examination of the medical witnesses and its comment could not be deemed prejudicial or made the basis for a new trial. State v. Rice, 38 W (2d) 344, 156 NW (2d) 409.

Whether or not in a criminal prosecution the harmless error rule can be applied to error at trial which offends a constitutional norm depends on whether there is reasonable possibility that the evidence complained of might have contributed to the conviction; hence all trial errors which violate the constitution do not automatically call for reversal. Hayes v. State, 39 W (2d) 125, 158 NW (2d) 545.

Since the trial court, in dismissing the prosecution's case, emphasized that this action was based on the belief that the state failed to show defendant's intent and the evidence offered by the state and excluded by the court had that purpose, the ruling on the evidence was prejudicial, necessitating reversal. State v. Hutnik, 39 W (2d) 754, 159 NW (2d) 733.

The rule in Wisconsin, following the early English rule, is that the exclusion, separation, sequestration of witnesses, or putting witnesses under the rule is not a matter of right but lies in the legal discretion of the trial court. The rule does not presume prejudice from a failure to sequester, and unless prejudice results therefrom there can be no abuse of discretion warranting reversal. Ramer v. State, 40 W (2d) 79, 161 NW (2d) 209.

See note to sec. 8, art. I, on limitations imposed by the Fourteenth Amendment, citing La Claw v. State, 41 W (2d) 177, 163 NW (2d) 147, 165 NW (2d) 152.

Admission of evidence of 2 previous convictions prior to finding and conviction, while improper, was harmless in the light of compelling evidence of defendant's guilt, and the fact that the case was tried to an able and experienced judge (without a jury) who, it could be presumed, disregarded in his consideration of the issue of guilt all matters not relevant to that issue. Block v. State, 41 W (2d) 205, 163 NW (2d) 196.

Where veracity or credibility of an accused is a major factor in determining his guilt or innocence, it is prejudicial error to exclude testimony in his behalf, otherwise admissible, which goes materially to that issue. Logan v. State, 43 W (2d) 128, 168 NW (2d) 171.

Where the medical examiner who performed an autopsy testified that in her opinion the victim's death resulted from homicide (which after objection was qualified by her statement that the cause of death was due to a blow or blows), and the trial court ordered the testimony stricken and instructed the jury to disregard it, there was no prejudicial error. Woodhull v. State, 43 W (2d) 202, 168 NW (2d) 281.

CHAPTER 275.

Ejectment.

275.01 History: R. S. 1858 c. 141 s. 1; R. S. 1878 s. 3073; Stats. 1898 s. 3073; 1925 c. 4; Stats. 1925 s. 275.01; 1935 c. 541 s. 296.

See note to sec. 16, art. I, citing Howland v. Needham, 10 W 495.

An action of ejectment abates upon the death of the sole defendant. Farrell v. Shea, 66 W 561, 29 NW 634.

If both parties claim title to the land under a will their rights under the will may be determined in an action of ejectment. Kelley v. Kelley, 80 W 486, 50 NW 334.

Where title or the right of possession is in dispute between 2 parties, one of whom is in actual possession under claim or color of right, injunction will not as a rule lie to transfer possession to the other party; and particularly, injunction will be refused to determine an issue of ownership or the right of possession of land where an adequate remedy at law is available, as by ejectment. Lipinski v. Lipinski, 261 W 327, 52 NW (2d) 922.

Where adjoining landowners take conveyances from a common grantor which describe the premises conveyed by lot numbers, but such grantees have purchased with reference to a boundary line then marked on the ground, such location of the boundary line so established by the common grantor is binding on the original grantees and all persons claiming under them, irrespective of the length of time which has elapsed thereafter. Thiel v. Damrau, 268 W 76, 66 NW (2d) 747.

The statutory directive is that ejectment may be "commenced and proceeded in as other civil actions". Arthur v. State Conservation Comm. 33 W (2d) 585, 148 NW (2d) 17.

275.02 History: R. S. 1849 c. 106 s. 3; R. S. 1849 c. 118 s. 1 to 4; R. S. 1858 c. 141 s. 2; R. S. 1858 c. 152 s. 1 to 4; R. S. 1878 s. 3074, 3197, 3199; 1885 c. 252; Ann. Stats. 1889 s. 3074; Stats. 1898 s. 3074, 3197, 3199; 1925 c. 4; Stats. 1925 s. 275.02, 281.15, 281.17; 1935 c. 541 s. 297, 389; Stats. 1935 s. 275.02; 1939 c. 513 s. 53.

Revisor's Comment, 1950: The ancient and intricate rules of common law and of equity pleadings have been abolished. In olden times, the hair-splitting distinctions and artificial subtleties whereby a skilled barrister determined whether ejectment would lie in a law court, or whether the remedy must be sought in an equity court, were very important. Those distinctions and niceties have dwindled almost to the vanishing point.

Ch. 120, Laws 1856, adopted the Civil Code (Field Code). That act says (a) actions are of 2 kinds, civil and criminal; (b) the distinction between "actions at law and suits in equity and the forms of all such actions and suits have been abolished and there is but one form of action for the enforcement or protection of private rights" (260.08, Stats.); (c) "The complaint shall contain * * * a statement of the ultimate facts constituting each cause of action" and a "demand of the judgment to which the plaintiff supposes himself entitled" (263.03). If the plaintiff asks for what the law does not give, still the court will award to him what the law does give. In furtherance of justice he may amend his pleading; the court may "change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa" (269.44). If he is in the wrong court, his action "shall be certified to some other court which has jurisdiction" (269.52).

But the Civil Code of 1856 did not include actions in ejectment. Those actions continued to be governed, to some extent, by the rules of the common law as modified by statutes. Ch. 541, Laws 1935, provided that actions of ejectment may proceed "as other civil actions are except as otherwise provided" in ch. 275 (275.01). Ch. 541, Laws 1935, repealed most of those exceptions. The ejectment chapter was so deleted that little if anything remains of the technical rules of pleading and procedure which formerly governed ejectment. The present rules are simple. There is little need of resorting to the early decisions except as an aid to determining which party to the action is entitled to possession of the land in question. And that question is substantive, not procedural. Again, the bench and the bar were slow and seemed reluctant to accept the civil code at its face. It made scrap of so much shining armor. That attitude has changed.

1. Who may maintain ejectment.
2. Who may not maintain ejectment.

1. Who May Maintain Ejectment.

Where one quitclaims land, and afterward the tax deed under which he claimed was declared void for apparent defects, and he took a new deed on the original tax certificate, ejectment may be maintained. Lain v. Shephardson, 23 W 224.

One who has the bare right of possession may maintain ejectment against a wrongdoer who has intruded on such possession. Bates v. Campbell, 25 W 613.

The owner of land dedicated for a public street may maintain ejectment against a railroad company permanently occupying the same. Hegar v. Chicago & Northwestern R. Co. 26 W 624.

One out of possession, asserting an absolute legal title and right of possession, should bring ejectment against the party in possession. Lee v. Simpson, 29 W 333.

Under ch. 22, Laws 1859, the tax deed grantee has constructive possession of the land if actually unoccupied, and after expiration of time limited for an action by the former owner to test validity of the tax deed the grantee may maintain ejectment against any person thereafter taking possession. If defendant relies upon adverse possession within 3 years (under sec. 5, ch. 138, Laws 1861) next after recording of deed he has the burden of proving it. Lawrence v. Kenney, 32 W 281.

The owner of a school-land certificate may maintain ejectment against one in possession claiming under a patent subsequently issued. He may show that the subsequent sale was unlawful. Gunderson v. Cook, 33 W 551.

Where plaintiff claims under a grant from the United States, the occupation of land by defendant under claim of exclusive right for any number of years before the government parted with the title is no bar to a recovery. Whitney v. Gunderson, 31 W 359; Whitney v. Morrow, 36 W 438.

The grantor may, after breach of condition subsequent, recover land conveyed subject thereto. Bogie v. Bogie, 41 W 209.

Plaintiff must show at least a prima facie title in himself. Nys v. Biemeret, 44 W 104.

The original owner or those claiming under him of land dedicated to public use may maintain ejectment against a permanent incumbrancer. Heirs may maintain ejectment when administrator has not taken possession though the estate has not been settled. Filbey v. Carrier, 45 W 469.

The original owner of unoccupied lands may bring ejectment as against one who has recorded a tax deed thereto. Hewitt v. Butterfield, 52 W 384, 9 NW 15.

The holder of a school-land certificate may bring ejectment. Tobey v. Secor, 60 W 310, 19 NW 99.

Plaintiff is only required to show title and right of possession at commencement of the action, but he must recover upon the strength of his own title. Kelley v. McKeon, 67 W 561, 31 NW 324.

One whose equitable rights to lands were acquired by a law of the United States granting lands to the state in trust and who has obtained a right to their possession by a release from the state pursuant to the original grant may maintain ejectment. Wisconsin C. R. Co. v. Wisconsin River L. Co. 71 W 94, 36 NW 837.

The owner of the fee may, after expiration of the life estate, maintain ejectment against the grantee in a tax deed issued before the expiration of the period of redemption in favor of a widow under ch. 89, Laws 1868. Little v. Edwards, 84 W 649, 55 NW 43.

The owner of land may maintain ejectment after it has been sold for taxes and after the limitation of sec. 1188, R. S. 1878, has run, if the taxes remained unpaid because he was told by the town treasurer that no taxes were assessed against his land. Gould v. Sullivan, 84 W 659, 54 NW 1013.

Actual possession is sufficient proof of title until the defendant shows a better title. Elofrson v. Lindsay, 90 W 203, 63 NW 89.

An owner of the land where the foundation of another's wall projects thereon may maintain ejectment (McCourt v. Eckstein, 22 W 153, distinguished). Zander v. Valentine Blatz B. Co. 95 W 162, 70 NW 164.

Ejectment may be maintained by the original owner against one claiming under a void tax deed, although the land is vacant. Dunbar v. Lindsay, 119 W 239, 96 NW 557.

Where a person has the legal title to lands and is entitled to the possession thereof, he may sue in ejectment although such right must be established by proof of fraud. He may may also bring his action in equity. Steinberg v. Saltzman, 130 W 419, 110 NW 198.

The plaintiffs in an ejectment action do not need to have identical interests, nor is it necessary that all have the right to recover possession of the premises in dispute. Beck v. Ashland C. Co. 146 W 324, 130 NW 464.

The fact that ejectment is brought for the whole property does not prevent judgment for such part or interest as the plaintiff may be entitled to. Illinois S. Co. v. Kunkel, 146 W 556, 131 NW 842.

In an action for ejectment of defendants from part of a farm formerly operated by plaintiff's grandfather and father, evidence that plaintiff had leased the farm from his father from 1917 to 1927, and that his father

had given him a deed thereto in 1927, and that defendants had no record or paper title but that both plaintiff and defendants had used the parcel in dispute during the 20-year period necessary to effect adverse possession, was sufficient to show a grant from one in possession to the plaintiff and prima facie title in the plaintiff, so that, defendants having failed to show a better or stronger title, such evidence supported a judgment in favor of plaintiff. Schaefer v. Bednarski, 271 W 574, 74 NW (2d) 191.

A vendee entitled to possession under an executory contract may bring ejectment. Mellenthin v. Keith, 17 F 583.

The purchaser at a tax sale of wild and unoccupied lands which were occupied before a patent therefor was obtained, but which were patented subsequent to such sale, may maintain ejectment against the patentee or his vendee. Coleman v. Peshtigo L. Co. 30 F 317.

2. Who May Not Maintain Ejectment.

Ejectment cannot be maintained by a person having only an equitable interest. Eaton v. Smith, 19 W 537.

Ejectment cannot be maintained by the holder of the equity of redemption against the mortgagee or his assigns lawfully in possession. Hennessy v. Farrell, 20 W 42.

The grantee in a deed absolute on its face, in fact a mortgage, cannot maintain ejectment if he has never been in possession. Rountree v. Denson, 59 W 522, 18 NW 518.

A city cannot maintain ejectment to recover a public alley or street. Racine v. Crotsenberg, 61 W 481, 21 NW 520.

Ejectment does not lie for the recovery of an easement. Fritsche v. Fritsche, 77 W 270, 45 NW 1089; Pinkum v. Eau Claire, 81 W 301, 51 NW 550; Buckner v. Hutchings, 83 W 299, 53 NW 505.

Heirs cannot maintain ejectment to recover lands purchased with partnership means, and used for partnership purposes, and which were partnership personalty to be used in paying firm debts. They remain personal property so long as such debts are unpaid. Weld v. Johnson M. Co. 86 W 552, 57 NW 374.

A tenant in common cannot maintain ejectment to segregate his share from the common property and give him such share in severalty. Duncan v. Rodecker, 90 W 1, 62 NW 533.

An administrator cannot recover the real estate of the decedent, unless it is needed for the payment of debts or legacies. Volk v. Stowell, 98 W 385, 74 NW 118.

The right to bring ejectment for an overhanging roof was denied, under the special circumstances of the case. Rasch v. Noth, 99 W 285, 74 NW 820.

Where person has granted upon condition subsequent and claims a breach of such condition but does not allege either demand or other act equivalent to a re-entry for such breach, there can be no recovery. Mash v. Bloom, 133 W 646, 114 NW 457.

Under 275.02, Stats. 1951, the plaintiff in an action of ejectment must establish an interest in the premises claimed and a right to the possession thereof, or to some share, interest, or portion thereof. Williams v. Larson, 261 W 629, 53 NW (2d) 625.

275.03 History: R. S. 1849 c. 106 s. 4; R. S. 1858 c. 141 s. 3; R. S. 1878 s. 3075; Stats. 1898 s. 3075; 1901 c. 152 s. 1; 1925 c. 4; Stats. 1925 s. 275.03; 1935 c. 541 s. 298.

A tax-title claimant may maintain an action against one who merely claims title if it appears that no one is in possession, but not if the contrary appears. Eaton v. Tallmadge, 24 W 217.

Sec. 3, ch. 141, R. S. 1858, merely gives the right of action; the rule of pleading is laid down in sec. 4, ch. 141, and it must be alleged that defendant unlawfully withholds the possession although the premises claimed may not be actually occupied. Platto v. Jante, 35 W 629.

The title or interest mentioned is a title or interest which entitles the owner to the possession of the premises or to some possessory right therein. Pier v. Fond du Lac, 38 W 470.

One who puts a tax deed upon record enables the party claiming to be owner to maintain ejectment against him. Knox v. Cleveland, 13 W 245; Deery v. McClintock, 31 W 195; Hewitt v. Butterfield, 52 W 384, 9 NW 15.

If parties conspire to defeat an action of ejectment all will be liable for the acts of one. Burchard v. Roberts, 70 W 111, 35 NW 286.

A complaint stating that one defendant built a foundation wall upon plaintiff's side of the boundary line, and the other defendant, successor in interest in possession, refuses to remove it, states a cause of action against both defendants. Rahn v. Milwaukee E. R. & L. Co. 103 W 467, 79 NW 747.

Where a tenant of adverse claimant obtains possession of premises he is a necessary defendant and he should be joined in a writ of error to review a judgment against him and other defendants, but a failure to so join him may be cured by amendment. Huebschmann v. Cotzhausen, 107 W 64, 82 NW 720.

An action may be maintained against the holder of a recorded tax deed and costs recovered, even though the defendant disclaims title. Stephenson v. Doolittle, 123 W 36, 100 NW 1041.

Where a complaint alleged that plaintiff was the owner of land under certain tax deeds, that the same were fair on their face and were duly recorded, and that defendant claimed title, it was good upon demurrer, although it also alleged that the lands were vacant and unoccupied. Wisconsin River L. Co. v. Paine L. Co. 130 W 393, 110 NW 220.

One holding possession without title but peaceably and adversely may maintain ejectment against a trespasser. Klooz v. Hood, 159 W 301, 150 NW 441.

275.04 History: R. S. 1849 c. 106 s. 25; R. S. 1858 c. 141 s. 12; 1866 c. 130; 1871 c. 52 s. 1; R. S. 1878 s. 3076; Stats. 1898 s. 3076; 1925 c. 4; Stats. 1925 s. 275.04; 1935 c. 541 s. 299.

Whether the defenses be legal or equitable, those whose interests are only collaterally affected need not be made parties. They can put the responsibility upon those under whom they claim and so conclude them by the judgment. Du Pont v. Davis, 35 W 631.

275.05 History: R. S. 1849 c. 106 s. 8; R. S. 1858 c. 141 s. 4, 5; R. S. 1878 s. 3077; Stats. 1898 s. 3077; 1925 c. 4; Stats. 1925 s. 275.05; 1935 c. 541 s. 300.

Where the tract described in the complaint as the "south 28 feet" of a village lot which was rectangular, and 2 of its boundary lines ran east by 38 degrees north, the other 2 north by 38 degrees west, the description was so defective that plaintiff could not be put in possession if he obtained judgment. The judgment must follow the complaint in the description. Orton v. Noonan, 18 W 447.

Where a complaint merely alleges ownership and right of possession, without setting forth specific title, defendant, under a denial, may prove anything tending to defeat the title which plaintiff attempts to establish. Lain v. Shephardson, 23 W 224.

Bare possession is sufficient to sustain a possessory action against a mere wrongdoer. Hence, when the complaint shows an actual possession by plaintiff under a claim of right and an invasion thereof by a wrongdoer, it shows a valid existing interest entitled to protection. Bates v. Campbell, 25 W 613.

Where a complaint is in accordance with statutory requirements it need not be amended in order to allow the introduction of evidence to identify the premises. Jenkins v. Sharpf, 27 W 472.

The nature and extent of the interest must be stated, and the plaintiff can recover only what is claimed. Allie v. Schmitz, 17 W 169; Bresee v. Stiles, 22 W 120; Riehl v. Bingenheimer, 28 W 84.

Without an allegation to that effect plaintiff may show that a deed put in evidence by defendant was executed without authority. Meade v. Brothers, 28 W 689.

It is not sufficient to aver that plaintiff is the owner, that defendant is in possession and wrongfully withholds, etc.; there must be a distinct averment that plaintiff is entitled to the possession. Barclay v. Yeomans, 27 W 682; Lee v. Simpson, 29 W 333.

Mere clerical errors in description do not vitiate the complaint. Du Pont v. Davis, 30 W 170.

See note to 275.03, citing Platto v. Jante, 35 W 629.

A complaint is not defective for alleging acts of waste and praying for an injunction. Riemer v. Johnke, 37 W 258.

Special complaints setting out title are proper where the rights of parties depend upon questions of construction. Lawe v. Hyde, 39 W 345.

The estate claimed must be pleaded; it is not sufficient to state paper title. Haight v. Clifford, 42 W 571.

The statute authorizes ejectment, in certain cases, against persons not in actual possession, but requires the averment that defendant withholds the possession. In such case the averment is formal and untrue, but imperatively required. Wilson v. Henry, 40 W 594; Stephenson v. Wilson, 50 W 95, 6 NW 240.

A complaint which does not aver that plaintiff is entitled to the possession is defective. Methodist E. Church v. Northern P. R. Co. 78 W 131, 47 NW 190.

A description is sufficient if, by the aid of a competent surveyor and persons knowing the monuments or objects mentioned in the complaint as boundaries, the lands can be found. Ayers v. Reidel, 84 W 276, 54 NW 588.

A plaintiff may show any facts affecting the defendant's tax deed, or which render it unavailable to him, without having pleaded them. Morgan v. Bishop, 56 W 284, 14 NW 369; Gould v. Sullivan, 84 W 659, 54 NW 1013.

In an action of ejectment where there is default the court should adjudge the title to the plaintiff as set out in the complaint. Emerson v. Pier, 105 W 161, 80 NW 1100.

Where the complaint alleged that plaintiff was the owner in fee simple of land under certain tax deeds, that the same were fair on their face, and were duly recorded, and that defendant claimed title thereto, it was good upon demurrer, although it also alleged that the lands were vacant and unoccupied. Wisconsin River L. Co. v. Paine L. Co. 130 W 393, 110 NW 220.

A party claiming title by reason of the breach by the defendant of a condition subsequent in the deed of plaintiff's ancestor should proceed by action at law; but if the complaint states a cause of action in ejectment, it will be sustained as such notwithstanding its prayer for equitable relief and even though demurred to on the ground that the plaintiff had an adequate remedy at law. Instead of sustaining such demurrer the action should be transferred upon plaintiff's motion to the jury calendar for trial. Williams v. Oconomowoc, 167 W 281, 166 NW 322.

In an action of ejectment by vendors to recover possession of land on default of purchaser in payment of interest, defendant may set up facts justifying relief from forfeiture by a court of equity. Britt v. Bauman, 199 W 514, 226 NW 955.

A complaint in ejectment is required to set forth the plaintiff's estate or interest in the premises claimed and that he is entitled to possession. A complaint which merely alleged that 2 years before the commencement of the action the plaintiff was seized of the fee, fails to meet such requirements, was defective as setting forth an allegation which was a "negative pregnant." Chris Schroeder & Sons Co. v. Lincoln County, 244 W 178, 11 NW (2d) 665.

Plaintiffs, suing on the alternate theory of adverse possession by which they claimed ownership to a disputed parcel, were not obliged to specifically plead adverse possession; hence allegations in their complaint that they were entitled to possession and that defendants unlawfully withheld possession from them were sufficient under 275.05. Beduhn v. Kolar, 39 W (2d) 148, 158 NW (2d) 346.

275.06 History: R. S. 1858 c. 141 s. 7; R. S. 1878 s. 3078; 1889 c. 277; Ann. Stats. 1889 s. 3078; Stats. 1898 s. 3078; 1925 c. 4; Stats. 1925 s. 275.06; 1935 c. 541 s. 301.

In an action of ejectment to recover land to which plaintiffs had record title, it is not sufficient for defendants merely to allege and prove a mistake which would entitle them to a reformation of their deed; defendants must plead a counterclaim and demand the judg-

ment they seek. Smith v. Vogt, 251 W 619, 30 NW (2d) 617.

275.07 History: R. S. 1849 c. 106 s. 21, 22; R. S. 1858 c. 141 s. 8, 9; R. S. 1878 s. 3079; Stats. 1898 s. 3079; 1925 c. 4; Stats. 1925 s. 275.07; 1935 c. 541 s. 302.

If the defendant claims by his answer to be rightfully in possession of the premises under a contract with the plaintiff for their purchase he cannot question the title of the latter, and proof thereof is not required. Cutler v. Babcock, 79 W 484, 48 NW 494.

Where plaintiff's right to lands depends on a breach of a condition subsequent, the provision of sec. 3079, Stats. 1898, does not obviate the necessity of showing that a right of possession under such breach, and a revesting of the former title by re-entry or its equivalent, was vested in the plaintiff when the action commenced. Mash v. Bloom, 133 W 646, 114 NW 457.

Where the record made in proceedings on plaintiff's motion for summary judgment would not support a finding that plaintiff acquiesced in the encroaching construction or maintained silence so as to mislead defendant into doing what he would not have done but for such silence, it did not raise an issue of fact as to estoppel against plaintiff, and judgment should be granted for plaintiff. Gerrits v. Blow, 7 W (2d) 115, 96 NW (2d) 93.

275.08 History: R. S. 1849 c. 106 s. 23; R. S. 1858 c. 141 s. 10; R. S. 1878 s. 3080; Stats. 1898 s. 3080; 1925 c. 4; Stats. 1925 s. 275.08; 1935 c. 541 s. 303.

Testimony by a husband, his wife not a party, that he held land and built a fence around it as agent of his wife does not show an ouster, plaintiff claiming an undivided two-thirds of the land and the wife owning the other third. Yager v. Larsen, 22 W 184.

The purchaser at a void guardian's sale of land is in possession, claiming title under the guardian's deed, that is sufficient ouster to sustain an action of ejectment by the heirs. Wilkinson v. Filby, 24 W 441.

Claiming to have a deed and assuming the right to lease the premises and collect and retain rents tends to show an ouster. Durkee v. Felton, 54 W 405, 11 NW 588.

275.10 History: R. S. 1849 c. 106 s. 39, 40; R. S. 1858 c. 141 s. 13, 15; R. S. 1878 s. 3082; Stats. 1898 s. 3082; 1925 c. 4; Stats. 1925 s. 275.10; 1935 c. 541 s. 305.

On judgment for damages execution may issue against the body. Howland v. Needham, 10 W 495.

Where the verdict assessing damages is against more than one defendant it is error to take a judgment against one only. Thrasher v. Tyack, 15 W 256.

One who recovers in an action of ejectment is entitled to a crop planted on the land after commencement of the action. McLean v. Bovee, 24 W 295.

The question is what has been the value of the use and occupation of the land for 6 years immediately preceding the commencement of the action, exclusive of the value of the use of any and all the improvements made thereon by the defendant. Blodgett v. Hitt, 29 W 169.

The value of improvements may be set up in an action between tenants in common. Davis v. Louk, 30 W 308.

In ejectment there can be no recovery for more than 6 years before action is brought, but in an action against him for improvements made prior thereto the plaintiff may counterclaim for rents and profits prior to the same period. Davis v. Louk, 30 W 308.

Damages for mesne profits should be assessed to the day of trial, and may be recovered though they accrued during plaintiff's minority. McCrubb v. Bray, 36 W 333.

There cannot be a recovery of mesne profits under a complaint in an action of ejectment which fails to allege that the plaintiff is entitled to the possession of the premises. Methodist E. Church v. Northern Pacific R. Co. 78 W 131, 47 NW 190.

Where the plaintiff in an action of ejectment had recovered judgment for rents and profits but it did not appear for what period, it will be presumed that evidence was not excluded as to any rents or profits which were properly a setoff. Dorer v. Hood, 113 W 607, 88 NW 1009.

275.12 History: R. S. 1849 c. 106 s. 26; R. S. 1858 c. 141 s. 14; R. S. 1878 s. 3084; Stats. 1898 s. 3084; 1925 c. 4; Stats. 1925 s. 275.12.

Where the issues were whether plaintiff was the absolute owner in fee simple and whether defendant unlawfully withheld possession, a general verdict "for the plaintiff" found both issues in his favor. Allard v. Lamirande, 29 W 502.

After judgment for defendant upon an equitable counterclaim which determined that plaintiff's legal title could not prevail against defendant's equitable title, it was proper to refuse plaintiff's demand for a trial by jury of the issues raised by a denial of his legal title. Cornelius v. Kessel, 58 W 237, 16 NW 550.

Where the court did not specify the estate which was established by the plaintiff, it was not ground for reversal where plaintiff's title was in fee and defendant's title was entirely bad. Grindo v. McGee, 111 W 531, 87 NW 468.

Where a jury is waived the finding of the court should state the quality and extent of the title of the plaintiff. Beranek v. Beranek, 113 W 272, 89 NW 146.

275.13 History: R. S. 1849 c. 106 s. 27; R. S. 1858 c. 141 s. 17; R. S. 1878 s. 3085; Stats. 1898 s. 3085; 1925 c. 4; Stats. 1925 s. 275.13.

275.14 History: R. S. 1849 c. 106 s. 29; R. S. 1858 c. 141 s. 18; R. S. 1878 s. 3086; Stats. 1898 s. 3086; 1925 c. 4; Stats. 1925 s. 275.14.

Where it is stipulated by all parties that, at commencement of the action, defendants were in possession of the premises a joint judgment may properly be rendered against all for the lands to which plaintiff shows title. Horner v. Chicago, M. & St. P. R. Co. 38 W 165.

The failure to state in the judgment the quality or extent of plaintiff's title may be disregarded under sec. 2829, Stats. 1898. Coe v. Rockman, 126 W 515, 106 NW 290.

The proper judgment in an action of ejectment where the answer contains neither an affirmative defense nor a counterclaim, and

plaintiff fails to prove title, is nonsuit. Comstock v. Boyle, 134 W 613, 114 NW 1110.

In an action of ejectment where evidence showed that the plaintiff had no title, a judgment on the merits was proper rather than a dismissal without prejudice. Menomonee River L. Co. v. Seidl, 149 W 316, 135 NW 854.

The judgment granted on the record in this case should not include requirement that defendant make any part of his land available to plaintiff's use for access to rear entrance to common stairway blocked off by defendant's extension of his building. Gerrits v. Blow, 7 W (2d) 115, 96 NW (2d) 93.

275.15 History: 1874 c. 270; R. S. 1878 s. 3087; 1880 c. 305; Ann. Stats. 1889 s. 3087; Stats. 1898 s. 3087; 1925 c. 4; Stats. 1925 s. 275.15; 1935 c. 541 s. 307.

A judgment for plaintiff without making the order required by ch. 305, Laws 1880, is erroneous. Wisconsin C. R. Co. v. Comstock, 71 W 88, 36 NW 843.

It is proper on the return of a verdict to make a conditional order instead of rendering a conditional judgment, to be made absolute thereafter on proof of payment or default, as the case may be. Hewitt v. Wisconsin River L. Co. 81 W 546, 51 NW 1016.

Sec. 3087, Ann. Stats. 1889, shows legislative intention to have the judgment conclude all further controversy as to any claim made by defendant on account of taxes. Cook v. McComb, 98 W 526, 74 NW 353.

Defendant in ejectment claiming under a tax deed, who procures additional tax deeds pendente lite, must present them in the action, and failing to do so is estopped from afterwards claiming title under them. Bell v. Peterson, 105 W 607, 81 NW 279.

It is not error to require that the whole sum for which the lands were sold be deposited in court as a condition of relief, although such sum includes an illegal charge for advertising fees. Chippewa River L. Co. v. J. L. Gates L. Co. 118 W 345, 94 NW 37, 95 NW 954.

The fact that the tax proceedings were illegal would not relieve the plaintiff from paying the amount imposed by sec. 3087, Stats. 1898. Pinkerton v. J. L. Gates L. Co. 118 W 514, 95 NW 1089.

A finding by the court is the equivalent of a verdict and the period during which interest is allowed ends with such finding. Pinkerton v. J. L. Gates L. Co. 122 W 471, 100 NW 841.

The proceedings in execution of sec. 3087 are not to be taken until the question as to the validity of the tax title is determined. Stephenson v. Doolittle, 123 W 36, 100 NW 1041.

A judgment in the form of a final judgment awarding costs and limiting the payment to the amount for which the lands were sold, with interest and subsequent costs and charges, is erroneous. Washburn L. Co. v. Swanby, 131 W 1, 110 NW 806.

Where the defendant failed to establish any claim through deeds based on tax sales prior to the sale on which the plaintiff's title was founded and failed as to this last deed because the tax on which the deed issued had been paid, the case was not within sec. 3087. Doolittle v. J. L. Gates L. Co. 131 W 24, 110 NW 890.

An unsuccessful defendant in an action of ejectment is liable for costs. Van Ostrand v. Cole, 131 W 454, 110 NW 891.

275.16 History: R. S. 1849 c. 106 s. 32; R. S. 1858 c. 141 s. 19; R. S. 1878 s. 3088; Stats. 1898 s. 3088; 1901 c. 152 s. 2; Supl. 1906 s. 3088; 1925 c. 4; Stats. 1925 s. 275.16; 1935 c. 541 s. 308.

Revisers' Note, 1878: Section 19, chapter 141, R. S. 1858, changed so as to make the judgment conclusive only from time of filing lis pendens, and not from commencement of action. The statute, as it now reads, was well enough when originally enacted, as ejectment suits were then commenced by declaration; but as they are now commenced by service of a summons, and as the lis pendens may be filed at any time, and as there may not be anything of record anywhere to show that the action has been commenced for months after its commencement, it is but just that the effect of the judgment should date from the time some public notice, accessible to purchasers, etc., is given.

A notice of lis pendens duly filed is inoperative as notice until complaint is filed. Sherman v. Bemis, 58 W 343, 17 NW 8; Gile v. Colby, 92 W 619, 66 NW 802.

The amendatory legislation of 1901 served to avoid the effect of the decision in Webster v. Pierce, 108 W 407, 83 NW 938. Stephenson v. Doolittle, 123 W 36, 100 NW 1041.

275.18 History: R. S. 1849 c. 106 s. 35; R. S. 1858 c. 141 s. 22; R. S. 1878 s. 3090; Stats. 1898 s. 3090; 1925 c. 4; Stats. 1925 s. 275.18; 1935 c. 541 s. 310.

275.21 History: R. S. 1849 c. 106 s. 37; R. S. 1858 c. 141 s. 24; R. S. 1878 s. 3093; Stats. 1898 s. 3093; 1925 c. 4; Stats. 1925 s. 275.21; 1935 c. 541 s. 313.

Where, after judgment at the circuit for plaintiff, who was put in possession before an appeal was perfected, and afterwards judgment was reversed and a new trial awarded, defendant cannot have a writ of restitution from the supreme court, but must proceed at the circuit. Vroman v. Dewey, 23 W 626.

275.23 History: R. S. 1849 c. 106 s. 53; R. S. 1858 c. 141 s. 28; R. S. 1878 s. 3095; Stats. 1898 s. 3095; 1925 c. 4; Stats. 1925 s. 275.23.

275.24 History: R. S. 1849 c. 107 s. 1, 2; 1857 c. 84 s. 2; R. S. 1858 c. 141 s. 30, 31, 33; R. S. 1878 s. 3096; Stats. 1898 s. 3096; 1925 c. 4; Stats. 1925 s. 275.24.

Revisers' Note, 1878: This section is written to express the right of a defendant to recoup improvements made and taxes paid, as stated by sections 30, 31, 33, chapter 141, R. S. 1858, as construed by the supreme court in numerous cases; see particularly Davis v. Louk, 30 W 308; Blodgett v. Hitt, 29 W 169; Phoenix L. M. & S. Co. v. Sydnor, 39 W 600.

A claim of property in good faith under a conveyance void on its face and inadequate to carry the true title is a claim under color of title. Edgerton v. Bird, 6 W 527.

This statute is based upon the broad principles of equity and, if properly administered,

will give to each party his rights. Pacquette v. Pickness, 19 W 219.

Defendant is entitled to recover for improvements the amount which they have added to the value of the land. Pacquette v. Pickness, 19 W 219.

Defendant is entitled to compensation for improvements and taxes paid. Blodgett v. Hitt, 29 W 169.

The remendy must be strictly followed. If the party evicted removes fixtures he cannot set up a defense to the landowner's action to recover their possession or value. Huebschmann v. McHenry, 29 W 655.

In an action against plaintiff for improvements made prior to 6 years he may counterclaim for rents and profits prior to the same period; and this rule applies to tenants in common. He may also counterclaim for the balance adjudged due him for rents, profits and costs in ejectment suit and value of plaintiff's use of premises (exclusive of improvements) since judgment in ejectment. Davis v. Louk, 30 W 308.

A tax-title claimant who was ejected could not recover for improvements unless the tax upon which his deed issued was lawfully assessed. Oberich v. Gilman, 31 W 495.

Damages for mesne profits should be assessed to the day of trial. McCrubb v. Bray, 36 W 333.

Secs. 30 to 33, ch. 141, R. S. 1858, applied to an action in which plaintiff recovered an undivided interest as cotenant of defendant. Where such claim was sought to be enforced in ejectment suits, proceedings were required to be taken after verdict and before judgment. Phoenix L. M. & S. Co. v. Sydnor, 39 W 600.

This section applies to a homestead. Mohr v. Tulip, 44 W 274.

Sec. 1182, R. S. 1878, which prohibits the issuing of a tax deed upon a certificate of sale for taxes or the maintenance of any action thereon, does not relieve the original owner from the payment of the taxes upon which such certificates were issued, if they are owned or held by a claimant under a tax deed or by any person under whom he claims, before he can have execution upon a recovery in ejectment under sec. 3096. Lombard v. Antioch College, 60 W 459, 19 NW 367.

A tax deed, though void for reasons going to the groundwork of the tax, is "color of title" within the meaning of sec. 3096. Zwietusch v. Watkins, 61 W 615, 21 NW 821.

If a plaintiff insists upon recovering a building upon the land as a part thereof he cannot claim that it is not a fixture and a permanent improvement for the value of which he is liable. Zwietusch v. Watkins, 61 W 615, 21 NW 821.

The commencement of ejectment by the original owner against one claiming under a tax title is not inconsistent with good faith in the latter's continued assertion of title under his tax deed although it is in fact void. Zwietusch v. Watkins, 61 W 615, 21 NW 821.

If the defendant entered upon possession of lands under color of title and in good faith and held adversely to the plaintiff he may recover for improvements made by him after he had notice of plaintiff's claim. Barrett v. Stradl, 73 W 385, 41 NW 439.

The counterclaim allowed by sec. 3096 applies only to actions of ejectment. Davidson v. Rountree, 69 W 655, 34 NW 906; Prickett v. Muck, 74 W 199, 42 NW 256.

As between cotenants where one of them had been in adverse possession of the entire premises by color of title asserted in good faith and founded on a deed which was void because not delivered, the defendant could be reimbursed for one-half the sum paid to discharge a mortgage, for taxes and interest thereon, and also for one-half the value of the repairs and improvements he made, notwithstanding some of such items are not specified in secs. 3096-3098. Stewart v. Stewart, 90 W 516, 63 NW 886.

A deed adjudged void because it was never delivered was color of title. Stewart v. Stewart, 90 W 516, 63 NW 886.

An invalid certificate of homestead entry is not color of title and one who has made homestead entry but has failed to complete the purchase cannot hold adversely to the United States or its grantee. Whitcomb v. Provost, 102 W 278, 78 NW 432.

Deed by executor or administrator pursuant to a contract made by decedent is color of title. (Falck v. Marsh, 88 W 680, 61 NW 287, distinguished.) Dorer v. Hood, 113 W 607, 88 NW 1009.

The owner of land conveyed it to his married daughter and after her death upon a sufficient consideration paid to her widower resumed possession, but without any reconveyance, and with no paper title other than the deed to his daughter which was returned, both parties supposing the husband was the sole heir and that the return of the deed was a sufficient reconveyance; while, in fact, the deceased left 6 children surviving. Such possession was not held adversely by color of title founded on any written instrument. Tellett v. Albregtson, 160 W 487, 152 NW 152.

No recovery can be had for improvements placed upon land by one not holding possession adversely. Graf v. Newman, 172 W 643, 179 NW 780.

One whose possession was not adverse by color of title asserted in good faith cannot recover for improvements under secs. 3096 and 3097. Perkins v. Perkins, 173 W 421, 181 NW 812.

The necessity of good faith as basis for recovery for improvements. Davis, 32 MLR 164.

275.25 History: 1857 c. 84 s. 3; R. S. 1858 c. 141 s. 34; 1861 c. 273; R. S. 1878 s. 3097, 3100; Stats. 1898 s. 3097, 3100; 1925 c. 4; Stats. 1925 s. 274.25, 274.28; 1935 c. 541 s. 315, 316; Stats. 1935 s. 275.25.

Revisers' Note, 1878: This section states the mode in which the right to improvements may be tried, and is not supposed to alter in fact the law as it is, so far as the modes are concerned, while it seeks to define and give precision to the law declaring them. The right to bring an independent action is limited to a year after execution of the judgment in ejectment, because as the claim for improvements and taxes when established is an ab-

solute lien, the privilege ought to be exercised without delay which might be oppressive. It disposed of chapter 273, Laws 1861.

Where defendent sets off the value of improvements and the claim is adjudicated the judgment is conclusive. Davis v. Louk, 30 W 308.

The claim must be made within the term at which the judgment in ejectment was rendered. Thomas v. Rewey, 36 W 328.

The claim should be made and tried before judgment and be included therein. Scott v. Reese, 38 W 636.

The claim may be enforced in an independent action. Phoenix L. M. & S. Co. v. Sydnor, 39 W 600.

It is error to enter judgment for plaintiff before trial of claim for improvements. Hills v. Laporte, 40 W 113.

Whether a claim is set up as a counterclaim or made after verdict and before judgment the defendant is entitled to have the issue thereon tried by a jury before judgment. The issue may be made after the filing of the findings if the case was tried before the court. Fowler v. Schafer, 69 W 23, 32 NW 292.

One against whom a judgment has been recovered in an independent action by the defendant in ejectment and who has no interest or title in the lands, and so alleges in his answer, cannot appeal from a judgment declaring a lien on the land for improvements and taxes. Herndon v. Bock, 97 W 548, 73 NW 39.

275.26 History: R. S. 1849 c. 107 s. 3; R. S. 1858 c. 141 s. 32; R. S. 1878 s. 3098; Stats. 1898 s. 3098; 1925 c. 4; Stats. 1925 s. 275.26.

Revisers' Note, 1878: This section takes the place of section 32, chapter 141, R. S. 1858, and while it does not change the law as to the rights of the parties, it provides definitely how expression of them shall be made in the judgment. The advantage of such a provision over the present statute seems too obvious to demand explanation. The value of the improvements is required to be fixed as of the date of the recovery in the ejectment, and hence interest is allowed thereon from that date.

There is but one judgment to be entered under sec. 3098, R. S. 1878, and that is the conditional one for which it provides. If the plaintiff does not, within 3 years after verdict, pay the amount assessed for improvements and taxes he is barred of the right to recover, whether or not it is provided in the judgment. If judgment has not been entered within such time plaintiff cannot have an entry thereof made subsequently, but the defendant is entitled to have it entered nunc pro tunc and made absolute in his favor. Neeves v. Eron, 73 W 542, 41 NW 725.

275.27 History: R. S. 1878 s. 3099; Stats. 1898 s. 3099; 1925 c. 4; Stats. 1925 s. 275.27.

275.29 History: 1893 c. 282 s. 1 to 6; Stats. 1898 s. 3100a to 3100d; 1925 c. 4; Stats. 1925 s. 275.29 to 275.32; 1935 c. 541 s. 317; Stats. 1935 s. 275.29.

The judgment granted will be subject to 275.29, permitting a defendant, on certain conditions, to elect to purchase the land on which a building encroaches. Gerrits v. Blow, 7 W (2d) 115, 96 NW (2d) 93.

275.33 History: R. S. 1849 c. 111 s. 16; R. S. 1858 c. 146 s. 16; R. S. 1878 s. 3195; Stats. 1898 s. 3195; 1925 c. 4; Stats. 1925 s. 281.13; 1935 c. 541 s. 388; Stats. 1935 s. 275.33.

CHAPTER 276.

Partition.

276.01 History: R. S. 1849 c. 108 s. 1, 4 to 6; R. S. 1858 c. 142 s. 1, 3; R. S. 1878 s. 3101; Stats. 1898 s. 3101; 1909 c. 283; 1925 c. 4; Stats. 1925 s. 276.01; 1935 c. 541 s. 318; 1949 c. 278.

Comment of Advisory Committee, 1949: 276.01 (1) provides that whenever a person has a life estate and is in possession, any action for partition of estates in remainder or reversion shall be subject to such life estate. The amendment to (2) is proposed in order to reconcile (2) with 233.23, as amended by ch. 371, Laws 1947. The widower's curtesy right is now an absolute right, not terminated by his remarriage. His homestead right, like the widow's, may, if there are children, be terminated by remarriage (237.02 (2)), and should be deemed a life estate for the purpose of 276.01. [Bill 415-S]

The holder of undivided interests in 2 separate parcels of land owned in common by persons whose rights were acquired by descent from the same intestate may maintain a single action for the partition of both parcels, and may join as defendants all who have acquired any interest in any part of such land as purchasers from any of his coheirs. Grady v. Maloso, 92 W 666, 66 NW 808.

A life tenant who is not also a joint tenant or a tenant in common of the life estate or the remainder cannot maintain an action for partition. Pabst Brew. Co. v. Melms, 105 W 441, 81 NW 882.

An action under sec. 3101, Stats. 1913, can be maintained only by a person having a presently vested interest therein. Cashman v. Ross, 155 W 558, 145 NW 199; Greeney v. Greeney, 155 W 621, 145 NW 201.

Where the trust was a passive trust in its entirety, legal title in fee simple vested in the beneficiaries subject only to a contingent power of sale in the trustee to sell at the end of 20 years, and any beneficiary or his successor in interest would be entitled to partition during such 20 year period. Janura v. Fencl, 261 W 179, 52 NW (2d) 144.

Partition of joint property as between husband and wife is discussed in Jezo v. Jezo, 23 W (2d) 399, 127 NW (2d) 246, 129 NW (2d) 195.

Partition where a remainderman also holds a life estate in the land. 39 MLR 398.

Partition and dower. 48 MLR 277.

Partition in the modern context. Charney, 1967 WLR 988.

276.02 History: 1851 c. 156 s. 1; R. S. 1858 c. 142 s. 2, 4 to 6; 1861 c. 108; R. S. 1878 s. 3102; Stats. 1898 s. 3102; 1899 c. 336 s. 1; Supl. 1906 s. 3102; 1911 c. 663 s. 434; 1925 c. 4; Stats. 1925 s. 276.02; 1929 c. 210 s. 1; 1935 c. 541 s. 319.