

## CHAPTER 268.

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**268.01 Order substituted for injunction.** The writ of injunction is abolished. An injunction may be the final judgment in the action or may be allowed as a provisional remedy therein; and when so allowed it shall be by order as prescribed by this chapter. [1935 c. 541 s. 116]

**Note:** A so-called lease for five years by which the owners of certain land, undertaking the construction of a filling station in which they subsequently invested upwards of \$7,000, leased the premises to an oil company for \$1 annually, agreeing personally to operate the station and sell the lessee's products exclusively, and authorizing termination by the lessee on ten days' notice, and giving the lessee in case of breach, as to the existence of which the lessee was to be the sole judge, the option to take over the premises at a rental of \$20 monthly, is determined to be so harsh and one-sided as to preclude the lessee from obtaining injunctive relief equivalent to specific performance. *Cities Service Oil Co. v. Kuckuck*, 221 W 633, 267 NW 322.

A high degree of proof is required before a court will interfere with the enforcement of a judgment on the ground that it was obtained by fraud. *Federal Life Ins. Co. v. Thayer*, 222 W 658, 269 NW 547.

In an action to enjoin defendants from denying plaintiffs the right to use a silo filler, the complaint, alleging that the plaintiffs and the defendants had purchased a silo filler for their joint use, but that the defendants, contrary to the agreement, would not permit the plaintiffs to use it, is not demurrable on the ground that, the parties being tenants in common, the plaintiffs could not secure control of the silo filler by an action against their cotenants in possession, since the parties, although tenants in common, were at liberty to contract as they saw fit as to the use and possession of the silo filler, and the plaintiffs were seeking merely to enforce their right to the use of the silo filler in accordance with the agreement. [Newton v. Gardner, 24 W 232, applied.] *Kuenzi v. Leis-*

*ten*, 223 W 481, 271 NW 18.

A complaint alleging that an employe had obtained a workmen's compensation award against employers for the loss of the sight of an eye, but that such award had been obtained by wilful perjury and fraud in that such employe had lost the sight of the eye years previously and had recovered compensation therefor from another employer in another state; that the employers concerned in the award alleged to have been obtained by wilful perjury and fraud had used due diligence to discover the facts about such loss of the eye but were unsuccessful until after such award had become effective; and that they had then unsuccessfully appealed to the circuit court and thence to the supreme court, is held to state a cause of action for an injunction against the enforcement of a judgment based on such award. *Amberg v. Deaton*, 223 W 653, 271 NW 396.

Power of equity court to enjoin enforcement of a judgment is not dependent upon its jurisdiction to review the proceedings on which judgment is based. To authorize injunction against enforcement of a judgment obtained by perjury, such perjury must be established by the same degree of proof as generally required in proof of criminal acts in civil cases, and plaintiff must prove that he was not negligent in making timely discovery of such perjury and that he has exhausted legal remedies. *Amberg v. Deaton*, 223 W 653, 271 NW 396.

Courts may enjoin judgment in cases of extrinsic as well as intrinsic fraud. Equitable relief is not confined to judgments which were procured by fraud practiced on the court. *Nehring v. Niemerowicz*, 226 W 285, 276 NW 325.

**268.02 Temporary injunction; when granted.** (1) When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

(2) If, after the commencement of any action for waste or to restrain waste, or any action for the recovery of land or the possession or partition thereof or after any real estate has been levied upon by execution, any party to such action or execution shall commit waste or shall threaten or make preparations to commit waste upon the lands, tene-

ments, or anything appertaining thereto, he may be restrained by injunction from committing any waste or further waste thereto. Such injunction may be issued in any of said actions or in cases of the levy above mentioned by the court from which the execution issued.

(3) In an action for that purpose commenced by the attorney-general in the name of the state against a corporation, the court may restrain it from assuming or exercising any franchise, liberty or privilege or transacting any business not authorized by its charter; and in the same manner may restrain individuals from exercising corporate rights, privileges or franchises not granted to them by law; and such court, pending such action, may issue a temporary injunction until final judgment. [1935 c. 483 s. 29; 1935 c. 541 s. 117, 117a]

**Note:** A mandatory injunction is held not to lie to compel an electric utility to reconnect its service to a customer who had wilfully tampered with a meter and refused to pay the cost of reconnection and of installation of a protective device to prevent further tampering. *Bartman v. Wisconsin Michigan P. Co.*, 214 W 608, 254 NW 376.

On an appeal from an order refusing a temporary restraining order, the merits of the case are not before the court. The only question is whether the trial court abused its discretion. *State ex rel. Attorney-General v. Manske*, 231 W 16, 285 NW 378.

The supreme court does not, except where its original jurisdiction is invoked, grant temporary injunctions. The granting of such injunctions is more appropriately left to the

discretion of the trial courts even if the supreme court has jurisdiction where its original jurisdiction is not invoked, which may be doubted. *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 W 153, 286 NW 707.

Under the labor code, peaceful picketing and similar acts to induce an employer to conform to union rules governing wages, hours, apprenticeship and other working conditions are justifiable, precluding the employer from obtaining an injunction, where the primary purpose of the acts is to protect and improve the conditions of workmen represented by the union. *Senn v. Tile Layers Protective Union*, 222 W 383, 268 NW 270, 872. Affirmed in *Senn v. Tile Layers Protective Union*, 57 S. Ct. 857, 301 US 468.

**268.03 When granted defendant.** A temporary injunction may also be granted on the application of the defendant, when it shall appear that the plaintiff is doing, or threatens, or is about to do, or is procuring or suffering to be done some act in violation of the defendant's rights respecting the subject of the action and tending to his injury or to render ineffectual such judgment as may be rendered in his favor.

**268.04 Same; when granted; Sunday or holiday.** The injunction may be granted at any time before judgment upon its appearing satisfactorily to the court or judge, by the complaint or answer or by affidavit that sufficient grounds exist therefor. A copy of the pleading or affidavit on which granted must be served with the injunction unless previously served. In case of exigency an injunction may be granted and may be served on Sunday or on a legal holiday. [1935 c. 541 s. 118]

**268.05 Notice required.** (1) An injunction shall not be allowed after the defendant shall have answered, unless upon notice or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

(2) In an action against an insurance company or fraternal benefit society for an injunction or a receiver the commissioner of insurance shall be notified. Mailing a copy of such notice addressed to the commissioner of insurance at Madison, Wisconsin, shall be sufficient service. [1935 c. 483 s. 20]

**268.06 Security for damages.** The court or judge shall require a bond of the party seeking an injunction, with sureties, to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction if the court shall finally decide that the party was not entitled thereto. Copies of such bond, affidavit or other pleading shall be served upon the party enjoined and the officer serving the same shall, within eight days after such service, file his return in the office of the clerk of the court. [1935 c. 541 s. 119]

**Note:** Damages sustained by reason of an improvidently issued injunction include the reasonable value of attorney's fees for services in procuring its dissolution, and also for services upon a reference to ascertain damages; hence defendants were entitled to

recover attorneys' fees incurred in an unsuccessful effort to dissolve the temporary injunction which, as it was finally determined, the court erred in not dissolving. *Muscoda B. Co. v. Worden-Allen Co.*, 207 W 22, 239 NW 649, 240 NW 802.

**268.07 Assessment of damages; bill of particulars; costs.** Upon an assessment of the damages caused by an injunction the defendant may be required to serve upon the plaintiff and his sureties, within such time and in such manner as the court or referee shall direct, a bill of particulars. The plaintiff or the sureties may within ten days after such service offer in writing to permit the court or referee to assess the defendant's damages at a specified sum together with the costs of such proceeding incurred up to the time of such offer. If such offer be not accepted in writing within five days after it is made, it shall be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to obtain a more favorable assessment of damages he cannot recover costs, but must pay the costs of the opposite party from the time of the offer. [1935 c. 541 s. 120]

**Note:** Where plaintiff's sureties appeared and stipulated regarding amount expended by defendant, and were served with notice of proceeding to assess damages on dissolving restraining order, they made themselves parties, and award against them was properly incorporated in judgment. *Schlitz R. Corp. v. Milwaukee*, 211 W 62, 247 NW 459.

A defendant's violation of a temporary injunction would not forfeit his right, under a bond given by the plaintiff pursuant to 268.06, to recover damages sustained because of the injunction; the proceeding on the bond being in the nature of an action on contract, not a proceeding in equity. *Prest v. Stein*, 220 W 354, 265 NW 85.

**268.08 Injunction, defendant may be heard before enjoined.** The court or judge may, before granting the injunction, make an order requiring cause to be shown why the injunction should not be granted, and the defendant may in the meantime be restrained. [1935 c. 541 s. 121]

**268.09 Injunctions against corporations.** An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or presiding judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers of the corporation except where the state is a party to the proceedings, unless the plaintiff give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.

**268.10** [Renumbered 269.28 by Supreme Court Order, effective Jan. 1, 1936]

**268.11 Injunction, additional security.** The party enjoined may, upon notice, apply for additional security and may combine such application with one to vacate or modify the injunction, and the presiding judge may require a further bond, in a sum and with sureties to be approved by him, as a condition of the continuance of the injunction. [1935 c. 541 s. 123]

**268.12** [Repealed by 1935 c. 541 s. 124]

**268.13 Writ of ne exeat.** The court or a judge may grant the writ of ne exeat to prevent any defendant from going out of the state until he shall give security. It may be granted at any time before judgment. [1935 c. 541 s. 125]

**268.14 Same; when granted.** No writ of ne exeat shall be granted unless it appears to the court or judge by the complaint or an affidavit that grounds exist therefor; and the court or judge granting such writ shall direct to be indorsed thereon the penalty of the bond and security to be given by the defendant. [1935 c. 541 s. 126]

**268.15 Same; discharge of.** If the defendant shall satisfy the court or judge granting such writ that there is no reason for his restraint or shall give security for the performance of the judgment in the action the writ shall be discharged. [1935 c. 541 s. 127]

**268.16 Receivers.** A receiver may be appointed:

(1) On the application of either party, when he establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired.

(2) By the judgment, or after judgment, to carry it into effect or to dispose of the property according to the judgment.

(3) To preserve the property during the pendency of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment or in an action by a creditor under chapter 273.

(4) When a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.

(5) In accordance with the practice which obtained when the code of 1856 took effect except as otherwise provided in this chapter.

(6) The receiver shall give to and file with the clerk of the court a bond, conditioned in the usual manner, with sureties to be approved by the judge making the appointment sufficient to cover all property likely to come into his hands. [1935 c. 483 s. 16; 1935 c. 541 s. 128; 1937 c. 431]

**Revisor's Note, 1935:** (6) was formerly section 6 of Circuit Court Rule XXVII. That rule was repealed by Supreme Court order of June 29, 1933. (Bill No. 50 S, s. 128)

Equity courts have inherent power to appoint receivers for insolvent corporations and this power was not suspended by the federal bankruptcy act. Such receivers take the bankrupt's title and have legal capacity to sue, to collect unpaid stock subscriptions. *Hazelwood v. Third & Wells R. Co.*, 205 W 85, 236 NW 591.

Though waste that lessens the security of the mortgage debt authorizes the appointment of a receiver in a foreclosure action, and such appointment is largely dis-

cretionary with the trial court, an order appointing a receiver without finding that waste reduced the value of the mortgaged premises in excess of the amount by which the mortgage debt had been reduced was unwarranted, the function of the equity court in that respect being merely to protect security of holder of mortgage as originally procured. While a receiver for a mortgaged homestead may be appointed upon sufficient cause, facts justifying such appointment for premises not a homestead do not always warrant such appointment for the homestead. *Crosby v. Keilman*, 206 W 252, 239 NW 431.

A motion for a receiver for mortgaged

premises, made prior to judgment in a foreclosure action by the trustee under a trust deed securing bonds, should have been granted where there were prior defaults in the payment of taxes, interest and insurance, and the likelihood of future defaults in the payment of interest and taxes to the extent that the amount of the defaulted payments by the time of the sale of the premises would exceed the payments on the principal debt, and where there was a likelihood that a tax deed of the premises might be issued in the meantime unless the trustee redeemed the premises from the tax sale, and he had no funds with which to redeem. *Dick & Reutman Co. v. Hunholz*, 213 W 499, 252 NW 180, 253 NW 184.

Purchaser's nonpayment of taxes as required by land contract held "waste," as respects vendor's right to appointment of receiver of rents and profits. *Scharf v. Hartung*, 217 W 500, 259 NW 257.

Mortgagors' impairment of security and commission of waste by using rent moneys collected by them for other purposes than payment of taxes due on realty covered by mortgage pledging rents and issues thereof

justified appointment of receiver to collect rents. *First Wisconsin T. Co. v. Adams*, 218 W 406, 261 NW 16.

A mortgagee is not entitled to the possession of the property on foreclosure merely because of a clause hypothecating the rent, but he must enforce his rights by petition for a receiver. The foundation for the appointment of a receiver in a mortgage foreclosure is waste of the security. After the commencement of foreclosure against property which was not a homestead the mortgagor's use for his own purpose of the surplus rent over that necessary to pay interest, taxes and operating expenses, which by the terms of the mortgage was a part of the mortgagee's security constituted waste and entitled the mortgagee to a receiver (notwithstanding the adequacy of the security) in the absence of any act on the part of the mortgagor which added to the mortgagee's security so as to balance the waste, and hence the refusal of the trial court to appoint a receiver was an abuse of discretion. *Dick & Reuteman Co. v. Jem Realty Co.*, 225 W 428, 274 NW 416.

**268.17 Receiver; payment of employes' wages.** Whenever a receiver shall be appointed to manage or close up any business he shall immediately report to the court the amount due the employes in such business; and said court shall order him to pay out of the first receipts of said business, after the payment of costs, debts due the United States or this state, taxes and assessments and the current expenses of carrying on or closing said business, the wages of such employes earned during the last three months of employment and within one year prior to his appointment. [1933 c. 473 s. 1; 1935 c. 541 s. 129]

**268.18 to 268.30** [1931 c. 376; 1935 c. 541 s. 130; renumbered sections 103.51 to 103.63 by 1935 c. 551 s. 5]

**268.22 Absentee's property act; insurance policy provisions invalid.** (1) No provision concerning the effect to be given to evidence of absence or of death in any policy of life or accident insurance or in the charter or by-laws of any mutual or fraternal insurance association hereafter executed or adopted, shall be valid.

(2) When any such policy, charter or by-laws hereafter executed or adopted contains a provision requiring a beneficiary to bring suit upon a claim of death within one year or other period after the death of the insured, and the fact of the absence of the insured is relied upon by the beneficiary as evidence of the death, the action may be begun, notwithstanding such provision in the policy or charter or by-laws, at any time within the statutory period of limitation for actions on contracts in writing dating from the date of the giving of written notice of such absence to the insurer, which notice shall be given within one year from the date when the beneficiary last heard of the absent insured. If such notice is not given then the statutory period runs from the time when the absent person was last heard of by the beneficiary. [1941 c. 81]

**268.23 Receiver may be appointed when.** (1) When a person domiciled in this state and having an interest in any form of property disappears and is absent from his place of residence without being heard of after diligent inquiry, upon application for a finding of such disappearance and absence and of the necessity for the appointment of a receiver to the circuit court of the county of the absentee's domicile by any person who would have an interest in said property were said absentee deceased or by an insurer or surety or creditor of such absentee, after notice as provided in section 268.24, and upon good cause being shown, the court may find that he was last heard of as of a date certain and may appoint a receiver to take charge of his estate. The absentee shall be made a party to said proceeding; and any other person who would have an interest in said property were said absentee deceased, upon direction by the court, may be made a party to said proceeding.

(2) The receiver, upon giving bond to be fixed in amount and with surety to be approved by the court and upon such conditions as will insure the conservation of such property, shall under the direction of said court administer said property as an equity receivership with power (a) to take possession of all property of the absentee wherever situated, (b) to collect all debts due the absentee, (c) to bring and defend suits, (d) to pay insurance premiums, (e) with the approval of the court in each case, to pay all debts due by the absentee, and (f) to pay over the proceeds of such part or all of said property, or the income thereof as may be necessary for the maintenance and support of the absentee's dependents; and if the personal property of said absentee be not sufficient to pay all his debts, and to provide for the maintenance and support of his dependents, the receiver may apply to the court for an order to sell or mortgage so much of the real estate as may be necessary therefor; said sale or mortgage

to be reported to, approved and confirmed by the court and said receiver to be ordered to make deed conveying or mortgaging said real property to the purchaser or lender upon his complying with the terms of sale or mortgage.

(3) Upon the filing of the application referred to in subsection (1), the court may for cause shown appoint a temporary receiver to take charge of the property of the absentee and conserve it pending hearing upon the application. Such temporary receiver shall qualify by giving bond in an amount and with surety to be approved by the court and shall exercise only the powers named by the court. Should a permanent receiver be appointed, the temporary receiver shall turn over all property in his possession, less such as may be necessary to cover his expenses and compensation as allowed by the court, to the permanent receiver, shall file his final account and upon its approval be discharged. Should the application for permanent receiver be denied, the temporary receiver shall restore to those from whom it may have been obtained, all property in his possession, less such only as may be necessary to cover his expenses and compensation as allowed by the court, shall file his final account and be discharged. Where the application is denied, the expenses of the temporary receivership and the compensation of the temporary receiver may in the discretion of the court be taxed as costs of the proceeding to be paid by the applicant and shall be enforceable by the temporary receiver against him. [1941 c. 81]

**268.24 Notice.** All notices required under sections 268.22 to 268.34 shall be served upon all parties ordered by the court to be served in the manner prescribed by existing statutes or rules, except that in addition thereto the absentee shall be served by publication once a week for 4 successive weeks in a newspaper printed in the English language of general circulation in the county of the absentee's domicile, the last publication to be not less than 10 nor more than 20 days prior to the time set for any hearing. The original notice prescribed in subsection (1) of section 268.23 shall require each person claiming an interest in the property of the absentee to file in court within a time fixed by the court a statement of the nature and extent of such interest. [1941 c. 81]

**268.25 Search for absentee.** (1) The court, upon application, may direct the receiver to make search for the absentee in any manner which the court may deem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the absentee's whereabouts;

(b) By notifying officers of justice and public welfare agencies in appropriate locations of the absentee's disappearance;

(c) By engaging the services of an investigation agency.

(2) The expenses of such search and of the notices provided for in section 268.24 shall be taxed as costs and paid out of the property of the absentee. [1941 c. 81]

**268.26 Final hearing and finding.** (1) At any time, during the proceedings, upon application to the court and presentation of satisfactory evidence of the absentee's death, the court may make a final finding and decree that the absentee is dead; in which event the decree and a transcript of all of the receivership proceedings shall be certified to the probate court for any administration required by law upon the estate of a decedent, and the receivership court shall proceed no further except for the purposes set forth in subsections (1) and (3) of section 268.28.

(2) After the lapse of 5 years from the date of the finding provided for in subsection (1) of section 268.23, if the absentee has not appeared, the court may proceed to take further evidence and thereafter make a final finding and enter a decree declaring that all interest of the absentee in his property has ceased and devolved upon others by reason of his failure to appear and make claim. [1941 c. 81]

**268.27 Claim of absentee barred.** No action shall be brought by an absentee to recover any portion of this property after the final finding and judgment provided for in section 268.26. [1941 c. 81]

**268.28 Termination of receivership and disposition of property of absentee.** Upon the entry of any final finding and decree as provided in section 268.26, the court shall proceed to wind up the receivership and terminate the proceedings:

(1) In the case of a finding under subsection (1) of section 268.26 that the absentee is dead:

(a) By satisfying all outstanding debts and charges of the receivership; and

(b) By then certifying the proceedings to the probate court; or

(2) In the case of a finding under subsection (2) of section 268.26:

(a) By satisfying all outstanding debts and charges;

(b) By then deducting for the insurance fund provided in section 268.31 a sum equal to five per cent of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life;

(c) By distributing the remaining property as provided in section 268.29; and

(3) In both cases by requiring the receiver's account and upon its approval discharging him and his bondsmen and entering a final decree terminating the receivership. [1941 c. 81]

**268.29 Distribution of property of absentee.** The property remaining for distribution in accordance with the provisions of paragraph (c) of subsection (2) of section 268.28 shall be distributed among those persons who would be entitled thereto under the laws of descent and distribution of this state had the absentee died intestate as of the date determined by the court in its final finding and decree; or in case the absentee leaves a document which, had he died, would under the laws of this state be entitled to probate as his will, the distribution shall be according to the terms of that document as of that date. The validity and effect of the distribution of said property shall be determined by the court administering the receivership and shall be final and binding upon all persons including the absentee. [1941 c. 81]

**268.30 Insurance policies.** (1) At the time of the distribution under section 268.29, the court may direct the payment to the beneficiaries of any sums due and unpaid under any policies of insurance upon the life of the absentee, if the claim is uncontested by the insurer.

(2) If the claim is contested, the court shall take jurisdiction of the action and shall submit to a jury, if one be called for, the issue of death of the insured and any other issues arising under the policy.

(3) Where the survival of a named beneficiary is not established, the provisions of sections 268.22 to 268.34 shall apply as if the proceeds of the insurance were a part of the estate of the absentee.

(4) If in any proceeding under subsections (1) and (2) the absentee is not found to be deceased and the policy provides for a surrender value, the beneficiary may request the receiver, acting for the insured, to demand the payment of surrender value. The receiver's receipt for such payment shall be a release to the insurer of all claims under the policy. The receiver shall pay over to the beneficiary (if he survives the insured, otherwise to the estate of the absentee) the sum thus received, reserving only an amount allowed by the court as costs of the proceedings under this section.

(5) Payment by an insurer hereunder shall be in full discharge of all contractual liability. No action shall be brought by an absentee to recover any portion of the proceeds, or any other benefits or values, arising out of contracts of life insurance issued upon his life, after any distribution of such property pursuant to this section. [1941 c. 81]

**268.31 Absentee insurance fund.** (1) In each case of termination of receivership as provided in section 268.28, the court, except in cases where the proceedings have been certified to the probate court under subsection (1) of section 268.26, shall set aside the sum there named and direct its payment by the receiver, to the state treasurer.

(2) The state treasurer shall retain and invest in a separate account the funds thus paid in, cumulating thereto the annual interest.

(3) If at any time thereafter an absentee whose estate has been distributed under a final finding and judgment made as herein provided shall appear and make claim for reimbursement from such fund, the court may in a proceeding by the claimant against the state treasurer order payment to the claimant of such part of the accumulated fund from all sources as in its opinion may be fair and adequate under the circumstances.

(4) If in the lapse of time the accumulated fund increases to an amount actuarially found to be in excess of reasonable requirements, the court may on application by the state treasurer authorize him to reduce it by an amount to be paid into the general fund of the state treasury. [1941 c. 81]

**268.32 Uniformity of interpretation.** Sections 268.22 to 268.34 shall be so construed as to make uniform the law of those states which enact it. [1941 c. 81]

**268.33 Name of act.** Sections 268.22 to 268.34 may be cited as the "Uniform Absence as Evidence of Death and Absentee's Property Act." [1941 c. 81]

**268.34 Time of taking effect and not retroactive.** The provisions of sections 268.22 to 268.34 shall not be retroactive and they shall take effect on July 1, 1942. [1941 c. 81]