CHAPTER 263.

PLEADINGS.

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263.01 Forms. The forms of pleading in civil actions in courts of record and the rules by which the sufficiency of the pleadings are determined are prescribed by chapters 260 to 297. [*1935 c. 541 s. 31*]

263.02 Complaint. The first pleading on the part of the plaintiff is the complaint.

263.03 Complaint, contents. The complaint shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial and the names of the parties to the action.

(2) A plain and concise statement of the ultimate facts constituting each cause of action, without unnecessary repetition.

(3) A demand of the judgment to which the plaintiff supposes himself entitled; if the recovery of money be demanded, the amount thereof shall be stated.

(4) In an action by or against a corporation the complaint must aver its corporate existence and whether it is a domestic or a foreign corporation. [*Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Jan. 1, 1935, amended Jan. 3, 1935; Supreme Court Order, effective Jan. 1, 1937; 43.08 (2)*]

Cross Reference: For effect of demand for judgment or want of such demand in the complaint in case of judgment by default, see 270.57.

Note: The court cannot supply essentials omitted from the complaint. An allegation that the defendant is indebted to the plaintiff is a conclusion of law and failure to allege the facts upon which the conclusion is based renders the complaint demurrable. Hoard v. Gilbert, 205 W 557, 238 NW 371.

The complaint should state the facts within the plaintiff's knowledge positively, and not upon information and belief, but a disregard of this rule does not render the complaint demurrable. Bloch-Daneman Co. v. J. Mandelker & Son, 205 W 641, 238 NW 831.

If the pleading fairly informs the opposite party of what he is called upon to meet by alleging the specific acts which resulted in injury to the plaintiff, and there is included a general statement that the defendant negligently performed the acts complained of, the pleading is sufficient. The remedy for failure to state the facts out of which the cause of action arose more specifically is by motion to make the complaint more definite and certain, not by demurrer. Weber v. Naas, 212 W 537, 250 NW 436.

Section 328.01 requires the courts to take judicial notice of the statutes of the United States and of other states. Hummel v. Moore, 218 W 241, 260 NW 468, was decided without reference to said section.

In an action against a power company for the death of a telephone lineman who came in contact with a high-voltage wire of the company, the complaint, liberally construed, alleging that the company did not have the vertical clearance of its high-voltage wires at the time and place where the accident occurred as prescribed by orders of the industrial commission and failed to use ordinary care in placing and carrying its wires along the highway where the accident occurred, and that the death of the lineman was directly caused and produced by the negligence of the company, is not demurrable on the ground that it failed to allege the existence and violation of a specific applicable order of the commission, nor is such complaint demurrable as stating conclusions of law, nor as insufficiently alleging proximate cause. Nicolai v. Wisconsin P. & L. Co., 222 W 605, 269 NW 281.

In suit by taxpayer to recover money paid without protest under invalid statute imposing graduated occupational tax on gross incomes of chain stores, complaint, to be sufficient, must allege facts indicating a resisting attitude on part of taxpayer and circumstances capable of overcoming that attitude. Interstate Department Stores v. Henry, 224 W 394, 272 NW 451.

A complaint alleging the plaintiffs' execution of a mortgage note to the defendants, one defendant's possession of the note and mortgage, the plaintiffs' readiness and offer to pay in full to both defendants, one de-

fendant's claim to owning one-half interest in the note and refusal to release the mortgage except on payment of one-half to him, the other defendant's claim to owning the entire interest and refusal to release except on payment of the full amount to her, and the plaintiffs' inability to pay because of the dispute between the defendants, and seeking judgment determining the matter and directing the plaintiffs to pay to the proper parties, and that on such payment being made the defendants be adjudged to release the mortgage and cancel the note, stated facts sufficient to constitute a cause of action in the nature of a suit for relief on a bill of interpleader and for redemption. Foljahn v. Wiener, 233 W 359, 289 NW 609.

Under the rule of liberal construction in favor of the pleader, however, direct allegations of the mortgagor's complaint, that the defendant county judge colluded with the sheriff and the mortgagees in a plan or scheme to acquire possession of the plaintiff's farm and gave directions to the other defendants, were sufficient to state a cause of action against the county judge, as well as against the sheriff and the mortgagees, although the allegations in general strongly inferred that the county judge was acting in his official capacity only. Kalb v. Luce, 234 W 509, 291 NW 841.

Where, in an action by an incorporated association of highway-construction contractors to collect a membership assessment, the complaint showed an assessment on contractors engaged in public works determined by the volume of public business obtained by them, the inference was that the expenses would be allocated to the bids and would tend to increase the expenditure on the part of the public with relation to those contracts, and, such inference not being repelled by any allegations of fact showing that such was not the case, the complaint was subject to demurrer on the ground that the assessment was based on a contract void as against public policy. Associated Wisconsin Contractors v. Lathers, 235 W 14, 291 NW 770.

With respect to a cause of action for fraud, a vendee is entitled to rely on positive assertions by the vendor concerning facts which are matters of record. Angers v. Sabatinelli, 235 W 422, 293 NW 173.

A valid foreign judgment that the defendant do or refrain from doing an act other than the payment of money will not be enforced by an action on the judgment; but in an action on the original claim, the effect of res adjudicata will be given to findings of fact in a prior suit between the parties in which a valid judgment was rendered requiring the defendant to do or refrain from doing an act other than the payment of money. Bailey v. Tully, 242 W 226, 7 NW (2d) 837.

To raise an issue of negligence, a complaint must allege the fact of action or nonaction relied on and all facts necessary to render such fact proximately causal. Ludwig v. Wisconsin Power & Light Co,. 242 W 434, 8 NW (2d) 272.

Under the official bond of an assistant city treasurer, so framed as to give a cause of action to third parties who sustain damages by reason of her failure to discharge her duties, such damages are "special" as to third parties, and therefore allegations as to damages are an integral part of the statement of the city treasurer's cause of action on the bond. Maxwell v. Stack, 246 W 487, 17 NW (2d) 603.

To make a cause of action there must be a right in the plaintiff and a violation of such right by the defendant. Before it can be determined that two causes of action are improperly united, it must be found that two causes of action are pleaded. Zander v. Columbus Foods Corp. 249 W 268, 24 NW (2d) 624.

A motion to quash an alternative writ of mandamus is regarded as a general demurrer when made on the ground that the petition does not state a cause of action entitling the plaintiff to a writ of mandamus. State ex rel. Dame v. LeFevre, 251 W 146, 28 NW (2d) 349.

263.04 Uniting causes of action. The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately.

Note: Where a complaint in form alleges two causes of action, but incorporates the first cause in the second cause by reference, the complaint may be regarded as though stating but one cause of action. In an action by a holder of notes of an officer of a corporation, secured by a pledge of certain stock of the corporation, against the maker of the notes, the corporation, its officers, and the transferee of certain other stock of the corporation, to set aside the transfer, alleged to be fraudulent, to require additional collateral, for a personal judgment against the maker of the note, and to foreclose the collateral, the complaint, although demanding different kinds of relief not affecting all of the parties to the action, asserts but one primary right or purpose, namely, to collect what is due the plaintiff, and therefore is not demurrable as misjoining causes of action. Usow v. Usow, 213 W 395, 251 NW 458.

The legal remedy in the instant action by a city against the administratrix of a deceased city treasurer, a broker, and the sureties on the treasurer's official bonds, for profits made with city funds, was inadequate, in that an accounting was necessary in order to fix the liability of the respective sureties on the treasurer's bonds during the treasurer's several successive terms, making a case for equitable relief, and hence the complaint was not demurrable for improperly uniting causes of action. Milwaukee v. Drew, 220 W 511, 265 NW 683.

The fact that the complaint did not state the several causes of action in separate counts is not material so far as improper joinder is concerned. If a complaint intermingles several causes of action which might properly be joined, the remedy of a defendant is by motion to make more definite and certain. Where, however, the separate causes of action are intermingled in one count and the actions are not joinable, the remedy is by demurrer. Karass v. Marquardt, 230 W 655, 284 NW 514.

A cause of action in equity and a cause of action at law, both involving the same parties and the same place of trial, were properly united in the same complaint where stated separately. Pennsylvania Oil Co. v. Andrew, 233 W 226, 288 NW 246.

A mortgagor's complaint against a judge, sheriff and mortgagees, separately stating a cause of action for an unlawful confirmation of foreclosure sale and writ of assistance and dispossession, for assault and battery, and for false imprisonment, was not subject to demurrer on the ground of misjoinder of causes of action where, under the allegations, all that was done was done by some one of the defendants acting in concert with or pursuant to the direction of the others and each therefore was a participant in each of the transactions which resulted in the three separate causes of action. Kalb v. Luce, 234 W 509, 291 NW 841.

The rule that where causes of action are intermingled in one count the remedy is by motion to make more definite and certain, rather than by demurrer on the ground that several causes of action are improperly united, does not apply where the causes stated are not joinable. Where it appeared that the complaint stated two causes of action, one for an accounting of the partnership business and one for damages by unlawful acts performed by a deceased surviving partner and one of the defendants in a conspiracy to injure the plaintiff, and that such causes of action did not affect all of the parties to the action, demurrers on the ground that several causes of action were

improperly united should have been sustained. Michels v. Michels, 240 W 539, 3 NW (2d) 359.

Stockholders of incorporated automobile agency who jointly accepted manufacturer's offer of exclusive agency by contributing required additional capital, for which stock certificates were issued, and who were damaged by manufacturer's failure to grant exclusive agency, had separate causes of action which could not be joined. Jordan v. Buick M. Co., 75 F (2d) 447.

A materialman's cause of action to foreclose as against a college a lien for materials furnished in the construction of buildings, and his cause of action to recover for the same debt against a bank because of the latter's wrongful conversion of funds paid by the college to the contractor, are separate causes of action against separate defendants. Uniting such causes of action in a single complaint constitutes a misjoinder. To justify a demurrer grounded on misjoinder of causes of action, the complaint must state 2 or more good causes of action which cannot be joined. Marston Brothers Co. v. Oliver W. Wierdsma Co. 244 W 394, 12 NW (2d) 748.

263.05 Pleadings by defendant. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

Note: In an action for partition, the defendants' pleading which merely admitted the allegations of the complaint and that in ordinary times the plaintiffs were entitled to partition, and prayed that, if this could not be done without prejudice, the sale be postponed for a reasonable length of time because of the depression, was an "answer" since the only pleading on the part of the defendants was either an answer or a demurrer; and such "answer" was demurrable as not stating a defense. Fleischmann v. Reynolds, 216 W 117, 256 NW 778.

The objection that a cause of action had not accrued when the action was begun may be interposed by a plea in abatement. A plea in abatement is necessarily an "answer," since the only pleading named in the code setting up a defense to the complaint is the answer. Binsfeld v. Home Mut. Ins. Co. 245 W 552, 15 NW (2d) 828.

263.06 Demurrer to complaint. The defendant may demur to the complaint when it shall appear upon the face thereof either:

(1) That the court has no jurisdiction of the person of the defendant or the subject of the action; or

(2) That the plaintiff has not legal capacity to sue; or

(3) That there is another action pending between the same parties for the same cause; or

(4) That there is a defect of parties, plaintiff or defendant; or

(5) That several causes of action have been improperly united; or

(6) That the complaint does not state facts sufficient to constitute a cause of action; or

(7) That the action was not commenced within the time limited by law.

Note: A defendant by answering to the merits, instead of appealing from an order overruling his demurrer to the complaint, does not render the order res adjudicata or prevent a subsequent review on appeal from the judgment. Connell v. Connell, 203 W 545, 234 NW 894.

For complaint which attempts but fails to allege libel, see note to 263.37, citing Grell v. Hoard, 206 W 187, 239 NW 428.

A complaint for rent was not demurrable because not alleging that lessor's re-entry for purpose of reletting to minimize damages was evidenced by formal notice or other unequivocal act amounting to an election to re-enter for such purpose. An allegation that the lessor re-entered the premises and took possession thereof for the lessee and made diligent effort to relet the premises in order to minimize damages, is construed as alleging something more than mere entry and taking possession for the purpose of leasing; the allegation that reentry was made for the lessee importing that the re-entry was made for him to minimize his damages. Elmor R. Co. v. Community Theatres, 208 W 76, 241 NW 632.

Complaint stating no cause of action in favor of plaintiff, though it might state causes of action in favor of another, is demurrable as not stating cause of action. Madison v. Schott, 211 W 23, 247 NW 527.

Motion to dismiss complaint for want of equity held equivalent to demurrer on ground complaint fails to state cause of action. Schlitz R. Corp. v. Milwaukee, 211 W 62, 247 NW 459.

In an action against a trust company and its managing directors to recover money deposited with the company in trust for investment, a complaint alleging no facts because of which any trust or fiduciary relationship existed as to such directors is insufficient as a basis of recovery against them for breach of trust. Larson v. Ela, 212 W 525, 250 NW 379.

The complaint failing to state the terms of the contract or the amount of salary agreed upon or that any salary was agreed upon, is insufficient to state a cause of action against the state upon an express promise to pay the plaintiff an agreed salary for services as cafeteria manager; but it can be considered to state sufficiently upon demurrer a cause of action for the reasonable value of such services. Sullivan v. State, 213 W 185, 251 NW 251.

A demurrer to a complaint admits only the facts stated therein and not conclusions drawn from contracts attached thereto. A general allegation in the complaint of the contractor against the state that the industrial commission failed to certify eligible workmen is inconsistent with and controlled by specific allegations that every request for certification of eligible workmen was filled by the commission. Generally the defense of estoppel must be raised by answer, but when the facts constituting the estoppel are alleged in the complaint, the question of estoppel may be raised by demurrer. Brogan v. State, 214 W 313, 252 NW 566.

Upon an appeal involving a general demurrer the court is required to determine whether, upon any theory, the complaint states a cause of action. The complaint alleging that the buyers of an insurance agency agreed to employ the seller for an indefinite period, and reserved the right to terminate his employment "at their discretion," and that the buyers, after securing title, evicted the seller without giving him an opportunity to perform services under the contract, states a cause of action against the buyers for breach of contract, since the words "at their discretion" required the buyers to act upon a sound judgment and excluded an arbitrary, unreasonable or oppressive act, and their alleged act of evicting the seller when they did could not be justified as a discretionary one. Beers v. Atlas Assurance Co., 215 W 165, 253 NW 584.

A claim that the electors of a school district had not authorized an action against another district for tuition, and that such action could not be brought unless so authorized, did not furnish a basis for demurrer, but should have been presented by a plea in abatement, where failure of the electors to authorize the action did not ap-

pear upon the face of the complaint. Union F. H. S. Dist. v. Union F. H. S. Dist., 216 W 102, 256 NW 788.

A complaint for libel alleging that a newspaper article charged the plaintiff with being a robber is demurrable, where the article, read as a whole, merely related that the plaintiff was the object of an unfounded accusation by his wife, and that the plaintiff was not detained by the police, who were called by the wife, but that the wife was arrested, because of what happened, on a charge of disorderly conduct. Woods v. Sentinel-News Co., 216 W 627, 258 NW 166.

Allegation in complaint that wrapped loaves of bread were sold "in package form" as defined by statute held conclusion of law not admitted by demurrer. M. Carpenter Baking Co. v. Department of Agriculture and Markets, 217 W 196, 257 NW 606.

Section 328.01 requires the courts to take judicial notice of the statutes of the United States and of other states. Hummel v. Moore, 218 W 241, 260 NW 468, was decided without reference to said section.

Defendant's cross complaint, praying recovery against interpleaded city on latter's agreement to indemnify defendant for damage arising from construction of sewer, was not demurrable on ground that indemnity agreement did not cover damages caused by defendant's negligence, where cross complaint said nothing about negligence. Hohensee C. Co. v. Chicago, M., St. P. & P. R. Co., 218 W 390, 261 NW 242.

Existing final judgment rendered upon the merits without fraud or collusion by court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties and their privies, though made on demurrer. Lewko v. Chas. A. Krause M. Co., 219 W 6, 261 NW 672.

Pending action for foreclosure of mortgage and for deficiency judgment constitutes defense to subsequent action commenced by same plaintiff, demanding judgment on obligation secured by mortgage against those personally liable thereon. Farmers & Merchants Bank v. Matsen, 219 W 401, 263 NW 192.

In an action by a city against the administratrix of a deceased city treasurer, a broker, and the sureties on the treasurer's official bonds, a paragraph of the complaint alleging the illegal hypothecation of securities purchased with city funds and the illegal use of the proceeds of the hypothecation in the private business of the city treasurer and the broker, resulting in profits not accounted for to the city, states a cause of action against the treasurer's administratrix and the broker. Milwaukee v. Drew, 220 W 511, 265 NW 683.

In an original action by the contractor to recover sums alleged to have been expended by the state out of rentals in excess of the amount allowed by the contract for operating expenses of the exhibition building, the state's assertion in a reply brief that the excess payments were made under a separate agreement cannot be considered on demurrer to the complaint. First Wis. Trust Co. v. State, 221 W 215, 265 NW 229.

On demurrer to the complaint in an original action for a declaratory judgment, the supreme court cannot consider factual statements in the briefs, not contained in the complaint and not within the judicial notice of the court. State ex rel. Froedtert G. & M. Co. v. Tax Commission, 221 W 225, 265 NW 672, 267 NW 52.

In an action by a legatee to establish his right to the testator's interest in a note and mortgage payable to the defendant, allegations that the testator's estate had been fully administered and the personal property and choses in action belonging to said estate assigned to the legatee constituted a sufficient allegation of the legatee's title to such asset, and it was not necessary to allege that such asset had been included in the inventory of the testator's estate. Latsch v. Bethke, 222 W 485, 269 NW 243.

A complaint by the department of agriculture and markets, alleging that an action is pending in a federal district court to restrain the enforcement of state statutes requiring licenses from truckers, hawkers or peddlers, and praying for the enforcement of such statutes, is not demurrable on the ground that the prayer for relief fails to meet the issues raised in the federal court action, where, liberally construed, the complaint is sustainable as one seeking a declaratory judgment determining whether the questioned statutes are constitutional. Department of Agriculture and Markets v. Laux, 223 W 287, 270 NW 548.

On an appeal from an order overruling a demurrer to the complaint in a proceeding to restrain violations of a code of fair competition, it must be presumed, in the absence of anything before the supreme court relating to the proceedings had before the governor or the record made on the hearing required to be held prior to the promulgation of the code, that the governor proceeded in the manner prescribed by statute, made the necessary findings, and that such findings are properly supported by evidence offered on the hearing. State ex rel. Attorney-General v. Fasekas, 223 W 356, 269 NW 700.

A complaint alleging that three sons entered into a conspiracy with their father to hinder, delay and defraud his creditors, and that to carry out the purpose of the conspiracy the father executed three bills of sale to his sons, and three days later the sons entered jointly into an agreement whereby the father was to remain in possession of the property conveyed, states but one cause of action, and hence the complaint is not subject to demurrer on the ground of misjoinder of causes of action. Warne v. Petzke, 223 W 435, 270 NW 922.

Municipality's petition in condemnation proceedings, being a commencement of action, may be attacked by demurrer for failure to state a cause of action. New Lisbon v. Harebo, 224 W 66, 271 NW 659.

In an action for funeral expenses of the plaintiff's adult son, whose death was caused by the defendant's intestate, a statement in the complaint that the plaintiff was liable for and obligated to pay the funeral expenses was a conclusion of law; even if it were the duty of a parent to provide burial for an adult child, the primary obligation, under 313.16, would be on the child's estate if he had any, so that the complaint, not alleging that the son had no estate was demurrable as not stating a cause of action. The complaint was likewise demurrable as not stating a cause of action, in that it did not allege facts under which the plaintiff might possibly be liable for the funeral expenses of her adult son under 49.11. Palmisano v. Century Indemnity Co., 225 W 582, 275 NW 525.

A complaint alleging that in a divorce settlement the wife received unincumbered property connected with a going business was subject to outstanding listed debts against the business, and that the plaintiff was a creditor for a listed debt, stated a cause of action in equity to charge the property with a lien, and was not demurrable, notwithstanding the complaint prayed only for a personal judgment at law against the wife. Klauser v. Reeves, 226 W 305, 276 NW 356.

In a complaint in an action by firemen against a city to recover salary deductions, allegations that it was represented to the firemen that drastic action would be taken if they did not sign waivers of ten per cent of their salary which was to be used for an unemployment relief fund, taken in connection with an allegation that in consideration of the signing of the waivers the firemen would receive time off to equal the amount deducted from their pay, did not state a cause of action. Coughlin v. Milwaukee, 227 W 357, 279 NW 62.

An order of the trial court sustaining a demurrer to a pleading is not res adjudicata upon the same questions raised upon a second demurrer. United States F. & G. Co. v. Pullen, 230 W 137, 283 NW 462.

As to a demurrer resting on the point that the action was not begun timely, the court is limited in its inquiry to the face of the complaint. G. M. C. Hotels, Inc. v. Hanson, 234 W 164, 290 NW 615.

The judge of a county court having jurisdiction of actions to foreclose mortgages, to confirm the sale, and to issue writs of assistance, who decided that the mere filing of the farmer-mortgagor's petition under sec. 75 (n) of the bankruptcy act did not oust the state court of jurisdiction to proceed in a foreclosure proceeding pending therein, and who proceeded to confirm the sale and issue a writ of assistance, and whose decision was affirmed by the state supreme court but reversed by the United States supreme court, could not be said thereby to have acted wilfully, maliciously or corruptly in exercising such jurisdiction so as to be subject to civil liability therefor to the mortgagor. Kalb v. Luce, 234 W 509, 291 NW 841.

A demurrer to a complaint on the ground that there is a defect of parties does not reach the defect that the plaintiff is not the real party in interest, since a demurrer for defect of parties is grounded on the fact that some necessary party has been omitted, not that a person who assumes to sue as plaintiff has only a nominal interest. Contentions advanced against the form of general demurrers to a complaint, based on the fact that some of the demurrers did not state that the objection appears "on the face of the complaint," and that one demurrer did not state that the complaint does not state facts sufficient to state a cause of action "in favor of the plaintiff," are deemed to be without merit. Angers v. Sabatinelli, 235 W 422, 293 NW 173.

A party demurring to a pleading raises the question of the sufficiency of that pleading to state a cause of action, and he cannot, in aid of making the pleading demurred to defective or insufficient, import into such pleading allegations of fact contained in another pleading. Ryan v. First Nat. Bank & Trust Co. 236 W 226, 294 NW 832.

However inartificially the facts may be presented by a complaint, or however defective, uncertain or redundant may be the mode of their statement, if a good cause of action can be gathered from it by a liberal interpretation, a general demurrer to it will not be sustained. A prayer asking for more relief than the plaintiff's pleaded facts entitles him to have is not reached by demurrer. Whittier v. Atkinson, 236 W 432, 295 NW 781.

In order for the plaintiff to have a cause of action there must be a right in the plaintiff and a wrongful invasion of that right by the defendant. Rhyner v. Hartl, 239 W 589, 2 NW (2d) 248.

In an action in personam, brought in a California court, against the heirs of a Wisconsin decedent, to obtain relief from unrecorded and allegedly undelivered deeds of Wisconsin land, executed by the plaintiffs to the decedent, the land was not the subject matter of the action so as to render the California court without jurisdiction, but the rights of the plaintiffs to have the land conveyed to them by the defendants constituted the subject matter, which rights were not immovables, and the California court had jurisdiction to entertain such action in equity against the defendants, where it obtained personal service, and to issue a decree in personam requiring them to execute deeds of reconveyance. [McArthur v. Moffet, 143 W 564, and other cases, distinguished.] Such decree of the California court, since it could do no more than operate on the consciences of the defendants, and would be enforceable only by proceedings in contempt, did not directly affect the title to the real estate in Wisconsin, except as the defendants by obeying the decree and making conveyances might themselves convey title. Bailey v. Tully, 242 W 226, 7 NW (2d) 837.

In general, a civil action, or a series of civil actions, maliciously prosecuted, where neither the person nor the property of the defendant therein was interfered with inflicting special damages to him, will not sustain an action for malicious prosecution. [Whether a civil action involving a charge of defamation, maliciously prosecuted, although there was no interference with the person or the property of the defendant therein in the course of its prosecution, may not form a basis for an action for malicious prosecution, is expressely reserved.] Myhre v. Hessey, 242 W 638, 9 NW (2d) 106.

A complaint alleging violation of the terms and conditions of a lease by underletting a portion of the premises and by using the same, or permitting the same to be used, for unlawful and illegal purposes, sufficiently alleged violation of the terms of the lease to maintain an action of unlawful detainer, and was good as against demurrer, although the notice of termination of the lease alleged an "apparent subletting or arrangement equivalent to subletting." Baraboo Nat. Bank v. Corcoran, 243 W 386, 10 NW (2d) 112.

A complaint will not be set aside on demurrer unless, taking all the facts to be admitted, the court can say they constitute no cause of action whatever. London & Lancashire Ind. Co. v. American State Bank, 244 W 203, 12 NW (2d) 133.

Where the first cause of action alleged is good as against general demurrer, a second cause of action, realleging in full the first cause of action, is likewise good even though additional claims made in the second cause of action may not be sufficiently set forth or may not be proper claims. London & Lancashire Ind. Co. v. American State Bank, 244 W 203, 12 NW (2d) 133.

In general, where a cause of action depends on a statute, the constitutionality of that statute may be raised by a general demurrer to the complaint. Ocean Accident & Guar. Corp. v. Poulsen, 244 W 286, 12 NW (2d) 129.

The "cause" contemplated by 62.13 (5) (b), authorizing the discharge of a policeman for cause, is an act of misfeasance or nonfeasance; but a discharge may be made for other causes, and where a policeman's complaint for damages for unlawful discharge because of failure to prefer charges against him or give him a hearing, as required in a case of discharge for cause, fails to allege that his discharge was made for any cause contemplated by (5) (b), it cannot be implied that he was so discharged. Schoonover v. Viroqua, 244 W 615, 12 NW (2d) 912.

An amended complaint which is an entirely new complaint, complete in itself, without any reference therein to the original complaint, supersedes the original complaint, and hence the sufficiency of the facts alleged in the amended complaint to constitute a cause of action must be determined solely on its allegations, and the facts appearing in the original complaint cannot be considered in passing on a demurrer to the amended complaint. Larson v. Equity Cooperative Elevator Co. 248 W 132, 21 NW (2d) 253.

If two causes of action are improperly joined in one complaint, the remedy is by demurrer. Zander v. Columbus Foods Corp. 249 W 268, 24 NW (2d) 624.

A demurrer will not lie to mere surplusage not attempted to be set forth as a separate cause of action, nor to a sentence, nor to a fragment of a cause of action. Zander v. Columbus Foods Corp. 249 W 268, 24 NW (2d) 624.

See note to 331.04 citing Johnson v. Larson, 249 W 427, 25 NW (2d) 82.

263.07 General demurrer limited. In case of a general demurrer to a complaint, if upon the facts stated, construing the pleading as provided in section 263.27, plaintiff is entitled to any measure of judicial redress, whether equitable or legal and whether in harmony with the prayer or not, it shall be sufficient for such redress.

Note: A complaint which alleges breach of a contract wherein the defendant promised to bid enough on a foreclosure to protect plaintiff if they acquired mortgage,

states a cause of action. Such contract is not breach prior to foreclosure sale. Starbird v. Davison, 202 W 302, 232 NW 535.

That a complaint does not state facts sufficient to entitle plaintiff to equitable relief is no ground for demurrer. The complaint is sufficient if it shows that the plaintiff is entitled to any judicial relief. Fisher v. Goodman, 205 W 286, 237 NW 93.

Demurrer to complaint for specific performance of land contract cannot be sustained because remedy of specific performance is discretionary with court, where plaintiff was entitled to other relief under allegations of complaint. Big Bay R. Co. v. Rosenberg, 211 W 684, 248 NW 414, 782.

Where plaintiff made a partnership entity the sole party defendant, demurrer filed on behalf of partnership entity should have been sustained, where complaint was insufficient as against partnership, although it may have been sufficient as against one of partners individually, and individual names of partners appeared on demurrer, the demurrer being deemed a demurrer of the partnership and not a joint demurrer by the individual partners. Philipsky v. Scheflow & Monahan, 219 W 313, 263 NW 171.

Allegations that the husband wrongfully accused the wife of infidelity and beat her, and that the defendants spread false rumors concerning the wife's mental condition, charge wrongs committed by the husband for which the wife can maintain an action against him for injury to her person and character, hence the complaint is good as against the husband's general demurrer thereto. Singer v. Singer, 245 W 191, 14 NW (2d) 43.

In testing the sufficiency of a complaint on general demurrer, the court is not concerned with the theory of the pleader, and the fact that the allegations fail to measure up to the theory evidently entertained does not require that the demurrer be sustained, but the sole question is whether the complaint states a cause of action, and, if it does, the demurrer must be overruled. Waldheim v. Bienenstok, 248 W 37, 20 NW (2d) 633.

A complaint against a city for damages for the unlawful sale of, and depriving the plaintiff of the proper use of, crypts allegedly owned by the plaintiff in a mausoleum, in a public cemetery operated by the city, was good on general demurrer, as against a contention that, assuming the facts to be as alleged, the action should have been brought against the person claiming title from the city. Speth v. Madison, 248 W 492, 22 NW (2d) 501.

On general demurrer, if the court can discover from the complaint that the plaintiff is entitled to some measure of judicial redress, the complaint must be held good. Speth v. Madison, 248 W 492, 22 NW (2d) 501.

Since this section is applicable, a motion to quash an alternative writ of mandamus on the ground that the petition does not state a cause of action for a writ of mandamus, which is in substance a general demurrer, is properly denied if the petition sets out a cause of action entitling the plaintiff to some form of relief, irrespective of whether it shows that he is entitled to a writ of mandamus. [Application of the statute results in overruling decisions such as State ex rel. Baraboo v. Page, 201 W 262.] State ex rel. Dame v. LeFevre, 251 W 146, 28 NW (2d) 349.

263.08 Demurrer to whole or part. The demurrer may be taken to the whole complaint or to any of the alleged causes of action therein; and the defendant may demur to one or more of the several causes of action stated in the complaint and answer the residue.

263.09 Ground of demurrer to be stated. The demurrer shall distinctly specify the grounds of objection to the complaint, in the language of the subdivision of section 263.06 relied upon, adding, if based upon the second or fourth subdivision, a particular statement of the defect, and if based upon the seventh, a reference to the statute claimed to limit the right to sue. Unless it do so the demurrer may be stricken out.

Note: That a corporation's annual report listed the person served as vice president rendered applicable the presumption that a status once proven to exist continues. The presumption of continuance of a condition or status once proven to exist is not in and of itself of the nature of actual evidence and disappears where there is some credible evidence to the contrary. As respects the court's jurisdiction over a foreign corporation where the minutes of the corporate directors' meetings, uncontradicted, showed that at the time of the service on the person as vice president he had resigned and his successor had been elected, the circuit court acquired no jurisdiction over the corporation by such service. State v. Gehrz, 230 W 412, 283 NW 827.

A demurrer is an entity in pleading, and its grounds or causes are separate and not joint, and it should be sustained if any of its grounds or causes presented is good, and if sustained, the effect is to hold the complaint for naught. An order sustaining a demurrer to a complaint does not determine the law of the case after the service of an amended complaint. Chas. H. Stehling Co. v. Milcor Steel Co., 242 W 629, 9 NW (2d) 78.

263.10 Amended complaint to be served. If the complaint be amended a copy thereof must be served and the defendant must demur or answer thereto within twenty days thereafter or the plaintiff, upon filing proof of service thereof and of the defendant's omission, may obtain judgment in the manner provided for a failure to answer in the first instance.

263.11 Answer may state grounds of demurrer. When any of the matters enumerated in section 263.06 do not appear upon the face of the complaint the objection may be taken by answer; and the objection that the action was not commenced within the time limited by law may in any case be taken by answer.

Note: On demurrer to the complaint, the court is made aware only of such facts as are stated in the complaint, and matters relied on by the defendant, where not appearing on the face of the complaint, must be raised by answer. Horlick v. Swoboda, 221 W 373, 267 NW 38.

If the statute of limitations is relied on as a defense and the pleading itself does not show the date of the beginning of the action, the defendant cannot raise such defense by demurrer, but must plead the facts on which he relies, in his answer. G. M. C. Hotels, Inc. v. Hanson, 234 W 164, 290 NW 615.

263.12 Waiver by not demurring or answering. If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court and the objection that the complaint does not state a cause of action. [*1935 c. 541 s. 32*]

Note: A defendant not amending his answer to object to a defect of parties plaintiff not appearing on the face of the complaint but developed during the trial, waives the defect. Frederick v. Great N. R. Co., 207 W 234, 240 NW 387, 241 NW 363.

For waiver by defendant of defect of plaintiffs, see note to 313.03, citing Estate of Nitka, 208 W 181, 242 NW 504.

In action on bonds secured by trust deed, where plaintiff was holder of all outstanding bonds and her title was admitted, objection to plaintiff's failure to allege demand on trustee to sue, which was required by trust deed, held waived under statute by defendants' failure to raise objection by demurrer or answer, since objection went to plaintiff's capacity to sue, and not to existence of cause of action. Wasielewski v. Racke, 272 NW 846, 273 NW 819.

263.13 Answer, contents. The answer of the defendant must contain:

(1) A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

(2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. [*Supreme Court Order, effective Sept. 1, 1931*]

Note: An allegation that a claim was filed with the county board and disallowed, denied merely by a general denial of any knowledge or information sufficient to form a belief, stands admitted. Necedah M. Corp. v. Juneau County, 206 W 316, 237 NW 277, 240 NW 405.

Plaintiff was not entitled to judgment on note allegedly barred by statute of limitations, on ground that defendant's answer by inference admitted note was not barred, where defendant also alleged that no payment of any nature had been made on note by defendant or any one on his behalf within statutory period. Earl v. Napp, 218 W 433, 261 NW 400.

While, generally, the parties to the two actions must be identical to make the doctrine of res judicata applicable, if a principal's liability is claimed to rest on the tortious act of his agent, and in a former suit the agent's act has been determined not to have been tortious, the judgment is pleadable as a bar by either in a suit against him, although in the former suit only the other was a party. Vukelic v. Upper Third Street S. & L. Ass'n., 222 W 568, 269 NW 273.

Interposing in the answer both a plea in abatement and a plea on the merits is proper practice. Boden v. Lake, 244 W 215, 12 NW (2d) 140.

Motion to dismiss answer under summary judgment statute includes counterclaims. Atkinson v. Bank of Manhattan T. Co., 69 F (2d) 735.

Defendant who has claim which constitutes defense to action against him and an affirmative cause of action against plaintiff has option of using it for defense or for attack, but he cannot use it for both purposes. Plaintiff held precluded from suing for services rendered under oral contract relating to timber transaction, where, in prior suit by defendant against plaintiff, plaintiff set up such services to limit liability or to abate action and jury found issues for plaintiff generally. Young v. Baker, Fentress & Co., 74 F (2d) 422.

Fraud must be separately pleaded as a defense to be available as such. Since a contract is void as to creditors as against public policy where there has been no consideration for it, want of consideration may be interposed as a defense to its enforcement. The rule barring assertion of rights under an instrument void on grounds of public policy because violative of a statute applies equally to writings void as against public policy at common law, and the rule is as applicable in actions at law as in actions in equity. Meske v. Wenzel, 247 W 598, 20 NW (2d) 654.

A denial, in the same words as the allegations of the foreclosure complaint, that the mortgage was "duly attested by 2 subscribing witnesses and duly acknowledged," was a "negative pregnant" and only a conclusion of law that the witnessing and acknowledging were not "duly" done, and raised no issue as to execution and acknowledgment of the mortgage. Virkshus v. Virkshus, 250 W 90, 26 NW (2d) 156.

263.14 Counterclaim. (1) A defendant may counterclaim any claim which he has against a plaintiff, upon which a judgment may be had in the action.

(2) The counterclaim must be pleaded as such and the answer must demand the judgment to which the defendant supposes himself entitled upon his counterclaim.

(3) This section does not extend to or include claims assigned to a defendant after he was served with the summons. [*Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective Oct. 1, 1943*]

Comment of Advisory Committee: The new rule 263.14, governing counterclaims, is much like federal rule 13. There is some difference between these two rules: Under 263.14 counterclaims are purely permissive. The defendant has the choice of counterclaiming or not, as to him seems best. Under the federal rule counterclaims are divided into two classes, viz. compulsory and permissive. Where the counterclaim arises out of "the transaction or occurrence that is the subject matter" of the complaint, the claim is barred unless it is pleaded. All other counterclaims are permissive. New 263.14 is a generalization of what was 263.14 (1) (c). That applied only in actions in which the plaintiff was a nonresident. The new rule extends to all actions. If the defendant has a claim upon which he can presently commence a separate action against the plaintiff in the same court, he may counterclaim. [Re Order effective Oct. 1, 1943]

Note: Where complaint stated cause of action as arising out of contract, defendant's counterclaim, alleging fraud in stock transaction, but which contained no allegations that fraud arose out of contract on which notes sued on were given, held demurrable. First Wisconsin Nat. Bank v. Carpenter, 218 W 30, 259 NW 836.

When a defendant has a court counterclaim that he might have interposed, but did not, that fact does not prevent him from thereafter bringing an action on his counterclaim; and even failure to appear and litigate a counterclaim which has been interposed is a withdrawal of the counterclaim, and judgment for the plaintiff does not bar prosecution of the counterclaim in a subsequent action. Nehring v. Niemerowicz, 226 W 285, 276 NW 325.

When a defendant has a counterclaim against the plaintiff that he might have interposed in the plaintiff's action against him, but did not, the fact that he might have litigated his counterclaim in that action does not prevent him from thereafter bringing an action on it; and even failure to appear and litigate a counterclaim where it is imposed is a withdrawal of it, and judgment for the plaintiff does not bar prosecution of the counterclaim in a subsequent suit. Linker v. Batavian Nat. Bank of La Crosse, 244 W 459, 12 NW (2d) 721.

See note to 263.13, citing Young v. Baker, Fentress & Co., 74 F (2d) 422.

263.15 Cross complaint. (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. Such relief may be demanded in the answer, which must be served upon the party against whom the same is asked or upon such person not a party, upon his being brought in, or may be by a cross complaint served in like manner or by petition in intervention under section 260.19, or by answer, served in like manner, when new parties are brought in under sections 260.19 and 260.20.

(2) In all cases the court or the judge thereof may make such orders for the service of the pleadings, the bringing in of new parties, the proceedings in the cause, the trial of the issues and the determination of the rights of the parties as shall be just. The party against whom such relief is demanded may demur to the answer or cross complaint, as provided in section 263.17, or may answer, serving such demurrer or answer on the defendant claiming such relief, as well as upon the plaintiff, or he may object thereto at the trial for insufficiency. If he shall serve no answer or demurrer and make no such objection he shall be deemed to have denied the allegations relied on for such relief. Unless such an answer, petition or cross complaint be so served such affirmative relief shall not be adjudged. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: For right to file cross complaint, see note to 260.12, citing Frederickson v. Schaumburger, 210 W 127, 245 NW 206.

Consolidation for trial of the various actions arising out of the same collision was not an abuse of discretion, although it gave to the attorneys for parties whose interests were on the same side the opportunity to cross-examine each other's witnesses. Hein v. Huber, 214 W 230, 252 NW 692.

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

Railway company's cause of action against city on latter's contract to indemnify former against loss or damage arising from construction of sewer through its land was pleadable as cross complaint in contractor's action against railway company for damage to machinery struck by train. H. Hohensee C. Co. v. Chicago, M., St. P. & P. R. Co., 218 W 390, 261 NW 242.

Defendants who had filed a cross complaint against the remaining defendants for contribution and who had settled with the plaintiff during the trial, of which settlement the remaining defendants, their counsel, and the trial court were informed, were entitled to continue to participate in the trial as parties defendant to determine whether they had a right to recover on the cross complaint. Van Gilder v. Gugel, 220 W 612, 265 NW 706.

A bill in the nature of a bill of interpleader filed where there are conflicting claims to mortgage money need not contain the allegations required of a strict bill of interpleader. Foljahn v. Wiener, 233 W 359, 289 NW 609.

263.16 Several defenses allowed. The defendant may set forth, by answer, all defenses and counterclaims he has, whether legal or equitable, or both; they must be separately stated. [*1935 c. 541 s. 33*]

263.17 Demurrer to answer. The plaintiff may, within twenty days, demur to the answer or any alleged defense therein when it does not state a defense; and to any counterclaim therein where it appears upon the face thereof either that:

(1) The court has no jurisdiction thereof; or

(2) The defendant has not legal capacity to maintain the same; or

(3) Another action is pending between the same parties for the same cause; or

(4) There is a defect of parties; or

(5) The counterclaim does not state a cause of action; or

(6) The cause of action stated is not pleadable as a counterclaim; or

(7) The counterclaim is barred by the statutes of limitations. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: If a complaint states no cause of action a demurrer to an answer should be overruled, as a bad answer is good enough for a bad complaint. Whitewater v. Richmond, 204 W 388, 235 NW 773.

In an action on an indemnity contract for an employe's defalcation, a demurrer to counterclaims pleading judgments in effect legal setoffs obtained against plaintiffs' assignor raised the sufficiency of the complaint. The action being by assignees for the benefit of creditors in their own right on said indemnity contract, such judgments are not pleadable as offsets, and a demurrer to counterclaims so pleading them was properly sustained under (6). John v. Maryland C. Co., 207 W 589, 242 NW 201.

A motion to strike out in its entirety a separate defense is, in legal effect, a "demurrer." Williams v. Journal Co., 211 W 362, 247 NW 435.

A demurrer to an answer reaches back to the complaint and requires a determination of whether the answer sets up a good defense to the complaint. Mutual B. & S. Ass'n v. American S. Co., 214 W 423, 253 NW 407.

A motion to strike an entire answer as frivolous is treated as a "demurrer" to the answer on the ground that it does not state facts sufficient to constitute a defense. Fleischmann v. Reynolds, 216 W 117, 256 NW 778.

Order holding that defenses were not stated in certain paragraphs of answer, based on motion to strike such paragraphs as irrelevant and stipulation between parties that motion should be considered as demurrer to each such paragraph, is not appealable; stipulation not making such motion the equivalent of a demurrer, and not making such order the equivalent of an order sustaining demurrer, which would have been appealable. Paraffine Companies v. Kipp, 219 W 419, 263 NW 84.

Where a plaintiff's motion for the dismissal of a plea in abatement was in effect a demurrer, the facts alleged in the plea will be considered as admitted on a review of an order sustaining the motion. Kilcoyne v. Trausch, 222 W 528, 269 NW 276.

A demurrer must go to the whole answer, or to the whole of a portion thereof pleaded as a distinct and complete defense, and not to portions of the answer not so pleaded. A denial in an answer is not a subject of demurrer. Conclusions of law are not subjects of demurrer. McCarthy v. Steinkellner, 223 W 605, 270 NW 551.

The rule as to opening up the record and searching the complaint is applied when a plaintiff by demurrer challenges the sufficiency of an answer to his complaint, and in that situation, if on such search the plaintiff's complaint is found to be bad, then the answer demurred to is considered good enough even though it is likewise bad, but the rule is inapplicable to the complaint of a plaintiff who has not demurred to a defendant's answer and where the demurrer is but that of a defendant to a codefendant's pleading. Foljahn v. Wiener, 233 W 359, 289 NW 609.

On an appeal to the supreme court from an order sustaining a demurrer to the defendant's return in a mandamus proceeding, certain exhibits in aid of the pleadings, not made a part of the pleadings either originally or by formal amendment thereof, but by stipulation included in the record, are considered as facts admitted by the demurrer. State ex rel. Lathers v. Smith, 238 W 291, 299 NW 43.

This section does not authorize a demurrer to an affirmative defense in a libel action on the ground that the facts stated cannot be determined from the pleadings or that they do not set forth any circumstances mitigating the tort alleged to have been committed, and are set forth only to prejudice the court and jury. Schneider v. Kenosha News Publishing Co. 247 W 382, 20 NW (2d) 568.

This section does not authorize a demurrer to a sentence taken out of its context in an affirmative defense. Schneider v. Journal-Times Co. 247 W 391, 20 NW (2d) 572.

263.18 Demurrer may be to whole or part; reply to counterclaim. The plaintiff may demur to one or more of the defenses and counterclaims and reply to the residue of the counterclaims. The demurrer shall specify the grounds of objection and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint; otherwise, it may be stricken out. [*1935 c. 541 s. 34*]

263.19 Reply to counterclaim; waiver. When any objection to a counterclaim mentioned in section 263.17 does not appear upon the face of the answer the objection may be taken by reply. If not taken, by demurrer or reply, the plaintiff waives the same, excepting only the objection to the jurisdiction of the court and the objection that the counterclaim does not state a cause of action. [*1935 c. 541 s. 35*]

Note: Where a trial proceeded from beginning to end on the theory on both sides that the allegations of a counterclaim were in issue, a formal reply was waived. Kaiser v. Better Farms, Inc. 249 W 302, 24 NW (2d) 621.

263.20 What to contain. (1) When the answer contains a counterclaim the plaintiff may, within twenty days, if he do not demur thereto, reply to the counterclaim. Such reply must contain:

(a) A specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief.

(b) A statement of any new matter constituting a defense, in ordinary and concise language, without repetition.

(2) The plaintiff may set forth by reply as many defenses to the counterclaims as he may have; they must be separately stated and refer to the counterclaims which they are intended to answer in such manner that they may be intelligibly distinguished. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: Where parties fully tried issue presented by defendant's counterclaim and "counterclaim" of plaintiff in its reply, and there was no demurrer or motion to strike, though issue had nothing to do with issues raised in action, defendant's counterclaim will be regarded as complaint, and plaintiff's reply as counterclaim, and it will be considered that issue raised thereby was consolidated with main action for purpose of trial, there being nothing in statutes or rules permitting party to interpose counterclaim to counterclaim. Standard Oil Co. v. La-Crosse Super Auto Service, Inc., 217 W 237, 258 NW 791.

263.21 Judgment by default on counterclaim. If the answer contain any counterclaim to which the plaintiff fails to reply or demur, within the time prescribed by law, the defendant may move, on a notice of not less than eight days, for such judgment as he is entitled to upon such counterclaim, and if the case require it an assessment of damages may be made or he may at the trial have the counterclaim treated as established without proof.

263.22 Demurrer to reply. The defendant may, within twenty days, demur to the reply or any defense therein, when, upon the face thereof, it does not state facts sufficient to constitute a defense, stating such grounds.

263.23 Pleadings, how subscribed and filed. Every pleading must be subscribed by the party or his attorney and must be filed not later than ten days after the action is noticed for trial. In case of a failure by either party to file his pleading it may be stricken out, on motion, unless permitted to be filed on such terms as the court shall think proper; or the opposite party may file a copy thereof. [*Supreme Court Order, effective Jan. 1, 1936*]

263.24 Verification of pleading. Every pleading, except a demurrer, must be verified; but the verification may be omitted when an admission of the allegations might sub-

ject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading. [*Supreme Court Order, effective Sept. 1, 1931*]

Note: A defect in the verification of a complaint would be ground for a motion to strike the pleading, but if permitted to stand, the pleading must be weighed by its contents. G. M. C. Hotels, Inc. v. Hanson, 234 W 164, 290 NW 615.

The statutory proceeding relating to judgments by confession, 270.69, is special and is not a civil action, and there is no requirement that the complaint or answer in such special proceeding be verified, the provisions of 263.24, requiring a verification of pleadings, being applicable to civil actions only, 263.01. Husman v. Miller, 250 W 620, 27 NW (2d) 731.

263.25 Form of verification. (1) The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief and as to those matters that he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides and capable of making the affidavit. The affidavit may be made by an agent or attorney if no such party be within the county where the attorney resides, or if the action or defense be founded upon a written instrument in such attorney's possession, or if all the material allegations of the pleading be within his personal knowledge or belief.

(2) When the pleading is verified by any person other than a party he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject and the reason why it is not made by the party, and if made on knowledge shall state that the pleading is true to his knowledge, and if on his belief, that he believes it to be true.

(3) When a corporation is a party the verification may be made by any officer thereof. In actions wherein the state or any officer thereof in his official capacity is a party, verification of pleadings shall not be required by either the state or anyone in its behalf or by any such officer, but all pleadings made by other parties in actions wherein the state or any such officer is a party shall be verified as provided in this section. In all actions wherein the state is the sole party plaintiff and an unverified answer shall be interposed and the demand of the complaint is for money judgment, judgment may be taken by default with the same force and effect and in the same manner as though the complaint were duly verified. [*Supreme Court Order, effective July 1, 1945*]

Comment of Advisory Committee: The amendment to 263.25 (2) merely expresses the meaning which was given to it in Bergougnan Rubber Corp. v. Gregory, 179 W 98. [Re Order effective July 1, 1945]

Note: Allegations followed by the words "as plaintiff verily believes," are improperly pleaded, and cannot be considered on demurrer. Thauer v. Gaebler, 202 W 296, 232 NW 561.

263.26 Admission by not denying. Every material allegation of the complaint, and of a counterclaim not controverted as prescribed, shall, for the purposes of the action, be taken as true. But the allegation of new matter in an answer not pleaded as a part of a counterclaim or of new matter in a reply is deemed controverted. [*1935 c. 541 s. 36*]

Note: Where there is good reason to believe that admissions in pleadings were advisedly made, they should be controlling on the trial. Schwenker v. Teasdale, 206 W 275, 239 NW 434.

An allegation that the claim for damages was duly filed with the county board as required by statute (59.76) and was disallowed, not denied other than by a general denial of any knowledge or information sufficient to form a belief, stands as admitted. Necedah M. Corp. v. Juneau County, 206 W 316, 237 NW 277, 240 NW 405.

Where national bank in process of voluntary liquidation admitted validity of depositors' claim and asserted its willingness to pay claimants their pro rata share of dividends as declared, claimants held not entitled to have judicial determination of claim, since only effect of judgment would be to establish claim. Peters v. First Nat. Bank of New London, 218 W 126, 259 NW 600.

263.27 Pleadings liberally construed. In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties.

Note: In an action by a stockholder on a promissory note brought on behalf of himself and other stockholders of a dissolved corporation, allegations that the corporation was dissolved and that the note was a corporate asset which belonged to the stockholders, who are now the owners and holders thereof, were sufficient upon demurrer. Marshall v. Wittig, 205 W 510, 238 NW 390.

263.28 Variances, materiality. (1) No variance between the allegation in a pleading and the proof shall be deemed material unless it misleads the adverse party to his prejudice. Whenever it shall be proved to the satisfaction of the court that a party has been so misled, and in what respect he has been misled, the court may order the pleading amended upon such terms as may be just.

(2) When the variance is not material, the fact shall be found in accordance with the evidence and the court may order an amendment without costs. [*1935 c. 541 s. 37*]

Note: Where a claim for a lien filed by a materialman stated that lumber was sold and furnished at the request of landowners, one of their sons, and a third person, but the evidence disclosed that the materialman had contractual relations with two sons of the

landowners and with no one else, there was a fatal defect in the claim for lien, within 289.08, and, the claim not being amended, there was a complete variance between the claim filed and the proof offered, precluding judgment for the lien claimant. Appleton S. Bank v. Fuller Goodman Co., 213 W 662, 252 NW 281.

See note to 274.37, citing Madison Trust Co. v. Helleckson, 216 W 443, 257 NW 691.

Where a complaint against a bank, its directors, and an affiliated investment company for damages growing out of an investment, although framed in tort, stated the facts on which the plaintiff sought recovery, and all of the material evidence in proof of the ultimate facts alleged was received without objection and showed a right to recover on contract, there was no failure of proof within 263.31, and it was not error for the trial court to amend the complaint to conform to the proof made and to award judgment as on contract. Lindsley v. Farmers Exch. Inv. Co., 223 W 565, 271 NW 364.

263.29 [*Renumbered section 269.44 by Supreme Court Order, effective Jan. 1, 1934*]

263.30 [*Renumbered section 263.28 by 1935 c. 541 s. 37*]

263.31 When failure of proof. When, however, the allegation of the cause of action, counterclaim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within section 263.28, but a failure of proof. [*43.08 (2)*]

Note: The plaintiff relying on a complaint grounded on an express contract and the proof not sustaining the complaint, there was a failure of proof, and hence judgment dismissing the complaint was properly entered. Johnson v. Brown, 232 W 642, 288 NW 239.

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

263.32 Accounts; bill of particulars. It is not necessary for a party to plead the items of an account but he shall deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account verified by his oath or that of his agent or attorney, that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a further account and may in all cases on notice order a bill of particulars of the claim of either party to be furnished. [*Supreme Court Order, effective Jan. 1, 1934*]

263.33 Judgments, how pleaded. In pleading a judgment or other determination of a court or officer of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Note: The jurisdiction of the municipal court of Chicago being limited and, therefore, not being presumed in an action brought in Wisconsin to recover on its judgment, it was incumbent on the plaintiff to establish that the municipal court had jurisdiction of the subject matter of the action, as well as of the defendant, particularly where the defendant alleged in his answer that the municipal court was without jurisdiction; and the plaintiff lifted its burden by the facts proven by the certified transcript of the proceedings in the municipal court and by proof as to the provisions in the Illinois statutes relating to the jurisdiction of that court. Weathered Misses Shop, Inc., v. Coffey, 240 W 474, 3 NW (2d) 693.

263.34 Conditions precedent in contract, how pleaded. In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted the party pleading shall be bound to establish on the trial the facts showing such performance.

263.35 Pleading by copy; notes, etc. In an action, defense or counterclaim founded upon an instrument for the payment of money only it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

263.36 [*Repealed by 1935 c. 541 s. 38*]

263.37 Libel and slander, how pleaded. In an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matters out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted the plaintiff shall be bound to establish on the trial that it was so published or spoken.

Note: In determining whether a newspaper article was libelous the article and headlines were required to be construed together as one document where the headlines did not contain the plaintiff's name. Statements are not libelous unless they refer to the plaintiff. Schoenfeld v. Journal Co., 204 W 132, 235 NW 442.

A newspaper article, interpreted as the pleader interpreted it, was not libelous as charging a highway commissioner personally with reckless disregard for human life in building side ditches, the article being construed as charging rather that by constructing the side ditches human life was endangered, and a demurrer to a cause of action founded thereon should have been sustained. [Stevens v. Morse, 185 W 500, 201 NW 815, and Williams v. Hicks P. Co., 159 W 90, 150 NW 183, distinguished in the application of the doctrine there laid down, which is not departed from.] Grell v. Hoard, 206 W 187, 239 NW 428.

See note to 263.06, citing Woods v. Sentinel-News Co., 216 W 627, 258 NW 166.

263.38 Answer in libel and slander. In an action for libel or slander the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances. [*1935 c. 541 s. 39*]

263.39 Answer in action for distrained property. In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made and that the property distrained was at the time doing damage thereon shall be good without setting forth the title to such real property.

263.40 Pleadings in special proceedings. In special proceedings pending on appeal, the court may direct an issue of fact to be made up between the parties by complaint and answer, and such issue shall be tried by the court, or by the jury, as the court shall prescribe. [*Stats. 1931 s. 270.10; Court Rule XXIX s. 1, 2, 3; Supreme Court Order, effective Jan. 1, 1934*]

Note: Issues of fact may arise in special proceedings, and when they do so arise they may be tried by the same constitutional jury that tries an issue of fact arising in an action. Lamasco Realty Co. v. Milwaukee, 242 W 357, 8 NW (2d) 372.

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

263.42 Sham pleadings may be stricken out. A sham or frivolous answer, reply or defense may be stricken out on motion and upon such terms as the court may impose. [*Supreme Court Order, effective Sept. 1, 1931; Supreme Court Order, effective Jan. 1, 1936*]

Note: On a motion to strike an answer as sham, affidavits may be submitted in support of the motion, when the answer contains affirmative matter. A "sham answer" is one so unmistakably false that the party is not entitled to demand the delay of a trial. Slama v. Dehmel, 216 W 224, 257 NW 163.

263.43 Irrelevant, scandalous and indefinite pleadings. If any pleading contains irrelevant, redundant or scandalous matter it may be struck out, with costs, on motion, and the court may order the attorney who signed the same to pay costs. When a pleading is so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may on motion order the pleading to be made definite and certain. The time to serve a required responsive pleading is extended 10 days after the service of notice of entry of an order made upon the motion, unless the order fixes a different time. [*1935 c. 541 s. 40; Supreme Court Order, effective April 1, 1948*]

263.44 Motions to strike out. A party may move upon one notice to strike out an answer or reply as sham, and frivolous, and irrelevant, and the court or presiding judge, on such motion, may strike out any matter or defense as sham, any other as frivolous, or as irrelevant or otherwise, as the pleading shall be found to be.

Note: An allegation in the answer that the vendor's option to forfeit payments made upon the purchaser's default was waived by the acceptance of interest from the purchaser was properly stricken as sham, since, by the terms of the contract, the vendor was under no obligation to declare the exercise of the option, and since the vendor was not asking for a forfeiture of the payments made. Slama v. Dehmel, 216 W 224, 257 NW 163.

263.45 Amendments of course to pleadings. Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, within twenty days after service thereof. But if it shall appear to the court that such amendment was made for the purpose of delay or that the same was unnecessary and the opposite party will thereby lose the benefit of a term at which the action may be tried, the amended pleading may be stricken out and such terms imposed as may seem just. [*Supreme Court Order, effective Jan. 1, 1936*]

Note: On an appeal from a judgment for the plaintiff the complaint will be deemed to have been amended to conform to the evidence admitted without objection, although there was no formal application to amend. Krudwig v. Koepke, 227 W 1, 277 NW 670.

263.46 Proceedings on decision of demurrer. After the decision of a demurrer the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over or to withdraw the demurrer on such terms as may be just. If a demurrer to a complaint be sustained upon the ground that several causes of action have been improperly united the court may, in its discretion and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

Note: An unsuccessful demurrant cannot plead over as a matter of right. Costs are not recoverable on an order overruling or sustaining a demurrer except by the prevailing party at the final determination of the litigation or as a condition of answering or amending a pleading. Marshall v. Wittig, 205 W 510, 238 NW 390.

A plaintiff is not entitled to amend his complaint indefinitely, and pleading over after the decision of a demurrer is a matter that is within the sound discretion of the trial court. Angers v. Sabatinelli, 239 W 364, 1 NW (2d) 765.

263.47 Supplemental pleadings. The plaintiff and defendant, respectively, may be allowed, on motion and on such terms as may be just, to make a supplemental complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.