276.55 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153a; 1925 c. 4; Stats. 1925 s. 276.55; 1935 c. 541 s. 354; 1961 c. 495.

276.57 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153c; 1925 c. 4; Stats. 1925 s. 276.57; 1935 c. 541 s. 356.

276.58 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153d; 1925 c. 4; Stats. 1925 s. 276.58; 1935 c. 541 s. 357.

276.59 History: 1905 c. 234 s. 1; Supl. 1906 s. 3153e; 1925 c. 4; Stats. 1925 s. 276.59; 1935 c. 541 s. 358.

CHAPTER 277.

Partition of Personal Property.

277.01 History: 1887 c. 189 s. 1; Ann. Stats. 1889 s. 2327a; Stats. 1898 s. 2327a; Stats. 1923 s. 3153f; 1925 c. 4; Stats. 1925 s. 277.01; 1935 c. 541 s. 359.

In a suit for the partition of personal property the court has general equity jurisdiction. It may appoint a receiver, enter an interlocutory decree, and by decree provide every possible relief made necessary by the exigencies of the case in order to do final and complete justice. Laing v. Williams, 135 W 253, 115 NW 821.

A cheese factory building erected upon a permanent foundation by a voluntary association upon land donated orally for that purpose, but with the condition that the land should revert to the donor whenever the building ceased to be used as a cheese factory, was a proper subject for partition where it appeared that the intent was to give the building the character of personal property. Brobst v. Marty, 162 W 296, 156 NW 195.

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

277.02 History: 1887 c. 189 s. 2; Ann. Stats. 1889 s. 2327b; Stats. 1898 s. 2327b; Stats. 1923 s. 3153g; 1925 c. 4; Stats. 1925 s. 277.02; 1935 c. 541 s. 360.

277.03 History: 1887 c. 189 s. 3; Ann. Stats. 1889 s. 2327c; Stats. 1898 s. 2327c; Stats. 1923 s. 3153h; 1925 c. 4; Stats. 1925 s. 277.03; 1935 c. 541 s. 361.

CHAPTER 278.

Foreclosure of Mortgages.

278.01 History: R. S. 1849 c. 84 s. 76; R. S. 1858 c. 145 s. 1; R. S. 1878 s. 3154; Stats. 1898 s. 3154; 1925 c. 4; Stats. 1925 s. 278.01; 1931 c. 79 s. 28.

Revisor's Note, 1931: The addition repeats the substance of part of 281.03 (the lis pendens section) and is made to obviate the mistake of entering foreclosure judgment in disregard of the requirement that the notice of the pendency of the action must be filed twenty days before judgment. [Bill 51-S, s. 28]

The mortgagee is not precluded from foreclosing in equity because the power of foreclosure by advertisement is given in the mortgage. That remedy is merely cumulative. Walton v. Cody, 1 W 420.

The statute has reference to ordinary mortgages which leave the fee of the mortgaged premises in the mortgagors. A sale is necessary to divest the mortgagor of the fee. Church v. Smith, 39 W 492.

The requirement that the premises be sold is for the benefit of the owner of the equity of redemption and those interested under or through him. Bresnahan v. Bresnahan, 46 W 385, 1 NW 39.

In foreclosure, where it is doubtful whether plaintiff's rights are those of a mortgagee or legal owner under a contract to convey, the court inclines to the former construction by the parties. In such case judgment of foreclosure and sale should be rendered. Rogers v. Burrus, 53 W 530, 9 NW 736.

The object of foreclosure is to bar the mortgagor and those claiming subject to the mortgage. Plaintiff will not be compelled to litigate questions of paramount title. Hekla Fire Ins. Co. v. Morrison, 56 W 133, 14 NW 12.

A mortgage may be foreclosed though the statute of limitations has barred suit on the note which it was given to secure. Cerney v. Pawlot, 66 W 262, 28 NW 183.

A personal judgment is erroneous; this can only be contained in a deficiency judgment. Duecker v. Goeres, 104 W 29, 80 NW 91.

The suit is wholly regulated by statute, leaving nothing to the ordinary discretionary power. Sands v. Kaukauna W. P. Co. 115 W 229, 91 NW 679.

Where the legal title to mortgaged premises remains in the mortgagor, a receiver can be appointed in foreclosure proceedings, but only for the purpose of preventing waste; but delinquent taxes and unpaid interest depreciate the value of the mortgage security and amount to waste. Grether v. Nick, 193 W 503, 215 NW 571.

On grounds for employment of a receiver in foreclosure proceedings, see note to 268.16, citing Crosby v. Keilman, 206 W 252, 239 NW 431.

Where a land contract required the purchaser to pay the purchase price to children of the vendor and to execute a new contract and mortgage when a deed should be given, but a deed was given without the execution of a new contract or mortgage, the debt was not thereby extinguished, and the vendor and the beneficiaries under the land contract were equitable mortgagees having a specifically enforceable right to the execution of a mortgage and new contract, and to subject the premises to the payment of the debt. Knutson v. Anderson, 216 W 69, 255 NW 907.

A holder of a negotiable mortgage note, who had purchased the same after maturity from the agent of parties who had previously assumed the mortgage debt and who through the agent had previously paid the original mortgagee, could not foreclose the mortgage, since the note had been discharged by such payment and was no longer a subsisting obligation. Michalak v. Nowinski, 220 W 1, 264 NW 498.

A lessee of premises involved in an action to foreclose a mortgage, who had not been joined as a party, but who, pursuant to an

order to show cause why he should not be required to vacate the mortgaged premises, entered a general appearance in such proceeding and moved for an adjournment and leave to produce testimony to enable the court to adjudge the rights of the parties therein, is deemed to have waived objection to the jurisdiction of the trial court to make an order requiring him to vacate. Evans v. Orgel, 221 W 152, 266 NW 176.

A mortgagee's agreement with a grantee, who had assumed a first mortgage debt, to extend the time of payment thereof, had the effect of releasing the mortgagor from personal liability, but did not destroy the mortgagee's right by foreclosure to subject the mortgaged land to payment of the debt, and did not have the effect of subordinating the lien of the first mortgage to the lien of a second mortgage. (Sexton v. Pickett, 24 W 346, distinguished.) Farmers & Merchants S. Bank v. Hildebrandt, 221 W 394, 267 NW 42, 268 NW 212.

See note to 267.01, citing Roberts v. Saukville Canning Co. 247 W 277, 19 NW (2d) 295.

There is no requirement in the law that any party who acquires an interest in the mortgagor's equity after the filing of a proper notice of lis pendens should be served with any notice of any step to be taken in the prior-instituted mortgage foreclosure suit. United States v. Klebe T. & D. Co. 5 W (2d) 392, 92 NW (2d) 868.

An action to foreclose a mortgage is a quasi proceeding in rem, wherein the property, as well as the parties, is under the jurisdiction of the court. Syver v. Hahn, 6 W (2d) 154, 94 NW (2d) 161.

278.02 History: 1915 c. 235; Stats. 1915 s. 3154m; 1925 c. 4; Stats. 1925 s. 278.02; 1935 c. 541 s. 362.

278.02 and 278.15 are not mutually exclusive. Syver v. Hahn, 272 W 165, 74 NW (2d) 803.

278.04 History: 1862 c. 243 s. 2, 3; R. S. 1878 s. 3156; Stats. 1898 s. 3156; 1925 c. 4; Stats. 1925 s. 278.04; 1935 c. 541 s. 364.

In an action against a mortgagor and a subsequent incumbrancer the complaint demanded judgment for deficiency against the former, a judgment was entered against defendant, without naming which one. Such a judgment could not be construed to apply to the incumbrancer. Baasen v. Eilers, 11 W 277.

The practice of uniting the legal cause of action for a debt secured by a mortgage with the equitable remedy of foreclosure prevailed before the adoption of the constitution, and the provision therein preserving the right of jury trial does not apply to such actions. Connecticut M. L. Ins. Co. v. Cross, 10 W 109; Stilwell v. Kellogg, 14 W 461.

On a note by partners for a partnership debt personal judgment for deficiency may be demanded against one only. Merchants Nat. Bank v. Raymond, 27 W 567.

A judgment which provides that the sheriff shall specify the amount of deficiency in his report and that the defendant pay the same is erroneous. Tormey v. Gerhart, 41 W 54.

Where a joint and several guaranty is secured by mortgage of only one of the guarantors all of them may be made defendants to an action for its foreclosure and for judgment against them all for any deficiency. Fond du Lac H. Co. v. Haskins, 51 W 135, 8 NW 15.

Under ch. 143, Laws 1877, an additional personal judgment against a mortgagor after foreclosure sale for a liability not previously determined was unauthorized. Northwestern M. L. Ins. Co. v. Droun, 51 W 419, 8 NW 237.

A demand of execution for any deficiency remaining unpaid after applying proceeds of sale of mortgaged premises is sufficient to authorize a judgment for deficiency. Olinger v. Liddle, 55 W 621, 13 NW 703.

A judgment in personam followed by the usual order of sale and judgment for deficiency is construed as a finding of the sum due. Boynton v. Sisson, 56 W 401, 14 NW 373.

A judgment which makes the heirs and devisees of the deceased mortgagor personally liable for any deficiency to the extent of the mortgagor's property which shall have come to them and which makes such deficiency a lien upon the property of the deceased mortgagor without proof that they have incurred such liability is erroneous. Reinig v. Hecht, 58 W 212, 16 NW 548.

If the statute of limitations has run against the note secured by the mortgage before action to foreclose was begun there can be no judgment for deficiency. Cerney v. Pawlot, 66 W 262, 28 NW 183.

A judgment is not irregular because it provides that the plaintiff shall have execution for any deficiency there may be after a sale of the premises, because if he should undertake to issue execution without first obtaining an order the defendant could protect himself by a motion to set the execution aside. Leary v. Leary, 68 W 662, 32 NW 623.

Sec. 3156, R. S. 1878, does not extend to actions to foreclose pledges, chattel mortgages and other liens. Hence a cause of action upon a note secured by a pledge cannot be joined with a cause to foreclose the pledge, unless both causes of action affect all the parties. Plankinton v. Hildebrand, 89 W 209, 61 NW 839.

Where a second mortgagee forecloses, the first mortgagee not being a party, the former cannot claim judgment for deficiency for a sum greater than is due him after deducting the net proceeds of the sale. Kasson v. Tousey, 96 W 511, 71 NW 894.

See note to 274.09, citing Kane v. Williams, 99 W 65, 74 NW 570.

A judgment for deficiency is improper except in conformity to an order included in the decree. Packard v. Kinzie A. H. Co. 105 W 323, 81 NW 488.

If a sale pursuant to a judgment of foreclosure be set aside because of a clerical mistake and a resale be ordered, a judgment for deficiency rendered pursuant to the report on the first sale should be set aside because the remedy for the collection of the mortgage indebtedness by a sale of the entire mortgaged property must be exhausted as a condition precedent to such a judgment. Bostwick v. Van Vleck, 106 W 387, 82 NW 302.

Where one executed a deed making a covenant on his part to pay the note and mortgage, he became personally liable for the debt secured by the mortgage and upon the same contract which the mortgage was given to secure, and was properly united as a defend-

ant in the action. Kuener v. Smith, 108 W 549, 84 NW 850.

An attempt in foreclosure to obtain a judgment for deficiency against one who had assumed the payment of the mortgage debt, which failed because he was not served with process, was not the election of a remedy inconsistent with a remedy by subsequent action at law against him upon the mortgage note. Carpenter v. Meachem, 111 W 60, 86 NW 552.

Judgment for deficiency may go against a purchaser from the mortgagor, who, as a part of the purchase price, has assumed to pay the mortgage debt. Palmeter v. Carey, 63 W 426, 21 NW 793, 23 NW 586; Lenz v. Chicago & Northwestern R. Co. 111 W 198, 86 NW 607.

There can be no judgment for a deficiency arising from sale under a final judgment establishing a trust and giving the defendant a lien and providing for sale to satisfy the same, but without personal judgment in case of deficiency. Fuller v. Abbe, 114 W 127, 89 NW 825.

One of the joint makers of a note and mortgage, who had secured an assignment of them after default in payment, may bring an action to foreclose and demand judgment for deficiency both against the purchaser of the land who had assumed the loan and against his co-makers on the note, the judgment against the latter not to exceed more than their equitable proportion of such deficiency. Fanning v. Murphy, 117 W 408, 94 NW 335.

A judgment for deficiency is conclusive if not appealed from and cannot be questioned on an appeal from a former judgment for deficiency. Pereles v. Leiser, 123 W 233, 101 NW 413.

Where plaintiff fails to obtain a judgment for foreclosure, a personal judgment against other defendants liable upon the debt cannot be entered in that action. Marling v. Maynard, 129 W 580, 109 NW 537.

A prayer for general relief is not a demand for judgment for deficiency. Wisconsin Nat. L. & B. Asso. v. Pride, 136 W 102, 116 NW 637.

When a mortgage contains a personal covenant to pay the debt, and the foreclosure complaint asks as relief a personal judgment and a foreclosure judgment without any judgment for deficiency, the court may grant such relief in the absence of any request for an ordinary foreclosure judgment. Ogden v. Bradshaw, 161 W 49, 150 NW 399, 152 NW 654.

No judgment for deficiency can be had against the heirs of a deceased mortgagor if no claim therefor was presented to the county court and an administration of the mortgagor's estate has been had and fully completed before the commencement of the foreclosure. Schmidt v. Grenzow, 162 W 301, 156 NW 143.

The right to enforce personal liability in an action to foreclose a mortgage is purely statutory. In an action of foreclosure the trial court had no authority to render judgment against plaintiff's assignor for deficiency on its guaranty of collection of the mortgage, since the liability on the guaranty was not on the same contract which the mortgage was given to secure. Stellmacher v. Union M. L. Co. 195 W 635, 219 NW 343.

The indorsers and the guarantors of a note, where due demand was made and notice given, may be joined in an action to foreclose the mortgage given as security for the note, and judgment for deficiency may be recovered against them. Halbach v. Trester, 102 W 530, 78 NW 759; Westboro L. Co. v. Schwenker, 199 W 350, 226 NW 313.

A mortgagee may join an action for foreclosure, without asking for a deficiency judgment, and an action on the mortgage note in the same complaint, setting up the causes of action separately, where the parties are limited to the parties to the note and mortgage. Cavadini v. Larson, 211 W 200, 248 NW 209.

A court's power to limit a mortgagee's statutory right to deficiency judgment on foreclosure should be exercised with circumspection and solely for the purpose of preventing a result that shocks the conscience. An order finding that unimproved unproductive property was worth $10 a front foot more than the mortgagee's bid, confirming sale on that basis and reducing the mortgagee's deficiency judgment accordingly, was error. Weimer v. Uthus, 217 W 56, 258 NW 358.

In an action for foreclosure of a mortgage, wherein the judgment provided that plaintiff was to have a deficiency judgment if the proceeds of the sale should be insufficient to pay the amount due, the trial court, after confirming the sale, had no power to deny the plaintiff a deficiency judgment on the ground that the value of the premises sold was in excess of the price obtained on the sale, although the court, prior to the sale, had found the value of the premises to be in excess of the price obtained on the sale. (Big Bay Realty Co. v. Rosenberg, 218 W 318, 259 NW 735, applied.) Buel v. Austin, 219 W 397, 263 NW 82.

A pending action for foreclosure of a mortgage and for deficiency judgment constitutes a defense to a subsequent action commenced by the same plaintiff, demanding judgment on the obligation secured by the mortgage. Farmers & Merchants Bank v. Matsen, 219 W 401, 263 NW 192.

The complaint in an action for strict foreclosure of a land contract is deemed amended to include a request for a deficiency judgment, where the supreme court on a former appeal held that the plaintiffs were entitled to the remedy to which they would have been entitled had they commenced an action for specific performance of the contract to execute a mortgage and had they been awarded a foreclosure of such mortgage. Plaintiffs who were properly before the trial court were entitled to a deficiency judgment, although their interests were several and not joint and several. Knutson v. Anderson, 220 W 364, 265 NW 91.

The trial court, having confirmed a foreclosure sale of mortgaged premises, could only render a deficiency judgment for the amount of deficiency appearing in the sheriff's report of sale. Drach v. Hornig, 221 W 575, 267 NW 291.

In an action to foreclose a mortgage where service of the summons is made by publication on a nonresident mortgagor, the court has no jurisdiction to render a personal judgment against him for deficiency, and such judgment is void and may be attacked collaterally.

Riley v. State Bank of De Pere, 223 W 16, 269 NW 722.

278.05 History: R. S. 1849 c. 84 s. 86, 87; R. S. 1858 c. 145 s. 4, 5; R. S. 1878 s. 3157; Stats. 1898 s. 3157; 1925 c. 4; Stats. 1925 s. 278.05; 1935 c. 541 s. 365.

The holder of a mortgage providing that the whole sum shall become due upon default, at the option of the mortgagee, must declare his option before commencing suit. Basse v. Gallagher, 7 W 442.

The statutory rule applies to cases where only a part of the mortgage debt is due and the premises cannot be sold in parcels. Manning v. McClurg, 14 W 350.

If there be any dispute as to the amount due for principal, interest or costs, these questions must be disposed of on defendant's motion to dismiss the action on payment of what shall be found due. Schroeder v. Laubenheimer, 50 W 480, 7 NW 427.

The mortgagee may foreclose when any part of the secured debt becomes due and remains unpaid independently of the terms of the mortgage. Where that instrument is conditioned for the payment of a sum according to the terms of a note, such terms are incorporated in the mortgage, and a failure to comply therewith is a breach of the condition. Scheibe v. Kennedy, 64 W 564, 25 NW 646.

Interest was properly allowed by the court on the mortgages in accordance with their terms, as the right of the mortgagees to receive interest is not suspended during an operating receivership. Thomsen v. Cullen, 196 W 581, 219 NW 439.

Such option must be declared by the mortgagee within a reasonable time after default. A notice of election given 6 weeks after default was too late under the circumstances of the case. Wilson v. Winter, 6 F 16.

278.06 History: R. S. 1849 c. 84 s. 88; R. S. 1858 c. 145 s. 6; R. S. 1878 s. 3158; 1895 c. 161; Stats. 1898 s. 3158; 1925 c. 4; Stats. 1925 s. 278.06; 1935 c. 541 s. 366.

The judgment, where a portion of debt is not due, should determine the sum actually due and the amount secured by mortgage and unpaid, and should contain a provision for a stay of proceedings in case of payment. Where the court is satisfied that sale in parcels is proper it should direct sale of so much as may be necessary and provide that in case of default plaintiff may apply for a further order for the sale of so much as may be sufficient to satisfy the amount to become due. Rice v. Cribb, 12 W 179.

Where judgment is for sale of so much only as will raise the sum actually due it need not be conditional or provide for a stay. Roe v. Nicholson, 13 W 373.

The court may take the proof without a reference. Stewart v. Nettleton, 13 W 465.

Where only part of a debt is due and the property cannot be sold in parcels judgment should direct payment of the sum due from the proceeds of sale and that the surplus be paid into court. Walker v. Jarvis, 16 W 28.

Where defendant does not have an opportunity to be heard concerning the sale of the property in parcels the order therefor will be set aside on motion made at the same term. Brockway v. Newton, 49 W 406, 5 NW 781.

Secs. 3158-3160, Stats. 1898, require, in case only a part is due, that there shall be an adjudication whether the premises can be separated so that only enough thereof need be sold to satisfy the portion of the mortgage which is due, and if so, that the court shall adjudicate how that division shall be made. Hiles v. Brooks, 105 W 256, 81 NW 422.

278.07 History: R. S. 1849 c. 84 s. 90, 91; R. S. 1858 c. 145 s. 7; R. S. 1878 s. 3159; 1879 c. 194 s. 2 sub. 26; Ann. Stats. 1889 s. 3159; Stats. 1898 s. 3159; 1925 c. 4; Stats. 1925 s. 278.07; 1935 c. 541 s. 367.

278.08 History: R. S. 1858 c. 145 s. 8, 9; R. S. 1878 s. 3160; Stats. 1898 s. 3160; 1925 c. 4; Stats. 1925 s. 278.08; 1935 c. 541 s. 368.

278.09 History: 1876 c. 152; R. S. 1878 s. 3161; Stats. 1898 s. 3161; 1925 c. 4; Stats. 1925 s. 278.09.

Sec. 3161, R. S. 1878, is inapplicable to a mortgagor when he is not made a party. But if it applies to such a case it does not authorize a judgment against such a party for an amount in excess of that for which he would have been liable if he had been made a defendant in the first instance. Moore v. Kirby, 76 W 273, 45 NW 114.

A complaint sufficiently alleging that certain defendants have rights in the mortgaged premises which plaintiff is entitled to have foreclosed by the judgment and sale is good on demurrer. Citizens' L. & T. Co. v. Witte, 110 W 545, 86 NW 173.

Upon foreclosure the court had power within one year after judgment of foreclosure to determine that plaintiff's predecessor owned the premises upon tax deed and that the same were not liable to foreclosure, and an order modifying the judgment accordingly could not be attacked collaterally. Mason v. West P. R. Co. 193 W 14, 213 NW 286.

Where the record in a mortgage foreclosure action showed the existence of a prior subsisting mortgage, bidders were entitled to assume that purchasers at the sale would buy it subject to the prior mortgage. Plaintiffs having failed to assert a claim before the sale could not have the land declared free from the prior mortgage after the sale. In this case the holder of the first mortgage was not entitled to any of the proceeds of sale under foreclosure of the second mortgage. DeKeyser v. State Bank of Maplewood, 194 W 61, 215 NW 444.

An amended complaint filed after the deficiency judgment rendered in a foreclosure action, which alleged that the defendant, who had assigned the mortgage to the plaintiffs by an instrument clearly indicating that all of the lands described in the mortgage were covered by the assignment, had concealed the fact that part of the land conveyed had been sold and released from the lien of the mortgage, and that plaintiffs did not know of such fact at the commencement of the action, states a cause of action for fraud. The measure of plaintiffs' damage was only the value of the land released from the mortgage. Wooster v. Weyh, 194 W 85, 216 NW 134.

278.09 is not a statutory substitute for a bill to redeem. Buchner v. Gether Trust, 241 W 148, 5 NW (2d) 806; Winter v. O'Neill, 241 W 280, 5 NW (2d) 809.

278.10 History: R. S. 1849 c. 84 s. 84, 85; R. S. 1858 c. 145 s. 2, 3; 1877 c. 143 s. 1, 3; R. S. 1878 s. 3155, 3162; Stats. 1898 s. 3155; 3162; 1925 c. 4; Stats. 1925 s. 278.03, 278.10; Court Rule XXV; Sup. Ct. Order, 212 W xviii; Stats. 1933 s. 278.03, 278.095, 278.10; 1935 c. 541 s. 363, 369; Stats. 1935 s. 278.10; 1937 c. 422; Sup. Ct. Order, 229 W viii; 1949 c. 304; 1959 c. 626.

Revisor's Note, 1935: Disbursement of proceeds of sale is covered by 278.16. Execution of a deed is required by 278.17. Surplus goes under 278.03 and 278.08. The proceeds should not be paid before the sale is confirmed. [Bill 50-S, s. 369]

On deficiency judgments see notes to 278.04.

A decree of foreclousre and a sale merges the interests of the parties thereto and vests them in the purchaser. Tallman v. Ely, 6 W 244.

A judgment is not defective for directing the officer to make and deliver to the purchaser at sale a certificate as required by law, without further specification. Walker v. Jarvis, 16 W 28.

A judgment foreclosing the equity of redemption, growing out of an oral defeasance accompanying a deed absolute on its face, should provide the same period for redemption as in other cases. Briggs v. Seymour, 17 W 255.

A judgment not containing the redemption clause provided for was void. Walker v. Gulliford, 36 W 325.

When an irregular judgment is cured by act of the purchaser and is not injurious to the former owner it will not be set aside. Peterman v. Turner, 37 W 244.

Misdescription of premises in a decree may be corrected after confirmation of sale under a decree which improperly describes them, and a sale made under it as amended. Seeley v. Manning, 37 W 574.

The judgment of foreclosure and sale is a final and the only judgment in the case. Any direction of the court subsequently is an order. Tormey v. Gerhart, 41 W 54.

A judgment providing that if the proceeds of the sale are insufficient the sheriff should specify the amount of deficiency and that defendants should pay the same was a judgment for deficiency before sale and erroneous. Tormey v. Gerhart, 41 W 54.

It is irregular to take any step towards the sale until the expiration of one year from date of judgment. Northwestern Mut. Life Ins. Co. v. Neeves, 46 W 147, 49 NW 832.

Notice of sale must be published for full 6 weeks after expiration of one year from date of judgment. The presumption is that publication of notice in daily papers is first made on day of date of notice; and where published notice is dated before expiration of one year there is an apparent irregularity. Kopmeier v. O'Neil, 47 W 593, 3 NW 365.

The judgment must conform to the statute in force when it is rendered. Welp v. Gunther, 48 W 543, 4 NW 647.

Sec. 3162, R. S. 1878, authorizes a judgment for deficiency, which must be entered after the sale and confirmation. Welp v. Gunther, 48 W 543, 4 NW 647.

The judgment was for the amount of the mortgage debt, costs and disbursements. It did not authorize the sheriff to pay out of the proceeds of the sale any sums which the mortgagee might thereafter be obliged to pay for insurance. The sale was for the amount specified in the judgment. A subsequent judgment or order for the amount paid by the mortgagee for insurance during the year allowed for redemption was unauthorized. Northwestern Mut. Life Ins. Co. v. Droun, 51 W 419, 8 NW 237.

A recital in a judgment cannot be contradicted by affidavits in support of a motion to vacate the judgment. Mitchell v. Rolison, 52 W 155, 8 NW 886.

A judgment of foreclosure which embraces an order directing a judgment for any deficiency bars an action upon the note secured by the mortgage. Witter v. Neeves, 78 W 547, 47 NW 938.

In order that a sale might be made within one year, the consent of a subsequent incumbrancer who is a defendant is necessary. Hiles v. Milwaukee P. & L. Co. 85 W 90, 55 NW 175.

Sec. 3162, Stats. 1898, is mandatory and provides for a personal recovery only by means of a deficiency judgment and in that case only against the person personally liable. Duecker v. Goeres, 104 W 29, 80 NW 91.

A mistake in drawing a foreclosure judgment whereby it fails to conform to the judgment pronounced may be corrected in the court where the mistake occurred in the absence of equities rendering such correction unjust. Packard v. Kinzie A. H. Co. 105 W 323, 81 NW 488.

Where a sale is unjust and inequitable the court should adjust the rights of the parties on equitable principles, fully protecting the rights of the innocent so as to place the parties in as favorable a position at least as they were before the sale. Veit v. Meyer, 105 W 530, 81 NW 653; Kremer v. Thwaits, 105 W 534, 81 NW 654.

Where a sheriff, in ignorance of an unusual and peculiar provision of a foreclosure judgment requiring him to satisfy the plaintiff's demands before discharging tax liens, paid 2 tax liens before confirmation, an order providing that the sheriff should have a lien upon the premises superior to the plaintiff's lien for such taxes and interest did not justify a reversal. Kremer v. Thwaits, 105 W 534, 81 NW 654.

An order setting aside a sale for inadequacy and mistake, etc., is a matter resting in the sound discretion of the trial court, and will not be disturbed except for an abuse thereof. John Paul L. Co. v. Neumeister, 106 W 243, 82 NW 144.

If a sale pursuant to a judgment of foreclosure be set aside because of a clerical mistake therein and a resale be ordered, a judgment for deficiency rendered pursuant to the report on the first sale should be set aside. Bostwick v. Van Vleck, 106 W 387, 87 NW 302.

Secs. 3154 and 3162, Stats. 1898, do not contemplate a sale of the mortgaged property for the purpose of providing funds to reimburse the mortgagee for expenses necessarily made by him between the date of the judgment and the day of sale to protect the property from tax liens. Sands v. Kaukauna W. P. Co. 115 W 229, 91 NW 679.

Where a mortgagee by inducing prospective buyers not to bid was enabled to obtain the

lands at much less than their value and almost immediately thereafter sold to one who was present at the sale at an advance of more than 50%, he must account to the mortgagor for the amount he actually received for the lands. Huntzicker v. Dangers, 115 W 570, 92 NW 232.

Where the trial court held that certain defendants were not liable for any deficiency and the supreme court reversed the judgment and remanded the case to the trial court with direction to complete the entry of judgment, there could be no sale as against such defendants until the expiration of the year from the completion of the judgment. Citizens' L. & T. Co. v. Witte, 119 W 517, 97 NW 161.

Where a judgment on default was signed by the court and costs taxed and inserted, the failure of the clerk to mark the papers as filed did not prevent the actual filing from being effectual, nor did the change in the judgment reducing the amount of solicitors' fees extend the time for redeeming from the judgment which had originally been entered. Hart v. Schlitz Brew. Co. 120 W 553, 98 NW 526.

The inclusion in a foreclosure judgment of an order for personal judgment for deficiency is ground for an appeal although it does not appear that there will be any deficiency. Wisconsin N. L. & B. Asso. v. Pride, 136 W 102, 116 NW 637.

Where the defendant in a foreclosure paid the amount due into court a third party intervened claiming to be the owner of the note and mortgage. Held, that the action had been changed to an action of interpleader and the judgment need not conform to the provisions of sec. 3162. Swanby v. Northern S. Bank, 150 W 572, 137 NW 763.

The purchaser of mortgaged land in a foreign state, who assumed the mortgage indebtedness, could be sued by the mortgagee for personal judgment without foreclosure. First T. Co. v. Calumet S. B. F. Ranch, 210 W 278, 246 NW 331.

In ordering a foreclosure sale or resale the court may take notice of economic emergency and fix the minimum price at which the premises must be bid in if the sale is confirmed. On application to confirm the foreclosure sale, the court may establish the property's value and require that it be credited on judgment, giving the mortgagee the option to accept or not. Suring State Bank v. Giese, 210 W 489, 246 NW 556.

The refusal of the trial court to confirm a foreclosure because of the refusal of the mortgagees to bid the upset price fixed by the trial court was an abuse of discretion, under circumstances disclosing that the mortgagees were aged and in necessitous circumstances; that the buildings on the premises were old and some were dilapidated and useless and beyond repair; that 3 times the trial court ordered a resale of the premises, and each time no bidders except the mortgagees were found; that the trial court based its upset price on the price of farm products prevailing during 1910 to 1914; that there was no testimony adduced at the hearing to show that a better price would be bid at the second sale or at the third sale, which sales demonstrated that no better price would be offered; and that the mortgagees expressly waived a deficiency judgment. Kremer v. Rule, 216 W 331, 257 NW 166.

Where a judgment on foreclosure of a land contract required, as a condition to confirmation of the sale, that the fair value of the property as determined by the trial court be credited on the amount due, and the fair value as so determined after sale exceeded the amount due, the vendor nevertheless could not be compelled to accept a confirmation of the sale and a denial of a deficiency judment, but was entitled in the alternative to reject confirmation and have a resale of the property. Wahl v. H. W. & S. M. Tullgren, Inc. 222 W 306, 267 NW 278.

A promissory note is the evidence of indebtedness, and the substitution of one note for another does not discharge the debt evidenced thereby nor release the security given for its payment. A debt is the principal thing, of which the mortgage is an incident, and the transfer of the debt carries the mortgage with it. In re Beaver D. Dist. 244 W 603, 13 NW (2d) 76.

In an action to foreclose a mortgage allegedly executed by the mother of a defendant, the defendant son was estopped from attacking the execution of the mortgage and claiming that the signature of the mother thereto was a forgery, where, admittedly, a deed of the premises by the mother to the son was expressly made subject to the mortgage, and a deed by the son to the mother, executed prior to the mortgage, was executed in fraud of the son's creditors. Virkshus v. Virkshus, 250 W 90, 26 NW (2d) 156.

Assuming, without deciding, that equity might relieve a mortgagor from that part of a foreclosure judgment authorizing the foreclosure sale to be advertised and made as soon as possible after the expiration of one year from entry of the judgment, on a sufficient showing that enforcement of such part of the judgment would offend against equity and good conscience, such power should in any event be exercised sparingly, and only in cases where serious inequity, approaching at least the unconscionable, would result from carrying out the original judgment. Welfare B. & L. Asso. v. Hennessey, 2 W (2d) 123, 86 NW (2d) 1.

Where judgment of foreclosure adjudged that defendants be foreclosed of all right in the mortgaged premises, except the right to redeem before sale as provided by law, and no appeal was taken, nor review asked, from this portion of the judgment, it was res adjudicata, so that the rights of the holder of a second mortgage were foreclosed and restricted to right to redeem before sale. Syver v. Hahn, 6 W (2d) 154, 94 NW (2d) 161.

Where the attorney for defendant judgment creditor, in an action to foreclose a mechanic's lien, did not prepare and serve an answer or demurrer, but did admit service of a summons and complaint and served and filed a notice of retainer and appeared at the trial, the judgment creditor should have been permitted to offer proof as to its judgment being a valid judgment lien and to establish the priority of its lien. Builder's Lumber Co. v. Stuart, 6 W (2d) 356, 94 NW (2d) 630.

278.101 History: 1959 c. 626; Stats. 1959 s. 278.101.

278.11 History: 1877 c. 143 s. 1; R. S. 1878 s. 3163; Stats. 1898 s. 3163; 1925 c. 4; Stats. 1925 s. 278.11; 1949 c. 245.

In an action to foreclose a mortgage of all a debtor's land a subsequent mortgagee, made defendant, cannot insist that the homestead, on which his mortgage is not a lien, shall be first sold to pay the prior mortgage. Hanson v. Edgar, 34 W 653.

Nor can a subsequent mortgagee of same lands, except the homestead, insist that such homestead be first sold to pay the mortgage in suit. Smith v. Wait, 39 W 512.

A vendor's lien on a homestead and adjoining land cannot be waived on the latter without releasing the former to the extent of the value of the land released, such lien being treated as a mortgage. Carey v. Boyle, 56 W 145, 14 NW 32.

The court in which an equitable action in aid of an execution is pending has no jurisdiction to require the court in which some future action to foreclose a mortgage involved in that action may be brought to make any special order for the sale of the homestead. Rozek v. Redzinski, 87 W 525, 58 NW 262.

278.12 History: 1877 c. 143 s. 4, 5; R. S. 1878 s. 3164; 1889 c. 186; Ann. Stats. 1889 s. 3164; 1891 c. 303 s. 1; Stats. 1898 s. 3164; 1925 c. 4; Stats. 1925 s. 278.12; 1935 c. 541 s. 370; 1969 c. 291.

If the principal debtor has acquiesced in a judgment to pay more than legal interest others will not be heard to complain unless the show that they have been injured. Boyd v. Sumner, 10 W 41.

Upon foreclosure of mortgage of lands belonging to the estate of a decedent the administrators cannot, for the purpose of preventing a sale, make an agreement which will bind the estate for the payment of a higher rate of interest than allowed by law. Williams v. Troop, 17 W 463.

After sale on foreclosure and before the sheriff has executed his deed the removal of fixtures by the mortgagor is waste for which the purchaser may recover damages. Lackas v. Bahl, 43 W 53.

If the judgment allows a higher rate of interest than is authorized the plaintiff may remit the excess or the trial court may correct the error by modifying the judgment on plaintiff's application. German M. F. Ins. Co. v. Decker, 74 W 556, 43 NW 500.

An appeal from a judgment providing an excessive rate of interest is without merit where the attention of the trial court was not called to the obvious mistake. Windross v. McKillop, 98 W 525, 74 NW 342.

278.13 History: 1876 c. 141; 1877 c. 143 s. 6; R. S. 1878 s. 3165; Stats. 1898 s. 3165; 1925 c. 4; Stats. 1925 s. 278.13; 1935 c. 541 s. 371.

The offer must be accompanied by money; a bank check is not a good tender. Lewis v. Larson, 45 W 353.

Under secs. 3165 and 3167, R. S. 1878, a mortgagor has paramount and absolute right to redeem any time before a sale; and a deposit previously made by a subsequent lienholder for the purpose of redemption becomes of no effect. Wylie v. Welch, 51 W 351, 8 NW 207.

Title on sale does not pass so as to vest in the purchaser the right of possession until the sale is confirmed, and the right of redemption is not barred until confirmation of the sale. Gerhardt v. Ellis, 134 W 191, 114 NW 495.

A contract executed pending the foreclosure of a mortgage, giving the mortgagors 9 months to find a purchaser for the premises, failing which the premises were to be sold at public auction, and providing for a conveyance in escrow by the mortgagors to a named third person, did not place the burden upon the mortgagee to show affirmatively that such conveyance was voluntarily based upon an adequate consideration untainted by fraud and made without advantage being taken of the debtor's necessity. Waukesha Nat. Bank v. Dewey, 216 W 524, 257 NW 622.

278.14 History: R. S. 1878 s. 3166; Stats. 1898 s. 3166; 1925 c. 4; Stats. 1925 s. 278.14.

Sec. 3166, R. S. 1878, gives only an additional remedy to the tenant desiring to redeem, but does not supersede the previously established rule that when the estates of 2 persons are subject to a common mortgage which one pays for the benefit of both, he becomes entitled to a lien upon his cotenant's share of the estate to the amount of equitable proportions of the sum paid to redeem, provided the equities of the parties are equal. Connell v. Welch, 101 W 8, 76 NW 596.

278.15 History: 1876 c. 141; 1877 c. 143 s. 6; R. S. 1878 s. 3167; Stats. 1898 s. 3167; 1925 c. 4; Stats. 1925 s. 278.15; 1935 c. 541 s. 372.

A second mortgagee who advanced interest due on a first mortgage to protect his own interest became subrogated to the extent of his advances to the lien of the first mortgage. Vogt v. Calvary Lutheran U. M. Society, 213 W 380, 251 NW 239.

See note to 281.01, citing Buchner v. Gether Trust, 241 W 148, 5 NW (2d) 806, and Winter v. O'Neill, 241 W 280, 5 NW (2d) 809.

278.15 and 278.02 are not mutually exclusive. Syver v. Hahn, 272 W 165, 74 NW (2d) 803.

Rights of junior lienholders in Wisconsin. Becker, 43 MLR 89.

278.16 History: 1877 c. 143 s. 7; R. S. 1878 s. 3168; Stats. 1898 s. 3168; 1925 c. 4; Stats. 1925 s. 278.16; 1933 c. 304; 1935 c. 541 s. 373; 1935 c. 542; Sup. Ct. Order, 221 W vi; Sup. Ct. Order, 225 W v; 1959 c. 302; 1969 c. 276 s. 591 (1).

The sale is not regular unless notice has been published for 6 full weeks after the expiration of one year from the date of judgment. Kopmeier v. O'Neil, 47 W 593, 3 NW 365.

Irregularities in a foreclosure sale must be taken advantage of by an appeal from the order of confirmation. They are waived if the defendant with notice of them surrenders possession of the premises for a valuable consideration coming from the purchaser at the sale. Trilling v. Schumitsch, 67 W 186, 30 NW 222.

Where the sheriff announced that 10% down payment would be required, and refused bids of $51,000 and $52,000 because bidders tendered only $100 deposits, confirmation of a sale for $50,570 was not error, since the statute merely

gave the sheriff discretion whether to sell for cash or to accept down payment, and provided minimum amount of down payment. Plankinton Pack. Co. v. Cincrete Corp. 225 W 239, 272 NW 836.

It is proper for the trial court to amend a 10-year old foreclosure judgment to delete a limit on the amount to be required as a down payment on the sale where after the first sale the successful bidder forfeited the down payment. Bihlmire v. Hahn, 31 W (2d) 537, 143 NW (2d) 433.

Requiring more that $100 down payment, particularly on a second sale, is not an abuse of discretion. Hales Corners S. & L. Asso. v. Kohlmetz, 36 W (2d) 627, 154 NW (2d) 329.

278.162 History: Court Rule XXV; Sup. Ct. Order, 212 W xviii; Stats. 1933 s. 278.095 (4); 1935 c. 541 s. 369, 373; 1935 c. 542; Stats. 1957 s. 278.102; 1959 c. 19; Stats. 1959 s. 278.162.

Editor's Note: The text of this section was 278.095 (4), Stats. 1933. It was omitted from the statutes of 1935 and subsequent editions by oversight resulting from an unnoticed conflict of legislative acts. The supreme court in Kienbaum v. Haberny, 273 W 413, 78 NW (2d) 888, held that it was still the law and that junior lien holders may participate in the surplus even though they fail to answer the complaint or make an appearance prior to the confirmation of the sale.

278.165 History: 1933 c. 11; 1933 c. 474 s. 1; Stats. 1933 s. 278.105; 1935 c. 319, 449; Sup. Ct. Order, 225 W v; Sup. Ct. Order, 255 W vii; 1959 c. 19; Stats. 1959 s. 278.165.

Editor's Note: In the opinion in Northwestern L. & T. Co. v. Bidinger, 226 W 239, 276 NW 645, there is a statement to the effect that 278.105 (2), derived from ch. 449, Laws 1935, was a legislative recognition or approval of the law of Suring State Bank v. Giese, 210 W 489, 246 NW 556.

Where, on motion to confirm a mortgage foreclosure sale, the court stated that the sale might be confirmed on condition that the deficiency would be a specified amount and that the mortgagee might have a deficiency judgment for that amount, the confirmation was conditional and plaintiff was given option to accept or reject it, and, not having rejected it, must be deemed to have accepted it and to be bound by the terms imposed. First Nat. B. & T. Co. v. Plous Bros. 224 W 634, 272 NW 861.

278.105 (2), Stats. 1935, gave the courts no power which they did not already possess. "Fair value" as used therein is that amount which will not shock the conscience of the court. The lack of higher bids on a resale should be considered by the court when again called on to confirm a sale. It is optional with a mortgagee whether he will credit the fair value of the mortgaged premises as a condition of immediate confirmation, and the crediting of the amount fixed by the court as fair value cannot be compelled, but only a resale of the premises can be ordered. Northwestern L. & T. Co. v. Bidinger, 226 W 239, 276 NW 645; Cameron v. Heinze, 231 W 479, 286 NW 47.

Courts of equity will not refuse to confirm a mortgage foreclosure sale simply because of mere inadequacy of the price, where inadequacy of the price is the only fact appearing, and there is no showing of other facts such as mistake, misapprehension, or inadvertence on the part of the interested parties or intending bidders resulting in failure to obtain a fair and adequate price. A. J. Straus Paying Agency v. Jensen, 226 W 462, 277 NW 105; Cameron v. Heinze, 231 W 479, 286 NW 47.

The granting or refusing of an application to set aside a mortgage foreclosure sale and order a resale, as a favor, rests in the sound discretion of the trial court, and its determination cannot be disturbed on appeal except for clear abuse of judicial discretion. Prudential Ins. Co. v. Cuttone, 227 W 48, 277 NW 630; Cameron v. Heinze, 231 W 479, 286 NW 47.

The contention that 278.105, enacted in 1933 and amended in 1935, affected or destroyed the plaintiff's judgment obtained in 1932 cannot be sustained. White Eagle B. & L. Asso. v. Freyer, 231 W 563, 286 NW 32.

The power of a court of equity to prevent an unconscionable result in mortgage foreclosure proceedings must be exercised with respect to the sale of the mortgaged premises. In fixing an upset price as a condition to confirmation of a mortgage foreclosure sale, the assessed value of the mortgaged premises or what the property may bring at a private sale is not the test of the real value thereof which the court should apply, but the "real value of the premises" should approximate that price which a person willing and able to buy the property would reasonably pay for it, not for the purposes of speculation, but for that use to which it has been or reasonably may be put. Rio-Fall River Union Bank v. Hollnagel, 234 W 181, 290 NW 636.

Where there was no bid at either the first or the second sale on foreclosure except the mortgagee's bid of $10,500, which was the face amount of the mortgage, and there was no likelihood of a better bid if a third sale should be had, an order, based on alleged inadequacy of the bid but fixing no upset price, denying confirmation of the second sale unless the mortgagee elect to have the sale confirmed without a deficiency of $1,990, and ordering a resale in the event of his not so electing, was an abuse of discretion. Welfare B. & L. Asso. v. Gearhard, 235 W 229, 293 NW 813.

An offer or agreement to advance a bid on a judicial resale which is made before the sale is confirmed, not accompanied by a showing of mistake, misapprehension, or inadvertence, is insufficient to sustain an order setting aside the sale. Gratiot State Bank v. Martin, 242 W 254, 7 NW (2d) 863.

A trial court may refuse to confirm a foreclosure sale if satisfied, (1) that the price received for the property was inadequate, and (2) that there was a showing of mistake, misapprehension, or inadvertence on the part of the interested parties or prospective bidders. A trial court also has discretion to refuse to confirm a foreclosure sale even though there is no mistake, misapprehension, or inadvertence, where the sale price is not only inadequate, but is so grossly inadequate as to shock the conscience of the court. Gumz v. Chickering, 19 W (2d) 625, 121 NW (2d) 279.

See note to 274.09, on jurisdiction on appeal,

citing Alsmeyer v. Norden, 30 W (2d) 593, 141 NW (2d) 177.

278.17 History: 1877 c. 143 s. 2; R. S. 1878 s. 3169; Stats. 1898 s. 3169; 1925 c. 4; Stats. 1925 s. 278.17; 1935 c. 541 s. 374; 1935 c. 542; 1965 c. 216.

Revisor's Note, 1935: An amendment of 278.17 withholds delivery of the sheriff's deed until the sale is confirmed. [Bill 50-S, s. 374]

The rights and interests which pass by a sheriff's deed are such as were, or might properly have been, litigated in the foreclosure action. Pelton v. Farmin, 18 W 222.

Confirmation of sale must precede issue of writ of assistance in favor of a purchaser. Meehan v. Blodgett, 91 W 63, 64 NW 429.

The discretion of the court in setting aside an order of confirmation because of the sheriff's conduct in chilling the bidding will not be disturbed unless it was abused. Koop v. Burris, 95 W 301, 70 NW 473.

A defendant's prior and paramount right or title to the mortgaged premises cannot be determined in a foreclosure suit, and any such rights of the mortgagor's grantor are not in issue, though he is a party to the suit; hence purchasers at a foreclosure sale under a mortgage executed by the grantees in a deed are bound by all the reservations in the latter. Gilchrist v. Foxen, 95 W 428, 70 NW 585.

A referee's deed passes all the right, title and interest of the mortgagee, including his interest in the premises arising under tax certificates held by him at the time of sale. Ames v. Storer, 98 W 372, 74 NW 101.

The writ of assistance under sec. 3169, Stats. 1898, may be issued against one who purchased the premises after foreclosure. Mere delay in applying for a writ of assistance is not sufficient to authorize its denial. The right to the remedy is not absolute and the court is clothed with discretionary power in respect to its issuance, but one who holds a sheriff's deed issued on foreclosure sale, duly confirmed, is prima facie entitled to the writ and to be put in possession of the purchase. Prahl v. Rogers, 127 W 353, 106 NW 287.

A foreclosure and sale of a mechanic's lien which was prior to a mortgage but subsequent to the foreclosure sale under the mortgage, the interest being purchased by the mortgagee, operated to pass to the purchaser the inchoate right of dower of the wife of the mortgagor. Connecticut M. L. Ins. Co. v. Goldsmith, 131 W 116, 111 NW 208.

Title vests, and redemption is barred, only on confirmation. Gerhardt v. Ellis, 134 W 191, 114 NW 495.

Where stanchions permanently attached to a barn were removed between the dates of purchase of the property on foreclosure, and the confirmation of the sale, an action for trespass was maintainable by the purchaser. Robicheau v. Arnovitz, 186 W 397, 202 NW 794.

A bona fide purchaser for value from a purchaser at a mortgage foreclosure sale takes free from the equities of the mortgagor and a second mortgagee. First Nat. Bank v. Savings L. & T. Co. 207 W 272, 240 NW 381.

Parties purchasing mortgaged premises at a foreclosure sale and obtaining possession through a writ of assistance issued after a void confirmation of the sale had only the rights of a purchaser before confirmation of the sale, and hence were not entitled to possession of the premises as against the mortgagor until the sale should be validly confirmed. Kalb v. Feuerstein, 234 W 507, 291 NW 840.

278.18 History: 1947 c. 143; Stats. 1947 s. 278.18.

CHAPTER 279.

Waste.

279.01 History: R. S. 1849 c. 109 s. 17; R. S. 1858 c. 143 s. 17; R. S. 1878 s. 3170; Stats. 1898 s. 3170; 1925 c. 4; Stats. 1925 s. 279.01; 1961 c. 495.

An insolvent mortgagor will be restrained from cutting timber on mortgaged premises when such cutting will render the security inadequate. Bunker v. Locke, 15 W 635.

Equity will grant an injunction in favor of the owner of the reversion to stay or prevent waste threatened or being committed by a tenant. Poertner v. Russel, 33 W 193.

If purchaser under a land contract, before payment, has no right to remove a building the vendor's remedy is by a proceeding to stay waste. Northrup v. Trask, 39 W 515.

Where a mortgagor threatens waste involving irreparable injury which will render the security inadequate the mortgagee may have an injunction regardless of the mortgagor's solvency or insolvency. Starks v. Redfield, 52 W 349, 9 NW 168.

Waste is an act or omission of duty, by a tenant of land, which does a lasting injury to the freehold, and tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or to impair the evidence of title. Bandlow v. Thieme, 53 W 57, 9 NW 920.

A tenant in possession of a building, whether rightfully or not, who makes any material alteration therein, as by erecting a chimney where there was none, without the landlord's consent, commits waste. Brock v. Dole, 66 W 142, 28 NW 334.

One who purchases land subject to a mortgage and removes a building therefrom to other lands which he owns, thus rendering the security inadequate, commits waste. Edler v. Hasche, 67 W 653, 31 NW 57.

Where property had become valueless for residence purposes because of the growth of the city and the fact that it was surrounded by factories and railway tracks, it was not waste for the owner of the life estate to remove the dwelling house. Melms v. Pabst Brew. Co. 104 W 7, 79 NW 738.

The measure of damages for waste by removing timber from land is the diminished value of the land, not the value of the timber in its manufactured state. Nelson v. Churchill, 117 W 10, 93 NW 799.

An action for waste may be brought against the executor or administrator of the estate of the wrongdoer, whether the plaintiff has or has not filed a claim. Waste is an action sounding in tort, and purely tort actions should