CHAPTER 330.

LIMITATIONS OF COMMENCEMENT OF ACTIONS AND PROCEEDINGS.

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330.01 Civil actions; objection as to time of commencing. Civil actions can only be commenced within the periods prescribed in this chapter, except when, in special cases, a different limitation is provided by statute. But the objection that the action was not commenced within the time limited can only be taken by answer or demurrer in proper cases.

Note: Statutes of limitations do not run upon the claim of a wife against her husband. Campbell v. Mickelson, 227 W 429, 279 NW 73.

The legislature has power to repeal statutes of limitations and make the repeal effective as to causes of action which have accrued but which have not been barred, but it is not to be presumed that such is the intention of the legislature unless this intent is clearly expressed. Estate of Tinker, 227 W 519, 279 NW 83.

A debt is not destroyed by the running of the statute of limitations, but the effect of the statute is merely to prevent the judicial enforcement of the debt against the will of the debtor. Banking Commission v. Buchanan, 227 W 544, 279 NW 71.

330.02 Realty, seizin and possession of. No action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

Note: The construction of a building across a strip of land occupied adversely to the owner and the payment of rent to the owner for one and one-half years interrupted the running of the statute. Frank C. Schilling Co. v. Detry, 203 W 109, 233 NW 635.

330.03 Defense or counterclaim, when effectual. No defense or counterclaim, founded upon the title to real property or to rents or services out of the same, shall be effectual unless the person making it or under whose title it is made, or his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the committing of the act with respect to which it is made.

330.04 Entry upon realty, when valid. No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry descended or accrued; and when held adversely under the provisions of section 330.07, within ten years from the time when such adverse possession begun.

330.05 Presumption from legal title. In every action to recover real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by another person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years, under the provisions of section 330.06, or twenty years under the provisions of section 330.08, before the commencement of such action.

Note: Use of way across another's lot for users' convenience, openly, notoriously, and without permission, constituted "adverse user." Shepard v. Gilbert, 212 W 1, 249 NW 54.

330.06 Presumption on adverse holding under conveyance or judgment. Where the occupant or those under whom he claims entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed the possession of any other lot of the same tract.

Note: Easements of light and air over adjacent premises are not created or acquired by a prescription, and such easements are not favored. Depner v. United States Nat. Bank, 202 W 405, 232 NW 851.

Though one claiming title by adverse possession is not required to prove that he served notice on the true owner, his possession must be shown to be not only adverse but exclusive and hostile; and it requires declarations or acts of the most unequivocal character to change a use permissive in the beginning to one of an adverse character. McNeill v. Chicago & N. W. R. Co., 206 W 574, 240 NW 377.

Where the holder of the legal title in fee to certain lands executed and duly recorded a 99-year lease of the same which reserved the right to flood or overflow the lands and exacted as rental only the payment of taxes by the lessee, and the lessee conveyed the lands by warranty deed to a third person, who in turn conveyed by warranty deed to the plaintiff, and the plaintiff, although having actual notice of the lease and reservation of flowage rights within 4 or 5 years of the time she entered possession, never notified the holder of the legal title that she claimed any rights in opposition to the lease, and plaintiff's possession and use of the lands for farming purposes was not inconsistent with a tenancy and did not constitute any notice of hostile invasion to the holder of the legal title, and during the years of plaintiff's occupancy there had been no efforts by the holder of the legal title (until shortly prior to the present action) to exercise its flowage rights so as to call on the plaintiff to resist and thereby bring home to the holder notice of the adverse claim—there was no adverse possession by the plaintiff effective to establish her title as against the reserved flowage rights, and she had no greater rights in the premises than those of an assignee of the original lease, although she had been in continuous possession under her warranty deed for more than 10 years. [Illinois Steel Co. v. Budzisz, 139 W 281, distinguished.] McFaul v. Eau Claire County, 234 W 542, 292 NW 6.

Although an outstanding title be acquired with intent to defraud the owner of the land of his title, this does not defeat the acquisition of title by the perpetrator of the fraud by adverse possession. Although a tax deed conveyed only a one-tenth interest in the premises, a quitclaim deed by the tax-deed grantee, describing the premises as a whole, constituted color of title to the entire interest so that the grantee under such quitclaim deed could acquire title to the entire interest by adverse possession, even though his deed was void to his own knowledge. Marshall & Ilsley Bank v. Baker, 236 W 467, 295 NW 725.

330.07 Adverse possession defined. For the purpose of constituting an adverse possession by any person claiming a title founded upon some written instrument or some judgment land shall be deemed to have been possessed and occupied in the following cases:

(1) Where it has been usually cultivated or improved;

(2) Where it has been protected by a substantial inclosure;

(3) Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purpose of husbandry or for the ordinary use of the occupant;

(4) Where a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated.

Note: Land occupied adversely to a person who holds the life estate does not become the property of the one so occupying as against the remainderman during the life of the owner of the life estate, since, as the remainderman has no possession or right thereof, no adverse possession as against him can exist so long as he is merely a remainderman. Blodgett v. Davenport, 219 W 596, 263 NW 629.

330.08 Extent of possession not founded on writing, judgment, etc. When there has been an actual continued occupation of any premises under a claim of title, exclusive of any other right, but not founded upon any written instrument or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

330.09 Adverse possession, what is. For the purpose of constituting an adverse possession by a person claiming title, not founded upon some written instrument or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

(1) When it has been protected by a substantial inclosure.

(2) When it has been usually cultivated or improved.

Note: Where plaintiff's predecessor purchased right of way easement for purpose of transporting milk to cheese factory but predecessor and plaintiff used right of way for all purposes necessary and convenient in connection with operation of farm, such use was permissive and predecessor and plaintiff did not acquire rights by user hostile and adverse to those of servient estate. Lindokken v. Paulson, 224 W 470, 272 NW 453.

Where the plaintiff, occupying a lot under a deed accurately describing it, did not claim a strip, located on the adjacent lot under color of title but relied solely on adverse possession by his grantor and himself, and the plaintiff (also his grantor) and the

neighbor both contemporaneously used the unfenced strip, and there was no exclusive possession by the plaintiff until he erected a garage on a part of the disputed strip ten years prior to the commencement of the action, and prior thereto there was merely a dispute as to the location of the boundary with both parties in possession, there was no exclusive adverse possession for twenty years by the plaintiff and his grantor. Bettack v. Conachen, 235 W 559, 294 NW 57.

An oral arrangement by which one became the purchaser and occupant of a lot was sufficient to create continuity of the vendor's original adverse possession of an adjacent disputed strip of land. The possession of a person who enters into land under a deed of title is construed to be coextensive with his deed. Section 330.09 defining "adverse possession", is affirmative and does not purport to enumerate all the conditions which constitute adverse possession. Actual possession is not the less adverse because taken innocently and through mistake, it being the visible and adverse possession, with an intention to possess the land occupied as the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor. Bettack v. Conachen, 235 W 559, 294 NW 57.

The rights, by adverse possession, of one who goes on the land of another without color of title will be confined to that portion of the property of which he takes actual possession. The true owner, in actual possession of a part of the land, has the constructive possession of all the land not in the actual possession of the intruder. Bettack v. Conachen, 235 W 559, 294 NW 57.

330.10 Action barred by adverse possession, when. An adverse possession of ten years under sections 330.06 and 330.07 or of twenty years under sections 330.08 and 330.09 shall constitute a bar to an action for the recovery of such real estate so held adversely or of the possession thereof. But no person can obtain a title to real property belonging to the state by adverse possession, prescription or user unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years. [*1931 c. 79 s. 34*]

Note: Purchaser's adverse possession and occupancy of lot, with acquiescence of adjoining lot owners, for over twenty years, up to line he regarded as correct boundary line, settled location thereof and ownership of disputed strip though stakes marking line were not located with absolute accuracy. Lot owners' building of sidewalk beyond line claimed as boundary by adjoining lot owner did not invade or interrupt latter's adverse holding of disputed strip. Krembs v. Pagel, 210 W 261, 246 NW 324.

330.11 Tenant's possession that of landlord. Whenever the relation of landlord and tenant shall have existed between any persons the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy; or where there has been no written lease until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title or may have claimed to hold adversely to his landlord; but such presumption shall not be made after the periods herein limited.

Note: See note to 330.06, citing McFaul v. Eau Claire County, 234 W 542, 292 NW 6.

330.12 What use not adverse. (1) No presumption of the right to maintain any wire or cable used for telegraph, telephone, electric light or any other electrical use or purpose whatever shall arise from the lapse of time during which the same has been or shall be attached to or extended over any building or land; nor shall any prescriptive right to maintain the same result from the continued maintenance thereof.

(2) The mere use of a way over uninclosed land shall be presumed to be permissive and not adverse. [*1941 c. 94*]

Note: See 180.17 (5) relating to right to condemn for easement for transmission lines.

330.13 Rights not impaired. The right of any person to the possession of any real estate shall not be impaired or affected by a descent being cast in consequence of the death of any person in possession of such estate.

330.14 [*Repealed by 1941 c. 293*]

330.14 Actions, time for commencing. The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued. [*1941 c. 293*]

Note: Affirmative relief for vendor's fraud in misrepresenting the acreage conveyed by a deed is barred by failure to sue within six years. But the purchaser's failure to receive the full acreage falsely represented as conveyed was a valid defense pro tanto to the vendor's suit for the purchase price. Recoupment is not a counterclaim or a setoff, and hence is not barred by 300.27. Peterson v. Feyereisen, 203 W 294, 234 NW 496.

330.15 [*Renumbered section 330.14 by 1941 c. 293*]

330.15 Actions concerning real estate. (1) Except as provided in subsection (5) hereof, no action affecting the possession or title of any real estate shall be commenced by any person, corporation, state, or any political subdivision thereof after January 1, 1943, which is founded upon any unrecorded instrument executed more than 30 years prior to the commencement of such action, or upon any instrument recorded more than 30 years prior to the date of commencement of the action, or upon any transaction more than 30 years old, unless within 30 years after the execution of such unrecorded instrument or within 30 years after the date of recording of such recorded instrument, or within 30 years after the date of such transaction there is filed in the office of the register of deeds of the county in which the real estate is located, a notice setting forth the name of the claimant, a description of the real estate affected and of the instrument or transaction on which such claim is founded, with its

date and the volume and page of its recording, if it be recorded, and a statement of the claims made. This notice shall be filed and may be discharged the same as a notice of pendency of action. Such notice filed after the expiration of 30 years shall be likewise effective, except as to the rights of a purchaser for value of the real estate or any interest therein which may have arisen prior to such filing.

(2) The filing of such notice shall extend for 30 years from the date of filing, the time in which any action founded upon the written instrument or transaction referred to in the notice may be commenced; and like notices may thereafter be filed with like effect before the expiration of each successive 30-year period.

(3) This section does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute.

(4) This section shall be construed to effect the legislative purpose of allowing bona fide purchasers of real estate, or of any interest therein, dealing with the person, if any, in possession, to rely on the record title covering a period of not more than 30 years prior to the date of purchase and to bar all claims to an interest in real property, whether dower (which for the purpose of this section shall be considered as based on the title of the husband without regard to the date of marriage) inchoate or consummate, curtesy, remainders, reversions, mortgage liens, old tax deeds, rights as heirs or under wills, or any claim of any nature whatsoever, however denominated, and whether such claims are asserted by a person sui juris or under disability, whether such person is within or without the state, and whether such person is natural or corporate, or private or governmental, unless within such 30-year period there has been recorded some record evidence of the existence of such claim or unless a notice of renewal pursuant hereto has been filed. This section does not apply to any action commenced by any person who is in possession of the real estate involved as owner at the time the action is commenced.

(5) Actions to enforce easements, or covenants restricting the use of real estate set forth in any instrument of public record shall not be barred by this section for a period of 60 years after the date of record of such instrument, and the timely filing of notices of renewal shall extend such time for 60-year periods from such filing. [*1941 c. 293*]

330.16 Within twenty years. Within twenty years:

(1) An action upon a judgment or decree of any court of record of this state or of the United States sitting within this state.

(2) An action upon a sealed instrument when the cause of action accrues within this state, except those mentioned in sections 19.015, 321.02 and 330.19 and subsection (2) of section 330.20.

Note: Liability on broker's bond was dependent on existence of cause of action against broker created by exercise of election on part of purchaser to tender back securities purchased and ask for his purchase money, and until that time no statute of limitations was applicable, and thereafter, bond being sealed instrument, twenty-year statute of limitations was applicable. Chas. A. Krause M. Co. v. Chris. Schroeder & Son Co., 219 W 639, 263 NW 193.

330.17 Within twenty years, against railroads and utilities for entry on lands. Whenever any land or any interest therein has been or shall hereafter be taken, entered upon or appropriated for the purpose of its business by any railroad corporation, electric railroad or power company, telephone company or telegraph company without said corporation or company having first acquired title thereto by purchase or condemnation, as by statute provided, the owner of any such land, his heirs, assigns and legal representatives shall have and are hereby given the right to at any time within twenty years from the date of such taking, entry or appropriation, sue for damages sustained because of such taking, from the corporation or company so taking, entering upon or appropriating said lands or its successors in title, in the circuit court of the county in which said land is situated.

Note: This section is not mentioned in Price v. Marinette & Menominee P. Co., 197 W 25, 221 NW 381, and Benka v. Consolidated W. P. Co., 198 W 472, 224 NW 718, which hold that condemnation is the landowner's exclusive remedy.

330.18 Within ten years. Within ten years:

(1) An action upon a judgment or decree of any court of record of any other state or territory of the United States or of any court of the United States sitting without this state.

(2) An action upon a sealed instrument when the cause of action accrued without this state, except those mentioned in section 330.19.

(3) An action for the recovery of damages for flowing lands, when such lands have been flowed by reason of the construction or maintenance of any milldam.

(4) An action which, on and before the twenty-eighth day of February in the year one thousand eight hundred and fifty-seven, was cognizable by the court of chancery, when no other limitation is prescribed in this chapter.

(5) An action for the recovery of damages for flowing lands when such lands shall have been flowed by reason of the construction or maintenance of any flooding dam or other dams constructed, used or maintained for the purpose of facilitating the driving or handling of saw logs on the Chippewa, Menomonee, or Eau Claire rivers or any tributary of either of them, provided that in cases where the ten years have already expired, the parties shall have six months from and after the passage and publication hereof within which an action may be brought.

(6) Any action in favor of the state when no other limitation is prescribed in this chapter. No cause of action in favor of the state for relief on the ground of fraud shall be deemed to have accrued until discovery on the part of the state of the facts constituting the fraud. [*1931 c. 79 s. 35*]

Revisor's Note, 1931: Subsection (6) is a transfer of part of 330.28 which section is repealed. (Bill No. 51 S, s. 35)

The exclusive jurisdiction of courts of equity over controversies between a trustee and the beneficiary is confined to the establishment and protection of the trust; other controversies between them are cognizable in courts of law. The latter are barred by the six-year statute of limitations and the former by the ten-year statute. Woodmansee v. Schmitz, 202 W 242, 232 NW 774.

Effect of this section on county's claim, Estate of Kuplen, 209 W 178, 244 NW 623.

The ten-year statute of limitation applies to a promissory note under seal. Alropa Corp. v. Flatley, 226 W 561, 277 NW 108.

Lapse of time before acceptance of a charitable bequest is not significant, so long as the parties are in the same condition; and the statute of limitations does not apply to a continuing express trust not repudiated by the trustee. Estate of Mead, 227 W 311, 277 NW 694, 279 NW 18.

330.19 Within six years; foreign limitation; notice of injury. Within six years:

(1) An action upon a judgment of a court not of record.

(2) An action upon any bond, coupon, interest warrant or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district in this state.

(3) An action upon any other contract, obligation or liability, express or implied, except those mentioned in sections 330.16 and 330.18.

(4) An action upon a liability created by statute when a different limitation is not prescribed by law.

(5) An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action shall be barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state. No action to recover damages for an injury to the person shall be maintained unless, within two years after the happening of the event causing such damages, notice in writing, signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction thereof is claimed of such person or corporation. Such notice shall be given in the manner required for the service of summons in courts of record. No such notice shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the description of the injuries, the manner in which they were received or the grounds on which the claim is made, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby; provided, that the provision herein requiring notice of two years shall not apply to any event causing damage which happened before the passage and publication of this act. When an action shall be brought and a complaint actually served within two years after the happening of the event causing such damages, the notice herein provided for need not be served.

(6) An action to recover personal property or damages for the wrongful taking or detention thereof.

(7) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.

(8) No action against any railroad corporation for damages to property occasioned by fire set from a locomotive or for stock killed or injured by such corporation shall be maintained unless within one year after the happening of the event causing such damage the complaint be served or a notice in writing, signed by the party owning such property or stock, his agent or attorney, shall be given to the corporation in the manner provided for service of a circuit court summons, stating the time and place such damage occurred and that satisfaction therefor is claimed of such corporation. No such notice shall be deemed insufficient solely because of any inaccuracy or failure therein in stating the time when or describing the place where such damages occurred if it shall appear that there was no in-

tention on the part of the claimant to mislead said corporation and that the latter was not in fact misled thereby.

(9) An action upon a claim, whether arising on contract or otherwise, against a decedent or against his estate, unless probate of his estate in this state shall have been commenced within six years after his death. This subsection shall not have the effect of barring any claim prior to 1942. [*1931 c. 79 s. 36; 1941 c. 70*]

Note: The manager appointed by syndicate to purchase lands could pay interest on overdue note so as to toll limitations as to all members. Reinig v. Nelson, 199 W 482, 227 NW 14.

Purchaser whose action for original misrepresentation in sale of mortgage was barred, held entitled to recover on proof that within statutory period sellers induced her to waive contract rights on further misrepresentations. Danielson v. Bank of Scandinavia, 201 W 392, 230 NW 83.

A contract to bid enough on a foreclosure sale to protect the owner of a mortgage is not breached prior to the foreclosure sale. Starbird v. Davison, 202 W 302, 232 NW 535.

Interest payment by the maker of a note, following the accommodation maker's statement that the plaintiff would get interest soon, suspended limitations as to the accommodation maker. Gillitzer v. Kremer, 203 W 269, 234 NW 503.

The claim of a daughter for services rendered her father was barred after six years. His indorsement thereafter of two certificates of deposit was not a payment on account for such services so as to constitute the claim a mutual running account. In re Teynor's Estate, 203 W 369, 234 NW 344.

The six-year statute of limitations commenced to run on a cause of action for breach of a contract to build a silo in a workmanlike manner from the date the silo was completed, even though plaintiff did not know of the breach. But an action on a warranty to repair defects in the silo for ten years, brought within the ten-year period, was not barred. Krueger v. V. P. Christianson S. Co., 206 W 460, 240 NW 145.

A statute of limitation is applicable to actions both at law and in equity, and it is the imperative duty of courts to apply the statute when the facts require. The six-year limitation runs against an action for relief on the ground of fraud from the time when by the use of reasonable diligence the fraud could have been discovered. The statute bars assertion of rights against the trustee of an express trust by the cestui que trust where more than six years elapse after repudiation of the trust is brought home to him. Gottschalk v. Ziegler, 208 W 55, 241 NW 713.

Institution of an action against one person on a cause of action existing against another does not arrest the running of the statute of limitations, with respect to an action against such other. Baker v. Tormey, 209 W 627, 245 NW 652.

An action commenced October 24, 1932, for deceit is barred by the six-year statute of limitations where the complaint on its face shows that the misrepresentations relied upon were made on January 20, 1923; and subsequent misrepresentations amounting merely to a fraudulent concealment of a cause of action would not toll the statute. [Blake v. Miller, 178 W 228, 189 NW 472, and Seideman v. Sheboygan L. & T. Co., 198 W 97, 223 NW 430, approved.] Larson v. Ela, 212 W 525, 250 NW 379.

A clause in a note executed by two joint makers, waiving demand, notice and protest, and agreeing to "all extensions and partial payments" before and after maturity, without prejudice to the holder, is construed to include extensions by operation of law due to payment as well as those made by contract. Such clause was not a waiver of the statute of limitations, but only an agreement which operated to extend the time when the statute began to run. Kline v. Fritsch, 213 W 51, 250 NW 837.

An action against a nonresident labor union and its members for personal injuries sustained in an automobile collision, brought more than six years after the collision, was barred by the plaintiff's failure to serve a notice of injury within two years as required by (5). Bode v. Flynn, 213 W 509, 252 NW 284.

For estoppel to plead limitation see note to 330.47, citing Bowe v. La Buy, 215 W 1, 253 NW 791.

As respects the liability of legatees for claims against their testator, the statute of limitations does not begin to run until a cause of action accrues against the legatees; and a cause of action against legatees of a surety upon the bond of a discharged administratrix did not accrue until a judgment was rendered setting aside, for fraud, a decree allowing the final account of the administratrix. Clark v. Sloan, 215 W 423, 254 NW 653.

Where a decedent had orally promised to devise real estate as consideration for services rendered to the decedent and the board and room furnished by the decedent did not constitute an open and mutual "account" so as to take a claim for the services rendered out of the statute of limitations where there were no cash transactions and, in view of the character of the agreement, no occasion for an accounting. The decedent's sojourn in a hospital in another state for two years prior to her death did not toll the statute of limitations as to the claim for services. The claimant was entitled to recover from the estate only for services rendered within six years of the decedent's death. Murphy v. Burns, 216 W 248, 257 NW 136.

The requirement of (5) that the injured party shall give notice of injury within two years after the accident, is a condition precedent to the right to maintain such an action, and is not tolled by failure to appoint an administrator for a tort-feasor within the two-year limit, nor affected by 330.34, providing that an action may be begun within one year after the appointment of an administrator. Manas v. Hammond, 216 W 285, 257 NW 139.

A claimant for the reasonable value of services rendered to a decedent under a void oral agreement to convey real estate to the claimant could be allowed nothing, in the absence of evidence of the rendering of any services of value within the six-year period preceding the death of the decedent, since the six-year statute of limitations began running immediately after the rendering of the services. Estate of Goyk, 216 W 462, 257 NW 448.

Where M was trustee for J of a fund remaining at the death of M, originally represented by a certificate of deposit, but M had had a certificate made payable to herself and son C or survivor, a trust company receiving the fund by virtue of the latter certificate after the death of M was a trustee, as to J, of a constructive trust created by operation of law, which constructive trust was subject to the statute of limitations (sec. 330.19) and the statute began to run against J's claim at the death of M, at which time J's right to the fund accrued. Glebke v. Wisconsin Valley T. Co., 216 W 530, 257 NW 620.

Where injury occurred on August 12, 1925, rendering work impossible, but workman made no claim for compensation until May 12, 1932, claim was barred by limitation. Nelson v. Industrial Commission, 217 W 452, 259 NW 253.

In action by legatee to enforce payment of legacy charged upon devised land, complaint, alleging that payments upon legacy had been made by devisees within six years of commencement of action, held not to show on its face that limitations had run against action, as respects right to enforce lien against devised land, which was in possession of purchaser at foreclosure sale, since lien was enforceable against a purchaser so long as personal obligation of any devisee to pay legacy was kept alive by payment thereon. Trickle v. Snyder, 217 W 447, 259 NW 264.

Where question was whether debtor had tolled statute of limitations by delivering lime to creditor as payment on note, issue of fact for jury was not whether lime had been delivered as payment on note, but whether creditor became indebted to debtor for lime. Earl v. Napp, 218 W 433, 261 NW 400.

The service of a summons, affidavit for, and notice of examination of the adverse party within two years after the happening of an event alleged to have caused personal injury is not a substantial compliance with the provisions of (5). Voss v. Tittel, 219 W 175, 262 NW 579.

Where a brewing company owned saloon fixtures in the possession of F as bailee in a saloon operated by him, but K purchased the premises and continued in open and notorious possession for nearly nine years before any demand for possession was made or action commenced against him, a buyer of the fixtures through the brewing company was barred from recovering them from K by the six-year statute of limitations. Ketler v. Klingbeil, 219 W 213, 262 NW 612.

The city's causes of action against the deceased city treasurer's administratrix, and a broker, for profits made through the illegal use of city funds, were subject to the six-year statute of limitations, since the action was one upon implied contract; and even if the action was one in equity, it was not one that was ever solely cognizable by a court of chancery, but one in which a court of equity exercised a merely concurrent jurisdiction, so that the ten-year statute of limitations, was not applicable thereto. Milwaukee v. Drew, 220 W 511, 265 NW 683.

Actions for wrongful death and an action for personal injuries were barred, where no proper service of summons nor written notice of injury was served on the defendant within two years after the date of the accident, although there was a defective service of summons on the defendant's father within the two-year period. Caskey v. Peterson, 220 W 690, 263 NW 658.

With respect to the question of whether a claim filed against the estate of a decedent was barred by limitations, the evidence warranted the conclusion of the county court that the decedent, who had acted as the claimant's agent for the investment of her funds, did not convert the claimant's funds or note when, using funds of his own and a relative in addition to funds of the claimant, he acquired a mortgage in his own name, but took three bearer notes in the exact amounts contributed by each. Estate of Pratt, 221 W 114, 266 NW 230.

A timely application for compensation tolls the running of the six-year statute of limitations as to all compensation to which the applicant may ultimately be entitled, so that, where an original application for compensation was timely, the applicant was not barred by such statute from recovering expenses of sanitarium treatment rendered more than six years before application for such addtional compensation. A. D. Thomson Co. v. Industrial Commission, 222 W 445, 268 NW 113, 269 NW 253.

A mortgagor and his vendee who had promised to pay the mortgage debt are not joint debtors or jointly liable, and a payment by the vendee does not toll the statute of limitations on the mortgage debt as to the mortgagor. Bank of Verona v. Stewart, 223 W 577, 270 NW 534.

If grantor had right of action in 1917 to recover damages for fraud then perpetrated on him by grantees' agents, then all rights of action, whether in equity or at law, based on that fraud became barred upon expiration of six years, and statutory amendment (in 1929) providing that cause of action for fraud should not be barred until six years after discovery of fraud did not apply. Gollon v. Jackson Milling Co., 224 W 618, 273 NW 59.

Creditor was entitled to recover on account of note executed more than eighteen years prior to institution of action where the item was carried on open account and included in subsequent accounts stated, and payments on open account served to keep item enforceable through time which elapsed. Meyer v. Selover, 225 W 389, 273 NW 544.

Where the decedent had contracted to contribute to the claimant's expense for the care of their incompetent brother by monthly payments, all promised payments which had accrued under the contract prior to six years before the death of the decedent were barred by this section, but not those payments which accrued within six years of his death. Will of Bate, 225 W 564, 275 NW 450.

Where husband and wife executed a joint note in 1923, the husband made payments of interest in 1926 and 1927 in the wife's presence and with her approval; the husband died in 1931, the payments were indorsed on the note by authorization of the wife, the holder made demand on the wife immediately after her husband's death, the wife admitted the obligation and promised payment, but at her request the claim was presented against the husband's estate, and the holder commenced an action against the wife one month after receiving an insufficient dividend from the husband's estate, the action was not barred by the six-year statute of limitations. Schneider v. Anderson, 227 W 212, 278 NW 460.

The personal liability for payment of a legacy is barred by the six-year statute of limitations. Mitchell v. Mitchell, 230 W 461, 283 NW 448.

Under 220.08, Stats. 1933, the running of the statute of limitations, so far as the commission is concerned, is stayed as to obligations of the bank on the date when the commission takes charge to liquidate, so that after such date the statute of limitations is not applicable to bar a claim filed during the pendency of the liquidation proceedings. In re Bank of Viroqua, 232 W 644, 288 NW 266.

A cause of action for criminal conversation is barred by the six-year period of limitation under (5), and hence, although the complaint also stated a cause of action for alienation of affections, it was not subject to demurrer on the ground that the action was not commenced within one year. Woodman v. Goodrich, 234 W 565, 291 NW 768.

In an action for a partnership accounting brought by the surviving partner against the administrator of the deceased managing partner a few months after the death, where the trial court properly found that the managing partner was guilty of fraud and that the plaintiff did not discover such fraud until after the death, neither the statute of limitations nor laches applied to bar extension of the accounting back to the creation of the partnership. Caveney v. Caveney, 234 W 637, 291 NW 818.

With respect to what constitutes discovery of the facts constituting the fraud, within the statute of limitations, when information brought home to a defrauded party is such as to indicate where the facts constituting the fraud can be discovered on diligent inquiry, it is the duty of such party to make the inquiry, and if he fails to do so he is, nevertheless, charged with notice of all facts to which such inquiry might have led. Ihlenfeld v. Seyler, 236 W 255, 295 NW 26.

The evidence in an action on a promissory note sustained findings that the plaintiff payee did not agree to look for payment to a corporation, which the defendant makers had formed, and that therefore there was no novation releasing the makers from personal obligation on the note. Where the defendants gave their joint and several promissory note to the plaintiff for property, purchased by them as partners, and then formed a corporation to which all of the partnership assets were transferred, and the defendants, owning all of the corporate stock and serving as directors and officers, made arrangements with their corporation to pay their indebtedness to the plaintiff, and participated in this arrangement and acquiesced in the payments, the situation was the same as if each defendant obligor had contributed to each payment so made, and the payments so made tolled the statute of limitations as to the obligation of each

on the note. Goerlinger v. Juetten, 237 W 543, 297 NW 361.

Where a tenant removed certain partitions in a garage building during 1928 and 1929, and the landlord knew of such removal before the expiration of the original lease in 1931, but did not commence an action for damages therefor until 1939, the landlord's cause of action was barred by the six-year statute of limitations, although there was a holding over of the premises to within less than six years of the commencement of the action. Voelz v. Spengler, 237 W 621, 296 NW 593.

County is prevented by statute of limitations from enforcing claim against town for excess delinquent tax roll payments which it made to town in cash in years 1918 to 1926. 29 Atty. Gen. 210.

330.20 Within three years. Within three years:

(1) An action against a sheriff, coroner, town clerk, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon execution; but this subsection shall not apply to an action for an escape.

(2) An action by any county, town, village, city or school district to recover any sum of money by reason of the breach of an official bond; such period to commence running when such municipality receives knowledge of the fact that a default has occurred in some of the conditions of such bond and that it was damaged because thereof.

(3) An action or proceeding to test the validity of a change of any county seat, within three years after the date of the publication of the governor's proclamation of such change; and every defense founded upon the invalidity of any such change must be interposed within three years after the date of the aforesaid publication, and the time of commencement of the action or proceeding to which any such defense is made shall be deemed the time when such defense is interposed.

Note: The limitation of three years after discovery of defalcation is the only limitation applicable to actions upon official bonds. Milwaukee v. Drew, 220 W 511, 265 NW 683.

330.21 Within two years. Within two years:

(1) An action by a private party upon a statute penalty or forfeiture when the action is given to the party prosecuting therefor and the state, except when the statute imposing it provides a different limitation.

(2) An action to recover damages for libel, slander, assault, battery or false imprisonment.

(3) An action brought by the personal representatives of a deceased person to recover damages, when the death of such person was caused by the wrongful act, neglect or default of another.

(4) An action to recover a forfeiture or penalty imposed by any by-law, ordinance or regulation of any town, county, city or village or of any corporation organized under the laws of this state, when no other limitation is prescribed by law. [*1931 c. 79 s. 37*]

Note: Section 330.50, limiting extension of time for commencing action, if there is no person in existence at accrual of action who is authorized to sue, to not more than double period otherwise prescribed, held not to avoid bar of limitation against action for wrongful death which was not commenced two years after death. Terbush v. Boyle, 217 W 636, 259 NW 859.

The two-year limitation for wrongful death is applicable whether the action is brought by the personal representative and notwithstanding inability to bring the action within the two-year period. London Guarantee & Acc. Co. v. Wisconsin Pub. Serv. Corp., 228 W 441, 279 NW 76.

330.22 Within one year. Within one year:

(1) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

(2) All actions for damages for seduction or alienation of affections.

(3) Any action to recover possession of, or to avoid the title to, any property real or personal acquired by the defendant or his predecessors in title, from a foreign corporation because such property was acquired by such corporation before complying with the terms of section 226.02.

(4) Any action to recover the possession of, or avoid the title to, any property real or personal because such property was acquired by a corporation before complying with the terms of section 226.02, brought against any foreign corporation which shall before the commencement of the action have complied with the terms of section 226.02, such year to be computed from the date of compliance with said section.

(5) Any action brought against any foreign corporation which has heretofore complied with the terms of section 226.02 to recover the possession of, or to avoid the title to, any property real or personal because such property was acquired by such corporation before complying with the terms of section 226.02 shall be brought on or before March 1, 1920, and not thereafter. [*1931 c. 223 s. 2*]

Note: A cause of action for alienation of affections accrues when the alienation is finally accomplished, and it is accomplished when a judgment of divorce is entered, if not before. In action by a husband for alienation of the affections of his wife, is barred by the one-year limitation of 330.22 notwithstanding the provision of 247.37 that a judgment of divorce so far as affecting the status of the parties shall not become effective until the expiration of one year from the date thereof. Harris v. Kunkel, 227 W 435, 278 NW 868.

330.23 Within thirty days. Within thirty days: An action to contest the validity of any state or municipal bond which has been certified by the attorney-general, as provided in subsection (5a) of section 14.53, for other than constitutional reasons, must be commenced within thirty days after such certification in the case of a state bond, and within thirty days after the recording of such certificate as provided by subsection (3) of section 67.02, in the case of a municipal bond.

330.24 Within nine months. Every action or proceeding to avoid any special assessment pursuant to section 62.16, or taxes levied pursuant to the same, or to restrain the levy of such taxes or the sale of lands for the nonpayment of such taxes, shall be brought within nine months from the end of the period of thirty days limited by the city improvement notice provided for by section 62.21, and not thereafter. This limitation shall cure all defects in the proceedings, and defects of power on the part of the officers making the assessment, except in cases where the lands are not liable to the assessment, or the city has no power to make any such assessment, or the amount of the assessment has been paid or a redemption made.

330.25 Actions upon accounts. In actions brought to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

330.26 Other personal actions. All personal actions on any contract not limited by this chapter or any other law of this state shall be brought within ten years after the accruing of the cause of action.

330.27 Defenses barred. A cause of action upon which an action cannot be maintained, as prescribed in this chapter, cannot be effectually interposed as a defense, counterclaim or set-off.

Note: See note to 330.19, citing Peterson v. Feyereisen, 203 W 294, 234 NW 496.

Where a legatee sought payment of a contingent legacy which had become absolute, and the executor claimed the right to deduct a note due the estate from the legatee, the rights of the parties must be determined as of the time the legacy became absolute. A finding that the note had become extinguished by the running of limitations prior to the time the contingent legacy became absolute precluded deduction thereof from such legacy, there being nothing in the will to indicate that the amount of the note should be deducted. Will of Weidig, 207 W 107, 240 NW 832.

330.28 [*Repealed by 1931 c. 79 s. 38*]

330.29 Bank bills not affected. None of the provisions of this chapter shall apply to any action brought upon any bills, notes or other evidences of debt issued by any bank or issued or put into circulation as money.

330.30 Limitation when person out of state. If when the cause of action shall accrue against any person he shall be out of this state such action may be commenced within the terms herein respectively limited after such person shall return or remove to this state. But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue is a resident of this state; and if, after a cause of action shall have accrued against any person, he shall depart from and reside out of this state the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action; provided, that no foreign corporation which owns or operates within this state a manufacturing plant and which shall have filed with the secretary of state, duly executed by its president and secretary and to which its corporate seal is attached, an instrument appointing a resident of this state its attorney for it and on its behalf to accept service of process in all actions commenced against it upon causes of action arising in this state, shall be deemed a person out of this state within the meaning of this section.

Note: This section is not, as applied to nonresident defendants, in violation of the "privileges and immunities" clause of the federal constitution. An action against a nonresident labor union and its members for property damages arising from an automobile collision, brought more than six years after the collision, was not barred. Bode v. Flynn, 213 W 509, 252 NW 284.

The construction of a state statute by the state supreme court is binding upon federal courts. But whether this statute, when so construed, conflicts with the U. S. constitution, raises a different question. The decision of the state court on that question is not conclusive. The validity of the discrimination against foreign corporations in section 330.30 depends upon its reasonableness and is a question of fact. Zalatuka v. Metropolitan Life Ins. Co., 90 F (2d) 230.

330.31 Application to alien enemy. When a person shall be an alien subject or citizen of a country at war with the United States the time of the continuance of the war shall not be a part of the time limited for the commencement of the action.

330.32 Effect of military exemption from civil process. The time during which any resident of this state has been exempt from the service of civil process on account of being in the military service of the United States or of this state, shall not be taken as any part of the time limited by law for the commencement of any civil action in favor of or against such person.

330.33 Persons under disability. (1) If a person entitled to bring an action mentioned in this chapter, except actions for the recovery of a penalty or forfeiture or against a sheriff or other officer for an escape, or for the recovery of real property or the possession thereof be, at the time the cause of action accrued, either

(a) Within the age of twenty-one years; or

(b) Insane; or

(c) Imprisoned on a criminal charge or in execution under sentence of a criminal court for a term less than his natural life.

(2) The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases.

330.34 Limitation in case of death. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced by his representatives after the expiration of that time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof and the cause of action survive an action may be commenced after the expiration of that time and within one year after the issuing, within this state, of letters testamentary or of administration.

Note: See note to 330.19, citing Manas v. Hammond, 216 W 285, 257 NW 139.

330.35 Appeals; if judgment for defendant reversed, new action for plaintiff. If an action shall be commenced within the time prescribed therefor and a judgment therein for the plaintiff, or the defendant, be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

Note: A new action, commenced by an amended complaint, setting up causes of action for procuring, directing and conspiring to commit an assault on the plaintiff, and commenced within one year after the reversal of a judgment for the plaintiff in an action commenced within the statutory time to recover damages for an assault, was not barred by the statute of limitations. Krudwig v. Koepke, 227 W 1, 277 NW 670.

330.36 When action stayed. When the commencement of an action shall be stayed by injunction or statutory prohibition the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

330.37 Disability. No person shall avail himself of a disability unless it existed when his right of action accrued.

330.38 More than one disability. When two or more disabilities shall coexist at the time the right of action accrued the limitation shall not attach until they all be removed.

330.39 Action, when commenced. An action shall be deemed commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons is served on him or on a codefendant who is a joint contractor or otherwise united in interest with him.

330.40 Attempt to commence action. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law which limits the time for the commencement of an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which the defendants or one of them usually or last resided; or if a corporation organized under the laws of this state be defendant to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served resides or has his office; or if such corporation has no such place of business or any officer or other person upon whom the summons may by law be served known to the plaintiff, or if such defendant be a nonresident, or a nonresident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons or the service thereof within sixty days. If the action be in a court not of record the service thereof must be made with due diligence.

Note: This section applies to actions in which service of summons may not be made by publication as well as to actions in which service may be made in that manner. [Contrary statements in Mariner v. Waterloo, 75 W 438, Levy v. Wilcox, 96 W 127, and Moulton v. Williams, 101 W 236, repudiated.] Rhode v. Quinn Construction Co., 219 W 452, 263 NW 200.

330.41 Presenting claims. The presentation of any claim, in cases where by law such presentment is required, to the county court shall be deemed the commencement of an action within the meaning of any law limiting the time for the commencement of an action thereon.

330.42 Acknowledgment or new promise. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby.

Note: The statute of limitations upon the note was tolled by a letter written with the knowledge of the maker acknowledging the indebtedness and by indorsements on the note properly crediting the maker with dividends. Marshall v. Wittig, 213 W 374, 251 NW 439.

330.43 Acknowledgment, who not bound by. If there are two or more joint contractors or joint administrators of any contractor no such joint contractor, executor or administrator shall lose the benefit of the provisions of this chapter so as to be chargeable by reason only of any acknowledgment or promise made by any other or others of them.

330.44 Actions against parties jointly liable. In actions commenced against two or more joint contractors or joint executors or administrators of any contractors, if it shall appear, on the trial or otherwise, that the plaintiff is barred by the provisions of this chapter as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover and for the other defendant or defendants against the plaintiff.

330.45 Parties need not be joined, when. If in any action on contract the defendant shall answer that any other person ought to have been jointly sued and shall verify such answer by his oath or affirmation, and issue shall be joined thereon, and it shall appear on the trial that the action is barred against the person so named in such answer by reason of the provisions of this chapter, the issue shall be found for the plaintiff.

330.46 Payment, effect of, not altered. Nothing contained in sections 330.42 to 330.45 shall alter, take away or lessen the effect of a payment of any principal or interest made by any person, but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made or purport to be made, shall be deemed sufficient proof of the payment so as to take the case out of the operation of the provisions of this chapter.

330.47 Payment by one not to affect others. If there are two or more joint contractors or joint executors or administrators of any contractor no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable, by reason only of any payment made by any other or others of them.

Note: Statute of limitations commenced to run in favor of guarantor on note at maturity thereof, though guarantor promised to pay at maturity or thereafter. Interest payment by maker of note did not toll statute of limitation applicable to guarantor. Bishop v. Genz, 212 W 30, 248 NW 771.

In the absence of statute, payments made by one co-maker or joint debtor toll the statute of limitations as to both. The purpose of this section was to prevent keeping an obligation alive as against joint contractors by payments made without their consent, acquiescence or authority. Kline v. Fritsch, 213 W 51, 250 NW 837.

Statute of limitations is no defense where the lapse of time occurred because of acts in which the debtor intentionally participated for the purpose of inducing credit, and which continued the debt as a recognized obligation; and such rule is not affected by this section. Bowe v. La Buy, 215 W 1, 253 NW 791.

Note authorizing renewal without notice to signers or indorsers held not to authorize payment of interest after maturity so as to toll limitation statute as to accommodation maker in absence of either renewal or definite time extension; word "renewal" usually meaning execution of new note. Estate of Schmidt, 218 W 444, 261 NW 240.

Under a demand note providing that sureties or indorsers consent that time of payment may be extended without notice thereof, the payee's mere retention of the note did not constitute an extension, and where accommodation makers did not furnish any money paid as interest on the note, the payee never requested either accommodation maker to make any payment on the interest accrued, and neither accommodation maker ever authorized the principal maker to make any payment on their behalf, the statute of limitations was not tolled as to such accommodation makers. Accola v. Giese, 223 W 431, 271 NW 19.

The signer of an undertaking that "for value received, we hereby guarantee the payment of the within note", was a guarantor and not an indorser, notwithstanding additional words "waiving demand of payment, protest and notice of protest." The liability of such a guarantor is several and his liability is unaffected by payment made by the maker of the note, on the question of the statute of limitation. Zuehlke v. Engel, 229 W 386, 282 NW 579.

330.48 Computation of time, basis for. The periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or defendant in the particular action or special proceeding, except that as to a defense, set-off or counterclaim the time of the commencement of the plaintiff's action shall be deemed the time when the claim for relief as to such defense, set-off or counterclaim is interposed.

330.49 Dismissal of suit after answer. When a defendant in an action has interposed an answer as a defense, set-off or counterclaim upon which he would be entitled to rely in such action the remedy upon which, at the time of the commencement of such action, was not barred by law, and such complaint is dismissed or the action is discontinued the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action by the de-

fendant to recover for the cause of action so interposed as a defense, set-off or counterclaim.

330.50 Extension of time if no person to sue. There being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues shall not extend the time within which, according to the provisions of this chapter, an action can be commenced upon such cause of action to more than double the period otherwise prescribed by law.

330.51 What actions not affected. This chapter shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a liability created by law; but such actions must be brought within six years after the discovery by the aggrieved party of the facts upon which the forfeiture attached or the liability was created.

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