CHAPTER 269.

PRACTICE REGULATIONS.

269.01 Agreed case; affidavit; judgment. Parties to a controversy which might be the subject of a civil action, may agree upon a verified case containing the facts upon which the controversy depends and submit the same to any court which would have jurisdiction if an action were brought. The court shall, thereupon, render judgment as in an action. Judgment shall be entered and docketed as other judgments and with like effect, but without costs for any proceeding prior to the trial. The case, the submission and the judgment shall constitute the judgment roll. [*1935 c. 541 s. 131*]

Revisor's Note, 1935: The declaratory judgment statute (269.56) has greatly reduced the need for 269.01. (Bill No. 50 S, s. 131)

Where all of the parties to an action asked for a final judgment upon the summons and complaint, an order to show cause and the return thereto, that amounted to an agreement to submit the case upon the complaint and the affidavits and judgment was entered accordingly. Luebke v. Watertown, 230 W 512, 284 NW 519.

Where a landowner appealed to the circuit court from the county judge's determination denying his petition for the appointment of commissioners to assess compensation for land allegedly taken by the county, which appeal was ineffective to confer jurisdiction because not authorized by statute, but the parties treated the matter in circuit court as an "action" and stipulated that the petition and pleadings, testimony and the entire record be submitted to the circuit court, and that in the event of the circuit court's reversing the county judge's decision the circuit court should proceed with the selection of a jury to try the issue of damages and any other issues involved, the case is deemed pending in the circuit court as an "action" on an agreed case. Olen v. Waupaca County, 238 W 442, 300 NW 178.

Stipulations signed and filed by the parties in interest for the determination of the validity of a sale of corporate personal property, made by a trustee under a trust deed, constituted an "agreed case," although no summons had been issued in a proceeding instituted by a creditor for the appointment of a receiver to wind up the affairs of the corporation. [In re Citizens State Bank of Gillette, 207 W 434, distinguished.] In re Davis Bros. Stone Co. 245 W 130, 13 NW (2d) 512.

269.02 Offer of judgment; effect. The defendant may, in any action, before the trial, serve upon the plaintiff an offer, in writing, to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accept the offer and give notice thereof in writing, before trial and within ten days, he may file the summons, complaint and offer, with an affidavit of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance be not given the offer is withdrawn and cannot be given as evidence on the trial. [*1935 c. 541 s. 132; 1937 c. 145*]

269.03 Defendant's offer as to damages, accepted. The defendant may serve upon the plaintiff a written offer that if he fail in his defense the damages be assessed at a specified sum, and if the plaintiff accepts the offer in writing, within ten days and before the trial and prevails on the trial, the damages shall be assessed accordingly. [*Supreme Court Order, effective Jan. 1, 1936*]

269.04 Same; if offer not accepted. If the plaintiff do not accept the offer he shall not be permitted to give it in evidence, and if the damages assessed in his favor shall not exceed the sum offered the defendant shall recover his expenses incurred in consequence of any necessary preparations or defense in respect to the question of damages; such expenses shall be determined by the presiding judge and carried into the judgment. [*Supreme Court Order, effective Jan. 1, 1936*]

269.05 Consolidation of actions. When two or more actions are pending in the same court, which might have been joined, the court or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order.

Note: The denial of a request to try together the separate actions arising out of the same collision was not an abuse of discretion. Reardon v. Terrien, 214 W 267, 252 NW 691.

269.06 Court may order delivery of property. When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party or which belongs or is due to another party the court may order the same to be deposited in court or delivered to such party with or without security, subject to the further direction of the court.

269.07 Refusal to deliver property; title passed by judgment. When a court shall have ordered the deposit, delivery or conveyance of property and the order is disobeyed, the court may order the sheriff to take the property and deliver, deposit or convey it in conformity with the direction of the court and the court may pass title by its judgment. [*1935 c. 541 s. 133*]

269.08 Summons to joint debtors not originally summoned. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 270.55, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned. The summons shall be subscribed by the judgment creditor, his representatives or attorneys, shall describe the judgment and require the person summoned to show cause, within twenty days after the service of the summons, and shall be served in like manner as the original summons. The summons shall be accompanied by an affidavit of the person subscribing it that the judgment has not been satisfied to his knowledge or information and belief, and specifying the amount due thereon.

269.09 Parties may defend. The party summoned may answer within the time specified and may make any defense which he might have originally made to the action, and may deny the judgment or make any defense which may have arisen subsequently.

269.10 Pleadings and trial. The party issuing the summons may demur or reply to the answer and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action and enforced by execution or the application of the property charged to the payment of the judgment be compelled by attachment, if necessary.

269.11 [*Repealed by Supreme Court Order, effective Jan. 1, 1936*]

269.12 Summons where no jurisdiction. When judgment shall have been entered in an action against any defendant upon whom service was attempted, but whereby jurisdiction was not acquired, such defendant may be summoned to show cause why he should not be bound by the judgment in the same manner as if he had been originally summoned. The summons shall be like that provided in section 269.08, with a like accompanying affidavit when the judgment is for a sum of money. It may be served in any manner as an original summons might be. Proceedings thereon shall be had as prescribed in sections 269.09 and 269.10, and judgment upon default or otherwise be entered, as the nature of the case demands. [*Supreme Court Order, effective Sept. 1, 1932; 1943 c. 275 s. 61*]

269.13 When action not to abate. An action does not abate by the occurrence of any event if the cause of action survives or continues.

269.14 Continuance if interest transferred, etc. In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, or the court may direct the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party, as the case requires.

Note: This section applies to a special proceeding, such as a proceeding for the vacation of a plat, as well as to an action. In re Henry S. Cooper, Inc., 240 W 377, 2 NW (2d) 866.

269.15 Action by officer, receiver, etc., not to abate. When an action or special proceeding is lawfully brought by or in the name of a public officer or by a receiver or by any trustee appointed by virtue of any statute his death or removal shall not abate the same, but it may be continued by his successor, who may be substituted therefor by order of the court or a judge.

269.16 Death or disability of party. In case of the death or disability of a party, if the cause of action survives, the court may order the action to be continued by or against his representatives or successor in interest. [*1935 c. 541 s. 134*]

269.17 Joint actions not abated by death; liability of estate. Where there are several plaintiffs or defendants in any action, if any of them shall die and the cause of action survives to or against the others the action may proceed, without interruption, in favor of or against the survivors. If all the plaintiffs or defendants shall die before judgment the action may be prosecuted or defended by the executor or administrator of the last surviving plaintiff or defendant, as the case may be. But the estate of a party jointly liable upon contract with others shall not be discharged by his death, and the court may, by order, bring in the proper representative of the deceased defendant, when it is necessary so to do, for the proper disposition of the matter; and where the liability is several as well as joint may order a severance of the action so that it may proceed separately against the representative of the decedent and against the surviving defendants.

Note: The survivorship statutes (sections 269.17, 269.18) do not apply to proceedings in the supreme court so as to permit an appeal to be prosecuted therein after the death of a party affected by the judgment appealed from. Stevens v. Jacobs, 226 W 198, 275 NW 555, 276 NW 638.

269.18 Death of parties; effect on action. In case of the death of any of several plaintiffs or defendants, if part only of the cause of action or part or some of two or more distinct causes of action survives to or against the others the action may proceed without bringing in the successor to the rights or liabilities of the deceased party, and the judgment shall not affect him or his interest in the subject of the action. But when it appears proper the court may order the successor brought in. [*1935 c. 541 s. 135*]

Note: Secs. 269.17 and 269.18, relating to the revival of actions, apply when a party dies before judgment in circuit court but they do not apply after that judgment and they have no application to the supreme court. (Sec. 260.01) Bond v. Breeding, 234 W 14, 290 NW 185.

Where one defendant in an action on contract against trustees of an unincorporated church congregation died and his death was called to the attention of the trial court before trial, and the action was not revived against his personal representative, the entry of judgment against such defendant personally was erroneous, in view of 269.18. Mitterhausen v. South Wisconsin Conference Asso., 245 W 353, 14 NW (2d) 19.

269.19 Action to recover real property. (1) DEATH OF PLAINTIFF. In an action for the recovery of real property if any plaintiff shall die before judgment his heir or devisee or his executor or administrator, for the benefit of the heir, devisee or creditors, may be admitted to prosecute the action in his stead.

(2) DEATH OF A DEFENDANT. When there are several defendants and any of them shall die before judgment the action may be prosecuted against the surviving defendants for so much of the premises as they shall hold or claim. [*1935 c. 541 s. 136, 137*]

269.20 Same. If the interest of the deceased party passes to the surviving plaintiffs, or if there be no motion for the admission of another person as heir, executor or administrator within the time allowed by the court for that purpose, the surviving plaintiffs may prosecute the action for so much of the premises in question as may be claimed by them.

269.21 [*Renumbered section 269.19 (2) by 1935 c. 541 s. 137*]

269.22 Death after verdict or findings; practice. After an accepted offer to allow judgment to be taken, or after a verdict, report of a referee or finding by the court in any action the action does not abate by the death of any party, but shall be further proceeded with in same manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report or finding be not set aside. But a verdict, report or finding rendered against a party after his death is void.

269.23 Proceedings to revive action. Whenever any person shall be entitled to continue any action or proceeding interrupted by death, removal from a trust or other disability he may file with the clerk a petition setting out the necessary facts and thereupon give notice to the other party of the time and place of such filing, and that unless he shows cause by affidavit within twenty days after service of such notice on him, exclusive of the day of service, why such action or proceeding should not be revived the same will stand revived according to such petition. Such notice may be served in the same manner as a summons

Upon filing such notice with proof of service and that no affidavit has been received the court or a judge shall order the action or proceeding revived. An affidavit showing cause against such revivor may be served on the party subscribing such notice as a pleading is served; and the court shall make such order as the circumstances may require. [*1935 c. 541 s. 138*]

Note: After a mortgage foreclosure judgment finally determining a defendant's liability for deficiency has been entered the action in which it was entered was so "pending" that after the death of such defendant his personal representative could be substituted as a party in place of the decedent in the subsequent proceedings, and thereafter judgment be entered against such representative for the deficiency arising on the sale. Johnson v. Landerud, 209 W 672, 245 NW 862.

Where the guardian of an incompetent heir appealed to the supreme court from an order of the county court appointing an administrator of the estate of a sister, and such heir died during the pendency of the appeal, his special administrator was a proper party in interest so as to be entitled to an order reviving the appeal. Estate of Edwards, 234 W 40, 289 NW 605.

269.24 Action dismissed if not revived. At any time after the death of the plaintiff the court may, upon notice to such persons as it shall direct and on the application of the adverse party or of a person whose interest is affected, order the action dismissed unless continued by the proper parties within the time therein specified; and unless so continued within such time the same shall stand dismissed. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: An appeal from a judgment of divorce granted to a husband who died after judgment and before appeal is not dismissible on the ground that the action was not revived in the court below, since the revivor statutes do not apply where a party dies after judgment in the action. Hirchert v. Hirchert, 243 W 519, 11 NW (2d) 157.

269.25 Dismissal for delay. The court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement. [*1935 c. 541 s. 139*]

Note: The supreme court cannot assume, in the absence of evidence, that the trial judge interpreted this section as mandatory. Dismissal of the action to foreclose the mechanic's lien for failure to bring it to trial for nearly nine years after its commencement was proper. Wisconsin Lumber & S. Co. v. Dahl, 214 W 137, 252 NW 714.

Circuit court practice of dismissing actions not brought on for trial within five years is ordained by statute, limited in application, and does not actually or by analogy extend to county courts in matters of claims filed against decedents' estates. Filing of claim in county court is not the commencement of a civil action. Estate of Smith, 218 W 640, 261 NW 730.

Denial of a motion to dismiss for want of prosecution, an action which was not brought to trial within five years owing to the neglect of counsel first retained by the plaintiff, is not an abuse of discretion, where the circumstances showed that the plaintiff on its own behalf was as diligent and vigilant as clients usually are who rely on counsel to keep them advised, and there was no defense set up in the answer. Northwestern M. I. Co. v. McMahon, 222 W 653, 269 NW 653.

269.26 [*Renumbered section 270.53 (2) by 1935 c. 541 s. 140*]

269.27 Motion defined; when and where made; stay of proceedings. An application for an order is a motion. Motions in actions or proceedings in the circuit court must be made within the circuit where the action is triable; in other courts, within their territorial jurisdiction. Orders out of court, without notice, may be made by the presiding judge of the court in any part of the state; and they may also be made by a county judge or court commissioner of the county where the action is triable. No order to stay proceedings after a verdict, report or finding in any circuit court shall be made by a county judge or court commissioner, or in any county court by a court commissioner. No stay of proceedings for a longer time than twenty days shall be granted by a judge out of court except upon previous notice to the adverse party.

269.28 Orders, how vacated and modified. An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice shall not be modified or vacated except by the court upon notice, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order. [*Supreme Court Order, effective Jan. 1, 1936*]

269.29 Restriction as to making orders; review by court. Where an order or proceeding is authorized to be made or taken by the court it must be done by the court in session; where an order or proceeding is authorized to be made or taken by the presiding judge or the circuit judge, using such words of designation, no county judge or court commissioner can act. Except as so provided or otherwise expressly directed a county judge or court commissioner may exercise within his county the powers and shall be subject to the restrictions thereon of a circuit judge at chambers but such orders may be reviewed by the court. The court may make any order which a judge or court commissioner has power to make. [*1935 c. 541 s. 142*]

Note: An order made by a judge at chambers is not an "order of the court," 269.29 requiring that a "court order" must be made by the court in session. Yanggen v. Wisconsin Michigan Power Co., 241 W 27, 4 NW (2d) 130.

269.30 Motions, how heard if judge disqualified. Where a motion is made to be heard before the court or the presiding judge thereof and such judge is disqualified to hear the motion it may be transferred by his order to some court having concurrent jurisdiction of the subject of the action or it may be so transferred by the written stipulation of the parties. The court so designated shall make the proper order for the determination thereof and carrying the same into execution, which shall be transmitted to and entered by the clerk of the court where the action is pending and have the same effect as if made by that court. [*1935 c. 541 s. 143*]

269.31 Time of notice of motion. When a notice of motion is necessary, unless the time be fixed by statute or the rules of court, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Note: Sole office of an order to show cause in connection with an application for an order is to prescribe a shorter time for hearing than that prescribed for notice of a motion. State ex rel. Ashley v. Circuit Court, 219 W 38, 261 NW 737.

269.32 Motions and orders; service of papers. (1) All such motions shall be brought to hearing on written notice or order to show cause. Such notice of motion or order to show cause shall state the nature of the order or relief applied for, and if based on irregularity, it shall specify the irregularities complained of.

(2) Copies of all records and papers upon which a motion or order to show cause is founded, except such as have been previously filed or served in the same action or proceeding, shall be served with the notice thereof or the order to show cause, and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, not served with the motion papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs, should request therefor be made.

(3) When a notice of a motion for an order has been served either party may take depositions, on notice, to be used on the hearing of such motion. Testimony may be taken on the hearing and such testimony shall be transcribed, certified and filed at the expense of the party offering the same unless otherwise ordered.

(4) All orders shall refer to the records and papers used, and the testimony taken upon the application for the order. [*Court Rule XI; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1936*]

269.33 Papers to be legible. Every paper in any action or proceeding and copies thereof shall be legible and on substantial paper and shall have indorsed thereon the title of the action or proceeding and character of the paper and serial record number of the action if filed after the clerk had given the action a number, and if not so prepared and indorsed, the clerk may refuse to file the paper and the party to be served need not receive it. The clerk shall indorse on all papers filed the date of filing. [*Court Rule I s. 1; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Jan. 1, 1936*]

269.34 Service of papers; personal and by mail. (1) The service of papers may be personal by delivery of a copy of the paper to be served to the party or attorney on whom the service is to be made.

(2) Service upon an attorney may be made during his absence from his office by leaving such copy with his clerk therein or with a person having charge thereof; or, when there is no person in the office, by leaving it in a conspicuous place in the office; or, if it be not open then by leaving it at the attorney's residence with some person of suitable age and discretion. If admission to the office cannot be obtained and there is no person in the attorney's residence upon whom service can be made, it may be made by mailing him a copy to the address designated by him upon the preceding papers in the action; or where he has not made such a designation, at his place of residence or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

(3) Service upon a party may be made by leaving the copy at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

(4) Service may be made by mailing such copy where the person making the service and the person on whom it is made reside in different places between which there is a communication by mail. The copy of the paper to be served must be properly inclosed in a postpaid wrapper (which may bear the sender's name and address) and must be addressed to the person on whom it is to be served at his proper post-office address, but without any request to the postal officers upon the wrapper for the return thereof in case of nondelivery to the person addressed. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: An admission of "due sufficient and personal service" of a notice of retainer, sent by mail by the defendant, on receipt of the plaintiff's summons, without, however, any attempt to make service of the notice by mail in accordance with (4), was equivalent to an admission that the notice had been personally served so that the service of the notice was not service by mail which would double the time within which the plaintiff's complaint might be served. Banking Comm. v. Flanagan, 233 W 405, 289 NW 647.

269.35 [*Renumbered 269.34 by Supreme Court Order, effective Jan. 1, 1936*]

269.36 Mail service doubles time allowed. Where a certain time before an act to be done is required for the service of any paper and where, after service of any paper, a specified time is allowed a party to do an act in answer to or in consequence of such service, if service be made by mail, the time shall be double the time required or allowed in case of personal service.

Note: Service of notice of hearing of a motion for an extension of time for settling a bill of exceptions by mail only 5 days before the date set for the hearing was defective, 8 days' notice being required in case of personal service, and 16 in case of service by mail. Morris v. P. & D. General Contractors, Inc. 236 W 513, 295 NW 720.

269.37 Service on attorney; when service not required. When a party to an action or proceeding shall have appeared by an attorney the service of papers shall be made upon the attorney. When a defendant shall not have appeared in person or by attorney service of notice or papers in the ordinary proceedings in an action need not be made upon him unless he be imprisoned for want of bail.

Note: The provision in 269.37 that service of notice or papers in the ordinary proceedings in an action need not be made on a nonappearing defendant, is a part of title XXV of the statutes and hence, by virtue of 260.01, applies only to proceedings in the circuit court or other courts of record having concurrent jurisdiction therewith, and has no application to matters pending in the supreme court. Benton v. Institute of Posturology, Inc., 243 W 514, 11 NW (2d) 133.

269.38 Service of papers dispensed with. When a party's residence and post office are not known and neither can with due diligence be learned and he has designated no place for service of papers upon him, service of notice and other papers on him is dispensed with unless there is a special rule requiring publication of notice, in which case the special rule shall be observed. [*Supreme Court Order, effective Jan. 1, 1936; Supreme Court Order, effective July 1, 1939*]

269.39 Process not included. The provisions of this chapter shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

269.40 [*Renumbered section 59.23 (9) by 1935 c. 541 s. 144*]

269.41 Sheriff's certificate as evidence; proof of service. When service of a notice or paper in an action or proceeding is authorized to be made by the sheriff his certificate of service shall be evidence thereof. Proof of service of notices and papers where no special mode of proof is provided may be made as provided by section 328.18.

Note: The rule, that an officer's return to the process of a court is conclusive, is not recognized in Wisconsin. [Statement in Davis v. State, 187 Wis. 115, implying to the contrary, disapproved.] Where an action is brought in one state on a judgment rendered in another state, the officer's return of service of process in the sister state is not conclusive as to the parties, and may be attacked to prove lack of jurisdiction. Mullins v. LaBahn, 244 W 76, 11 NW (2d) 519.

269.42 Papers, where filed. All affidavits and papers used on any motion shall be filed with the clerk of the court or with the judge by whom the motion is heard, and the judge shall, after decision thereof, file all such papers with the clerk. All undertakings given in actions or proceedings must be filed with the clerk unless otherwise directed by these statutes or the court expressly provides for a different disposition thereof.

269.43 Mistakes and omissions. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Note: Repeated insinuation by the defendant's attorney that the plaintiff was drunk and disorderly at the time of the automobile accident was prejudicial error, especially where the verdict awarded no damages. Rissling v. Milwaukee E. R. & L. Co., 203 W 554, 234 NW 879.

The supreme court is committed to the doctrine that a judgment will not be set aside for a mere irregularity in the proceedings leading to the entry thereof where no resulting prejudice is shown, the statute commanding the court to disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party. If the defect is such as to render the judgment void, the judgment is subject to being stricken from the record at any time for that reason. Where substantial prejudice is shown, ordinarily the supreme court in the exercise of its discretion will vacate the judgment where no notice of application for judgment was given. Federal Land Bank v. Olson, 239 W 448, 1 NW (2d) 752.

269.44 Amendments of processes, pleadings and proceedings. The court may, at any stage of any action or special proceeding before or after judgment, in furtherance of justice and upon such terms as may be just, amend any process, pleading or proceeding, nothwithstanding it may change the action from one at law to one in equity, or from one on contract to one in tort, or vice versa; provided, the amended pleading states a cause of ac-

tion arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based. [*Stats. 1931 s. 263.29; Supreme Court Order, effective Jan. 1, 1934*]

Note: This section authorizing a court upon the trial of an action to correct a mistake in the name of a party, is inapplicable to an action brought by mistake against the brother of the person causing an injury. Baker v. Tormey, 209 W 627, 245 NW 652.

See note to 269.52, citing Clark v. Sloan, 215 W 423, 254 NW 653.

Where the facts set forth in a complaint are such as to make the cause removable to the federal court and a proper petition and bond for removal are filed in the state court, the state court is without jurisdiction thereafter to permit an amendment of the complaint to delete facts making the cause removable. Egan v. Preferred Accident Ins. Co., 223 W 129, 269 NW 667.

Where the damages are unliquidated, the granting of a motion to increase the ad damnum clause of the complaint to conform to the judgment should be denied except as a condition of a new trial at least on the question of damages. McCartie v. Muth, 230 W 604, 284 NW 529.

It was an abuse of discretion to deny a motion to file an amended complaint alleging that the industrial commission acted without or in excess of its powers. Kaegi v. Industrial Commission, 232 W 16, 285 NW 845.

"It is well settled that, when a trial court keeps within the limitations imposed by the statute as to allowing amendments, the power is very broad, resting in sound discretion, and the decision will not be disturbed except for a clear abuse of judicial power." Kaegi v. Industrial Commission, 232 W 16, 285 NW 845, 849.

Where the plaintiff sued for the conversion of bonds, which he had delivered to the defendant's branch-business manager to collateralize a bank loan, credited to the defendant's bank account, on a note signed by such manager and the plaintiff, and which bonds were sold by the bank and the proceeds applied on the note, and the evidence did not establish the defendant's liability on the contract set forth in the complaint but it did establish that the defendant, although not knowing the source thereof, had received the money loaned on the note, a cause of action against the defendant for money had and received was proved, and the trial court properly considered the complaint amended to conform to the proofs. Duffy v. Scott, 235 W 142, 292 NW 273.

This section refers only to amendments of pleadings made by the trial courts and to the power of these courts to amend the pleadings while cases are pending therein and in the few instances in which the trial court still has power to act notwithstanding it has entered judgment. The section does not refer to practice in the supreme court. State Farm Mut. Automobile Ins. Co. v. Duel, 247 W 121, 19 NW (2d) 315.

269.45 Enlargement of time. The court or a judge may, upon notice and good cause shown by affidavit and upon just terms, extend the time within which any act or proceeding in an action or special proceeding must be taken (except the time for appeal) and may do so after the time has expired. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: Orders extending the time within which any act or proceeding in an action or special proceeding must be taken can not be granted as matters of grace. Wendlandt v. Hartford A. & I. Co., 222 W 204, 268 NW 230.

Affidavits which merely stated that the bill of exceptions was not served in due time because appellant's attorney was busy with other legal matters were insufficient to show "good cause" for the extension, and granting an extension of time was reversible error. Meyers v. Thorpe, 227 W 200, 278 NW 462.

An order requiring parties appealing from a judgment to pay the sum of $30 as a condition for an extension of the time within which to settle the bill of exceptions was within the discretion of the trial court. Warnke v. Braasch, 233 W 398, 289 NW 598.

An extension of the time within which any act or proceeding in an action or special proceeding must be taken can be granted only on notice and good cause shown by affidavit, whether the motion is made before or after expiration of the time. The power is highly discretionary, and the determination of the trial court will not be disturbed except where it clearly appears that its discretion has been abused. Banking Comm. v. Flanagan, 233 W 405, 289 NW 647.

Granting the defendant's motion to extend the time for settling the bill of exceptions was not abuse of discretion where there had been a substitution of attorneys after judgment and the defendant was endeavoring to get the appeal taken and acted with reasonable diligence, and by inadvertence of defendant's present counsel the application was not made within the required time. Bettack v. Conachen, 235 W 559, 294 NW 57.

"Good cause" must be shown for extending the time for serving the bill of exceptions, and an extension of the time cannot be granted as a matter of grace nor for the mere convenience of a party nor merely because an extension will not cause a term in the supreme court to be lost. Becker v. Smith, 237 W 322, 296 NW 620.

"Good cause" for extending the time for serving and settling a bill of exceptions must appear in the record. Millar v. Madison, 242 W 617, 9 NW (2d) 90.

269.45 applies to an order extending the time for hearing a motion for a new trial on the judge's minutes under 270.49 (1), which is silent as to notice, so that a court cannot make such an order ex parte but can do so only on notice. Boyle v. Larzelere, 245 W 152, 13 NW (2d) 528.

The order, in extending the time for serving the complaint to ten days after the filing of the deposition of the nonresident defendant with the clerk of the circuit court, is not invalid as beyond the power of the circuit court to extend the time for serving a complaint indefinitely. State ex rel. Walling v. Sullivan, 245 W 180, 13 NW (2d) 550.

269.46 Relief from judgments, orders and stipulations. (1) The court may, upon notice and just terms, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission in any proceeding.

(2) No agreement, stipulation or consent, between the parties or their attorneys, in respect to the proceedings in an action or special proceeding, shall be binding unless made in court and entered in the minutes or made in writing and subscribed by the party to be bound thereby or by his attorney. [*Court Rule V s. 2; Supreme Court Order, effective Jan. 1, 1934*]

Note: A trial court may not relieve a party from a judgment entered through mistake where the supreme court had affirmed the judgment. Belt L. R. Co. v. Dick, 202 W 608, 233 NW 762.

Where, after decision, the parties stipulated respecting the judgment, but, upon interposition and objection by new parties, the trial court disregarded it, the supreme court cannot by its judgment restore the stipulation. Massey v. Richmond, 208 W 239, 242 NW 507.

Where a defendant, in addition to a motion to vacate a judgment on the ground that the trial court had not acquired jurisdiction of his person, also moved for relief under this section, the application for such relief constituted a general appearance, notwithstanding statements in the motion papers that the appearance was special, and cured any invalidity in the judgment resulting from lack of jurisdiction of the person of the defendant in the first instance. Farmington M. F. Ins. Co. v. Gerhardt, 216 W 457, 257 NW 595.

"Stipulations" are of two types: first, those relating to merely procedural matters; and, second, those which have all essential characteristics of mutual contract. In death action against railroad, stipulation as to amount of damage, ownership of automobile in which decedents were riding, and presence of wigwag equipment at intersection where accident occurred, had reference to trial then pending and was not binding at any future trial, being merely series of admissions by defendant's counsel for purpose of shortening trial. Paine v. Chicago & N. W. R. Co., 217 W 601, 258 NW 846.

"Stipulations" are of two kinds: first, those which are mere admissions of fact, merely relieving party from inconvenience of making proof; and, second, those having all characteristics as concessions of some rights as consideration for those secured, and these stipulations are entitled to all sanctity of ordinary contract. In action on insurance policy, stipulation that policy was in effect, that plaintiff was beneficiary, that beneficiary made proper proofs of loss, and as to amount due in case of recovery, and circumstances and cause of insured's death, was conclusive unless set aside, being more than stipulation for convenience of parties, but in fact agreed case. Thayer v. Federal Life Ins. Co., 217 W 282, 258 NW 849.

Subsequent events, revealing that the amount of liquidated damages agreed on by the parties to a contract was inadequate, will not affect the right to limit recovery to the amount stipulated. Keehn v. United States F. & G. Co., 222 W 410, 268 NW 127.

A stipulation by which a bankrupt and his wife agreed not to appeal from a judgment in favor of the trustee setting aside a conveyance from the bankrupt to his wife as fraudulent, in consideration of the trustee's withdrawal of his opposition to the bankrupt's discharge, is held void as contrary to the bankruptcy act and as against public policy. Beat v. Mickelson, 220 W 158, 264 NW 504.

A motion for relief under this section cannot be granted by the supreme court but must be applied for in the trial court. Milwaukee County v. H. Neidner & Co., 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

An order denying a motion to vacate a judgment in an action at law, which order was based on failure of the movants to prosecute an equitable claim in such action after having been allowed to intervene, was res judicata only of the issue of negligence barring vacation of the judgment and was not a bar to an equitable action in the circuit court to enjoin enforcement of the judgment. Nehring v. Niemerowicz, 226 W 285, 276 NW 325.

An order setting aside an order of confirmation of a mortgage foreclosure sale and permitting redemption by payment of an amount less than that due under the foreclosure judgment, based on an alleged oral understanding of the parties, was erroneous, since the jurisdiction of the trial court to relieve against the order confirming the sale depended solely on this section. First Nat. Bank & Trust Co. v. Hardy, 226 W 457, 277 NW 181.

The rule that a judgment will not be set aside unless there is a showing that the defendant has a meritorious defense is inapplicable where the judgment attacked is void for want of jurisdiction. Chippewa Valley Securities Co. v. Herbst, 227 W 422, 278 NW 872.

The power of a court to relieve a party under this section depends upon a showing of mistake, inadvertence, surprise or excusable neglect. Wanting such showing, the court is powerless to afford relief. In re Coloma State Bank, 229 W 475, 282 NW 568.

A court is without jurisdiction to vacate a judgment on the ground of surprise, etc., more than a year after notice of the entry of judgment. The motion to vacate must be decided within such year. The burden of proof is on the mover. Harris v. Golliner, 235 W 572, 294 NW 9.

An agreement, made before the public service commission by counsel for two cities, that one should pay the other for water furnished by it at a rate to be fixed by the commission until the effective date of the commission's order, subject to the right of either party to appeal from the order, was comparable to a stipulation made in open court and was binding on both cities. Milwaukee v. West Allis, 236 W 371, 294 NW 625.

It is not enough under the statute that the motion for relief be made within a year but the court must act within a year. Kellogg-Citizens Nat. Bank v. Francois, 240 W 432, 3 NW (2d) 686.

The trial court is without power to relieve a party from a judgment rendered against him through mistake, surprise or excusable neglect after that judgment has been affirmed by the supreme court, even though the application for relief is made within one year after notice of the judgment. Hoan v. Journal Co., 241 W 483, 6 NW (2d) 185.

For effect of stipulation in divorce action, see note to 247.32 citing Beck v. First Nat. Bank in Oshkosh, 244 W 418, 12 NW (2d) 665.

The provision in 269.45, for extending the time, etc., even "after the time has expired," does not apply to a case within 269.46 (1), which provided that a court may, at any time "within one year after notice thereof," relieve a party from a judgment obtained through mistake. Boyle v. Larzelere, 245 W 152, 13 NW (2d) 528.

(2), in providing that no agreement, "in respect to the proceedings in an action" shall be binding unless made in open court or made in writing, etc., has reference to stipulations directly affecting the course of an action and does not control subsequent causes of action on different issues nor modify accepted contract law. Logemann v. Logemann, 245 W 515, 15 NW (2d) 800.

269.465 Affidavit of advice of counsel. Whenever it shall be necessary in any petition or affidavit to swear to the advice of counsel, a party shall, in addition to what has usually been required, swear that he has fully and fairly stated the case to his counsel and shall give the name and place of residence of such counsel. [*Court Rule XIII s. 1; Supreme Court Order, effective Jan. 1, 1934*]

Note: Since one cannot be his own unbiased disinterested counsel within the rule justifying action of a layman in reliance upon the advice of counsel, the fact that defendant was an attorney did not justify him in acting on his own advice. Mawhinney v. Morrissey, 208 W 333, 242 NW 326.

269.47 Defense where service by publication. When service of the summons shall have been made by publication, if the summons shall not have been personally served on a

defendant nor received by such defendant through the post office, he or his representative shall, on application and good cause shown, at any time before final judgment, be allowed to defend the action; and, except in an action for divorce or annulment of the marriage contract, the defendant or his representative shall in like manner, upon good cause shown and such terms as shall be just, be allowed to defend after final judgment at any time within one year after actual notice thereof and within three years after its rendition. If the defense be successful and the judgment or any part thereof shall have been collected or otherwise enforced such restitution may thereupon be compelled as the court shall direct; but the title to property, sold under such judgment to a purchaser in good faith, shall not thereby be affected.

Note: The defendant husband's motion to vacate a default judgment of divorce, and to permit the defendant to file an answer and counterclaim and defend the action, on the ground of newly discovered evidence of infidelity of the wife, should have been granted where the motion was sufficiently supported and properly and timely presented, and the defendant was not chargeable with lack of diligence. Jermain v. Jermain, 243 W 508, 11 NW (2d) 163.

269.48 Adding new defendants. In every action the summons or the summons and complaint may be amended of course, without costs, and without prejudice to the proceedings already had by adding other persons as parties defendant and making the proper allegations for such purpose. Service of the amended summons, together with the complaint or a notice of the object of the action, may be made upon such new defendants as prescribed in chapter 262. No further service shall be necessary on the original defendants, but the action shall proceed in the same manner as if the new parties had been originally joined.

269.49 Copy of paper may be used, when. If any original paper or pleading be lost or withheld by any person the court may authorize a copy thereof to be filed and used instead of the original.

269.50 Affidavits need not be entitled. It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

269.51 Irregularities and lack of jurisdiction waived on appeal; jurisdiction exercised; transfer to proper court. (1) When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction of the appellate court, unless he shall move to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it shall appear upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

(2) If the tribunal from which an appeal is taken had no jurisdiction of the subject matter and the court to which the appeal is taken has such jurisdiction, said court shall, if it appear that the action or proceeding was commenced in the good faith and belief that the first named tribunal possessed jurisdiction, allow it to proceed as if originally commenced in the proper court and shall allow the pleadings and proceedings to be amended accordingly; and in all cases in every court where objection to its jurisdiction is sustained the cause shall be certified to some court having jurisdiction, provided it appear that the error arose from mistake. [*1935 c. 541 s. 145*]

Note: Appellants who did not appear on the hearing for final distribution were denied an opportunity to perfect an appeal. In re Sveen's Estate, 202 W 573, 232 NW 549.

Upon reversal of a judgment of the county court solely because such court lacked jurisdiction of the action, the action was allowed, under (2), to proceed as if it had been commenced originally in the circuit court with permission to amend the pleadings and proceedings accordingly. Jansen v. Schoepke, 214 W 350, 253 NW 554.

The statutes giving the court, where an appeal has been attempted in good faith, power to allow a defect or omission in the appeal papers to be supplied with the same effect as if the appeal had been originally properly taken, indicate a general and wholesome policy of liberality in relieving from mistakes and omissions in furtherance of justice when they are excusable and have not misled or otherwise operated prejudicially to an adverse party. Guardianship of Moyer, 221 W 610, 267 NW 280.

Subsection (1) is not limited in its application to procedure in circuit court, but such statute applies as well to attempted appeals to the supreme court. The conduct creating a statutory waiver under (1) is in effect a conferring of jurisdiction on the supreme court by the statute, not by action of the court dispensing with timely service of the appeal papers. Where the appellants attempted in good faith to serve notice of appeal and undertaking on the respondent in time, the respondent, by signing a stipulation for settling, and receiving and retaining a copy of, the bill of exceptions, signing an acceptance of, and retaining copies of, the appellants' printed case, and receiving, and receipting in writing for, 3 copies of the appellants' briefs in the supreme court, so participated in the appeal proceedings, before moving to dismiss the appeal, as to waive irregularities in the service of the notice of appeal, so that the supreme court, by virtue of (1), had jurisdiction of, and was not required to dismiss, the appeal. [Stevens v.

Jacobs, 226 W 198, distinguished, and certain language therein modified.] Maas v. W. R. Arthur & Co., 239 W 581, 2 NW (2d) 238.

Where the appellant neither served nor attempted to serve notice of appeal on necessary adverse parties within the time prescribed therefor by statute, the appeal is ineffective, and the supreme court is without jurisdiction to entertain the appeal and is without power to allow the appellant to serve notice on such parties after the expiration of that period; and 269.51 and 274.32 are inapplicable. Estate of Pitcher, 240 W 356, 2 NW (2d) 729.

269.52 Mistaken remedy or action; no dismissal; amendment; transfer to court having jurisdiction. In all cases where upon objection taken or upon demurrer sustained or after trial it shall appear to the court that any party claiming affirmative relief or damages has mistaken his remedy, his action, proceeding, cross complaint, counterclaim, writ, or relation shall not be finally dismissed or quashed, but costs shall be awarded against him and he shall be allowed a reasonable time within which to amend and the amended action or proceeding shall continue in that court except in case that court has no jurisdiction to grant the relief sought, in which case the action in whole or in such divisible part in which jurisdiction is lacking shall be certified to some other court which has jurisdiction. [*1935 c. 541 s. 146*]

Note: An action brought in the circuit court to establish a will should be certified under this section to the proper county court. Will of Jones, 207 W 354, 241 NW 387.

A court of equity will retain jurisdiction to grant legal relief only where it appears that an equitable cause of action growing out of the transaction existed prior to the commencement of the action; that the equitable action was commenced in good faith to secure equitable relief; that such equitable relief cannot be had or is impracticable; that the constitutional right of trial by jury will not be denied; and that the ends of justice will be best served by retaining the cause for final determination. Clark v. Sloan, 215 W 423, 254 NW 653.

When an equitable cross complaint is filed in the civil court of Milwaukee county the court should send the case to the circuit court, the civil court having no equitable jurisdiction. Nehring v. Niemerowicz, 226 W 285, 276 NW 325.

As to the duty of the court in case the plaintiff has mistaken his remedy see note to 274.37 citing State ex rel. Adams County Bank v. Kurth, 233 W 60, 288 NW 810.

Section 269.52 in effect softens the rigor of 263.31 and renders 263.31 inapplicable in cases where evidence, received without objection and not denied and not claimed to be subject to refutation, constitutes a cause of action other than that stated in the complaint. Duffy v. Scott, 235 W 142, 292 NW 273.

Where the county court had jurisdiction of the cause of action alleged in the circuit court, and the circuit court did not have jurisdiction, the circuit court should have certified the action to the county court, but the circuit court's entry of a judgment dismissing the complaint, instead, is not prejudicial error, plaintiff having expressed no desire below to have the case certified to the county court, and defendant having made no objection to such certification. Hicks v. Hardy, 241 W 11, 4 NW (2d) 150.

269.53 Release of joint debtor; effect. (1) If any creditor to whom persons are jointly indebted, either upon contract or the judgment of a court of record, shall release any of them such release shall operate as a satisfaction or discharge of such joint debt to the amount of the proportion which the person so released ought in equity, as between himself and the other joint debtors, to pay; and the balance of such joint debt shall remain in force as to joint debtors not released and may be enforced against them. If the amount paid by a debtor to procure his release shall exceed the proportion of such joint debt which he, as between himself and co-debtors, ought to pay then such joint debt shall thereby be satisfied to the extent of the sum so paid. If the person released is only a surety his release shall operate as payment of such joint debt to the extent of the money paid by him and no further.

(2) This section does not permit the discharge of a principal debtor without also discharging his sureties. [*1935 c. 541 s. 147*]

Cross Reference: See also 113.05 concerning release of co-obligor.

Note: Release of surety by operation of law, and release of another surety by act of surety himself, held not to release remaining sureties on depository bond. Klatte v. Franklin State Bank, 211 W 613, 248 NW 158, 249 NW 72.

For release of parties secondarily liable, see note to 117.38, citing National Bank of La Crosse v. Funke, 215 W 541, 255 NW 147.

269.54 [*Renumbered section 269.53 by 1935 c. 541 s. 147*]

269.55 Interpreters for deaf mutes. Upon trial or examination of any deaf mute or deaf person who is unable to read and write, or upon any examination into the mental status of any such person, the court or person or body conducting such trial or examination shall call in an interpreter competent to converse in the special language, oral, manual or sign, familiar to or used by such deaf mute or deaf person. The necessary expense of furnishing such interpreter shall be paid by the county in which such trial or examination is held if satisfactory proof be offered that said deaf mute or person is unable to pay the same.

269.56 Declaratory judgments act. (1) SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(2) POWER TO CONSTRUE, ETC. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal rela-

tions are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(3) BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

(4) EXECUTOR, ETC. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(5) ENUMERATION NOT EXCLUSIVE. The enumeration in subsections (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in subsection (1) in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(6) DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(7) REVIEW. All orders, judgments and decrees under this section may be reviewed as other orders, judgments and decrees.

(8) SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(9) JURY TRIAL. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

(10) COSTS. In any proceeding under this section the court may make such award of costs as may seem equitable and just.

(11) PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

(12) CONSTRUCTION. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

(13) WORDS CONSTRUED. The word "person" wherever used in this section, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.

(14) PROVISIONS SEVERABLE. The several sections and provisions of this section except subsections (1) and (2) are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

(15) UNIFORMITY OF INTERPRETATION. This section shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

(16) SHORT TITLE. This section may be cited as the "Uniform Declaratory Judgments Act."

Note: In an action under this section the railroad commission could not be enjoined from objecting to the war department's granting permit for the erection of a building over the bed of a navigable stream. S. S. Kresge Co. v. Railroad Commission, 204 W 479, 235 NW 4, 236 NW 667.

In an action by the purchaser against the vendor and others for declaratory relief, the parties thereto having outstanding claims or equities affecting the title are concluded by the judgment. Miller v. Milwaukee Odd Fellows Temple, Inc., 206 W 547, 240 NW 893.

In the declaratory judgment act, the discretion conferred by (6) is not one to entertain the action but to enter or decline to enter judgment, which may be exercised only on the record as it exists when entry of judgment would be appropriate. Declaratory relief being the creation of statute and unknown to the common law, the jurisdiction of the court is derived from and limited by the statute conferring it. The term "uncertainty" referred to in said act is construed to mean legal uncertainty, not uncertainty in fact. An action to determine the status of plaintiff might properly be entertained under said act independent of any controversy relating to other rights, subject to the limitations of proper cases for declaratory relief. Miller v. Currie, 208 W 199, 242 NW 570.

An action for the declaration of rights of parties in case they should pay a mortgage debt incumbent on others to pay was improperly entertained, where the facts were in dispute and the right of a second mortgagee to proceed with a sale under his judgment of foreclosure was delayed, plaintiffs having no present right of subrogation since such right does not accrue until payment is made. Heller v. Shapiro, 208 W 310, 242 NW 174.

In an action on a fire policy in the standard form prescribed by 203.01 the defendant insurer's cross-complaint against an interpleaded insurer which also issued a policy covering the same property, and against which plaintiff sought no relief, entitled it to no relief under the declaratory judgments act, and a demurrer thereto should have been sustained, since the very issues as to which declaratory relief was sought had to be determined by the court in order to decide the issues raised by defendant's answer to the complaint. National R. M. Ins. Co. v. La Salle F. Ins. Co., 209 W 576, 245 NW 702.

In action for declaratory relief between county and purchaser at delinquent tax sale, court could not pass on validity of sale as between purchaser and property owner who was not party to action. Declaratory judgment act does not empower court to give directions. State v. Milwaukee, 210 W 336, 246 NW 447.

City of Madison seeking to abate alleged public nuisances and purprestures in Lake Monona did not have cause of action for declaratory judgment, since no interest in lake bed was vested in city and state was real party in interest. Madison v. Schott, 211 W 23, 247 NW 527.

In an action under the declaratory judgments act to have certain contracts for furnishing electric current declared void, the complaint, failing to allege facts showing the existence of a controversy between the parties, is held not to state a cause of action. Sun Prairie v. Wisconsin P. & L. Co., 213 W 277, 251 NW 605.

The supreme court took jurisdiction of an original proceeding brought by the judges of the second judicial circuit, for a declaratory judgment as to the power of the county board of Milwaukee county to decrease the salary of such judges after voting them an additional amount as authorized by statute, the case presenting a question publici juris, and many circuit judges being virtually disqualified to hear the matter. Petition of Breidenbach, 214 W 54, 252 NW 366.

The court granted a petition for leave to institute an original proceeding for a declaratory judgment, showing a determination by the petitioners to form the Progressive party and an indication by the defendant secretary of state that he would make rulings rendering the organization of the proposed new party impracticable by denying it a separate column on the ballot. State ex rel. Ekern v. Dammann, 215 W 394, 254 NW 759.

Complaint by street railway which alleged that defendant city had passed ordinance requiring plaintiff to reconstruct track on designated street and providing that, if plaintiff failed to comply with ordinance, defendant would reconstruct track and charge cost to plaintiff, and that plaintiff was operating street railway at great loss and was financially unable to make required expenditure, and praying for determination of its rights under franchise, stated cause of action for declaratory relief. Milwaukee E. R. & L. Co. v. South Milwaukee, 218 W 24, 260 NW 243.

Complaint by corporation against comthat statute levying taxes for emergency relief purposes was not lawfully enacted or published due to veto of parts thereof held to disclose genuine justiciable controversy entitling plaintiff to maintain action for declaratory relief. State ex rel. Wisconsin T. Co. v. Henry, 218 W 302, 260 NW 486.

Complaint by corporation against commissioner of insurance and fire insurance rating bureau, alleging that rating bureau had improperly refused to approve certain forms of policies previously written to meet plaintiff's special needs for use and occupancy coverage or to establish a rate for plaintiff's form of deviated coverage, and that, as a consequence, the insurance companies declined to issue such policies or to issue any policy except upon standard form having defendants' approval, is insufficient to show existence of controversy or any basis for declaratory relief; no alleged rights of plaintiff being threatened, and plaintiff seeking only a ruling as to whether such a policy, if some insurance company should issue one, would be valid and not subject to control or criticism by defendants, and plaintiff having no standing as member of general public, and no insurance company having been made a party to the action. Riebs Co. v. Mortensen, 219 W 393, 263 NW 169.

In order to obtain declaratory relief under the uniform declaratory judgments act, (1) there must be a justiciable controversy, which is a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legally protectible interest in the controversy; and (4) the issue involved must be ripe for judicial determination. The governor was not entitled to a declaratory judgment as to his power to make ad interim appointments to assertedly vacant statutory offices, although the defendant secretary of state questioned such power, since mere difference of opinion does not make a justiciable controversy, and the governor was not prevented from exercising such appointing power as he possessed, and since there were no gubernatorial appointees who could presently assert a legally protectible interest, and no prospective appointees or holdover officials were before the court, and a judgment would not terminate the uncertainty or controversy. State ex rel. La Follette v. Dammann, 220 W 17, 264 NW 627.

In an action for a declaratory judgment as to the constitutionality of the Wisconsin recovery act (ch. 110, Stats. 1935) the state's petition is held to disclose an actual controversy in a matter publici juris, involving the exercise of the sovereign power of the state, the conduct of its high officials, and the welfare of its citizens; warranting the supreme court in taking original jurisdiction of the action. Petition of State ex rel. Attorney-General, 220 W 25, 264 NW 633.

Orders of the railroad commission, establishing the elevation of a proposed dam necessary to maintain normal water levels of Horicon marsh and authorizing the conservation commission to construct and maintain a dam at the established elevation as not materially obstructing navigation, have no bearing on the questions presented in an action by the state against landowners for a declaratory judgment determining the rights of the parties in the marsh; the orders of the commission not foreclosing or affecting the rights of the defendants to insist on compensation for the flowage of their lands, and the defendants having no standing to attack the levels established by the commission. State v. Adelmeyer, 221 W 246, 265 NW 838.

An action for declaratory relief is essentially equitable in character, and a court of equity has power to retain jurisdiction to

give complete and effectual relief. The supplemental relief contemplated by (8) is not limited to further declaratory relief, but includes any relief essential to effectuate the declaratory judgment entered by the court. Morris v. Ellis, 221 W 307, 266 NW 921.

A plaintiff seeking to have a member of the election commission, appointed under 10.01, replaced on the ground that such member's party had ceased to be a dominant political party, and to obtain the appointment of a member of the plaintiff's party, was not entitled to declaratory relief, since neither the plaintiff's nor his party's rights were in controversy, and the plaintiff sought merely to vindicate a public right to have the laws of the state properly enforced and administered. The plaintiff should have brought mandamus or quo warranto to have the merits of his contentions determined, and the necessity of so proceeding could not be avoided by prosecuting an action for declaratory relief in the name of a private citizen. McCarthy v. Hoan, 221 W 344, 266 NW 916.

The words "suit to enforce such statute," within 285.06, include an action brought under the declaratory judgments act, to have determined the constitutionality of a state statute assailed in a federal court. Department of Agriculture and Markets v. Laux, 223 W 287, 270 NW 548.

If the city desires to have determined the questions, (1) whether the city has authority to establish and operate a municipally owned bus system, (2) whether it may operate such a system without acquiring the existing private bus system and (3) whether it may establish and operate such a municipally owned system without first obtaining a certificate of convenience and necessity from the public service commission, it may obtain such relief by bringing an action under the declaratory judgments act. State ex rel. Madison v. Maxwell, 224 W 17, 271 NW 393.

In an action for declaratory relief adjudging the plaintiff's legal name, identity, parentage, legitimacy and other related matters, where it did not appear that the defendant ever stood in any legal relationship to the plaintiff or that either of them ever asserted any legal right or obligation between them by reason of any status, the defendant was entitled to be discharged as a party in the action, and was entitled to the suppression of an adverse examination sought by the plaintiff. Sova v. Ries, 226 W 53, 276 NW 111.

In a fifteen-year lease containing a provision for renewal of the lease, a dispute arose between the parties as to the validity of the renewal provisions. Declaratory relief was afforded in the form of a construction of the lease. Gray v. Stadler, 228 W 596, 280 NW 675.

"This case has an interesting and unusual history." The plaintiff obtained a judgment in the circuit court upon a promissory note and more than five years thereafter issued an execution, but without first obtaining leave of the court. To remedy this omission the plaintiff presented to the county court, circuit court branch, an affidavit that no part of the judgment had been paid, whereupon the county judge signing as circuit judge directed "that an execution be issued out of the circuit court branch of the county court although the judgment was entered in the circuit court". Strangers to the action and to these proceedings, who claimed the property which the sheriff had levied, filed a petition in the county court, circuit court branch, setting up facts to show that the judgment was not a lien upon the property. Upon this petition the county court, circuit court branch, issued an order requiring the plaintiff to show cause why the plaintiff should not be restrained from levying on the property. In the proceedings upon this petition and the supplemental petition, the county court, circuit court branch, "ordered, determined, and adjudged a great many other things." From this judgment the plaintiff appealed to the supreme court. No bill of exceptions was settled although a proposed bill was served. "This consisted of a lot of exhibits which are not marked or identified by the reporter and a transcript of the reporter's notes but the trial judge attached no certificate. . . . it is proposed that a stipulation be entered that the matter be treated as an action for declaratory relief under the provisions of sec. 272.20 (2), Stats. However, no action has been begun. The appeal was not from a judgment entered in an action but from a final determination on a motion made in an action which was not pending in the court in which the motion was brought . . . so that it is impossible to treat it as an action for declaratory relief." "Under the circumstances it is considered that nothing remains to be done except to reverse the judgment, determination, or whatever it may be, made by the county court, with directions to dismiss the petition . . . . "No doubt the county court—circuit court branch— . . . has jurisidiction in a proper action to determine in accordance with the provisions of sec. 272.20 (2), Stats., what constituted the homestead of the judgment debtor . . . but it cannot entertain a motion in an action in the circuit court." Schweers Hardware Co. v. Davids, 228 W 683, 281 NW 684.

In an action by a grantee who had made part payments on the premises conveyed, seeking various kinds of relief against his grantor, the grantor's predecessor in title, a mortgagee, and creditors of the grantor's predecessor, all made defendants, the complaint, alleging facts showing that the conveyance to the plaintiff was void as against creditors of the grantor's predecessor who might seek to set it aside, warranted, for reasons stated in the opinion, an action by the plaintiff to establish a lien for payments made by him to his grantor before notice of the grantor's fraud, and the complaint, while not stating a good cause of action for interpleader because of asking not merely to pay money into court but demanding relief wholly separate and apart from this, did state a good cause of action for declaratory relief under 269.56. Angers v. Sabatinelli, 235 W 422, 293 NW 173.

A "moot case" is one in which it is sought to get a judgment on a pretended controversy when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment on some matter which, when rendered, for any reason, cannot have any practical legal effect on a then existing controversy. Thoenig v. Adams, 236 W 319, 294 NW 826.

A prayer for a declaratory judgment cannot be considered where all the parties in interest have not been made parties to the action. State ex rel. Joyce, 236 W 323, 295 NW 21.

In an action by a milk producer against a cheese factory operator, a cheese dealer, and a trustee who was to receive payment for cheese sold to the dealer, for a declaratory judgment as to the respective rights and obligations of the parties under 100.06 (4), and a contract made thereunder between the defendants, the trial court should have entered judgment adjudicating declaratory relief in accordance with its conclusions of law, instead of entering judgment dismissing the complaint. Woodke v. Procknow, 238 W 422, 300 NW 173.

In relation to an automobile liability policy containing a provision excluding from coverage any accident occurring after the transfer of the insured's interest in the automobile without the insurer's consent, the insurer, after an accident has occurred and the injured parties are threatening to bring action, is not entitled to maintain an action under 269.56 against the insured, the driver and alleged transferee, and the injured parties, for declaratory relief on the issue of coverage under the above stated policy provision, particularly since a declaration on this issue would not necessarily terminate any uncertainty or settle the controversy between the insurer and the injured parties, and would contravene the legislative policy of 85.93 and 260.11, making the insurer directly liable to an injured party, and permitting him to sue the insurer directly and to have all issues determined in a single ac-

tion. New Amsterdam Casualty Co. v. Simpson, 238 W 550, 300 NW 367.

The court holds that no declaratory relief should be given, because the Milwaukee board's refusal to recognize the Progressive party as one of two dominant political parties entitled to have members appointed as ballot clerks is in accordance with previous construction of the statutes by the court; the board's refusal to recognize the Progressive party, and the board's recognition of the Socialist party, as the third dominant political party entitled to have members appointed as election inspectors, if erroneous, is a matter in which the relators have no private interest does not endanger the purpose of the statutes to secure honest elections, and hence is not of great public concern; the matter in dispute, affecting appointments only in Milwaukee, is not of state-wide concern; there is no present emergency or present need for action; and any action taken by the court at this time would not make any substantial contribution in the public interest, the election officials having already been appointed for the period in question, and none of such appointees being a party to this action so as to be bound by a decision herein. State ex rel. State Central Committee v. Board, 240 W 204, 3 NW (2d) 123.

An action for a declaratory judgment adjudging that a highway is a town road and public highway, rather than mandamus to compel the town to maintain the highway, is proper where there are bona fide issues of fact as to the status of the highway involved. Zblewski v. New Hope, 242 W 451, 8 NW (2d) 365.

The purpose of the declaratory judgment statute is to expedite justice and to avoid long and complicated litigation, but not to interrupt the orderly process of liquidation or other legal proceedings presently in operation, and it would be a grave perversion of the principles of the statute and constitute an abuse of discretion for courts to apply it in such a situation. Where proceedings in liquidation of a mutual insurance company were pending in which a question, whether the commissioner of insurance in his capacity as liquidator could assess the plaintiff company on a policy of reinsurance by which the company being liquidated had reinsured certain risks of the plaintiff for a specified premium, could be fully and finally determined, the fact that certain special circumstances made it desirable from the plaintiff's viewpoint to have a declaration in advance, as to its liability for such assessment, did not make a case for a separate action for declaratory relief under the declaratory judgment statute, and in any event a denial of such relief was not an abuse of discretion. Cheese Makers Mut. Casualty Co. v. Duel, 243 W 406, 10 NW (2d) 125.

269.57 Inspection of documents and property; physical examination of claimant. (1) The court, or a judge thereof, may, upon due notice and cause shown, order either party to give to the other, within a specified time, an inspection of property or inspection and copy or permission to take a copy of any books and documents in his possession or under his control containing evidence relating to the action or special proceeding or may require the deposit of the books or documents with the clerk and may require their production at the trial. If compliance with the order be refused, the court may exclude the paper from being given in evidence or punish the party refusing, or both.

(2) The court or a presiding judge thereof may, upon due notice and cause shown, in any action brought to recover for personal injuries, order the person claiming damages for such injuries to submit to a physical examination by such physician or physicians as such court or a presiding judge may order and upon such terms as may be just; and may also order such party to give to the other party or any physician named in the order, within a specified time, an inspection of such X-ray photographs as have been taken in the course of the treatment of such party for the injuries for which damages are claimed, and inspection of hospital records and other written evidence concerning the injuries claimed and the treatment thereof; and if compliance with the portion of said order directing inspection be refused, the court may exclude any of said photographs, papers and writings so refused inspection from being produced upon the trial or from being used in evidence by reference or otherwise on behalf of the party so refusing. [*Stats. 1931 s. 327.21; Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective July 1, 1939*]

Note: Section 269.57 (4183 R. S.) provides a provisional remedy and an order made thereunder is appealable under 274.33 (3). Northern Wisconsin Co-op. Tobacco Pool v. Oleson, 191 W 586, 592, 211 NW 923.

Records of a university relating to disciplinary action taken by the faculty against classmates of the plaintiff in a student's action to compel the issuance of a diploma to him are held immaterial; hence he was not entitled to inspection of such records. Frank v. Marquette University, 209 W 372, 245 NW 125.

To entitle a party to an inspection of papers in the possession of the adverse party there must be facts set forth showing how and why discovery is material, and merely a general allegation of materiality and necessity is insufficient. Cespuglio v. Cespuglio, 238 W 603, 300 NW 780.

Where a statement signed by the plaintiff at the behest of the defendant's claim adjuster, and in the defendant's possession, relates to facts involved in the plaintiff's cause of action for injuries sustained through the defendant's alleged negligence, the matters therein are admissions by her and can be directly introduced on the trial as competent evidence against her, and such statement is a document "containing evidence relating to the action," so as to be subject to inspection by the plaintiff on order of the trial court. Walsh v. Northland Greyhound Lines, Inc., 244 W 281, 12 NW (2d) 20.

269.58 [*Omitted because expired*]

269.59 Consolidation of actions. The circuit court may, upon notice, order certified to said court any civil action pending in any other court in the same county for the purpose of consolidation or consolidation for trial with any action pending in said circuit court, in any case where such consolidation or consolidation for trial would be proper if the actions were originally brought in said court. Sections 261.10 and 261.11 so far as applicable shall govern such change in the place of trial. The change shall be deemed

complete and the action transmitted shall proceed as other actions in the circuit court, upon the filing of the papers in said court. [*1939 c. 100*]

269.60 Borrowing court files regulated. The clerk shall not permit any paper filed in his office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than ten days. If any paper is not returned to the clerk within ten days the person retaining the paper shall not be permitted to take any other paper from the office of the clerk until such paper shall have been returned. All papers in causes on the calendar shall be returned to the clerk at least one day before the opening of the term, and no paper in any cause shall be taken from the courthouse during the trial of such cause except upon written order of the presiding judge. [*Court Rule I s. 2; Supreme Court Order, effective Jan. 1, 1934*]

269.65 Pre-trial procedure. (1) In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(a) The simplification of the issues;

(b) The necessity or desirability of amendments to the pleadings;

(c) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(d) The limitation of the number of expert witnesses;

(e) The advisability of a preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;

(f) Such other matters as may aid in the disposition of the action.

(2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions. [*Supreme Court Order, effective Jan. 1, 1940*]

Note: A pretrial conference is not a part of the trial, and the court is not to take up and decide issues presented by the pleadings as to which counsel have not agreed, but in the pretrial conference an effort is made to have the parties agree as to the disposition of some of the issues, and those issues which are not disposed of by agreement must be disposed of on the trial and are the issues which the pretrial judge is to embody in his order, a form of which is set forth herein. Klitzke v. Herm, 242 W 456, 8 NW (2d) 400.