should be made to the trial court first. A reporter is not officially obligated to attend the sittings of a grand jury and such attendance is no excuse for delay in furnishing the desired transcript. In re Snyder, 184 W 10, 198 NW 616.

A court reporter is a public officer and entitled to such compensation as the law provides. The law allows him no extra compensation for making a transcript of evidence in proceeding at the request of the circuit judge. 8 Atty. Gen. 2.

For discussion of court reorganization legislation relative to fees for transcripts by county court reporter see 51 Atty. Gen. 77.

256.58 History: 1961 c. 495; Stats. 1961 s. 251.185; 1963 c. 427; 1967 c. 226; Stats. 1967 s. 256.58.

A circuit court cannot refuse to accept proper transfer of misdemeanor cases from a county court where a trial by jury of 12 is required. State ex rel. Murphy v. Voss, 34 W (2d) 501, 149 NW (2d) 595.

256.59 History: 1959 c. 315; Stats. 1959 s. 251.184; 1961 c. 495; 1967 c. 226; Stats. 1967 s. 256.59.

256.65 History: 1963 c. 536; Stats. 1963 s. 957.26 (1m); 1965 c. 433 s. 121; 1967 c. 291 s. 14; 1969 c. 255 s. 57; Stats. 1969 s. 256.65.

256.66 History: 1965 c. 384; Stats. 1965 s. 957.263; 1969 c. 255 s. 58; 1969 c. 339 s. 27; Stats. 1969 s. 256.66.

256.67 History: 1965 c. 479; Stats. 1965 s. 957.265; 1967 c. 43; 1969 c. 255 s. 59; 1969 c. 276 s. 585 (2); Stats. 1969 s. 256.67.

Appellate counsel for the indigent in Wisconsin. Evans, 41 WBB, No. 5.

CHAPTER 260.

Civil Actions, and Parties Thereto.

260.01 History: R. S. 1878 s. 2593; Stats. 1898 s. 2593; 1925 c. 4; Stats. 1925 s. 260.01; 1935 c. 541 s. 2; Sup. Ct. Order, 245 W vii.

Comment of Advisory Committee: In re Henry S. Cooper, Inc. 240 W 377, the court considered the distinctions between civil actions and special proceedings and stated that there is some confusion in the rules. It was suggested by the chief justice that the advisory committee study the subject and recommend to the court such amendments to the rules as will clarify and harmonize the provisions which relate to special proceedings with those which relate to actions. To that end the advisory committee recommended amendments to sections 260.01, 260.08, 260.10, 260.11 (1) (2d sentence), 260.23 (2), 260.27, 261.08 (1) and (4), 270.08, 270.12 (1), 270.21, 270.26, 270.43 (1st sentence), 270.48 (3) and 270.53. The purpose of those amendments was to clearly indicate that the procedure for actions shall apply to special proceedings unless obviously inapplicable. [Re Order effective July 1, 1945]

260.02 History: 1856 c. 120 s. 1; R. S. 1858 c. 122 s. 1; R. S. 1878 s. 2594; Stats. 1898 s. 2594; 1925 c. 4; Stats. 1925 s. 260.02.

Revisers' Note, 1878: Same as first 4 sections in chapter 122, R. S. 1858. The definitions made are perhaps of little consequence, and have been sharply criticized. But as nobody has suggested any better ones, they may as well be suffered to remain.

260.03 History: 1856 c. 120 s. 2, 3; R. S. 1858 c. 122 s. 2, 3; R. S. 1878 s. 2595, 2596; Stats. 1898 s. 2595, 2596; 1925 c. 4; Stats. 1925 s. 260.03, 260.04; 1935 c. 541 s. 3; Stats. 1935 s. 260.03.

A proceeding to acquire property by eminent domain is a special proceeding. Milwaukee L., H. & T. Co. v. Ela Co. 142 W 424, 125 NW 903; Wisconsin C. R. Co. v. Cornell University, 49 W 162, 5 NW 331.

An application, by one not a party to an action of replevin, to be made a party is a special proceeding. Carney v. Gleissner, 62 W 493, 22 NW 735.

An application to be made a party to partition proceedings is a special proceeding. Morse v. Stockman, 65 W 36, 26 NW 176.

See note to 898.16, citing Hodgeson v. Nickell, 69 W 308, 34 NW 118.

Motions to set aside levies under an execution and apply the proceeds of the sales to the mover's judgment are special proceedings. Auerbach v. Marks, 94 W 668, 69 NW 1001.

A habeas corpus proceeding is to all intents and purposes a civil suit in which the party seeking his liberty is plaintiff within the meaning of sec. 2601, Stats. 1898, and the person charged with the wrong is defendant to all intents and purposes. State ex rel. Durner v. Huegin, 110 W 189, 85 NW 1046.

On the distinction between actions and special proceedings see Deuster v. Zilmer, 119 W 402, 97 NW 31.

Mandamus is a civil action. The action is commenced by service of the writ. State ex rel. Risch v. Board of Trustees, 121 W 44, 98 NW 954.

An independent proceeding begun by an original writ, like certiorari or mandamus, is an action. State ex rel. Milwaukee Medical College v. Chittenden, 127 W 468, 107 NW 500.

An order refusing to suppress an examination before trial is a proceeding in the action, not a special proceeding. Mantz v. Schoen & Walter Co. 171 W 7, 176 NW 70.

An order bringing in new parties to an action is not a special proceeding. Bell L. Co. v. Northern Nat. Bank, 171 W 374, 177 NW 616.

The procedure under the corrupt practices act is that appropriate to an "action." State ex rel. Connors v. Zimmerman, 202 W 69, 231 NW 590.

Whether the remedy pursued is an "action" or a "special proceeding" may depend on whether the question affects substantive rights of parties or only matters of procedure. State ex rel. Ashley v. Circuit Court, 219 W 38, 261 NW 737.

See note to 887.29, citing Sora v. Ries, 226 W 53, 276 NW 111.

A juvenile delinquency proceeding under ch. 48 is a special proceeding. Lueptow v. Schraeder, 226 W 437, 277 NW 124.

A proceeding for the vacation of a plat un-

der ch. 236, which is commenced by a petition and the service of a notice of the application instead of by summons, is a "special proceeding" and not an "action," under 260.03, Stats. 1941. In re Henry S. Cooper, Inc. 240 W 377, 2 NW (2d) 866.

A proceeding brought by a taxpayer in the circuit court for the review of a decision of the board of tax appeals is a "special proceeding" and costs therein are properly assessable against the taxpayer under 271.02 (2), if he does not prevail. Baker v. Dept. of Taxation, 250 W 439, 27 NW (2d) 467.

Insanity proceedings under ch. 51, Stats. 1941, are not "actions" within 260.03, but are inquests to determine the sanity of the person about whom the inquiry is made and are therefore "special proceedings". In re Brand, 251 W 531, 30 NW (2d) 238.

If 260.03 and 260.05 were to be construed as defining the word "action" to include criminal as well as civil actions and proceedings, such definition, in view of 260.01, would apply only to those chapters of the statutes embraced within Title XXV, entitled "Procedure in Civil Actions" and covering chs. 260 to 281, incl., and such definition would not apply to any other statute not embraced within such enumerated chapters, in contrast to definitions contained in ch. 370, which apply generally to all statutes. State v. Surma, 263 W 388, 57 NW (2d) 370.

An appeal in a probate matter is a special proceeding to which 269.16 applies. Estate of Steck, 273 W 303, 77 NW (2d) 715.

In Wisconsin a prohibition proceeding is an action and not a special proceeding. State v. Donohue, 11 W (2d) 517, 105 NW (2d) 844. See also Consolidated Apparel Co. v. Common Council, 14 W (2d) 31, 109 NW (2d) 486.

Matters in probate are special proceedings. Estate of Stoeber, 36 W (2d) 448, 153 NW (2d) 599.

260.05 History: 1856 c. 120 s. 4 to 6; R. S. 1858 c. 122 s. 4 to 6; R. S. 1878 s. 2597 to 2599; Stats. 1898 s. 2597 to 2599; 1925 c. 4; Stats. 1925 s. 260.05, 260.06, 260.07; 1935 c. 541 s. 4; Stats. 1935 s. 260.05.

On actions for violations of city or village regulations see notes to 66.12; and on recovery of municipal forfeitures see notes to 288.10.

A prosecution under a village ordinance authorizing the arrest of persons found to be "drunk or disorderly", and authorizing the imposition of fines, is merely a civil action for the collection of a forfeiture. Chafin v. Waukesha County, 62 W 463, 22 NW 732.

A prosecution under a city ordinance is not a criminal action. Koch v. State, 126 W 470, 106 NW 531.

An action brought to recover the penalty imposed by a county ordinance prohibiting fast driving on county highways is a civil action; and a judgment or sentence imposing imprisonment cannot be entered therein. Kuder v. State, 172 W 141, 178 NW 249.

An action prosecuted by a city for violation of a city ordinance is a "civil action" and not a "criminal action." Milwaukee v. Johnson, 192 W 585, 213 NW 335; Neenah v. Krueger, 206 W 473, 240 NW 402; Milwaukee v. Burns, 225 W 296, 274 NW 273; Waukesha v. Schlessler, 239 W 82, 300 NW 498; Oshkosh v. Lloyd, 255 W 601, 39 NW (2d) 772; Milwaukee v. Stanki, 262 W 607, 55 NW (2d) 619.

Under a grant of power to provide for the good order of the community by enacting ordinances regulating local affairs, the county or municipal government may enact ordinances prohibiting some of the very acts prohibited by state law; but a prosecution under the state law is a criminal action, while a prosecution under an ordinance is a civil action for the recovery of a fine, and the result in the one does not bar the prosecution of the other. State ex rel. Keefe v. Schmiege, 251 W 79, 28 NW (2d) 345.

See note to 52.21, citing Sowle v. Brittich, 7 W (2d) 353, 96 NW (2d) 337.

An action for a violation of a county traffic ordinance is one to collect a forfeiture and is in the nature of a civil action rather than a criminal action. The violation of a municipal ordinance is not an offense against the state. 26 Atty. Gen. 600.

260.08 History: 1856 c. 120 s. 11, 12; R. S. 1858 c. 122 s. 8, 9; R. S. 1878 s. 2600, 2601; Stats. 1898 s. 2600, 2601; 1925 c. 4; Stats. 1925 s. 260.08, 260.09; 1935 c. 541 s. 5; Stats. 1935 s. 260.08.

When one person sues for himself and others similarly interested such others are not parties until they have been made such on due application to the court. Stevens v. Brooks, 22 W 695.

In order to determine who are parties the court will look to the whole pleading, and not merely to the caption. McKinney v. Jones, 55 W 39, 11 NW 606, 12 NW 381.

An attorney serving for a contingent fee is not a party. Gilchrist v. Brande, 58 W 184, 15 NW 817.

One named as a defendant, but not served with process, may appear and answer and is thereupon a party. Elliott v. Espenhain, 59 W 272, 18 NW 1.

"Now that the circuit courts exercise legal and equitable jurisdiction in the same action, and may grant any relief which could formerly be obtained either at law or in equity, there is no necessity whatever for instituting a second action, when to do so would only tend to a multiplicity of suits, which the law abhors." Stein v. Benedict, 83 W 603, 611, 53 NW 891, 894.

In an action on fire insurance policies, where the evidence showed that the buildings destroyed were those which the plaintiff and the insurance agent intended to include in the contract and the policy misdescribed the land on which the buildings were situated, the mistake could be corrected in an action at law. Coats v. Camden Fire Ins. Asso. 149 W 129, 135 NW 524.

When an oral contract is not enforceable by an "action" because of inhibitions in 121.04, specific performance of such contract cannot be obtained, since the term "action" in the statute includes remedies in equity as well as remedies at law. Schwanke v. Dhein, 215 W 61, 254 NW 346.

An action in equity is not changed to an action at law by the fact that a money judgment is also demanded or may result. An action for money had and received is one at law, although ruled by equitable principles.

Trempealeau County v. State, 260 W 602, 51 NW (2d) 499.

In abolishing distinctions between the forms of actions, the code (especially 260.08) has not abolished the essential differences between them or between actions for legal and those for equitable relief. Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

With the merging of legal and equitable actions into one civil action, the form of the remedy for fraud or misrepresentation has become less important, the distinction at the present time being between a right of rescission on the one hand and an action for damages on the other hand. Schnuth v. Harrison, 44 W (2d) 326, 171 NW (2d) 370.

260.10 History: 1856 c. 120 s. 21; R. S. 1858 c. 122 s. 18; R. S. 1878 s. 2602; Stats. 1898 s. 2602; 1925 c. 4; Stats. 1925 s. 260.10; Sup. Ct. Order, 271 W vi.

Revisers' Note, 1878: Section 18, chapter 122, R. S. 1858, verbally adapted. The revisers have endeavored to collect in this chapter the general provisions relating to parties to an action, slightly changing the arrangement of the former chapters.

Comment of Judicial Council, 1956: The change of "and" to "or" has two results: (1) It permits plaintiffs with different interests in the same subject of the action to join, and to ask for the same, or for different kinds of relief; (2) it permits plaintiffs who are interested in common relief to join, even though there is no common subject of the action. [Re Order effective Sept. 1, 1956]

Where a nuisance, like an obstruction to navigation, will cause special damage to several, all may join in an action to abate it. Barnes v. Racine, 4 W 454.

Judgment creditors of the same debtor may unite in an action to have a deed executed by the debtor set aside on the ground that it is fraudulent. Gates v. Boomer, 17 W 470.

Owners of land in severalty in a school district may join in an action to have a contract by the district board declared void. Peck v. School Dist. 21 W 517.

Owners in severalty adjoining a public square may enjoin erection of buildings thereon by the owner of a fee therein. Williams v. Smith, 22 W 594.

Tenants in common of a mill may join in an action for diversion of water. Samuels v. Blanchard, 25 W 329.

A bailee who has insured stored tobacco for his own benefit and that of its owners may sue with them for such insurance. Strohn v. Hartford Fire Ins. Co. 33 W 648.

Partners cannot join in an action against an officer for recovery of partnership goods levied on as exempt, they not being entitled to joint exemption. Russell v. Lennon, 39 W 570.

A mortgagee of insured property, to whom a policy was assigned to the extent of his interest, may join with a mortgagor in an action against the company thereon. Great Western C. Co. v. Aetna Ins. Co. 40 W 373.

Adjoining owners in severalty along the same highway or public place may unite in an action to enjoin obstruction of the same. Pettibone v. Hamilton, 40 W 402.

A wife may join with her husband in an action to set aside deed, releasing inchoate dower, obtained by fraud. Madigan v. Walsh, 22 W 501. See also Weston v. Weston, 46 W 130, 49 NW 834.

School districts may join in an action for drainage moneys belonging to each in proportion to its number of pupils. School Districts v. Edwards, 46 W 150, 49 NW 968.

Legatees whose legacies depend on the same right may join. Catlin v. Wheeler, 49 W 507, 5 NW 935.

In an action for negligent burning of property the owners thereof and several insurance companies who have paid losses thereon may join. Swarthout v. Chicago & Northwestern R. Co. 49 W 625, 6 NW 314.

A vendor may join with his vendee under a land contract in an action for damages to land. Seymour v. Carpenter, 51 W 413, 8 NW 251.

Partners may join in an action for libel which concerns them in the practice of their profession. Ludwig v. Cramer, 53 W 193, 10 NW 81.

Covenantor and his grantees may join to remove a cloud on title. Pier v. Fond du Lac County, 53 W 421, 10 NW 686.

In an action by a wife upon her contract to convey her separate property the fact that her husband joined in the contract and bound himself to convey all his interest in the estate does not make him a necessary party. McKinney v. Jones, 55 W 39, 11 NW 606, 12 NW 381.

Where the owners in severalty of contiguous lots who contracted jointly for the erection of a building thereon and subsequently promised to be responsible for materials therefor furnished to the contractor, materialmen who had filed separate petitions for liens were properly joined as plaintiffs. Treat L. Co. v. Warner, 60 W 183, 18 NW 747.

The widow of the insured, as such and also as administratrix, and the heirs of the insured may join as plaintiffs. Bailey v. Aetna Ins. Co. 77 W 336, 46 NW 440.

Sec. 2602, Stats. 1921, does not authorize a joint action by an heir for specific performance and a claim by an administrator for damages for a conversion. Weinzirl v. Weinzirl, 176 W 420, 186 NW 1021.

Ten corporations engaged in the same business could be allowed to join as plaintiffs to restrain members of a typographical union from continuing acts of conspiracy to force the plaintiffs to employ only members of the union. Trade Press P. Co. v. Milwaukee Typographical Union, 180 W 449, 193 NW 507.

Wagner, who owned an island and part of the mainland, connected his lands by a fill which created a public nuisance, and also a private nuisance to Breese. In an action by Breese to abate the nuisance the state, upon its request, was properly joined as a plaintiff. Breese v. Wagner, 187 W 109, 203 NW 764.

The mortgagor had the right as conservator of the rents to maintain an action to recover them; and the mortgagor, after assigning a lease of a portion of the mortgaged building to the trustee under the trust deed, was entitled as pledgor to maintain an action against the tenant for rent due, with the consent of the trustee as pledgee. In such action the trustee

was a proper party plaintiff. Zimmermann v. Walgreen Co. 215 W 491, 255 NW 534.

A local labor union was a proper party plaintiff to an action against the employer to enforce the labor code, the union being sufficiently interested in the subject of the action and in obtaining the relief demanded to be a party, and the right of a labor organization, although unincorporated, to bring an action to protect its rights or the rights of its members when such rights are invaded being impliedly recognized by the labor code. Trustees of Wisconsin S. F. of Labor v. Simplex S. M. Co. 215 W 623, 256 NW 56.

A city treasurer and general taxpayers had standing to question the constitutionality of a curative act under authority of which the city council had adopted a resolution directing payment for street paving, done under a void paving contract, and validating special assessments levied on abutting properties. Federal Paving Corp. v. Prudisch, 235 W 527, 293 NW 156.

See note to 260.12, citing Olson v. Johnson, 267 W 462, 66 NW (2d) 346.

When there is an excess of parties plaintiff, a motion to strike, and not a demurrer, is the proper procedure by which to challenge the complaint of a party plaintiff who has no interest in the subject matter alleged therein. A motion to strike is addressed to the sound discretion of the court. Marshfield Clinic v. Doege, 269 W 519, 69 NW (2d) 558.

Where defendant allegedly made the same fraudulent misrepresentations to 2 individuals at different times, they cannot join their causes of action under 260.10 and they were not united in interest under 260.12. Hartwig v. Bitter, 29 W (2d) 653, 139 NW (2d) 644.

260.10 and 263.04 must be read together, but if there is conflict the latter statute must prevail in favor of joinder. Van Dien v. Riopelle, 40 W (2d) 719, 162 NW (2d) 615.

260.11 History: 1856 c. 120 s. 22; R. S. 1858 c. 122 s. 19; R. S. 1878 s. 2603; Stats. 1898 s. 2603; 1915 c. 219 s. 5; 1925 c. 4; Stats. 1925 s. 260.11; 1931 c. 375; 1959 c. 380; Sup. Ct. Order, 16 W (2d) ix; 1967 c. 14; Sup. Ct. Order, 35 W (2d) vi; 1969 c. 198.

Comment of Judicial Council, 1963: The amendment makes the general procedure for impleading parties set forth in s. 260.19 applicable to the situation covered in this subsection. [Re Order effective May 1, 1963]

Legislative Council Note, 1967: These amendments overturn two recent cases interpreting Wisconsin's direct action statute. Sections 204.30 (4) and 260.11 (1) are made coextensive so that in all cases where the insurer is directly liable to the injured party, direct action against the insurance company will be proper. *Frye v. Angst,* 28 Wis. 2d 575 (1965), held that direct action was improper for negligent *maintenance* of an automobile, even though s. 204.30 (4) made the insurance company liable for negligent maintenance.

The last sentence of s. 260.11 (1) has been deleted and a new provision added to change the result in *Miller v. Wadkins,* 31 Wis. 2d 281 (1966).

Prior to the 1959 amendment (stricken language, lines 17-24, page 2) direct action could be brought against an insurance company if the policy was issued in Wisconsin, even though the accident occurred outside the state. See *Oertel v. Fidelity & Casualty Co.,* 214 Wis. 68 (1934).

In *Ritterbusch v. Sexmith,* 256 Wis. 507 (1950), which was substantially confirmed in *Schultz v. Hastings,* 5 Wis. 2d 265 (1958), the court held that where the policy was issued outside Wisconsin, containing a clause prohibiting direct action, the insurance company could not be sued directly, even if the accident occurred in Wisconsin.

The 1959 amendment said that direct action could be brought whether the policy was issued or delivered within or without the state *—provided the accident or injury occurred in the state of Wisconsin.* In the *Miller* case, the court held that the last phrase (italicized) applied to the whole 1959 amendment, with the result that direct action is possible only when the accident occurs in Wisconsin.

This bill, by striking the 1959 amendment, is intended to revive the case law in *Oertel* permitting direct action on a policy issued in Wisconsin, where the accident occurs outside the state. The new language should permit direct action where the policy is issued or delivered outside Wisconsin, if the accident occurs in the state. [Bill 10-A]

1. General.
2. Insurers as defendants.

1. General.

In a foreclosure action a prior mortgagee is a proper party defendant. Person v. Merrick, 5 W 231. But see Hekla F. Ins. Co. v. Morrison, 56 W 133, 14 NW 12, and Madison v. Smith, 49 W 200, 5 NW 336.

In an action by corporation creditors to compel an accounting the corporation and its delinquent stockholders may be joined. Adler v. Milwaukee P. B. M. Co. 13 W 57.

Judgment creditors under separate judgments against a school district may be joined in an action by property owners to set aside a tax levied to pay such judgments. Newcomb v. Horton, 18 W 566.

Where dams on different branches of a river jointly create a flowage the owners thereof cannot be joined in an action therefor, but each must be sued separately. Lull v. Fox & Wisconsin R. I. Co. 19 W 100.

If a person claiming a paramount title be made a defendant and set up his paramount right the plaintiff may either have such right tried or dismiss as to such defendant. Wicke v. Lake, 21 W 410; Roche v. Knight, 21 W 325.

In an action to restrain collection of a tax returned as delinquent the county is a proper party. Lefferts v. Calumet County, 21 W 688.

In an action by a receiver to set aside fraudulent conveyances by a debtor all the grantees may be joined. Hamlin v. Wright, 23 W 491.

In an action to avoid a tax certificate and to restrain the issuance of a deed the county clerk and the holder of the certificate are proper parties. Siegel v. Outagamie County, 26 W 70.

Defendants properly brought in cannot take

advantage of the improper joinder of other defendants. Truesdell v. Rhodes, 26 W 215.

A cestui que trust may be made a party in an action to have a conveyance to a trustee declared fraudulent. Day v. Wetherby, 29 W 363.

Persons authorizing continuance of a nuisance established by others on land purchased by them may be joined in an action for damages therefor. Cobb v. Smith, 38 W 21.

In foreclosure of a mortgage in which a wife did not join or which was executed before marriage, or for purchase, she is a proper, though perhaps not a necessary, party. Foster v. Hickox, 38 W 408.

A city is a proper defendant in an action to cancel a certificate of assessment on a lot therein, though one ward alone is interested. Pier v. Fond du Lac, 38 W 470.

In a divorce action, a fraudulent grantee of the husband may be joined. Gibson v. Gibson, 46 W 449, 1 NW 147.

In an action on award made under contract one whose name appears in the contract, but who does not sign or take any right thereunder, is not a proper party. McCourt v. McCabe, 46 W 596, 1 NW 192.

In an action to renew a lease persons who have taken tax deeds on the lands in question, claimed to be fraudulent and void, are proper parties. Hopkins v. Gilman, 47 W 581, 3 NW 382.

In an action by legatees to establish their right the executors and legatees disputing such right should be defendants. Catlin v. Wheeler, 49 W 507, 5 NW 935.

In an action to set aside tax certificates of plaintiff's land several holders thereof may be joined. Watkins v. Milwaukee, 52 W 98, 8 NW 823.

Where it is not shown that there was any intention to prejudice the rights of plaintiff or that they will be affected, the defendant still retaining the bulk of his property, it is not error to refuse to allow his grantee to be made a party. Varney v. Varney, 54 W 422, 11 NW 694.

A person claiming a lien paramount to mortgages is not a necessary party defendant in a foreclosure. Hekla Fire Ins. Co. v. Morrison, 56 W 133, 14 NW 12.

The owners in severalty of contiguous lots contracted jointly for the erection of a building thereon and promised to be responsible for materials furnished to the contractor. Such owners were properly joined as defendants in an action to enforce liens for materials. J. A. Treat L. Co. v. Warner, 60 W 183, 18 NW 747.

Persons having an interest in the questions to be determined in a suit in equity may be made defendants although the nature of such interest is unknown to the plaintiff. Patten P. Co. v. Water P. Co. 70 W 659, 36 NW 737.

An action by a riparian owner to restrain the diversion of water from his lands need not join other owners. Kaukauna W. P. Co. v. Green Bay & M. C. Co. 75 W 385, 44 NW 638; Grand Rapids W. P. Co. v. Bensley, 75 W 399, 44 NW 640.

A surety on a mortgage note who, to the knowledge of the mortgagor, before he brought an action against the mortgagee for an accounting and to have the mortgage debt adjudged paid, had been compelled to pay the note, is a necessary party. Hunt v. Rooney, 77 W 258, 46 NW 1084.

In an action to restrain a corporation from lowering the water of a lake, the president thereof, who owns a majority of the stock and has managed the corporate affairs, and his agent may be joined as defendants. Cedar Lake H. Co. v. Cedar Creek H. Co. 79 W 297, 48 NW 371.

A plaintiff had a right to determine for himself on the frame of his action and to make as many or as few of the alleged joint tort-feasors defendants as he chose. Zeller v. Martin, 84 W 4, 54 NW 330.

In a proceeding to restrain the removal of a fence which is alleged by town officers to be an encroachment on a highway the town is a proper party defendant. Nicolai v. Vernon, 88 W 551, 60 NW 999.

One who claims an interest in a certificate of stock, which is subordinate to the claim of the plaintiff, is a proper defendant to an action to foreclose a pledge thereof. Plankinton v. Hildebrand, 89 W 209, 61 NW 839.

If a corporation and its agent are both liable for the same act they may be joined as defendants. Greenberg v. Whitcomb L. Co. 90 W 225, 63 NW 93.

It is not necessary that all the defendants should be equally interested. In an equitable action to compel a conveyance of land of which the defendants have fraudulently obtained the title and taken possession of the land their wives who participated in the fraud and assert ownership of or substantial rights in the land are proper parties. Swihart v. Harless, 93 W 211, 67 NW 413.

A wife has such an interest in the homestead that she may be joined with her husband in an action to enforce a mechanic's lien thereon. Hausmann B. M. Co. v. Kempfert, 93 W 587, 67 NW 1136.

In an action for libel the plaintiff need not join as defendants all persons concerned in the publication of the libel. Monson v. Lathrop, 96 W 386, 71 NW 596.

In an action to restrain the defendant from manufacturing machines in violation of a contract, defendant's wife who was the owner of record of a patent for such machines was a proper party. Phoenix M. Co. v. White, 149 W 287, 135 NW 891.

The president of a village is a proper party to a taxpayer's action to rescind a sale of village property, in which the president was interested, as the action is in equity and because if he is joined he may be examined adversely before trial and also on the trial. Ryan v. Olson, 183 W 290, 197 NW 727.

Defendants may be joined where alternative relief may be proper against one or both according to the validity or invalidity of a mortgage involved in the controversy, notwithstanding the more general rule of sec. 2647, Stats. 1921, requiring that causes of action joined in an action must affect all the parties. De Groot v. People's S. Bank, 183 W 594, 198 NW 614.

Causes of action against a corporation and its agent to enjoin such agent from soliciting persons to breach contracts with plaintiff, and against others to require them to perform con-

tracts, were improperly joined; but no objection to the misjoinder having been taken the cases are deemed properly before the court on the joint appeal. Wisconsin Creameries, Inc. v. Johnson, 208 W 444, 243 NW 498.

Directors contracting to resell their stock to a corporation should be made parties to the corporation's action to recover money paid by it to persons holding stock as security for the directors' notes. The case cannot be remanded to make such directors parties defendant in the corporation's action for money paid pledgees of the stock, in the absence of a showing that the corporation will repudiate the transaction and restore the stock to the pledgees. Federal M. Co. v. Simes, 210 W 139, 245 NW 169.

The representative of an insolvent estate of a deceased insured which was not being administered in probate was not a necessary party defendant to an injured party's action against insurer on an automobile liability policy containing a "no action" clause which applied only to the insured. Suschnick v. Underwriters Cas. Co. 211 W 474, 248 NW 477.

In a mandamus proceeding to compel the state treasurer to reinstate petitioners to their positions in the state inspection bureau, petitioners' successors in office were not necessary parties. State ex rel. Tracy v. Henry, 217 W 46, 258 NW 180.

A bondholder not a party to an action to foreclose mortgages securing bonds, but whose rights the court sought to control by means of show cause orders was not a party to an "action," and consequently the rules of law applicable to parties to actions were without application. State ex rel. Ashley v. Circuit Court, 219 W 38, 261 NW 737.

The failure to join as defendants with the county the persons in a mob who committed the unlawful acts complained of did not constitute a defect of parties defendant, since 66.07, under which the action was brought, gives to the injured person an exclusive remedy against the county, and since one tortfeasor may be sued alone without joining the others. Febock v. Jefferson County, 219 W 154, 262 NW 588.

On an application for declaratory relief against upper riparian owners, in which it is sought to establish the right of the state to flow the upper lands without compensation, lower riparian owners are not necessary or proper parties, especially in the absence of any pleadings or actual declaration of the rights of lower riparian owners. State v. Adelmeyer, 221 W 246, 265 NW 838.

See note to 270.58, citing Larson v. Lester, 259 W 440, 49 NW (2d) 414.

See note to 269.05, citing Connecticut Ind. Co. v. Prunty, 263 W 27, 56 NW (2d) 540.

A wife was neither a necessary nor a proper party defendant in an action for strict foreclosure of a land contract signed by her husband as purchaser but not signed by her, no title having matured in his favor. Olsen v. Ortell, 264 W 468, 59 NW (2d) 473.

In an action to recover a balance due on a conditional sales contract covering a truck, wherein the defendant answered that he did not enter into such contract, and wherein the plaintiff assented to the defendant's son becoming an additional party defendant, the trial court did not err in denying the defendant's motion to substitute the son in his place as defendant and to interplead an insurance company which had issued to the son a theft policy covering the truck. Yellow Mfg. Acceptance Corp. v. Britz, 271 W 571, 74 NW (2d) 200.

In an action for injuries sustained in diving into shallow water at a public bathing beach, a complaint making the city a party defendant on the basis of having allegedly violated the safe-place statute and also making a city lifeguard and the recreational director parties defendant for their own negligence, was not demurrable by the city on the ground of misjoinder of causes of action, it being considered, among other things, that 260.11 (1), prevails over the limitation of 263.04 which demands that a cause of action united in a complaint must affect all parties to the action, if these two statutes conflict. Rogers v. Oconomowoc, 16 W (2d) 621, 115 NW (2d) 635.

2. Insurers as Defendants.

The insurer (a New York company) in an automobile liability policy written in Wisconsin was properly joined as a defendant in an action by an injured person to recover damages as a result of a collision (in Indiana) involving the automobile of the insured, notwithstanding a "no-action" clause in the policy. (Lang v. Baumann, 213 W 258, applied.) Whether the automobile liability insurer can be joined with the insured as a defendant in an action by an injured person to recover damages is a question of procedural law as to which the law of the state in which the action is brought controls. The insured in an automobile liability policy involving direct liability on the part of the insurer to injured persons was not a necessary party to an action by an injured person to recover damages. Oertel v. Fidelity & Cas. Co. 214 W 68, 251 NW 465.

Since the enactment of 260.11 it is not improper to call attention to the insurer's interest in the trial. To be prejudicial, any remarks must be shown affirmatively to have affected the jury. Roeske v. Schmitt, 266 W 557, 64 NW (2d) 394.

An automobile liability insurer, properly joined with its insured as a party defendant in an action, is not entitled to have the plaintiff enjoined from referring to it during the trial of the action, even though it has by its separate answer admitted the existence of insurance coverage and consented that judgment against its insured should run also against it up to the limits of the policy. Vuchetich v. General Cas. Co. 270 W 552, 72 NW (2d) 389.

See note to 344.15, citing Pinkerton v. United Services Auto. Asso. 5 W (2d) 54, 92 NW (2d) 256.

Where a foreign insurer, licensed in Wisconsin, issued and delivered an automobile liability policy in Illinois, where a no-action clause is valid, but the policy was issued to a Wisconsin corporation with its principal place of business in a Wisconsin city and covered trucks operating in and around the city and all of such trucks were registered in Wisconsin, and it was clear that the performance

of the contract was to be in Wisconsin, a person injured in a collision in Wisconsin could bring a direct action against the insurer. Schultz v. Hastings, 5 W (2d) 265, 92 NW (2d) 846.

In an action for damages caused by the negligent operation, management, or control of a motor vehicle, the word "operation" is not to be restricted to only a moving vehicle, and the word "control" cannot be construed to apply only to a situation where a person is sitting behind the wheel of a motor vehicle. Where the plaintiff was injured when his leg broke through the allegedly defective platform of a standing truck, he could bring a direct action against the insurer notwithstanding a no-action clause in the policy. Wiedenhaupt v. Van Der Loop, 5 W (2d) 311, 92 NW (2d) 815.

Where the injury was caused by the operation of a crane fixed to a truck, but during use the truck was immobilized, the insurer could not be joined as defendant under 260.11 or 204.30 (4). Smedley v. Milwaukee Auto. Ins. Co. 12 W (2d) 460, 107 NW (2d) 625.

The fact that a third person can sue an insurer directly does not enlarge the insurance coverage or increase the insurer's liability beyond the policy limits. Nichols v. United States F. & G. Co. 13 W (2d) 491, 109 NW (2d) 131.

See note to 204.30, on liability of insurers, citing Snorek v. Boyle, 18 W (2d) 202, 118 NW (2d) 132.

See note to 204.30, on liability of insurers, citing Rice v. Gruetzmacher, 27 W (2d) 46, 133 NW (2d) 401.

An airplane in flight is not a motor vehicle for purposes of direct action against an insurer. Newberger v. Pokrass, 27 W (2d) 405, 134 NW (2d) 495.

A backhoe excavator completely self-powered by means of a hydraulic device which activated the scoop, which unit was mounted on a truck used merely for transportation and shut off once the unit was stabilized for excavating purposes was not when so immobilized and positioned for operation a "motor vehicle" within the direct-action statutes. Neumann v. Wisconsin Natural Gas. Co. 27 W (2d) 410, 134 NW (2d) 474.

Although the forklift which was frequently used on the highway was required to be registered as a motor vehicle under 341.05 (12), it did not thereby become a motor vehicle within the meaning of the direct-action statute, since the registration exemption statute has no relationship to whether a vehicle is a motor vehicle for purposes of the direct-action statute. D'Angelo v. Cornell Paperboard Products Co. 33 W (2d) 218, 147 NW (2d) 321.

Direct action against an insurer can be maintained where an insured tractor is used to pull a wagon onto a highway and the wagon is left parked on the roadway. Hakes v. Paul, 34 W (2d) 209, 148 NW (2d) 699.

In a direct action by a fire insurer seeking subrogation from an automobile liability insurer after having paid a loss caused by fire damage to a home and an attached garage allegedly occasioned when the driver-insured, with knowledge that combustion was taking place in his vehicle (attributed to cigarette smoking) drove and parked the same in the garage, which the smouldering car subsequently ignited, the "no-action" clause in the liability policy did not preclude suit, for the negligence causing the accident (the fire) was reasonably related to the use or operation of the motor vehicle. Farmers Mut. Ins. Co. v. Fischer, 34 W (2d) 322, 149 NW (2d) 566.

In personal-injury actions arising out of a single car accident which occurred in Montana (at a date when 260.11 (1) contained a proviso excepting out-of-state accidents)—where the insurer of the car owner failed to plead in abatement the no-action clause in its policy, answering generally that the policy was subject to its terms, conditions, and endorsements, and that its liability was strictly limited thereby—the company in effect answered on the merits and waived its defense under the no-action clause. Attoe v. State Farm Mut. Auto. Ins. Co. 36 W (2d) 539, 153 NW (2d) 575.

In an action in Wisconsin by Oklahoma residents against Wisconsin residents for damages resulting from an accident occurring in Illinois, plaintiff was entitled to join a New York insurer of defendant, notwithstanding an Illinois law under which a "no action" clause in policy is valid and effective. Gandall v. Riedel, 133 F Supp. 28.

The plain meaning of 260.11 (1), Stats. 1967, "is that an insurance policy issued outside Wisconsin containing a no-action clause prevents a direct action against the insurer when the accident occurs outside Wisconsin". Scribbins v. State Farm Mut. Auto. Ins. Co. 304 F Supp. 1268, 1270.

Direct action against liability insurance companies. MacDonald, 1957 WLR 612.

260.12 History: 1856 c. 120 s. 23; R. S. 1858 c. 122 s. 20; 1859 c. 91 s. 2; R. S. 1878 s. 2604; Stats. 1898 s. 2604; 1925 c. 4; Stats. 1925 s. 260.12; Sup. Ct. Order, 204 W v; 271 W vi.

Revisers' Note, 1878: Section 20, chapter 122, R. S. 1858, as amended by section 2, chapter 91, Laws 1859. This section is not a very exact definition of the proceeding intended; but as the difficulty lies in the nature of the subject, it has seemed best to attempt no amendment, but to leave the requirements to be worked out by the courts as cases arise. See Stevens v. Brooks, 22 W 663.

Comment of Judicial Council, 1956: The amendment expands permissive joinder of plaintiffs from negligence (i.e. negligent conduct) to all tortious conduct, and would change the result arrived at in DeWitte v. Kearney & Trecker, (1953) 265 W 132, 140. It provides for joinder of claims in addition to those stated in 263.04. [Re Order effective Sept. 1, 1956]

Joint contractors for doing specific work must sue jointly. Martin v. Martin, 3 Pin. 272.

A trustee for the separate estate of a married woman is not a necessary party in an action for specific performance of a contract for the sale of real estate, though he joined in the contract, the party really in interest being before the court. Bull v. Bell, 4 W 54.

The covenantor in a covenant running with the land is not a necessary party in an action

for specific performance of covenant against his vendee. Noonan v. Orton, 4 W 335.

In a foreclosure action a subsequent judgment creditor of the mortgagor is not an indispensable party. Person v. Merrick, 5 W 231.

The landowner must join in an action against a company for land taken for a road, all parties interested therein as mortgagees or otherwise. Davis v. La Crosse & M. R. Co. 12 W 16.

Tenants in common of chattels must join in an action of trespass for taking and carrying away. Welch v. Sackett, 12 W 243.

Joint owners of 2 notes, to one of whom has been assigned a $500 interest and to the other the remaining interest therein are necessary plaintiffs in an action to foreclose a collateral mortgage. Stevens v. Campbell, 13 W 375.

Legatees are not necessary parties in an action by a stranger against executors to recover the funds possessed by him. King v. Lawrence, 14 W 238.

In a foreclosure by the holder of the last of 3 notes secured by one mortgage the owner of the second note is a necessary party. Pettibone v. Edwards, 15 W 95.

In an action by a subcontractor to enforce a lien for building material the principal contractor should be joined with the owner. Carney v. La Crosse & M. R. Co. 15 W 503.

A husband and wife must join in an ejectment action when they are joint tenants. Allie v. Schmitz, 17 W 175.

In an action to cancel a mortgage given through fraud to a railroad company and which has been assigned to a city to indemnify it against its bonds issued to such company, the bondholders are necessary parties in order to determine whether the transfer to the city was void by reason of the invalidity of the bonds. Burhop v. Milwaukee, 18 W 431.

A pledgor of a note need not be joined in an action by the pledgee against the maker. Curtis v. Mohr, 18 W 616.

A judgment creditor of a bank may sue in behalf of all other creditors. Merchants' Bank v. Chandler, 19 W 434.

In an action to enforce the personal liability of stockholders it is sufficient to join those who were such when the liability accrued. Merchants' Bank v. Chandler, 19 W 434.

In a foreclosure action a railway company which has taken possession of part of the land and taken measures to condemn it is not an indispensable party. Farmers' & Millers' Bank v. Eldred, 20 W 196.

The bondholders must not only be parties, but so subjected to the jurisdiction of the court that it may compel a surrender of the bonds. Burhop v. Roosevelt, 20 W 338 and 21 W 257.

The owner of an interest in land acquired through a grantee in a tax deed is an indispensable party in an action to cancel the same. Call v. Chase, 21 W 511.

A trustee is a necessary party in a foreclosure by the cestui que trust. Hays v. Lewis, 21 W 663.

An administrator is not a necessary party in an action by a creditor to set aside a deed of a deceased debtor for fraud. Cornell v. Radway, 22 W 260.

When liability is joint and several, joinder is unnecessary. Wood v. Luscomb, 23 W 287.

Heirs and the administrator are proper parties in an action by a widow to have a divorce set aside. Johnson v. Coleman, 23 W 452.

Cestuis que trust, when numerous, need not be joined with their trustee in an action to foreclose a mortgage claimed to be paramount to that held by the trustee. Iowa County v. Mineral Point R. Co. 24 W 93.

A principal must be joined in an action against his agents, through whom he has erected a building, to enforce a mechanic's lien thereon. Charboneau v. Henni, 24 W 250.

In an action to abate a dam, against those who constructed it, it is not necessary to join grantees of rights to use the water. Newell v. Smith, 26 W 582.

An executor need not be joined in an action to have a legacy declared a lien on real property, his interest being temporary. Powers v. Powers, 28 W 659.

Neither a county nor its treasurer is a necessary defendant in an action to restrain town officers from collecting taxes, though part of them is for county purposes. Milwaukee I. Co. v. Hubbard, 29 W 51.

In an action on a life insurance policy by an assignee the administrator of the life insured, who has commenced an action on the policy, is not a necessary party. Grant v. Connecticut Mut. Life Ins. Co. 29 W 125.

The owner of an equity of redemption is a necessary party in foreclosure. Baker v. Hawkins, 29 W 576.

Where there has been a joint liability, an obligor who has been discharged, as by the statute of limitations, need not be joined. Caswell v. Engelmann, 31 W 93.

An heir is a necessary party in an action by a legatee in a will claimed to have been suppressed, to have same established. Hall v. Allen, 31 W 691.

In an action on the bond of a deceased against a devisee of real and personal property in this state the devisee of land in another state need not be joined, the personal estate being primarily liable and being sufficient. McGonigal v. Colter, 32 W 614.

It is not necessary to join an agent with his principal. Klaus v. Green Bay, 34 W 628.

One directly affected by the decree is a necessary party unless joinder be inconvenient from the number of the parties. Douglas County v. Walbridge, 38 W 179.

A wife is a necessary party in foreclosure of a mortgage in which she joined with her husband. Foster v. Hickox, 38 W 408.

In attachment to enforce a lien on logs by a laborer for services to a contractor it is unnecessary to join the log owners. Winslow v. Urquhart, 39 W 260.

In foreclosure the grantee in a trust deed executed prior to the mortgage but recorded after the mortgage is a necessary party. Bass v. Chicago & N. W. R. Co. 39 W 296.

Where the amount of a trust fund is to be determined all the cestuis que trust must join for its recovery; the rule is otherwise where each is entitled to an aliquot part of a fund definite in amount. Eldridge v. Putnam, 46 W 205, 50 NW 595.

Partners must be joined in actions ex con-

tractu, but not in tort. Slutts v. Chaffee, 48 W 617, 4 NW 763.

When it appears at any stage of a proceeding that a necessary party is not before the court, as when it so appears by a counterclaim, the court will not proceed to judgment. Pennoyer v. Allen, 50 W 308, 6 NW 887.

The owner of an undivided third of real property is a necessary defendant in an action to abate a nuisance thereon. Pennoyer v. Allen, 50 W 308, 6 NW 887.

Cestuis que trust are necessary parties defendant in an action by a mortgagor to have a mortgage given to secure a trust fund discharged. Hill v. Durand, 50 W 354, 7 NW 243.

If the presence of a person not joined is so indispensable that it is impossible to fully dispose of the case in his absence, the court will not proceed to judgment until he is brought in. Taylor v. Collins, 51 W 123, 8 NW 22.

A person to whom a vendee under a land contract has conveyed an interest in the land is a necessary party in foreclosure of the same. Taylor v. Collins, 51 W 123, 8 NW 22.

In an action to recover for negligent burning of a building the owner must join insurance companies who have paid losses for less than its value. Pratt v. Radford, 52 W 114, 8 NW 606.

In an action for libel against the proprietor of a newspaper the author need not be joined. Ludwig v. Cramer, 53 W 193, 10 NW 81.

The rule requiring the presence of all parties directly interested in the subject matter of the litigation will not be enforced to create a multiplicity of suits. Pier v. Fond du Lac, 53 W 421, 10 NW 686.

On a counterclaim for accounting for use and unlawful sale of mortgaged property, in an action on a note secured by the mortgage, a purchaser at such sale is not a necessary party where no relief is sought against him. Boyd v. Beaudin, 54 W 193, 11 NW 521.

In a mortgage foreclosure the plaintiff cannot be compelled to litigate questions of paramount title. Helka Fire Ins. Co. v. Morrison, 56 W 133, 14 NW 12.

A taxpayer may sue for himself and others similarly interested to restrain the delivery of railroad bonds unlawfully issued. Lynch v. Eastern, La F. & M. R. Co. 57 W 430, 15 NW 743 and 825.

A taxpayer may sue on behalf of himself and others after refusal of the corporate authorities to bring suit, to restrain a misappropriation of corporate property which will result in an increase of taxation; and having acquired jurisdiction to restrain further sales of tax certificates the court may set aside sales already made without requiring the plaintiff to tender to the purchaser the amount of such sales as a condition of relief. Willard v. Comstock, 58 W 565, 17 NW 401.

A widow who had joined with her husband in a mortgage and who, at his death, had inherited the land as his sole heir may bring an action to redeem against a mortgagee in possession without joining the administrator of her husband's estate. Posten v. Miller, 60 W 494, 19 NW 540.

In an action by a stockholder against a corporation to procure a cancellation of stock unlawfully issued the directors are not necessary parties. Wood v. Union G. C. B. Asso. 63 W 9, 22 NW 756.

An absconding partner is not a necessary party in an action by the other partner, an infant, to set aside a note and mortgage given by him because of false representations. Salter v. Krueger, 65 W 217, 26 NW 544.

In an action to enforce a trust, creditors of the assignor creating the trust need not be joined as defendants. McLeod v. Evans, 66 W 401, 28 NW 173.

In an action against a county to cancel tax certificates the holders of certificates are necessary parties. Crites v. Fond du Lac County, 67 W 236, 30 NW 214.

A receiver in an action for the dissolution of a partnership is not a necessary party to a suit by creditors to set aside alleged fraudulent transfers of the firm property made before his appointment or to establish their prior rights to the assets in his hands. Mechanics' Nat. Bank v. Landauer, 68 W 44, 31 NW 160.

Where the right to a policy of life insurance vests in an executor or administrator and not directly in a legatee such an executor or administrator is a necessary party to an action for the insurance money. Shove v. Shove, 69 W 425, 34 NW 392.

The fact that one of the defendants in an action for conspiracy to injure the plaintiff was a partner with the plaintiff in the matter affected by such conspiracy does not make him a necessary party plaintiff. Murray v. McGarigle, 69 W 483, 34 NW 522.

In an action to reform a conveyance of an easement the remote grantor of the plaintiff is not a necessary party. Grossbach v. Brown, 72 W 458, 40 NW 494.

A complaint in an action to enforce a lien not showing that the plaintiffs are subcontractors or that there are other lien claimants does not show a defect of parties. Fredrickson v. Riebsam, 72 W 587, 40 NW 501.

Where 2 heirs made a power of attorney to convey their share of an estate it was not necessary to join them in an action to recover the share of one of them in the proceeds of sales by the attorney. Best v. Sinz, 73 W 243, 41 NW 169.

In an action by a riparian owner to restrain the diversion of water from his lands other adjoining riparian owners are not necessary parties. Kaukauna W. P. Co. v. Green Bay & M. C. Co. 75 W 385, 44 NW 638.

The trustees who signed the contract in suit are not necessary parties if it appears from the complaint that the plaintiffs are the successors of those who signed it. Skinner v. Richardson, 76 W 464, 45 NW 318.

In an action to remove a cloud on the title to land which results from assessing the same to 2 different persons, each of whom claims title to portions thereof, there can be no adjudication of the legal title as between the claimants. Hence, persons who assert title hostile to the plaintiffs have no interest in the controversy adverse to the latter, nor are such persons necessary parties to a complete determination of the questions involved. Gilman v. Sheboygan County, 79 W 26, 48 NW 111.

If the instrument sued on is several as respects each of the parties, any of them who

claims under it against any other party may maintain a several action therefor against him. Taylor v. Coon, 79 W 76, 48 NW 123.

A person not bound by or interested in a contract is not a necessary defendant although he was named by the proposer of the contract as one who wanted to go into the enterprise. Waterman v. Waterman, 81 W 17, 50 NW 668.

A person named in a will as an executor and also as one of the trustees of a trust created by a clause which demands a judicial construction is a necessary party to an action brought for that purpose, although he has declined to act as executor. Sawtelle v. Ripley, 85 W 72, 55 NW 156.

A creditor at large cannot have conveyances of his debtor's property set aside as fraudulent, nor can the alleged fraudulent grantees be made defendants in an equitable action against the debtor to restrain them from disposing of said property. North Hudson B. & L. Asso. v. Childs, 86 W 292, 56 NW 870.

Though proper, the directors are not necessary parties defendant to an action to compel delivery of a stock certificate. Wells v. Green Bay & M. C. Co. 90 W 442, 64 NW 69.

An action to restrain county officers from paying money or issuing warrants under a void contract may be brought by any taxpayer for himself and other taxpayers regardless of the amount of tax he paid. Frederick v. Douglas County, 96 W 411, 71 NW 798.

Where an action is brought to set aside a decree of probate court which is claimed to be void, a party who had been concerned in such fraudulent decree but had parted with all his interest in the land prior to the action is not a necessary party. Kruzinski v. Neuendorf, 99 W 264, 74 NW 974.

Solvent stockholders of a corporation whose stock subscriptions are unpaid are interested parties in an action for contribution between guarantors of the note of the corporation where the corporation is unable to pay its debts. Smith v. Dickinson, 100 W 574, 76 NW 766.

Where persons formed an association for the management and sale of land with equal contributions, and one of them was to act as trustee to hold the title and he executed a written trust in favor of the other parties, the effect of the agreement was to form a partnership and one could not sue on behalf of all. George v. Benjamin, 100 W 622, 76 NW 619.

Seventy-five is a sufficient number to allow a suit by one on behalf of others in a case to enforce subscriptions for the erection of a church. Hodges v. Nalty, 104 W 464, 80 NW 726.

One abutting owner cannot sue on behalf of others similarly interested to enjoin the laying of a street railway upon a street. Linden L. Co. v. Milwaukee E. R. & L. Co. 107 W 493, 83 NW 851.

Where property held in common has been converted by a stranger with the permission of one of the cotenants, the latter is not a necessary party to an action for the conversion. Sullivan v. Sherry, 111 W 476, 87 NW 471.

Where an action is brought by riparian owners upon a lake to abate a milldam which it is claimed unlawfully raises the waters in such lake, all of the riparian owners on such lake are necessary parties. Castle v. Madison, 113 W 346, 89 NW 156.

In an action by a taxpayer to restrain the county board from appropriating money to a claimant as a charity, the claimant is a necessary party because her rights are directly affected. Kircher v. Pederson, 117 W 68, 93 NW 813.

Where a husband makes a contract for work to be done upon the homestead, the wife is not a necessary party defendant in an action to foreclose a mechanic's lien under the contract. Hunt v. McDonald, 124 W 82, 102 NW 318.

Where a husband procures a life insurance policy in which his wife is a beneficiary, she could sue for damages for its unlawful forfeiture and her husband need not be joined as plaintiff. Merrick v. Northwestern Nat. Life Ins. Co. 124 W 221, 102 NW 593.

Where an action seeks to cancel a deed given to a husband the wife is not a necessary party, although the premises are occupied as a homestead. Mash v. Bloom, 126 W 385, 105 NW 831.

Where a plaintiff, his wife and the defendants were all jointly liable for the support of a person during life, the plaintiff could recover against any one or more of the parties for their share of the expense which the plaintiff had paid, without joining the other parties, and his wife was not a necessary party. Payne v. Payne, 129 W 450, 109 NW 105.

Where several parties were jointly liable to support a person for life, and 2 of such parties executed a mortgage to secure the performance of the contract, and a purchaser of such mortgaged property assumed the lien, such purchaser was not a necessary party to an action of contribution between the parties. Payne v. Payne, 129 W 450, 109 NW 105.

Where an action is brought against a municipality to recover for injuries sustained on a defective street, the persons who caused the defect when acting under the authority of the municipality under a contract to reimburse it for any injuries are not necessary parties. McGowan v. Watertown, 130 W 555, 110 NW 402.

In an action brought to set aside a deed for fraud, where the defendant died during the pendency of the action, the heirs were necessary parties. Hagan v. McDermott, 134 W 490, 115 NW 138.

A stockholder may sue to protect the corporate rights whenever the officers, being the persons authorized to sue, fail upon demand being made by such stockholder to do so. Donnelly v. Sampson, 135 W 368, 115 NW 1089.

A reversioner who refuses to join as a party plaintiff in an action against the executor of the life tenant for waste committed by the deceased is a proper party defendant. Payne v. Meisser, 176 W 432, 187 NW 194.

In an action on a note executed by a husband and wife, the wife should be a defendant. Mandelker v. Goldsmith, 177 W 245, 188 NW 74.

Where it was obvious that a corporation

would not join in a suit to enjoin a transfer of stock and protect the rights of a stockholder, it was properly made a defendant. Burke v. Universal G. Co. 180 W 520, 193 NW 517.

Taxpayers, on a city's refusal to institute an action against the mayor to recover salary improperly paid him, had the right to join the city as defendant. Kaiser v. Portage, 199 W 581, 225 NW 188.

Allegations that the stockholders of a dissolved corporation are very numerous, that the matters alleged are of common or general interest to all stockholders, that it is impracticable to bring all before the court, and that the plaintiff sues on behalf of all stockholders as a matter of convenience, are sufficient to bring the case within 260.12. Marshall v. Wittig, 205 W 510, 238 NW 390.

In a personal injury action by one occupant of an automobile against the owner and his driver of a truck which collided with the automobile, a second occupant who was impleaded by defendants could file a complaint against defendants for personal injuries. Frederickson v. Schaumburger, 210 W 127, 245 NW 206.

The town is a necessary party defendant in a taxpayer's action brought to recover money illegally spent by the town officers. Schulz v. Kissling, 228 W 282, 280 NW 388.

A complaint by employes suing an employer under 103.455, on their own behalf and also on behalf of all other employes from whose wages the employer had made deductions for alleged defective workmanship, without the employer's first complying with the requirements of that section, is within 260.12 when the question in an action is one of a common or general interest of many persons, etc. Peters v. International Harvester Co. 248 W 451, 22 NW (2d) 518.

Plaintiffs, consisting of some of the members of an unincorporated, local labor union, were proper parties to commence an action on behalf of the membership of such local union against certain other unions, the local union as an affiliate thereof, and certain other defendants, seeking relief from the affiliation of the local with the other unions in alleged violation of the constitution and bylaws of the local. Herman v. United Automobile, A. & A. I. Workers, 264 W 562, 59 NW (2d) 475.

It is permissible to unite, in one complaint against a defendant driver and his liability insurer, a wife's cause of action for injuries sustained when struck by the defendant driver's automobile, and the husband's cause of action for care, medical expenses, and loss of services, the respective causes of action being separately stated. Olson v. Johnson, 267 W 462, 66 NW (2d) 346.

Where the gist of a complaint by a stockholder of a corporation, in an action against another stockholder and the corporation, was that the defendant stockholder by wrongful conduct had prevented the plaintiff and other stockholders, together representing at least 50 per cent of the stock, from exercising their election rights at a regular stockholders' meeting, and the complaint did not demand relief against the defendant corporation but rather on its behalf, and the complaint did not contain any indication that the plaintiff stockholder was seeking any personal recovery, the plaintiff is deemed not to be suing in an individual capacity but in a representative capacity. Wesolowski v. Erickson, 5 W (2d) 335, 92 NW (2d) 898.

260.12 applies to both equitable suits and actions at law. In a situation where the question involved is one of common or general interest, a representative suit may be brought by one for the benefit of all who have such a common or general interest, without complying with the second alternative of showing that the parties are either numerous or that it would be impracticable to bring them before the court. The doctrine of class representation requires the parties suing or defending for the class to have a right or interest in common with the persons represented and to fairly represent the interest or right involved so that it may be fairly and honestly tried. Pipkorn v. Brown Deer, 9 W (2d) 571, 101 NW (2d) 623.

The question of jurisdiction of the court to proceed in a class or representative suit is not to be confused with the question of whether a judgment in a class or representative suit is res adjudicata on the absent members of the class and meets the requirements of due process. The instant case is within the sanctions of the rule announced in Hansberry v. Lee, 311 US 32. Pipkorn v. Brown Deer, 9 W (2d) 571, 101 NW (2d) 623.

The question of whether it is impracticable to bring all interested persons before the court is largely a matter of discretion for the trial court. Lozoff v. Kaisershot, 11 W (2d) 485, 105 NW (2d) 783.

See note to 895.04, citing Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

The partners of a partnership are not only necessary but indispensable parties to the assertion of a partnership cause of action and the question of nonjoinder of a partner as party plaintiff may be raised at any time during the proceeding while the court retains jurisdiction. Assuming the existence of a partnership, failure to join the wife as party plaintiff should not result in dismissal of the complaint, but if so determined, requires that she be brought in and the pleading amended to afford her the option of accepting the judgment in favor of the partnership. Karp v. Coolview of Wisconsin, Inc. 25 W (2d) 299, 130 NW (2d) 790.

See note to 260.10, citing Hartwig v. Bitter, 29 W (2d) 653, 139 NW (2d) 644.

A cause of action must be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right. While it is highly desirable that all related factual circumstances be considered in a single trial, there is no requirement that all proper parties under 260.10 and 260.11, Stats. 1965, must be joined; it is only those parties who are denominated as necessary or indispensable parties in 260.12 or 260.13 who must be joined and whose absence will result in a defective lawsuit. Borde v. Hake, 44 W (2d) 22, 170 NW (2d) 768.

A voluntary association cannot sue or be sued by its common name. The members must

either be joined or one must sue on behalf of the others where they are so numerous that it is impracticable to bring them in. Allis-Chalmers Co. v. Iron M. Union, 150 F 155.

Where a whole class of stockholders was entitled to dividends only in common, an attempt to enforce payment was a true class suit, and dismissal was conclusive on all. Williams v. G. B. & W. R. Co. 68 F Supp. 509.

The representative action as a pleading device. Eggers, 23 MLR 209.

The representative suit in Wisconsin. Carroll, 31 MLR 80.

260.13 History: 1856 c. 120 s. 15; R. S. 1858 c. 122 s. 12; R. S. 1878 s. 2605; Stats. 1898 s. 2605; 1925 c. 4; Stats. 1925 s. 260.13; 1935 c. 541 s. 8.

Desertion by a husband gives the wife no title to his property, nor can she bring action in her own name to recover it. Green v. Lyndes, 12 W 404.

An assignee for the benefit of creditors, who holds a mortgage as such, should sue for injury to premises affecting the security. Gillett v. Treganza, 13 W 472.

A workman on a water power project may sue on assessment made on a mutual covenant between owners thereof to pay for repairs made by him. Wooliscroft v. Norton, 15 W 198.

The assignee of things in action by a surviving partner must sue. Roys v. Vilas, 18 W 169.

The statute is imperative that every action must be prosecuted by the real party in interest. Robbins v. Deverill, 20 W 142.

An assignor of choses in action for the benefit of creditors cannot sue thereon; the action must be brought by the assignee. Smith v. Chicago & Northwestern R. Co. 23 W 267.

A tenant in possession is the proper party to sue for injury to his crop. Stoltz v. Kretschmar, 24 W 282.

A law giving one-half the penalty thereby imposed to a complainant authorizes an action in his own name. Lynch v. "Steamer Economy," 27 W 69.

A shipper who has contracted for safe carriage of goods may sue a carrier for injury thereto though the title has passed to the consignee. Hooper v. Chicago & Northwestern R. Co. 27 W 81.

A grantee cannot sue for breach of covenant of seizin made with his grantor because the covenant was broken when made; a right of action does not pass by the deed. Noonan v. Ilsley, 21 W 138.

The right of action for damages caused by flowage of land before the grantee became the owner of it is in the grantor alone. Pick v. Rubicon Hydraulic Co. 27 W 433.

A consignee of money lost in transmission by an express company, to whom the consignor has released his claim, may sue therefor. Ela v. American M. U. E. Co. 29 W 611.

An assignee of a life insurance policy as collateral is the only proper party to sue thereon. Archibald v. Mutual Life Ins. Co. 38 W 542.

A town might sue on its treasurer's bond, notwithstanding the statute authorizes the town board to prosecute such action. Cairns v. O'Bleness, 40 W 469.

The equitable owner of land may sue for timber cut thereon. Martin v. Scofield, 41 W 167.

A mortgage executed to secure a debt to the county in the name of the board of supervisors may be counted on as an obligation to the county, and the misdescription will not vitiate it. Oconto County v. Hall, 42 W 59.

The holder of a note as collateral security is the real party in interest. Germantown F. Mut. Ins. Co. v. Dhein, 43 W 420.

An insurance company compelled to pay a loss may sue the author thereof without assignment from the assured. Swarthout v. Chicago & Northwestern R. Co. 49 W 625, 6 NW 314.

A mortgagee to whom a policy has been assigned, whose debt is greater than the sum secured, is the sole party in interest in an action for the loss. Hammel v. Queen's Ins. Co. 50 W 240, 6 NW 805.

If one of the joint owners of chattels verbally tells the other that if he will bring an action for the conversion thereof he may have the benefit of it, this is a sufficient assignment to authorize the latter to sue. Arpin v. Burch, 68 W 619, 32 NW 681.

An assignment in writing under seal need not be shown to be supported by any consideration. Leary v. Leary, 68 W 662, 32 NW 623.

A partner to whom his copartner has assigned a partnership claim must sue thereon in his own name. Stuckey v. Fritsche, 77 W 329, 46 NW 59.

One whose interests will not be affected by the construction of a clause in a will cannot maintain an action to have it construed. Sawtelle v. Ripley, 85 W 72, 55 NW 156.

When one person, for a valuable consideration, engages with another to do some act for the benefit of a third person the latter may maintain an action against the promisor for breach of the engagement. Larson v. Cook, 85 W 564, 55 NW 703.

Under a fire insurance policy making the loss payable first to a mortgagee or his assigns as his interest shall appear, an action must be brought by the insured; the mortgagee may be joined as a coplaintiff. Williamson v. Michigan F. & M. Ins. Co. 86 W 393, 57 NW 46; Hodgson v. German Ins. Co. 86 W 323, 56 NW 920.

An agent is chargeable with the value of property if he sells it on other than terms which are prescribed by his principal. On being so charged and after payment of the sum due, he is the owner of the cause of action for the price of the property. Palmer v. Banfield, 86 W 441, 56 NW 1090.

The administrator of the estate of the purchaser of realty under a land contract cannot sue for specific performance of the contract unless the personalty was insufficient to pay the debts. Carpenter v. Fopper, 94 W 146, 68 NW 874.

The vendor of goods who has transferred the vendee's notes taken therefor cannot maintain an action upon them. Landauer v. Espenhain, 95 W 169, 70 NW 287.

On the right of taxpayers to sue in cases where the officers of a municipal corporation

refuse to do so see Kyes v. St. Croix County, 108 W 136, 83 NW 637.

The assignee of a claim is the proper party in interest even though the transfer was only colorable as between the parties. Chase v. Dodge, 111 W 70, 86 NW 548; Brossard v. Williams, 114 W 89, 89 NW 832.

The action of quo warranto is a civil action and must be prosecuted in the name of the real party in interest. A private person cannot maintain it unless he is entitled to the office. State ex rel. Heim v. Williams, 114 W 402, 90 NW 452.

Assignments of moneys to become due upon sales expected to be made, but not the subject of any binding contract, did not pass any interest in the money or any equitable lien as against a subsequent garnishment. O'Niel v. Kerr Co. 124 W 234, 102 NW 573.

Where certain trust deeds were given as security for notes and such notes were transferred, the holder of the notes was the real party in interest to a suit to set aside tax deeds on the lands covered by the trust deeds. Roach v. Sanborn L. Co. 135 W 355, 115 NW 1102.

An action for the breach of the official bond of a school district treasurer should be prosecuted in the name of the district. Board of School Directors v. Kuhnke, 155 W 343, 144 NW 987.

A private carrier waived its lien by transferring possession of goods to the consignee. Having transferred possession the carrier could not maintain an action for repossessing itself of the goods to cover the freight or in behalf of its principal for the purchase price of the goods. Madden Bros. v. Jacobs, 204 W 376, 235 NW 780.

The husband having lived over an hour after the accident and suffered pain, an action for pain and suffering lies in favor of his estate, and under 331.04 the cause of action for his death lies only in his personal representative. Neuser v. Thelen, 209 W 262, 244 NW 801.

A city is not the "real party in interest" in an action to have filled in lands in a lake, located within city limits, abated as nuisances and purprestures; the state is a necessary party. Madison v. Scott, 211 W 23, 247 NW 527.

A holder of notes secured by a chattel mortgage, although having no formal assignment of the mortgage, was entitled to maintain in its own name an action for replevin of the mortgaged property. Muldowney v. McCoy Hotel Co. 223 W 62, 269 NW 655.

For the purposes of an original action in the supreme court in the name of the state, on the relation of the state central committee of the Progressive party, against the board of election commissioners of the city of Milwaukee, for declaratory relief because of the board's allegedly erroneous interpretation of 6.32 and 10.04 (6), Stats. 1941, in refusing to recognize the Progressive party as a dominant political party and in appointing as election officials only members of the Republican, Democratic and Socialist parties, the state is the real party plaintiff and has an interest in the proper enforcement of its laws which would otherwise be lacking. State ex rel. State Central Committee v. Board, 240 W 204, 3 NW (2d) 123.

An action for the benefit of an incompetent should be brought in the name of the ward as plaintiff, by guardian, and not in the name of the guardian as plaintiff, and allegations and the prayer for judgment in the complaint should designate the ward, instead of the guardian, as the person entitled to the relief sought. Cannon v. Berens, 244 W 271, 12 NW (2d) 53.

Where neither the buyer of certain trucks nor his insurer could be certain how a court would ultimately decide questions of title and coverage in relation to a truck which the buyer had paid for but which had been wrecked while still in the possession of the seller, and the buyer made claim to prevent the loss of such rights as he might have under the binder, and the insurer then paid to him a sum equal to his insurance as a loan to be repaid only out of the proceeds of any recovery of damages by him, and the insurer than assigned to him such rights as it acquired by subrogation because of the loan, the insurer was not the real party in interest so as to be a necessary party plaintiff in an action against the seller for the loss of the truck. The assignee is the real party in interest notwithstanding a collateral agreement by which he contracts to pay to the assignor part of the amounts ultimately collected. Liner v. Mittelstadt, 257 W 70, 42 NW (2d) 504.

Where an incorporated medical clinic, having the right to do so as a third-party beneficiary, brought an action in its own name, against a physician who was formerly a stockholder-employe, to recover for the breach of a contract entered into by the defendant and other stockholder-employes whereby they agreed that none would practice medicine within a certain area for a period of 5 years after ceasing to be stockholder-employes and that any violator of such agreement should pay to the clinic corporation as liquidated damages the sum of $5,000, as the amount of damages done to the business of the corporation, the signatory physicians remaining as stockholder-employes were not real parties in interest within either 260.13 or 260.15, and hence the granting of a motion to strike them as parties plaintiff, and to dismiss the action as to them, was proper. Marshfield Clinic v. Doege, 269 W 519, 69 NW (2d) 558.

Where, after appeal from a condemnation award to the circuit court by the condemnee, the latter was adjudicated a bankrupt and a trustee appointed, who assigned the chose in action to an intermediate assignee, the latter in turn assigning the same to plaintiff in whose name alone the case was prosecuted, although various lien holders were interpleaded or permitted to intervene, the fact that the case was prosecuted in the assignee's name alone, if error, was not prejudicial, because the sole question for jury determination was limited to fair market value and compensable damages. P. C. Monday T. Co. v. Milwaukee County Expr. Comm. 24 W (2d) 107, 128 NW (2d) 631.

Where an insurer loaned money to its insured to settle claims against him, the loan to be repayable only to the extent of recovery of moneys from other tortfeasors, an action by the insured for such recovery will be dis-

missed because the insurer is the real party in interest. Kopperud v. Chick, 27 W (2d) 591, 135 NW (2d) 335.

A newspaper publisher is a real party in interest in an action to compel inspection of an alleged public document, as against a contention that the paper itself was the real party in interest. State ex rel. Youmans v. Owens, 28 W (2d) 672, 137 NW (2d) 470, 139 NW (2d) 241.

A collection agency which takes an assignment of an account for purposes of suit is procedurally the real party in interest, but in advising the creditor to make the assignment and obtaining and directing an attorney in handling the suit it is practicing law. State ex rel. State Bar v. Bonded Collections, 36 W (2d) 643, 154 NW (2d) 250.

260.14 History: 1856 c. 120 s. 16; R. S. 1858 c. 122 s. 13; R. S. 1878 s. 2606; Stats. 1898 s. 2606; 1925 c. 4; Stats. 1925 s. 260.14.

Assignment of a judgment to attorneys is superior to a setoff. Stanley v. Bouck, 107 W 225, 83 NW 298.

A party to a contract who, upon inquiry, fails to disclose his equities against the assignor or by his actions misleads the assignee, is estopped from setting up his equities against an assignee who, in good faith, relied on information given or impressions created. Norman F. Thiex, Inc. v. General Motors A. Corp. 218 W 14, 259 NW 855.

A party who, for a valuable consideration, obtained assignment of a note from a bank, had the right to set off the note against a claim by the maker against it. Browning v. Swift and Co. 388 F (2d) 78.

260.15 History: 1856 c. 120 s. 17; R. S. 1858 c. 122 s. 14; R. S. 1878 s. 2607; Stats. 1898 s. 2607; 1925 c. 4; Stats. 1925 s. 260.15; 1943 c. 527.

The assignee of a stock subscription, who holds it for the benefit of a bank, is a trustee. Kimball v. Spicer, 12 W 668.

An administrator may sue for breach of covenant to convey made with the deceased, but not to compel conveyance; the heirs can alone bring such action. Webster v. Tibbitts, 19 W 438.

A partner to whom a debt due the firm is transferred by absolute assignment, but really intended for the benefit of the firm, is not a trustee, but the partners must join in an action thereon. Robbins v. Deverill, 20 W 142.

There must be some written or verbal agreement in order to constitute one a trustee. Robbins v. Deverill, 20 W 142.

An administrator may sue in his own name on a note payable to bearer though transferred to intestate in his lifetime. (Sanford v. McCreedy, 28 W 103.) But upon a cause of action complete in the lifetime of the deceased he must sue as administrator, and in either capacity on a cause accruing after his death. Lawrence v. Vilas, 20 W 381.

A grantee of lands in trust to convey and pay over rents is a trustee. Goodrich v. Milwaukee, 24 W 422.

A receiver appointed to lease land of an imbecile and collect rents pendente lite cannot sue for summary removal of a tenant in his own name. King v. Cutts, 24 W 627.

A shipper of goods who makes a contract for their carriage for the benefit of the owner and consignee is a trustee of an express trust, like a factor or other mercantile agent. Hooper v. Chicago & N. W. R. Co. 27 W 81.

A warehouseman who has insured stored property for the benefit of himself and others may sue for such insurance in his own name as trustee; he is the real party in interest. Strohn v. Hartford Fire Ins. Co. 33 W 648.

One who takes a chattel mortgage for the benefit of another may maintain replevin. Allen v. Kennedy, 49 W 549, 5 NW 906.

A person for whose benefit a promise is made may maintain an action thereon in his own name. Hence, one having a lien upon timber may sue upon another person's covenant to pay such lien, made with third persons who took title to the timber subject to the lien. Kollock v. Parcher, 52 W 393, 8 NW 893.

One with whom a contract for the carriage of goods is made and who is described as the consignor, consignee and sole owner may maintain an action to recover an overcharge exacted by the carrier, although he was not the owner. Waterman v. Chicago, M. & St. P. R. Co. 61 W 464, 21 NW 611.

The state is trustee in suits to recover on forfeited recognizances, inasmuch as the money belongs to the county when recovered (State ex rel. Guenther v. Miles, 52 W 488, 9 NW 403), and the action must be brought in the name of the state. State v. Wettstein, 64 W 234, 25 NW 34.

Where 2 persons obtain a note and mortgage from another for their benefit, but which was taken in the name of one only, the one whose name does not appear in the security is held to have constituted the mortgagee his trustee. Salter v. Krueger, 65 W 217, 26 NW 544.

Residuary legatees are necessary parties to a suit against the testamentary trustee under whose will they claim. The case of Swift v. State L. Co. 71 W 476, 37 NW 441, did not call for a construction of the statute. The chancery rule is still in force and the beneficiaries are indispensable parties to an action against the trustee. Biron v. Scott, 80 W 206, 49 NW 747.

The ostensible partners are trustees, and may sue upon a partnership demand without joining the dormant partners. Platt v. Iron Ex. Bank, 83 W 358, 53 NW 737.

Under a policy insuring the owner of mortgaged property to an amount greater than the mortgage debt and making the "loss, if any, payable to" the mortgagee, and agreeing to make good unto the insured, and assigns all such loss, the mortgagee is not the trustee of an express trust, and, after the death of the insured, could not continue the prosecution of an action begun by the insured and himself to collect on the policy. Carberry v. German Ins. Co. 86 W 323, 56 NW 920.

A guardian appointed by the probate court is not the trustee of an express trust, but an officer of the court. An action by a ward should be brought in his name but the guardian is a proper party to the record. The proceedings may be amended by inserting the

ward's name as plaintiff. Webber v. Ward, 94 W 605, 69 NW 349.

A person who was in possession of the goods of another and who was authorized to contract in regard to such goods for the benefit of their owner is a trustee of an express trust and may enforce it in his own name. Beardsley v. Schmidt, 120 W 405, 98 NW 235.

A bond in paternity proceedings which runs to the county judge makes him a trustee of express trust, and he is the proper party to bring an action thereon. Meyer v. Meyer, 123 W 538, 102 NW 52.

If a person for a consideration moving to him from another agrees to pay that or any other's debt to a third person, he raises a contractual obligation in favor of a third person, although the latter was a stranger to the transaction. Fanning v. Murphy, 126 W 538, 105 NW 1056. See also Tweeddale v. Tweeddale, 116 W 517, 93 NW 440.

A bond by contractors to a school district to pay for all labor and material that might enter into the construction of the school building is a contract made for the benefit of materialmen. A third party may adopt it, and enforce it as if originally made by his express authority. R. Connor Co. v. Aetna Ind. Co. 136 W 13, 115 NW 811.

Where the bond of a municipal court runs to the city, suit may be brought on it for failure to pay over moneys, even though such moneys ultimately go to the county. The city is the trustee of an express trust. Milwaukee v. United States F. & G. Co. 144 W 603, 129 NW 786.

The indorsee of a note "for credit account of" another is a trustee for such other and may bring an action on the note to enforce the trust. The beneficiary may bring the action in his own name without joining the indorsee, not because he has legal title to the note, but because the statute authorizes him to bring it. Gulbranson-Dickinson Co. v. Hopkins, 170 W 326, 175 NW 93.

A collection agent authorized to collect, but not to accept a note in which the agent was payee, does not become a trustee by accepting such a note from the debtor and assuming payment of the claim; and he cannot bring an action on the note without joining the creditor. Peters v. Kanzenbach, 175 W 602, 185 NW 197.

See note to 260.13, citing Marshfield Clinic v. Doege, 269 W 519, 69 NW (2d) 558.

A town may maintain an action to test an annexation without joining any residents of the area as parties. Blooming Grove v. Madison, 275 W 328, 81 NW (2d) 713.

260.17 History: R. S. 1849 c. 93 s. 9; 1856 c. 120 s. 24; R. S. 1858 c. 122 s. 21; R. S. 1878 s. 2609; Stats. 1898 s. 2609; 1925 c. 4; Stats. 1925 s. 260.17.

Revisers' Note, 1878: Section 21, chapter 122, R. S. 1858, amended. An indorser is not permitted to sue all prior indorsers, nor a surety by a guaranty contract permitted to be joined as defendants by the present section; and this amendment is designed to extend the privilege of joining defendants liable for the same demand to all cases where they are directly liable to the plaintiff for the same debt to its full extent. The revisers' acknowledge their obligation to the recent board of revision in New York for the section.

Prior to the amendment introduced by the revision of 1878 a guarantor could not be joined in foreclosure and a personal judgment rendered against him. Borden v. Gilbert, 13 W 670.

The plaintiff may sue all or any of the parties severally liable, and having sued all may discontinue as to part and take judgment against the rest. Decker v. Trilling, 24 W 610.

Before it was amended in 1878, the action of trover was probably not within the provisions of the statute. Churchill v. Welsh, 47 W 39, 1 NW 398.

The maker and the indorser may be joined. Boyd v. Beaudin, 54 W 193, 11 NW 521.

In an action for rent, persons guaranteeing payment were properly joined as parties defendant. Selts Inv. Co. v. Promoters, 202 W 151, 231 NW 641.

Sureties may unite as plaintiffs in seeking contribution from cosureties. In such an action on a bond securing a bank which assumed liabilities of an insolvent bank, the fact that assets of an insolvent bank were not efficiently administered or that the liability of the bank stockholders had not been enforced constitutes no defense. Schlecht v. Anderson, 202 W 305, 232 NW 566.

A complaint which stated a cause of action against the makers of bonds and against a corporation which had subsequently assumed payment of the bonds was not demurrable for misjoinder of causes of action. Bechthold v. O. F. P. Inv. Co. 221 W 303, 266 NW 915.

260.18 History: 1893 c. 235; Stats. 1898 s. 2609a; 1925 c. 4; Stats. 1925 s. 260.18; Sup. Ct. Order, 217 W v.

Revisers' Note, 1878: Based on chapter 235, 1893; amended to include all insurance on property, and by omitting the clause as to attorneys' fees, because such a provision as that omitted is held void in Gulf R. Co. v. Ellis, 165 US 150, on the ground that it deprived the company of the equal protection of the law. See Cameron v. Chicago, etc., R. Co. 65 NW Rep. 652.

So much of ch. 235, Laws 1893, as relates to the entry of a separate judgment was given effect in Dick v. Equitable F. & M. Ins. Co. 92 W 46, 65 NW 742.

If the makers of the policies sued on might have been joined as defendants under ch. 235, Laws 1893, separate actions may be consolidated under sec. 2972, R. S. 1878. Gross v. Milwaukee M. Ins. Co. 92 W 656, 66 NW 712.

After consolidation a single judgment is proper. Bannon v. Insurance Co. of N. A. 115 W 250, 91 NW 666.

The liability under sec. 2609a, Stats. 1898, is several and an action cannot be maintained in the federal court unless the liability of each company exceeded the minimum amount required for federal court jurisdiction. Wisconsin C. R. Co. v. Phoenix Ins. Co. 123 F 989.

260.185 History: 1862 c. 186 s. 1, 2; R. S. 1878 s. 2834; Stats. 1898 s. 2834; 1925 c. 4; Stats. 1925 s. 269.48; Sup. Ct. Order, 16 W (2d) x; Stats. 1963 s. 260.185.

Comment of Judicial Council, 1963: Moves a joinder provision into ch. 260, and requires that notice of amendment be given to all parties. [Re Order effective May 1, 1963]

Even though plaintiff added and served a new defendant pursuant to a void order of interpleader, the action is good, since plaintiff can amend the summons and complaint without obtaining an order. State ex rel. Nelson v. Grimm, 219 W 630, 263 NW 583.

260.19 History: 1856 c. 120 s. 26; R. S. 1858 c. 122 s. 22; 1864 c. 168; R. S. 1878 s. 2610; 1883 c. 41; Ann. Stats. 1889 s. 2610; Stats. 1898 s. 2610; 1915 c. 219 s. 6; 1925 c. 4; Stats. 1925 s. 260.19; 1935 c. 541 s. 10; Sup. Ct. Order, 271 W vi; Sup. Ct. Order, 16 W (2d) x; Sup. Ct. Order, 29 W (2d) v.

Revisers' Note, 1878: Section 22, chapter 122, R. S. 1858, amended by inserting words to enable the court to bring in a party who has interest that may seem to require his presence to protect them, although he does not apply; which was the substance of chapter 168, Laws 1864, except what is contained in the next section.

Comment of Judicial Council, 1956: This new subsection sets a time within which application for bringing in additional parties may be made. Under the present statutes there is no time limit and defendants sometimes wait until the case is on the calendar for trial before asking to bring in other parties. [Re Order effective Sept. 1, 1956]

Comment of Judicial Council, 1963: Old 260.19 (2) and (3) are renumbered to be new (5) and (6). Old subs. (1) (to the comma in line 2) and (4) are completely rewritten into the new procedure spelled out in new subs. (1) to (4).

The procedure by which a defendant makes a person a party to the action is, throughout these sections, called impleader, rather than interpleader. Interpleader, as a name, is reserved for the action, historically equitable, in which a party offers to pay a sum or a fund to either of 2 alleged owners. [Re Order effective May 1, 1963]

An agent or officer (like a receiver of lands granted to the state to aid in the construction of a canal) cannot, when proceeded against to compel an accounting, force his principal and a third party to implead to determine their conflicting rights. State ex rel. Attorney General v. Merrill, 2 Pin. 279.

Interpleader will not lie after judgment against the complainant. Bird v. Fake, 2 Pin. 69; Danaher v. Prentiss, 22 W 311.

When the complainant can in no other way protect himself from conflicting claims he may interplead. McDonald v. Allen, 37 W 108.

The plaintiff in replevin should apply to have third persons who have interests in the property made parties. Such persons have an absolute right to be made parties upon their own application. Wilde v. Paschen, 67 W 90, 30 NW 279.

In an action against the sheriff for damages on account of attaching property third persons having a common-law lien upon the property may be made parties. Brickley v. Walker, 68 W 563, 32 NW 773.

If an order staying proceedings until a necessary party is brought in does not limit the time therefor and there is unnecessary delay the remedy is by an application for a modification or vacation of such order. Shove v. Shove, 69 W 425, 34 NW 392.

If the title to mortgaged chattels is in dispute and they have been sold under an execution by an unsecured creditor and the proceeds of the sale are in the officer's hands, an action in equity cannot be maintained by a judgment creditor and the officer to have the mortgages declared void or to restrain the prosecution of an action by the mortgagee for their conversion. The judgment creditor may become a party to the action for conversion. Markey v. Michelstetter, 77 W 210, 45 NW 1087.

An action for the conversion of money paid defendant for the use of plaintiff and by defendant paid to one who claimed a lien thereon because of services rendered plaintiff may be determined without making the lien claimant a party. Carroll v. Fethers, 82 W 67, 51 NW 1128.

Interpleader ought not to be brought except when there is no other way for the pleader to protect himself from a litigation in which he has no interest. Hinckley v. Pfister, 83 W 64, 53 NW 21.

A petitioner for equitable relief against a judgment may have new parties brought in if his petition shows that it is necessary. Stein v. Benedict, 83 W 603, 53 NW 891.

The plaintiff who seeks nothing but a money judgment cannot be compelled to bring in other parties than the one he has made defendant. Taylor v. Matteson, 86 W 113, 56 NW 829.

An insurer of corporate property which burned subsequent to an assignment by the insured cannot intervene in an action on its policy by a receiver to whom the assignee was ordered to deliver all the property, for the purpose of setting aside the appointment of the receiver. Barth v. Enger-Kress Co. 92 W 225, 65 NW 1035.

Where the plaintiff in an action for conversion claims to own a half interest in the property involved and to recover therefor a sum not exceeding that remaining due from defendant to his vendor, the vendor may be substituted as defendant. Merriam v. Horner, 92 W 654, 66 NW 808.

Before a vendee will be compelled to take title under his contract the holder of the legal title must be a party. Emerson v. Schwindt, 108 W 167, 84 NW 186.

Where an action was brought on a promissory note and the defendant pleaded bankruptcy, an order made in the federal court under the bankruptcy act cannot control the practice in state court. The statute is addressed to the discretion of the court and where it does not appear that the trustee was prejudiced by denial of his motion to make him a party the order will not be reversed. Bank of Commerce v. Elliott, 109 W 648, 85 NW 417.

The court is not bound to wait for an objection that necessary parties are not before it before acting under sec. 2610, Stats. 1898. Failure to bring in the parties does not render the judgment void but erroneous. McDougald

v. New Richmond R. M. Co. 125 W 121, 103 NW 244.

Where an action was brought against a town treasurer and his sureties to recover illegal payments made to a third party through banks and the sureties claimed that the banks and the third party knew that the payment was illegal, the sureties could have the banks and the third party made defendants. Washburn v. Lee, 128 W 312, 107 NW 649.

Where an action was brought to prevent the sale of property under the improvement tax, with the city as principal defendant, the owner of the tax claim was a necessary defendant and should have been brought in. Dahlman v. Milwaukee, 130 W 468, 110 NW 483.

In an action to foreclose a mortgage certain parties were properly made defendants, where it was alleged in the complaint that they claimed to have some interest in or lien upon mortgaged premises, and to have some interest in the note and mortgage. Doherty v. Doherty, 131 W 375, 111 NW 478.

In an action to set aside a deed for fraud, where the defendant died during the action and it was revived against the executor, the heirs should be made defendants. Hagan v. McDermott, 134 W 490, 115 NW 138.

Upon application of the plaintiff a new party may be made defendant with whom the original defendant claims that a novation had been made, even though there was no charge of a novation in the complaint. Hemenway v. Beecher, 139 W 399, 121 NW 150.

In an action to cancel a note and mortgage because of failure of consideration, the estate of the decedent from whom the defendant obtained the title to the note and mortgage was not a necessary party. Mills v. Morris, 150 W 277, 136 NW 556.

Sections 2610 and 2656a, Stats. 1898, were intended to give the trial court very broad powers in calling in new parties and in adapting the pleadings to controversies between all of them. Swanby v. Northern S. Bank, 150 W 572, 137 NW 763.

In an action to recover commissions for procuring a purchaser of real estate the defendant cannot require another person to be brought in who is suing for commissions for procuring the same purchaser. The issue can be determined completely without other parties and without "prejudice to the rights of others." Schenck v. Sterling E. & C. Co. 151 W 266, 138 NW 637, 769.

All the members of a partnership should be made parties to an action brought by one of them upon a note made by the association for advances to pay its debts and indorsed by other members, in a case where the association is insolvent; and all partnership differences should be tried out and settled. Conway v. Zender, 154 W 479, 143 NW 132.

An action by a merchant against an accident insurance company to recover what he had paid to settle a claim of damages, for an injury to a customer resulting from the negligence of a contractor doing repairs in the store, was not within the compulsory provisions of this section and a refusal to make the contractor a party was no abuse of discretion. Kresge v. Maryland Cas. Co. 154 W 627, 143 NW 668.

Where a street railway company in an action brought to charge it with liability for the negligence of its servant applied to have the negligent servant made a party, a denial of the application was proper. Ertel v. Milwaukee E. R. & L. Co. 164 W 380, 160 NW 263.

Any person may be made a party to an action on a guardian's bond whenever his presence is necessary to enable a surety who will, if held liable for his principal's misappropriation of property, become subrogated to rights of the ward to pursue such converted property. Brovan v. Kyle, 166 W 347, 165 NW 382.

Facts warranting the changing of the form of an action and the bringing in new parties are stated in Williams v. Thrall, 167 W 410, 167 NW 825.

In a tort action, judgment against a defendant will not prejudice his right to contribution from others, not made parties, who contributed to the wrong. For this reason such others should not be brought in upon defendant's application, and for the further reason that the right of the plaintiff to make his own election in the matter of joining tortfeasors should be preserved. Bakula v. Schwab, 167 W 546, 167 NW 378; Humboldt v. Schoen, 168 W 414, 170 NW 250.

A judgment creditor who had garnisheed his debtor's funds may intervene in an action brought by another creditor against the same debtor who had also garnisheed the same fund, and may present the debtor's defense to the principal action. Scheuer v. R. J. Schwab & Sons Co. 170 W 630, 176 NW 75.

Where a defendant's counterclaim in an action on a purchase-price note alleged that the deed from plaintiff and his cograntor embraced some land of which they were not owners, the cograntor was a necessary party if the covenants in the deed were joint and not joint and several. Rowell v. Rhadans, 171 W 86, 175 NW 937.

A railroad company, defendant in a personal injury action, may ask the court to require a physician to be made a party defendant whose malpractice aggravated the injury received by the plaintiff through the alleged negligence of the railroad company. For such aggravation the railroad company will, upon paying the whole damage suffered by the plaintiff, become subrogated to the plaintiff's rights against the physician. Sec. 2610 applies to tort actions as well as actions on contracts. Fisher v. Milwaukee E. R. & L. Co. 173 W 57, 180 NW 269.

Under some circumstances the granting or refusal of a motion to bring in new parties to an action is discretionary. Maxcy v. Peavey, 177 W 140, 187 NW 1020.

In an action to establish a right of way across adjoining land, one who was an owner of land crossed by the same right of way, but who did not dispute the right of way, was not a proper party. Schroeder v. Moeley, 182 W 484, 196 NW 843.

260.19 grants a privilege to be exercised only when the court in its discretion permits it. Wujcik v. Globe & Rutgers Fire Ins. Co. 189 W 366, 207 NW 710.

Whether a person should be made a party under 260.19 rests in the sound discretion of the court. Wait v. Pierce, 191 W 202, 209 NW 475, 210 NW 822.

260.19 (1) is intended to apply only to persons within the power of a then party to the action or of the court itself to bring within the court's jurisdiction. E. L. Husting Co. v. Coca-Cola Co. 194 W 311, 216 NW 833.

The state and the county which were concerned in the relocation of a state trunk highway in a proceeding to enjoin the road contractor from entering on plaintiff's property should have been allowed to intervene. Muscoda B. Co. v. Worden-Allen Co. 196 W 76, 219 NW 428.

A physician against whom actions for malpractice in treating a compensable injury are brought by either the compensated employe or the compensating employer may bring in the other party. Lakeside B. & S. Co. v. Pugh, 206 W 62, 238 NW 872.

The payment of a loss by the insurer under an automobile collision policy operates as an assignment pro tanto to the insurer of the rights of the insured against the tort-feasor responsible for the damages, whether or not the policy so provides. 260.19 has a larger objective than merely the protection of the parties, the legislative intent being that single controversies shall be determined in one action for the purpose of promoting expedition and economy in the administration of justice; and it applies to all actions whether at law or in equity. Said section applies to actions at law particularly where a single cause of action is vested in several persons by reason of partial assignments, especially where assignments occur by subrogation. Patitucci v. Gerhardt, 206 W 358, 240 NW 385; Frederick v. Great N. R. Co. 207 W 234, 240 NW 387, 241 NW 363.

Consolidation of actions for trial was proper. Newburg v. United States F. & G. Co. 207 W 344, 241 NW 372.

In the absence of some pleading stating a cause of action against an interpleaded defendant, or showing that it is a necessary or proper party, it is entitled to be discharged as a party. National R. M. Ins. Co. v. La Salle F. Ins. Co. 209 W 576, 245 NW 702.

The court should, of its own motion, require that persons, whose names a private citizen sought to enjoin commissioners from placing on primary ballots, be made parties to a suit before determining whether their nominating papers were filed in time. Manning v. Young, 210 W 588, 247 NW 61.

An heir to one-half of an estate, who had induced the administrator not to disclose in the inventory thereof an indebtedness of the administrator to the estate and to agree to pay the interest and principal directly to such heir, without disclosing the facts to his coheir, and who, after the administrator had become insolvent without having paid the principal, was appointed administrator de bonis non, and, as such brought an action to recover on the administrator's bond, was a necessary party defendant to the action in his individual capacity; consequently a motion to have him interpleaded should have been granted. Jones v. United States F. & G. Co. 214 W 629, 254 NW 95.

A court commissioner has no power to grant an order of interpleader. State ex rel. Nelson v. Grimm, 219 W 630, 263 NW 583.

The case being a proper one for interpleading, the supreme court will not presume that the trial court would refuse to interplead a proper party. Milwaukee County v. H. Neidner & Co. 220 W 185, 263 NW 468, 265 NW 226, 266 NW 238.

Where the plaintiff had obtained a final judgment for personal injuries against a hotel company reorganized under 77B of the bankruptcy act, the circuit court in subsequent proceedings on the application of the hotel company to compel satisfaction of the judgment by tender of stock in the reorganized corporation, properly ordered, on its own motion, that the liability insurer of the hotel company be made a party. Burling v. Schroeder Hotel Co. 238 W 17, 298 NW 207.

The defendant's wife was not an indispensable party to an action to secure specific performance of a written contract to transfer corporate stock where, although the wife was a party to the contract and the owner of shares of stock, the husband was liable for the whole performance, which could be had out of stock in his hands, and the wife was without the jurisdiction, so that the failure to join the wife was a mere defect of parties such as is waived by failure to make objection by answer or demurrer. McCoy v. May, 255 W 20, 38 NW (2d) 15.

In an action by one claiming to be the beneficiary under a life insurance policy, the insurer does not waive compliance in respect to policy requirements as to change of beneficiary by interpleading another claimant and offering to pay the amount of the insurance into court. Kaiser v. Prudential Ins. Co. 272 W 527, 76 NW (2d) 311.

When it appears that an additional party has an interest in the subject matter of an action, the matter of interpleader or intervention is ordinarily within the sound discretion of the trial court. Fish Creek Park Co. v. Bayside, 273 W 89, 76 NW (2d) 557.

In an action to enjoin the attorney general from enforcing a criminal statute on the ground of unconstitutionality, a person not a party who is interested in having the statute declared constitutional is not a necessary party under 260.19 (1), nor can they insist on being joined under 269.56 (11), since the attorney general is deemed to represent them. White House Milk Co. v. Thomson, 275 W 243, 81 NW (2d) 725.

Under 260.19 and 260.20 prior to their amendment by court order in 1956, a proposed cross-complaint had no standing as a pleading until the third person was ordered brought in, so that an order denying interpleader and dismissing the proposed cross-complaint on the merits was not res adjudicata in a subsequent action on the same facts. Stobbe v. Atkinson, 4 W (2d) 178, 90 NW (2d) 118.

The first part of 260.19 (1) makes it mandatory to permit a party to intervene when his protection requires it. A cause of action for breach of warranty cannot be split, and where a claim of subrogation to part of such cause

of action is made the intervention must be allowed. The fact that the subrogated claimant could sue in tort does not affect his right to intervene in the breach of warranty action. Kennedy-Ingalls Corp. v. Meissner, 5 W (2d) 100, 92 NW (2d) 247.

Where a mortgagor sues a mortgagee for conversion of the mortgaged personal property, the mortgagee may have the subsequent mortgagees made parties. Kohn v. Dravis, 94 F 288.

The right of defendants to compel third persons to intervene in contract actions. Faller, 25 MLR 197.

Comparison with impleader practice under federal rules. Kletecka, 27 MLR 208.

The discretionary nature of orders relating to third-party impleader. Gordon, 35 MLR 108.

260.195 History: Sup. Ct. Order, 29 W (2d) vi; Stats. 1965 s. 260.195.

260.205 History: Sup. Ct. Order, 16 W (2d) xi; Stats. 1963 s. 260.205.

Comment of Judicial Council, 1963: From 260.19 (1), after the comma in line 2. [Re Order effective May 1, 1963]

Under 260.19 (1), a person who has such an interest as requires him to be a party for his own protection has an absolute right to intervene. Lodge 78, I. A. Of Machinists v. Nickel, 20 W (2d) 42, 121 NW (2d) 297.

260.21 History: 1856 c. 120 s. 83; 1857 c. 14 s. 1, 2; R. S. 1858 c. 125 s. 39; R. S. 1858 c. 140 s. 53, 54; 1860 c. 229; 1861 c. 108; 1873 c. 15; R. S. 1878 s. 2612, 3196; 1883 c. 249 s. 2; Ann. Stats. 1889 s. 2612, 2612a; Stats. 1898 s. 2612, 3196; 1925 c. 4; Stats. 1925 s. 260.21, 281.14; 1935 c. 541 s. 12; Stats. 1935 s. 260.21.

Revisers' Note, 1878: This section is composed of section 39, chapter 125, R. S. 1858, and sections 53 and 54, chapter 140, R. S. 1858, as amended by section 1, chapter 229, Laws 1860, amended to extend the cases in which unknown persons may be brought into cases of a kindred character, to those originally provided for, proceedings in rem, to provide specifically for ignorance of a part of a name as perhaps not strictly within the former expression, and to combine and condense the whole matter.

Where the plaintiff is ignorant of the defendant's name the latter may be designated in the action by any name, and where the complaint avers ignorance of the individual names of certain defendants and refers to them by their surnames only, there is a sufficient compliance with the statute. Kellam v. Toms, 38 W 592.

A judgment is not void because the principal action was brought and prosecuted by partners in the firm name. Frisk v. Reigelman, 75 W 499, 43 NW 1117, 44 NW 766.

A notice of appeal from the judgment of a justice of the peace signed and entitled by partners in their individual names is good. Schweppe v. Wellauer, 76 W 19, 45 NW 17.

260.21 (3) does not apply where no partnership but only joint adventurers are involved, or where the summons and complaint merely run against individual defendants by name, and do not allege a partnership or suggest that the names of any persons are unknown. Eide v. Skerbeck, 242 W 474, 8 NW (2d) 282.

260.22 History: R. S. 1849 c. 96 s. 14; R. S. 1858 c. 122 s. 16 and c. 135 s. 10; R. S. 1878 s. 2613, 2615; Stats. 1898 s. 2613, 2615; 1925 c. 4; Stats. 1925 s. 260.22, 260.24; Sup. Ct. Order, 212 W vii; 1949 c. 301; Stats. 1949 s. 260.22; 1953 c. 298.

Comment of Advisory Committee, 1949: Under 260.22 all minors must appear by guardian ad litem irrespective of whether they have a general guardian. Under 260.24 (1) a guardian ad litem is required for incompetents only if they have no general guardian. It is best to have uniformity; hence the appointment is required in all cases of disability; the interests of the minor or incompetent are thereby better protected. The question of competency should be answered by the court or judge, to prevent raising the question later. The rule is so drawn as to authorize the appointment of a guardian for an incompetent at any stage of the proceeding. See Gerster v. Hilbert, 38 W 609, 612. [Bill 30-S]

A guardian ad litem, appointed after judgment, may move to have the judgment set aside on the ground that the fact of insanity of the defendant amounts to excusable neglect. Gerster v. Hilbert, 38 W 609.

It is a general rule that an action concerning the estate of a minor must be by or against the minor, who must be represented by a guardian. There are exceptions, and one is where the action is upon an express contract made by the guardian for the benefit of the ward. Such action may be brought by or against the guardian personally. McKinney v. Jones, 55 W 39, 11 NW 606, 12 NW 381.

A guardian ad litem may be appointed for an insane heir where the general guardian is adversely interested. Max v. Rowlands, 59 W 110, 17 NW 687.

There is no impropriety in appointing the general guardian as guardian ad litem. Straka v. Lander, 60 W 115, 18 NW 641.

A guardian ad litem is appointed for all the purposes of the action, including the taking of an appeal if he thinks that wise; and his authority continues until the disability ceases unless terminated by the court. He may exercise his power at will subject to the liability imposed by law. The power of the court to interfere with the guardian's discretion should not be exercised at the instance of the adverse party or a general guardian appointed at such party's request apparently for selfish purposes. Tyson v. Tyson, 94 W 225, 68 NW 1015; In re Jones' Will, 96 W 427, 71 NW 883.

Neither this nor any other statute nor circuit court rule preclude a person of a weak and feeble mind, and not of sufficient capacity to attend to ordinary transactions or to protect and preserve his property rights, from suing in his own name without a guardian ad litem as he might do at common law. When it becomes apparent that a plaintiff by reason of his insanity cannot safely protect his rights, the proper course is to appoint a guardian ad litem and direct the case to proceed; it is not to dismiss the case and deny all hearing. Wiesmann v. Donald, 125 W 600, 104 NW 916.

When appearing by his guardian ad litem the minor, not his guardian ad litem, is the party to the action. Scheiderer v. A. George Schulz Co. 169 W 6, 171 NW 660.

A minor not represented by a guardian ad litem is not bound by a judgment. In re Brandstedter's Estate, 198 W 457, 224 NW 735.

Service on plaintiffs' attorneys of a notice of retainer and appearance by an attorney for a minor defendant, who at the time had no guardian ad litem or general guardian, did not waive an ineffectual service of summons made on the father of such defendant or give the court jurisdiction of such defendant, since a minor must appear by guardian ad litem. Caskey v. Peterson, 220 W 690, 263 NW 658.

An order approving a settlement of a minor's claim for personal injuries can be set aside where the minor was not represented by a guardian ad litem or general guardian, even though the father was present and the child was represented by an attorney. 269.46, Stats. 1957, is not applicable. Matter of Andresen, 17 W (2d) 380, 117 NW (2d) 360.

A minor must always appear by guardian ad litem, but a mental incompetent can maintain an action until the court becomes aware of his incapacity. Prior proceedings need not be set aside. The burden of informing the court is on the incompetent, not the opposing party. Withers v. Tucker, 32 W (2d) 496, 145 NW (2d) 665.

Guardians ad litem in Wisconsin. Hohmann and Dwyer, 48 MLR 445.

260.23 History: R. S. 1858 c. 122 s. 17; 1866 c. 54 s. 1; R. S. 1878 s. 2614, 2616; Stats. 1898 s. 2614, 2616; 1925 c. 4; Stats. 1925 s. 260.23, 260.25; Sup. Ct. Order, 212 W vii, viii; Sup. Ct. Order, 239 W v; Stats. 1943 s. 260.23, 260.24 (2), (3), 260.25; Sup. Ct. Order, 245 W vii; 1949 c. 301; Stats. 1949 s. 260.23; 1955 c. 210 s. 1.

Comment of Advisory Committee, 1949: (2) is substantially the same as present section 260.23 (1). Incompetents at present are variously spoken of as "mentally incompetent" (260.23 (1)); "mentally incompetent to have charge of his affairs" (260.24 (1)); and "incompetent" (260.25). In this item incompetents are referred to in all cases as "mentally incompetent." (3) is a consolidation of 260.23 (2), (3) and 260.25. We see no reason for making a distinction in the appointment of a guardian ad litem for a defendant as between minors and incompetents, nor as between residents and nonresidents; therefore this section is made to apply to all such cases. Permitting a minor over 14 years of age to apply for a guardian ad litem is desirable; this is consistent with the authority to nominate his general guardian (319.02). The latter portion of (3) is modeled after 260.25 with two changes. First, in place of making it mandatory for the court to direct how notice should be given, it is made permissive. Second, the requirement of obtaining an order as to the method of giving notice is changed to permit the court at the time of the appointment of the guardian to approve notice already given. The practice is very prevalent in quiet-title actions to publish with the summons a notice that at a particular time the plaintiff will apply for the appointment of a guardian ad litem. This practice does not conform to 260.23 (3) nor 260.25. The present statute is undoubtedly a carry-over from the time when it was necessary to secure, at the outset, an order for service of a summons by publication. A similar change is made as to the appointment of a guardian ad litem. If the practice is adopted, then when the plaintiff makes his proofs he may show proof of service of the summons and at the same time secure appointment of the guardian ad litem. (4) is a consolidation of 260.23 (4) and 260.24 (2). (5) is a consolidation of 260.23 (5) and 260.24 (3). The prohibition against a settlement made by a general guardian of an incompetent contained in 260.24 (3) is omitted; under the suggested scheme the general guardian has no authority to act for the ward in the court proceedings. [Bill 30-S]

An infant who sues in justice's court should proceed by guardian; but if a next friend has actually been appointed the proceedings may be amended, on motion, so as to show the fact after the parties have appeared. Wheeler v. Smith, 18 W 651.

Where a minor sued without a guardian ad litem and leave was given to amend and prosecute by guardian after the evidence had disclosed the fact of minority there was no error. Sabine v. Fisher, 37 W 376.

An objection to the right of a guardian plaintiff to sue cannot be taken by plea in bar and is waived unless specially pleaded in abatement. Plath v. Braunsdorff, 40 W 107.

During the trial counsel for defendant stated, as an excuse for the nonappearance of his client, that he was paralyzed and of unsound mind. No objection was made to proceeding with the trial, and there was no application for the appointment of a guardian ad litem. It was not error to proceed with the trial. Hall v. Scott, 59 W 236, 18 NW 8.

A motion to dismiss an appeal to the circuit court on the ground that the appellant was a minor and had no guardian ad litem was properly denied where, before the hearing thereof, a guardian was appointed. Hepp v. Huefner, 61 W 148, 20 NW 923.

A guardian ad litem who fails to protect the interest of his ward is answerable in damages for negligence. An order directing an attorney to act as guardian ad litem, notwithstanding the attorney had told the court his convictions were such that he could represent only interests of those opposed to infants, was erroneous, and did not give the attorney the right to file a brief for the infants on appeal. Will of Jaeger, 218 W 1, 259 NW 842.

On the prevalent practice of appointing a guardian ad litem for unknown minors or incompetents, see Will of Knoepfle, 243 W 572, 580, 11 NW (2d) 127, 129.

260.26 History: 1856 c. 120 s. 323; R. S. 1858 c. 140 s. 46; R. S. 1878 s. 2617; Stats. 1898 s. 2617; 1925 c. 4; Stats. 1925 s. 260.26.

Revisers' Note, 1878: Section 46, chapter 140, R. S. 1858, amended to apply to guardians ad litem, of any ward, to direct the form of security, and to authorize it to be renewed.

260.27 History: R. S. 1878 s. 2618; Stats.

1898 s. 2618; 1925 c. 4; Stats. 1925 s. 260.27; Sup. Ct. Order, 245 W vii.

Revisers' Note, 1878: A new section to define an established and necessary practice as to guardians for plaintiff, and to declare the law as to guardians of defendants. By rule, any attorney is bound to act as a guardian for a defendant on direction of the court.

CHAPTER 261.

Place of Trial of Civil Actions.

261.01 History: R. S. 1849 c. 90 s. 5; 1856 c. 120 s. 27 to 29; 1858 c. 91 s. 2; R. S. 1858 c. 123 s. 1 to 5; 1868 c. 139; 1869 c. 185; 1872 c. 119 s. 42; R. S. 1878 s. 2619; 1885 c. 111; Ann. Stats. 1889 s. 2619; 1893 c. 60, 303; 1895 c. 34; Stats. 1898 s. 2619; 1905 c. 366; Supl. 1906 s. 2619a; 1907 c. 282; 1915 c. 604 s. 39; Stats. 1915 s. 2619; 1917 c. 152 s. 5; 1919 c. 334; 1919 c. 679 s. 92; 1925 c. 4, 383; Stats. 1925 s. 261.01; 1929 c. 42; 1935 c. 541 s. 14; 1943 c. 394; 1945 c. 197, 427; 1947 c. 383; 1951 c. 261 s. 3; 1959 c. 690.

Revisers' Note, 1878: This section embraces sections 1, 2, 3, 4 and 5 of chapter 123, R. S. 1858, section 4 as amended by section 2, Chapter 91, Laws 1859; and in part by chapter 185, Laws 1869, and the first part of section 42, chapter 119, Laws 1872, and section 1, chapter 139, Laws 1868, condensed. It has seemed the most convenient way to state the proper place of trial of all actions in one section, as thus all cases are more readily brought within view. The statutory declaration of a place of trial does not, as the court has decided, take away jurisdiction from the circuit court, although the proper county be not designated. All the provisions stand, therefore, on the same footing and ought to be arranged together.

Revisers' Note, 1898: The fourth subdivision is written from chapter 303, Laws 1893, with several changes of language. The provision as to trespass is from chapter 60, Laws 1893, as amended by chapter 34, Laws 1895. The exception is inserted because it is not believed that there was any purpose to repeal the subdivision referred to. The last sentence has been rewritten to make the meaning clear.

Revisor's Note, 1935: It is desirable that all provisions as to the place of trial be in this chapter. 220.12 is special. It governs venue in actions to enjoin the banking commissioner. The exception in (2) (a) is to harmonize it with (9). Ninth is the latest enactment. First (2) is made general to cover personalty. Fifth, "existing under the laws of this state" includes a licensed foreign company. State ex rel. Wis. D. M. Co. v. Circuit Court, 176 W 198, 204. Sixth. The amendment makes the statute express clearly the meaning given to it in State ex rel. Wis. D. M. Co. v. Circuit Court, 176 W 198, 204. Eighth. 261.01 deals with the place of trial. Change of venue is covered by other provisions (261.08) and so is "calling in a judge." [Bill 50-S, s. 14]

Editor's Note: In Beach v. Sumner, 20 W 274, the supreme court held that under sec. 1, ch. 243, Laws 1862, the circuit court for any county could not acquire jurisdiction of an action commenced therein, for the foreclosure of a mortgage on real estate, unless the mortgaged premises were situated wholly or partly in such county. The cited statute was not incorporated in sec. 2619, R. S. 1878, but was repealed.

1. General.
2. Where subject of action situated.
3. Where cause of action arises.
4. Actions against railroad corporations.
5. Actions against insurance companies.
6. Actions against other corporations.
7. Actions against the state.
8. Motor vehicle accident actions.
9. Other actions.

1. General.

If venue is laid improperly in commencing the action and no steps are taken to change the venue to the proper county, the action is triable in the county where it was begun. Dells P. & P. Co. v. Willow River L. Co. 170 W 19, 173 NW 317.

Actions commenced under 261.01 (1) are an exception, however, to the general rule, since the place of trial for such local actions is a jurisdictional requirement. State ex rel. Hammer v. Williams, 209 W 541, 245 NW 663.

2. Where Subject of Action Situated.

When more than one tract is involved, separate actions must be brought. Hackett v. Carter, 38 W 394.

Where land is situated in 2 or more counties the statute permits the action to be brought in either county. Geise v. Greene, 49 W 334; Lohmiller v. Indian Ford W. P. Co. 51 W 683.

A judgment of a county court foreclosing a mortgage on realty in another county was void; but the judgment as subsequently amended for damages in the amount due on the notes secured by the mortgage, though the defendants had not appeared or answered in the action, while irregular under 270.57 was not void and could not be collaterally attacked because the court had jurisdiction of the parties and general jurisdiction to render judgments for damages in proper cases, such as promissory notes. State ex rel. Hammer v. Williams, 209 W 541, 245 NW 663.

A specific performance action to enforce an option to purchase real estate does not constitute an action within 261.01 (1) (a), since the contract (option) and not the land is the subject matter of the action, and such a suit can be brought in the county in which any of the defendants reside pursuant to 261.01 (12). State v. Conway, 26 W (2d) 410, 132 NW (2d) 539.

3. Where Cause of Action Arises.

A determination for venue purposes of where the cause of action arose must include the facts showing (1) the plaintiff's right, (2) the defendant's corresponding duty, and (3) the defendant's breach of that duty, or to put it more tersely, the plaintiff's right and the violation of it by the defendant. McArthur v. Moffett, 143 W 564, 128 NW 445.

Location of property or agents of a corporate defendant are not, in themselves, im-