the taxation of costs, could approve and allow an item of $50 for attorney fees inserted in a bill of costs and allowed by the clerk without previous authorization by the court; the court having control of the costs to the extent to which discretion is vested in it by the statutes, and having the power to exercise this discretion either prior to the taxing of costs or on a review of the costs. Petition of Herman, 233 W 653, 290 NW 119.

In an equitable action, the taxation of $100 as costs was permissible under 271.02 (2), but an order of the trial court fixing the costs at an additional sum of $10 was unauthorized and erroneous in relation to the additional sum, in the absence of service of the notice required by 271.10 (1). Janesville v. Chicago & N. W. R. Co. 258 W 547, 46 NW (2d) 847.

A letter stating objections to a proposed bill of costs and the taxation thereof was not objectionably defective for not being "formal written objections," since insubstantial defects in proceedings and pleadings are to be disregarded, but the objections made were not stated with sufficient particularity under 271.10 (3). Unless the costs proposed are obviously unauthorized, the burden should fall on the objecting party to point out why they are not authorized or are improperly or inaccurately determined. Martell v. Klingman, 11 W (2d) 296, 105 NW (2d) 446.

The requirement of 3 days' notice of taxation of costs does not apply to actions to recover forfeitures under ch. 299. Milwaukee v. Milwaukee Amusement, Inc. 22 W (2d) 240, 125 NW (2d) 625.

Costs may not be taxed against the state unless authorized by statute, but where they were taxed against the highway commission without objection, the state cannot raise the question on appeal. Klingseisen v. State Highway Comm. 22 W (2d) 364, 126 NW (2d) 40.

A party cannot on appeal contest the taxation of costs if it did not comply with 271.10 (3) and (4) even though it had already objected prior to the taxation and had been refused relief. Savina v. Wisconsin Gas Co. 36 W (2d) 694, 154 NW (2d) 237.

271.11 History: R. S. 1849 c. 130 s. 47; R. S. 1858 c. 133 s. 83; R. S. 1878 s. 2928; Stats. 1898 s. 2928; 1925 c. 4; Stats. 1925 s. 271.11; 1935 c. 541 s. 194.

Full fees may be taxed though the same persons may have attended as witnesses for another party in another cause at the same term. McHugh v. Chicago & Northwestern R. Co. 41 W 79.

Attorneys may be allowed witness fees when it appears from the record that they are not counsel in the cause. Abbott v. Johnson, 47 W 239, 2 NW 332.

The presumption is that an allowance for sheriff's fees for serving subpoenas was supported by the returns before the court. Abbott v. Johnson, 47 W 239, 2 NW 332.

Where the clerk has been ordered to retax costs, and fills the blank in the judgment from his recollection of lost papers, without retaxation, consent or notice, and in violation of the order, his act is a nullity and may be expunged from the judgment. Ross v. Heathcock, 57 W 89, 15 NW 9.

If costs have been taxed on a former trial the amount thereof may be allowed as a single item upon a final taxation in favor of the party for whose benefit they were originally taxed. Duffy v. Hickey, 68 W 380, 32 NW 54.

The return of a constable upon a subpoena issued out of the circuit court is presumptive

evidence that service was made as stated and that the charges therefor are proper. Leary v. Leary, 68 W 662, 32 NW 623.

If the attendance of witnesses is regularly proved it is not a valid objection to taxing the fees due them that they were not sworn. Charles Baumbach Co. v. Gessler, 82 W 231, 52 NW 259.

Charges for taking the examination of a party under sec. 4096, R. S. 1878, may be taxed as a disbursement. Arpin v. Bowman, 83 W 54, 53 NW 151.

Where the case was set for trial on a day certain and plaintiff and his witnesses attended on that day, and because the court was engaged in other business and the trial was set for another day they returned to their homes, and attended court again on the adjourned day, it was proper to tax double fees for travel. Koch v. Peters, 97 W 492, 73 NW 25, 29.

Principal officers of a corporation are not parties to an action by or against the corporation, and witness fees of such officers may be allowed. Morse Chain Co. v. T. W. Meiklejohn, Inc. 241 W 45, 4 NW (2d) 162.

271.12 History: 1856 c. 120 s. 272; R. S. 1858 c. 133 s. 54; R. S. 1878 s. 2929; Stats. 1898 s. 2929; 1925 c. 4; Stats. 1925 s. 271.12.

The amount of costs due plaintiff under an order granting leave to file a supplemental answer may be set off against any judgment for costs which defendant may recover upon a discontinuance. Damp v. Dane, 33 W 430.

Where a party, before giving notice of motion to offset a judgment for costs, has assigned to his attorneys the judgment in his favor, such motion will be denied. Rice v. Garnhart, 35 W 282.

Judgment for costs in plaintiff's favor on a second appeal may be set off on a judgment in defendant's favor on a former appeal, notwithstanding plaintiff has assigned his judgment to his attorneys. Yorton v. Milwaukee, L. S. & W. R. Co. 62 W 367, 21 NW 516, 23 NW 401.

271.13 History: 1856 c. 120 s. 223; R. S. 1858 c. 133 s. 45; R. S. 1878 s. 2930; 1893 c. 68 s. 1; Stats. 1898 s. 2930; 1907 c. 360; 1915 c. 109; 1925 c. 4; Stats. 1925 s. 271.13.

Where the attorneys stipulate that the referee shall be allowed a certain sum per day and his expenses, he may recover it from both parties jointly. Malone v. Roby, 62 W 459, 22 NW 575.

The fact that a referee dies before making a report and another referee is appointed does not prevent an allowance for the first referee upon the making of the report by the second referee. Winnebago County v. Dodge County, 125 W 42, 103 NW 255.

271.131 History: Court Rule XXI s. 3; Sup. Ct. Order, 212 W xvii; Stats. 1933 s. 271.131.

271.14 History: 1856 c. 120 s. 227; R. S. 1858 c. 133 s. 49; R. S. 1878 s. 2932; 1895 c. 219; Stats. 1898 s. 2932; 1899 c. 351 s. 35; Supl. 1906 s. 2932; 1907 c. 325; 1911 c. 663 s. 433; 1925 c. 4; Stats. 1925 s. 271.14.

Where a sheriff is authorized to bring suit, judgment may go against him for costs, though collectible out of funds in his hands belonging to an unsuccessful plaintiff in attachment. Smith v. Carter, 30 W 424.

In an action in the nature of interpleader, brought by one interested in an estate to determine its descent and distribution, costs cannot be paid out of the estate. Estate of Kirkendall, 43 W 167, 177.

The circuit court is without authority to make an order concerning the costs in a cause appealed to it from the county court after the papers relating thereto have been remitted to that court. In re Carroll's Will, 53 W 228, 10 NW 375.

It must be affirmatively shown that the representative has been guilty of mismanagement or bad faith. His failure to appear when the cause is called for trial raises no inference of such conduct. Ladd v. Anderson, 58 W 591, 17 NW 320.

On appeal taken to the circuit court by the executor as such, in respect to the construction of a will, an award of "costs in favor of the respondent" is construed as requiring the costs to be paid out of the estate. Wolf v. Schaeffner, 51 W 53, 8 NW 8; Ladd v. Anderson, 58 W 591, 17 NW 320.

The judgment in form, in a proper case, should be against the party as administrator, trustee, etc., to be chargeable upon and collected out of the estate, etc., and such direction should be inserted in the judgment. Hei v. Heller, 53 W 415, 10 NW 620; Ladd v. Anderson, 58 W 591, 17 NW 320.

A judgment for costs against executors personally is unauthorized unless the court therein expressly directs the same to be paid by them personally for mismanagement or bad faith in the action. Wiessman v. Brighton, 83 W 550, 53 NW 911.

A receiver on whose bond a surety company has become surety is entitled to credit for the premium paid by him to such company if it be reasonable. Hamacker v. Commercial Bank, 95 W 359, 70 NW 295.

Where an administrator is authorized by the county court to bring suit and such suit is conducted without mismanagement, the costs are payable out of the estate. Ferguson v. Woods, 124 W 544, 102 NW 1094.

In an action to construe a will the court has no authority to allow attorneys' fees out of the estate in addition to the taxable costs. An action to construe a will is not a contest. In re Donges' Estate, 103 W 497, 79 NW 786; Kronshage v. Varrell, 127 W 597, 107 NW 342.

Sec. 2932, Stats. 1913, does not authorize the taxing of attorney's fees in the circuit court against the unsuccessful proponent of a will, who, although named as executrix in the will which was admitted to probate, did not qualify as executrix, but acted throughout in her individual capacity. Shelton v. Lynch, 163 W 466, 157 NW 557.

271.15 History: 1856 c. 120 s. 228; R. S. 1858 c. 133 s. 50; R. S. 1878 s. 2933; Stats. 1898 s. 2933; 1925 c. 4; Stats. 1925 s. 271.15.

Sec. 50, ch. 133, R. S. 1858, is not applicable to an assignment of a judgment as collateral security, as for fees due the judgment creditor's attorney, the creditor retaining a right to the balance of the proceeds. De Witt v. Perkins, 25 W 438.

271.16 History: 1856 c. 120 s. 229; R. S. 1858 c. 133 s. 51; R. S. 1878 s. 2934; Stats. 1898 s. 2934; 1925 c. 4; Stats. 1925 s. 271.16; 1935 c. 541 s. 196.

If the plaintiff in an action to foreclose a tax certificate accepts the money paid to redeem the land, the court cannot thereafter retain the cause even to render judgment for costs. A judgment for costs so rendered is void. Two Rivers Mfg. Co. v. Beyer, 74 W 210, 42 NW 232.

Except in case of some express statutory provision, an extinguishment of the entire cause of action by settlement pending the action with no mention of costs extinguishes the right to costs. Dr. Shoop Family Medicine Co. v. Schowalter, 120 W 663, 98 NW 940.

271.19 History: R. S. 1849 c. 131 s. 49; R. S. 1858 c. 133 s. 68; R. S. 1878 s. 2937; Stats. 1898 s. 2937; 1925 c. 4; Stats. 1925 s. 271.19.

271.21 History: R. S. 1858 c. 133 s. 84; R. S. 1878 s. 2939; 1895 c. 170; Stats. 1898 s. 2939; 1925 c. 4; Stats. 1925 s. 271.21; 1953 c. 327; 1959 c. 315; 1961 c. 495; 1963 c. 427; 1967 c. 324, 325; 1969 c. 253; 1969 c. 449 ss. 7, 8.

The Home Owners Loan Corporation is not subject to state tax of $1 for commencement of an action. 25 Atty. Gen. 401. See also 25 Atty. Gen. 499.

Federal land banks and the Federal Farm Mortgage Corporation are not subject to state tax of $1 for commencement of an action. 25 Atty. Gen. 495.

One dollar state suit tax in small claims cases in county court should be collected at the time the summons is issued. 51 Atty. Gen. 82.

The additional suit tax of $2, provided for in ch. 325, Laws 1967, does not apply under existing legislation at the municipal court level. 57 Atty. Gen. 64.

271.22 History: 1862 c. 223 s. 1; 1870 c. 15 s. 1; 1872 c. 71 s. 1; R. S. 1878 s. 2940; Stats. 1898 s. 2940; 1905 c. 254 s. 1; Supl. 1906 s. 2940; 1925 c. 4; Stats. 1925 s. 271.22; 1935 c. 541 s. 199.

An order under sec. 2940, Stats. 1898, taxing costs in favor of one party in an action where a change of venue is had is not an order in the action but is a special proceeding growing out of the action. Green Lake County v. Waupaca County, 113 W 425, 89 NW 549.

When an action is tried in a county on a change of venue, that county cannot charge the costs of the trial to any county other than the one in which the action was properly begun. If there is no such county the costs must be borne by the county wherein the action is tried. Portage County v. Columbia County, 148 W 329, 134 NW 908.

271.23 History: R. S. 1849 c. 10 s. 19, 23; R. S. 1858 c. 13 s. 19, 23; R. S. 1878 s. 660; Stats. 1898 s. 660; 1919 c. 695 s. 8; Stats. 1919 s. 2940a; 1925 c. 4; Stats. 1925 s. 271.23.

271.24 History: 1921 c. 242 s. 259; Stats. 1921 s. 2940b; 1925 c. 4; Stats. 1925 s. 271.24.

271.25 History: 1909 c. 543; 1911 c. 663 s. 431; Stats. 1911 s. 2619m; 1913 c. 772 s. 6; 1915 c. 604 s. 40; Stats. 1915 s. 2940m; 1917 c. 566 s. 44; 1919 c. 132; 1919 c. 454 s. 1; 1925 c. 4; Stats. 1925 s. 271.25; 1949 c. 262; 1961 c. 495; 1963 c. 544; 1965 c. 433 s. 121; 1967 c. 291 s. 14.

271.27 History: R. S. 1849 c. 92 s. 1; R. S. 1858 c. 133 s. 85; R. S. 1878 s. 2942; Stats. 1898 s. 2942; 1925 c. 4; Stats. 1925 s. 271.27; 1935 c. 541 s. 203.

An application for an order requiring security of costs is addressed to the sound discretion of the trial court. Cullen v. Hanisch, 114 W 24, 89 NW 900.

Where an affidavit was made asserting the nonresidence of 2 of the plaintiffs and stating that it was made for the purpose of securing an order for security of costs under secs. 2943-2945, Stats. 1898, the court could require security under sec. 2942. Colbeth v. Colbeth, 117 W 90, 93 NW 829.

271.28 History: R. S. 1849 c. 92 s. 2 to 6; R. S. 1858 c. 133 s. 86 to 90; R. S. 1878 s. 2943 to 2946; Stats. 1898 s. 2943 to 2946; 1907 c. 48; Stats. 1911 s. 2943 to 2946a; 1925 c. 4; Stats. 1925 s. 271.28, 271.30 to 271.32; 1927 c. 84 s. 1; 1935 c. 541 s. 204; Stats. 1935 s. 271.28; Sup. Ct. Order, 245 W ix.

Revisor's Note, 1935: The several provisions for security which go together are assembled. 271.30 stood next to 271.28 until 1927 when 271.29 was interpolated. 271.28 and 271.30 go together; 207 W 481, 483. 271.31 goes with 271.28 and 271.30. They were together until 1927. [Bill 50-S, s. 204]

If the plaintiff does not file security when required the court may dismiss the action on motion of defendant. Plaintiff is not entitled to notice of such motion. Joint School Dist. v. Kemen, 72 W 179, 39 NW 131.

No notice of an application for an order requiring security need be given. If security is not filed as required by the order a motion to dismiss the action must be granted. Felton v. Hopkins, 89 W 143, 61 NW 77.

A foreign corporation plaintiff must, on demand by defendant, furnish security for costs in the sum fixed by order and the making of such order is the duty of the court, the word "shall" in 271.30, Stats. 1931, precluding discretion except as to amount of security to be furnished. State ex rel. Firemen's Fund Ins. Co. v. Hoppmann, 207 W 481, 240 NW 884, 242 NW 133.

Where it was established that the plaintiff corporation had sold its assets, that the proceeds of the sale had been distributed to its shareholders, that the plaintiff maintained no business office in Wisconsin, that the addresses stated in the records of the register of deeds, in the telephone directory, and in the complaint itself were not addresses where the plaintiff or its agents occupied space, and that its officers and directors resided outside of Wisconsin, it was an abuse of discretion to deny the defendant's motion for security for costs. Midwest Broadcasting Co. v. Dolero Hotel Co. 273 W 508, 78 NW (2d) 898.

Bond must be executed within the time prescribed. When a cause is removed from a state to a federal court the latter begins where the former left off; and motion to dismiss for want of security having been made in the state court and being undetermined at time of removal will be decided in the federal court. Sutro v. Simpson, 4 McCrary 276.

271.29 History: 1927 c. 84; Stats. 1927 s. 271.29; 1935 c. 541 s. 205; 1967 c. 285.

Revisor's Note, 1935: 271.29 is amended to express the court's construction. State ex rel. Firemen's Fund Ins. Co. v. Hoppmann, 207 W 481. Perjury and false swearing are defined and punished by general criminal provisions. Old (2) seems unnecessary. (1) covers defenses. [Bill 50-S, s. 205]

271.33 History: R. S. 1849 c. 92 s. 7; R. S. 1858 c. 133 s. 91; R. S. 1878 s. 2947; Stats. 1898 s. 2947; 1925 c. 4; Stats. 1925 s. 271.33; 1935 c. 504 s. 206; Sup. Ct. Order, 245 W x.

271.34 History: R. S. 1849 c. 92 s. 8, 9; R. S. 1858 c. 133 s. 92, 93; 1859 c. 91 s. 4; R. S. 1878 s. 2948; Stats. 1898 s. 2948; 1925 c. 4; Stats. 1925 s. 271.34; 1935 c. 541 s. 207; Sup. Ct. Order, 245 W x.

Sec. 2948, R. S. 1878, raises an implied contract by a plaintiff's attorney that on failure to give the undertaking mentioned in it he will become liable for the costs. His liability is that of a principal debtor, not as surety merely, and the claim against him is assignable. Knowles v. Frawley, 84 W 119, 54 NW 107.

271.46 History: R. S. 1849 c. 130 s. 43; R. S. 1858 c. 133 s. 72; R.S. 1878 s. 2960; Stats. 1898 s. 2960; 1925 c. 4; Stats. 1925 s. 271.46.

271.47 History: R. S. 1849 c. 130 s. 44; R. S. 1858 c. 133 s. 73; R. S. 1878 s. 2961; Stats. 1898 s. 2961; 1925 c. 4; Stats. 1925 s. 271.47.

271.48 History: R. S. 1849 c. 130 s. 46; R. S. 1858 c. 133 s. 82; R. S. 1878 s. 2962; Stats. 1898 s. 2962; 1925 c. 4; Stats. 1925 s. 271.48; 1935 c. 541 s. 216.

CHAPTER 272.

Executions.

272.01 History: 1856 c. 120 s. 193; R. S. 1858 c. 134 s. 1; 1861 c. 140 s. 1; 1862 c. 27 s. 1; R. S. 1878 s. 2965; 1897 c. 217; Stats. 1898 s. 2965; 1925 c. 4; Stats. 1925 s. 272.01; 1935 c. 541 s. 218.

Editor's Note: In Collins v. Smith, 75 W 392, 44 NW 510, decided prior to the amendment of 1897, the supreme court observed that there was no statutory provision authorizing the assignee of a judgment, or his attorney, to issue execution thereof in his own name, or requiring the fact of the assignment to be stated in the execution, that the authority to enforce a judgment by execution was conferred by statute only upon the party in whose favor the judgment was given, and that the execution must be signed by him or his attorney.

272.02 History: 1856 c. 120 s. 195; R. S. 1858 c. 134 s. 3; R. S. 1878 s. 2966; Stats. 1898 s. 2966; 1925 c. 4; Stats. 1925 s. 272.02; 1935 c. 541 s. 219.

In the absence of a statute declaring otherwise the franchises and rights of a quasi-public corporation, owing important duties to the public, and the property vested in it and necessary for the accomplishment of its purposes, are an entirety and cannot be sold on execution, or for mechanics' liens, or on tax process. Chicago & Northwestern R. Co. v. Forest County, 95 W 80, 70 NW 77.

In a proceeding to enforce a judgment requiring the performance of an act other than the payment of money or delivery of property, the court may properly examine the pleadings and agreements referred to therein for the purpose of ascertaining its meaning and effect. Gimbel v. Wehr, 165 W 1, 160 NW 1080.

A provision in a money judgment that execution shall issue is surplusage as an execution follows as a matter of course. Sharpe v. First Nat. Bank of Antigo, 220 W 506, 264 NW 245.

272.03 History: 1856 c. 120 s. 196; R. S 1858 c. 134 s. 4; R. S. 1878 s. 2967; Stats. 1898 s. 2967; 1925 c. 4; Stats. 1925 s. 272.03; 1935 c. 541 s. 220.

A judgment in foreclosure which provides that on defendant's default to make payment and refusal to deliver possession the sheriff shall be authorized, upon a certified copy of the judgment, to remove defendant from the premises and put plaintiff in possession is erroneous if it does not provide that an application should be made to the court for the issuing of a writ of assistance to place plaintiff in possession. Landon v. Burke, 36 W 378.

The issuing of a general writ of execution for the purpose of enforcing a judgment in alimony does not release a specific lien created by that judgment. Schultz v. Schultz, 133 W 125, 113 NW 445.

272.04 History: 1856 c. 120 s. 197, 204; R. S. 1858 c. 134 s. 90; 1866 c. 14 s. 1; 1868 c. 11 s. 1; R. S. 1878 s. 2968, 3028; Stats. 1898 s. 2968, 3028; 1899 c. 351 s. 36; 1925 c. 4; Stats. 1925 s. 272.04, 273.01; 1935 c. 541 s. 221, 266; Stats. 1935 s. 272.04; 1951 c. 638; 1953 c. 365; 1965 c. 252.

Execution issued upon a dormant judgment without leave is not void, but voidable, and a sale thereunder is valid. Jones v. Davis, 22 W 421, 24 W 229.

Averment in pleading that execution was duly issued is sufficient without showing that leave was granted. Jones v. Davis, 22 W 421.

An execution is not levied on lands, but the seizure proceeds from the docketing previously made. Hammel v. Queen's Ins. Co. 54 W 72, 11 NW 349.

Execution upon a judgment enforcing a lien upon a pledge should issue only upon order of the court for a deficiency after sale. Wilson v. Johnson, 74 W 337, 43 NW 148.

If the original execution is for the whole amount of the judgment and the plaintiff indorses on it a direction not to levy and collect a part thereof, an alias may issue for the amount uncollected by order of the court. Bank of Sheboygan v. Trilling, 75 W 163, 43 NW 830.

Real estate may be sold on an execution issued within 20 years, if personal property cannot be found, notwithstanding sec. 2902, R. S. 1878, limits the lien of a judgment upon realty to 10 years. Collins v. Smith, 75 W 392, 44 NW 510.

A promise by a debtor to pay a judgment