fer statutes commonly permit any party to seek a transfer to another court on the grounds of justice and convenience. The doctrine of forum non conveniens has generally been confined to cases in which a defendant resists the exercise of jurisdiction in a case brought against him. At least one court, however, has permitted a plaintiff to invoke something resembling the doctrine to dismiss a counterclaim asserted by the defendant. F & F Laboratories Inc. v. Chocolate Spraying Co., Inc. 6 Ill. App. (2d) 299, 127 NE (2d) 682 (1955). S. 262.19 permits a stay of further action on a counterclaim where in the discretion of the trial court this is required to do substantial justice between the parties. Such a case will not be usual, however, since justice is ordinarily served best by putting an end to all controversy between the parties in one proceeding.

(2) *Time for Filing and Hearing Motion.*

A stay of proceeding is sought by motion filed prior to or with the answer if objection is made to trying any cause raised in the complaint, or prior to or with the reply if objection is made to a cause raised by counterclaim. The ruling on the motion shall be made prior to trial of the case on its merits and the order entered on the motion shall be appealable.

(3) *Scope of Trial Court Discretion on Motion to Stay Proceedings.*

The decision to stay further proceedings is left to the sound discretion of the trial court and this subsection enumerates some factors material to the questions of convenience and justice which the trial court may properly consider. A corollary of the rule just stated is that appellate review is confined to abuse of discretion by the trial court in granting or denying the stay.

No precise definitions of convenience and justice are attempted. In deciding whether to grant a stay, the same factors are relevant in general as those considered in passing on a question arising under the doctrine of forum non conveniens, or a motion for transfer to a more convenient venue. The test is not a matter of showing the inconvenience of trial in this state. Rather it is one of showing that trial outside this state is required to do substantial justice in the case.

(4) *Subsequent Modification of Order to Stay Proceedings.*

Once a stay of proceedings has been ordered, jurisdiction of the court continues over both the parties and the subject matter for the time fixed in this subsection. This continuing jurisdiction is terminated by the lapse of 5 years after the last court order entered in this state on the stayed action. Within the period that jurisdiction of the court continues over the stayed action and the parties, any party may on notice move to re-open the proceedings here in order that the court may take such further action as the interests of justice require. Upon the termination of jurisdiction of the court over the parties and the action, it is the duty of the clerk of the court in which the stay was granted to enter an order dismissing the case.

Forum non conveniens plea and jurisdiction under 1957 statutes is discussed in Lau v. Chicago & N. W. R. Co. 14 W (2d) 329, 111 NW (2d) 158.

262.20 History: 1959 c. 226; Stats. 1959 s. 262.20.

Reporter's Notes: This section is new. Its purpose is primarily that of a deterrent against abuse of the state's judicial power. The power of the trial court to order the plaintiff to pay, up to a sum of $500, the total expense to the defendant of appearing and obtaining the order dismissing the action for want of jurisdiction is discretionary. At the discretion of the court, too, is the matter of ordering recovery of statutory costs for a party who successfully obtains an order staying further proceedings under s. 262.19. This degree of flexibility should deter the assertion of frivolous jurisdiction claims and permit the trial courts to do substantial justice by taking into account such factors as the good faith of the plaintiff's jurisdictional claim.

CHAPTER 263.

Pleadings.

263.01 History: 1856 c. 120 s. 45; R. S. 1858 c. 125 s. 1; R. S. 1878 s. 2644; Stats. 1898 s. 2644; 1925 c. 4; Stats. 1925 s. 263.01; 1935 c. 541 s. 31.

On civil actions, and parties thereto, see notes to various sections of ch. 260; on place of trial of civil actions see notes to various sections of ch. 261; and on commencing civil actions see notes to various sections of ch. 262.

Filing a claim against the estate of a deceased in a county court is not the commencement of a civil action and so, even though a county court is a court of record, chapter 263 is not applicable to such proceedings. Estate of Beyer, 185 W 23, 200 NW 772.

Outline of rules of common-law pleading. Umbreit, 4 MLR 130.

263.02 History: 1856 c. 120 s. 46; R. S. 1858 c. 125 s. 2; R. S. 1878 s. 2645; Stats. 1898 s. 2645; 1925 c. 4; Stats. 1925 s. 263.02.

263.03 History: R. S. 1849 c. 113 s. 6; 1856 c. 120 s. 47; R. S. 1858 c. 125 s. 3; R. S. 1858 c. 148 s. 4; R. S. 1878 s. 2646, 3205; Stats. 1898 s. 2646, 3205; 1925 c. 4; Stats. 1925 s. 263.03, 286.02; Sup. Ct. Order, 204 W vi; Sup. Ct. Order, 214 W v; Sup. Ct. Order, 215 W v; 1935 c. 483 s. 8; Stats. 1935 s. 262.02 (4), 263.03; Sup. Ct. Order, 221 W v; Stats. 1937 s. 263.03; 1961 c. 518.

Revisers' Note, 1878: Section 3, chapter 125, R. S. 1858, using words as to place of trial to conform to the chapters on that subject, changing the article before "cause of action" to "each," for obvious reasons; and changing "relief" to judgment, in order that it shall not be supposed necessary for the prayer to embrace a demand for provisional remedies, as it often is, and perhaps reasonably.

Revisers' Note, 1878: Embraces section 4, chapter 148, R. S. 1858, in part, and is substantially as the section in the new code of procedure in New York, and is intended to do

away with the necessity in any case of alleging anything more than that the plaintiff or defendant is a corporation, and to designate whether it be a corporation existing under the laws of this state or otherwise, and also to require an averment that the plaintiff or defendant is a corporation, so that there will no longer be any question as to whether the mere name given to the party shall be construed to be an allegation that the party is a corporation.

In the case of a foreign corporation it is sufficient to plead the act of incorporation by reciting its title with averments as to authority by which it was enacted. Connecticut M. L. Ins. Co. v. Cross, 18 W 109.

A foreign corporation is not required to prove its corporate existence unless defendant denies by verified answer that it is a corporation. Williams M. & R. Co. v. Smith, 33 W 530.

Every person is presumed to have both Christian and surnames, and should be sued by his full name. But if his name cannot be ascertained he may be sued by any name, or by his surname if his Christian name cannot be learned. Kellam v. Toms, 38 W 601.

An allegation that defendant neglected to furnish cars for about 4 days, and refused to carry the stock with reasonable diligence, and that plaintiff arrived about 4 days later than he otherwise would, is sufficiently certain, as it shows that all the delay was in furnishing the cars. Richardson v. Chicago & Northwestern R. Co. 58 W 534, 17 NW 399.

In an action for a failure to furnish cars in which to ship stock an allegation that defendant neglected to provide cars for several days and when provided neglected to carry the stock to Chicago with reasonable diligence, and that plaintiffs arrived in Chicago about 4 days later than they would have done, is not sufficiently certain. Ayres v. Chicago & Northwestern R. Co. 58 W 537, 17 NW 400.

The rule in respect to pleading the performance or nonperformance of acts to which treble damages are attached is more strict than in other cases. Sweeney v. Chicago, M. & St. P. R. Co. 60 W 60, 18 NW 756.

General allegations of negligence in a complaint may be sufficient on demurrer, or when they are denied, but upon defendant's motion they should be made more specific, unless, from the nature of the case, the plaintiff cannot make them so. Young v. Lynch, 66 W 514, 29 NW 224. See also: Doolittle v. Laycock, 103 W 334, 79 NW 408; and Wood v. General R. S. Co. 161 W 71, 151 NW 269.

A new assignment is not necessary or allowable in pleading under the code. Baier v. Ziegelbauer, 66 W 524, 29 NW 277.

An allegation that defendant had and received a sum of money of plaintiff for the use of the plaintiff negatives a gift. Burke v. Milwaukee, L. S. & W. R. Co. 83 W 410, 53 NW 692.

An express warranty of the procreative capacity of a horse is alleged, as against a demurrer ore tenus, by stating that the defendant represented the horse purchased to be fit and good for breeding purposes. Bergeler v. Michael, 84 W 627, 54 NW 995.

A demand of either a legal or an equitable judgment is not a compliance with the statute. Johns v. Northwestern M. R. Asso. 87 W 111, 58 NW 76.

A waiver of the condition as to the time within which proofs of death are to be furnished before action may be proved on the trial though not pleaded. Foster v. Fidelity & Cas. Co. of N.Y. 99 W 447, 75 NW 69; Reisz v. Supreme Council, Am. Legion of Honor, 103 W 427, 79 NW 430. See also D'Angelo v. Cornell P.P. Co. 33 W (2d) 218, 147 NW (2d) 321.

"There can be but one action to redress a single wrong. The law does not permit a person to indulge in useless and vexatious litigation by splitting up a cause of action and prosecuting several suits of the same or different natures." Stern v. Riches, 111 W 591, 593, 87 NW 555. See also Werner v. Riemer, 255 W 386, 39 NW (2d) 457, 39 NW (2d) 917.

Sec. 3205, Stats. 1898, refers only to corporations which are parties to the action. Arpin H. L. Co. v. Carmichael, 115 W 441, 91 NW 965.

A defendant in a personal injury action is entitled to know what specific act or acts of negligence the plaintiff seeks to charge him with so that he may prepare his defense. Tolleman v. Sheboygan L., P. & R. Co. 148 W 197, 134 NW 406.

It is not necessary for the complaint to negative contributory negligence on the part of the plaintiff. Paradies v. Woodward, 156 W 243, 145 NW 657.

The complaint in a foreclosure action in which a corporation is one of the defendants because it is believed to be the owner of a subsequent incumbrance need not allege that such defendant is a corporation. The action is not against the corporation within the meaning of sec. 3205, Stats. 1913, and if the corporation makes no such claim it should put in a disclaimer and the suit should be dismissed. Greenya v. Reliance S. Co. 161 W 483, 154 NW 972.

"A mere general allegation [in a complaint invoking the safe-place statute] that a place is unsafe without averment stating in what respect the place was unsafe, is a mere conclusion of law and insufficient as a matter of pleading to raise the issue." Baker v. Janesville Traction Co. 204 W 452, 454, 234 NW 912, 913.

See note to 895.01, citing Booth v. Frankenstein, 209 W 362, 245 NW 191.

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.

"To raise an issue of negligence a complaint must allege the fact of action or nonaction relied on, and all facts necessary to render the fact proximately causal." Ludwig v. Wisconsin P. & L. Co. 242 W 434, 440, 8 NW (2d) 272, 274.

Under the official bond of an assistant city treasurer, so framed as to give a cause of action to third parties who sustained 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.

Where the ultimate fact essential to a cause of action is brought into existence by a series of detail acts and events, it is entirely competent and sufficient to plead those detail acts according to their legal effect. Matters of mixed law and fact, the ultimate of which is, in a broad sense, a fact, may be pleaded according to their legal effect, and every reasonable intendment must be indulged in in favor of the pleading. Larson v. Lester, 259 W 440, 49 NW (2d) 414.

See note to 269.25, citing Pautsch v. Clark Oil Co. 264 W 207, 58 NW (2d) 638.

In an action for injuries sustained by a person who had been invited by a dairy company to a picnic for its employes at an amusement park not owned or operated by it, and who was struck by a baseball while walking along an areaway adjacent to a baseball diamond which the dairy company was using for a game with the consent of the owner of the park, the complaint did not allege a cause of action against the dairy company based on violation of the safe-place statute, in that it did not allege that the park was a "place of employment" or a "public building" within the safe-place statute. Paykel v. Rose, 265 W 471, 61 NW (2d) 909.

"The purpose of the complaint is to acquaint the adverse party and the court of the cause of action relied upon by the plaintiff." Wright v. St. Mary's Hospital of Franciscan Sisters, 265 W 502, 506, 61 NW (2d) 900, 902. See also: Aldrich v. Skycoach Air Lines Agency of Milwaukee, 266 W 580, 64 NW (2d) 199; and Omer v. Risch, 269 W 61, 68 NW (2d) 541.

It is necessary that the complaint shall make a plain and concise statement of the facts constituting the cause of action so that they may be understood by defendant, court and jury. Watters v. National Drive-In, Inc. 266 W 432, 63 NW (2d) 708. See also: Masino v. Sechrest, 268 W 112, 66 NW (2d) 745; and Handy v. Holland Furnace Co. 11 W (2d) 151, 105 NW (2d) 299.

In general, in the absence of statute to the contrary, it is not necessary to state separately in a complaint the amounts claimed for each of the particular items of actual damages alleged, it being sufficient, as against demurrer, if the elements of damage alleged to have been suffered are definitely enumerated. The carrying forward of allegations contained in one count of a complaint into another count by incorporations, where they are inconsistent and wholly contradictory, is improper, but allegations in one count or separately stated cause of action may be incorporated in another in the same complaint by reference and adoption if the reference is consistent, clear, direct, positive, and explicit. Olson v. Johnson, 267 W 462, 66 NW (2d) 346. (Hall v. Frankel, 183 W 247, distinguished.)

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show; and the number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they are considered severally or in combination, is the violation of but one right by a single legal wrong. Blooming Grove v. Madison, 5 W (2d) 73, 92 NW (2d) 224.

See note to 274.33, on orders not appealable under 274.33 (entire), citing Blooming Grove v. Madison, 5 W (2d) 73, 92 NW (2d) 224.

"The mere labeling of a complaint does not determine its nature. The nature of an action is to be determined as a whole and all allegations in the complaint must be considered." Wesolowski v. Erickson, 5 W (2d) 335, 339, 92 NW (2d) 898, 901.

Only ultimate facts rather than evidentiary facts need to be pleaded. Bembinster v. Aero Auto Parts, 7 W (2d) 54, 95 NW (2d) 778.

When one of 2 or more joint tort-feasors pays more than his proper proportionate share (comparative negligence not being applied to contribution cases) and brings suit for contribution against the other tort-feasor, he must plead and prove, among the other necessary allegations, his own negligence, the negligence of the other tort-feasor, and their common liability, which rule places the burden of proof on the one asserting contribution. Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co. 8 W (2d) 512, 99 NW (2d) 746.

A complaint, by an employe and minority stockholder, that other officers and stockholders conspired to deprive him of employment and coerce him into selling his stock in order to acquire the stock for less than value and to give the job to an inexperienced relative of one of defendants, stated a cause of action for damages for conspiracy to cause loss of employment. Mendelson v. Blatz Brew. Co. 9 W (2d) 487, 101 NW (2d) 805.

In an action under the safe-place statute, where a defect due to failure of maintenance or repairs is involved, the complaint should allege actual or constructive notice of the defect. Krause v. Veterans of Foreign Wars Post No. 6498, 9 W (2d) 547, 101 NW (2d) 645.

It is not necessary for a plaintiff to plead a violation of the safe-place statute as a separate cause of action merely because the complaint also alleges acts on the part of the defendant which would constitute negligence at common law, there being but one cause of action, and that being for negligence. Mullen v. Reischl, 10 W (2d) 297, 103 NW (2d) 49.

Where a complaint alleged one subject, i.e., conspiracy to injure in business, the fact that several causes of action were alleged may be disregarded; malice need not be expressly alleged in a civil action; the fact that damages and equitable relief are sought does not make the complaint defective. Cohn v. Zippel, 12 W (2d) 258, 107 NW (2d) 184.

In an action against a labor union for wrongful expulsion of a member, plaintiff must allege that he has exhausted his remedy with the union or allege facts which would excuse him from doing so. Kopke v. Ranney, 16 W (2d) 369, 114 NW (2d) 485.

A party who has an opportunity to plead estoppel and does not do so waives it. If necessary, a complaint should be amended after answer to plead estoppel. If there is no opportunity to plead, the issue should be raised at the pretrial conference. Schneck v. Mutual Service Cas. Ins. Co. 18 W (2d) 566, 119 NW (2d) 342.

Where the complaint showed that all of the facts from which estoppel arises were duly pleaded, it was not incumbent on the plaintiff

to specially plead estoppel. Yurmanovich v. Johnston, 19 W (2d) 494, 120 NW (2d) 707.

"***in negligence actions pleadings are sufficient if they allege ultimate facts and that the acts were negligently performed." Wulf v. Rebbun, 25 W (2d) 499, 502, 131 NW (2d) 303, 305.

Where one defendant can be held liable only if another acted as his agent, a complaint alleging that the second defendant acted either as agent or as principal is fatally defective. Pavalon v. Thomas Holmes Corp. 25 W (2d) 540, 131 NW (2d) 331.

There is no requirement that a complaint state facts necessary to give the court personal jurisdiction over the defendant if service of the summons is made upon defendant otherwise than personally within the state. Pavalon v. Thomas Holmes Corp. 25 W (2d) 540, 131 NW (2d) 331.

In an action based upon contract the complaint must allege the essential and ultimate facts constituting consideration. Peters v. Peters Auto Sales, Inc. 37 W (2d) 346, 155 NW (2d) 85.

On demurrer, the court is not bound by the form of a complaint, but may consider the substance of the allegations thereof for the purpose of determining whether more than one cause of action is alleged therein. A cause of action is defined as a grouping of facts falling into a single unit or occurrence, as a lay person would view them. D'Amato v. Freeman Printing Co. 38 W (2d) 589, 157 NW (2d) 686.

A complaint in an action for injuries sustained while alighting from a bus, setting forth 3 bases for liability, one of which alleged negligence of the operator in permitting plaintiff to leave the bus at a place not designated as a proper and lawful place to discharge passengers, alleged at most a conclusion of law absent further averment showing the relationship between the negligence alleged and the fact that the place of discharge was not designated as proper and lawful. Burke v. Milwaukee & Suburban Transport Corp. 39 W (2d) 682, 159 NW (2d) 700.

Where the complaints set forth that the defendants made statements which were untrue, that the statements were made with intent to defraud and for the purpose of inducing the plaintiff to act upon them, and that the plaintiff did in fact rely on them and was induced thereby to act, to its damage, in the amount set forth in the respective complaints, the trial court properly overruled the demurrers of the defendants. First Credit Corp. v. Myricks, 41 W (2d) 146, 163 NW (2d) 1.

In pleading agency in contract actions where the pleading is attacked by demurrer, averments of authority expressed in most general terms are sufficient to allege both the specific facts of the agency relationship and that the agent had authority to do the acts relied upon. Herro v. Wisconsin F. S. P. D. Corp. 42 W (2d) 87, 166 NW (2d) 433.

A second cause of action seeking declaration in the alternative of an easement by prescription was not demurrable because the relief sought was inconsistent with the first (in that an implied easement of necessity is permissive and cannot ripen into a prescriptive easement), for it is proper for a plaintiff to plead inconsistent causes of action in the alternative. Humble Oil & Ref. Co. v. Schneider F. & S. Co. 42 W (2d) 552, 167 NW (2d) 223.

See note to 893.14, citing Holifield v. Setco Industries, Inc. 42 W (2d) 750, 168 NW (2d) 177.

If the facts stated in a complaint reveal an apparent right to recover under any legal theory, they are sufficient as a cause of action; and there is no violation of the rules of the pleading if the facts lead to the defendant's liability on more than one legal theory. Jost v. Dairyland Power Cooperative, 45 W (2d) 164, 172 NW (2d) 647.

A plaintiff, suing upon a conditional contract in order to show breach of duty by the defendant, must allege that all the conditions qualifying the promise have happened, been performed, or were excused. Price v. Ross, 45 W (2d) 301, 172 NW (2d) 633.

The declining significance of the ad damnum clause. 50 MLR 167.

263.04 History: 1856 c. 120 s. 73, 74; R. S. 1858 c. 125 s. 29, 30; 1859 c. 91 s. 4; R. S. 1878 s. 2647; Stats. 1898 s. 2647; 1915 c. 219 s. 4; 1925 c. 4; Stats. 1925 s. 263.04.

Editor's Note: See comments of judicial council to 260.10, and 260.11 and annotations to those sections after 1956. Annotations to this section will be found under 263.06, in the group concerned with misjoinder of causes.

263.05 History: 1956 c. 120 s. 48; R. S. 1858 c. 125 s. 4; R. S. 1878 s. 2648; Stats. 1898 s. 2648; 1925 c. 4; Stats. 1925 s. 263.05.

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. Such a plea is an "answer." Binsfeld v. Home Mut. Ins. Co. 245 W 552, 15 NW (2d) 828.

A plea in abatement does not go to the merits of the cause of action but to the form of the writ used by the plaintiff and, if true when interposed, the plea in abatement either defeats the pending suit or suspends the suit or proceeding in which it is interposed, but it does not bar the plaintiff from recommencing the action in some other way, except when the plea in abatement is made on the ground that there is another action pending and such other action is dismissed on the merits prior to the hearing on the plea. The plea of abatement speaks as of the time it is interposed, not at the time of hearing. Truesdill v. Roach, 11 W (2d) 492, 105 NW (2d) 871.

All defenses must be pleaded in the answer and not seriatim, and a defendant has no right to try its defense in steps, first by demurrer, then a plea in abatement, and finally by answer, and although some separate defenses

may be brought on for hearing separately, the right to plead separate defenses consecutively in the point of time as the prior ones are disposed of does not exist under our practice. Poehling v. La Crosse Plumbing Supply Co. 24 W (2d) 239, 128 NW (2d) 419.

If a plea in abatement is true when interposed it either defeats the pending suit or suspends the suit in which it is interposed except when such plea is made on the ground there is another action pending and such action is dismissed prior to the hearing on the plea; however, until the plea is determined to be true it has no such effect. Poehling v. La Crosse Plumbing Supply Co. 24 W (2d) 239, 128 NW (2d) 419.

263.06 History: 1856 c. 120 s. 49; R. S. 1858 c. 125 s. 5; R. S. 1878 s. 2649; Stats. 1898 s. 2649; 1925 c. 4; Stats. 1925 s. 263.06; Sup. Ct. Order, 271 W viii.

Revisers' Note, 1878: Section 5, chapter 125, R. S. 1858, adding the seventh subdivision to express the rule established in Howells v. Howells, 15 W 55.

Comment of Judicial Council, 1956: 263.06 (1) previously permitted a demurrer for lack of jurisdiction over the "subject of the action," a phrase hard to define. The amendment changes this to "subject matter" the terminology employed in Rule 12 (b) of the Federal Rules of Civil Procedure, and means that type of jurisdiction referred to in the A.L.I. Restatement of Judgments as "competence of the court." Jurisdiction over the subject matter cannot be waived since the parties cannot enlarge the competence of the court. The major change introduced by the amendment is the requirement of a single demurrer. Under previous practice, the defendant could raise the objections enumerated in this section by successive demurrers and obtain a separate ruling and appeal on each. The combined effect of the rules in this section, and in 263.11 and 263.12, is that the defendant must consolidate all objections to the complaint in a single demurrer as to defects appearing upon the face of the complaint; and where the objections do not appear upon the face of the complaint, to raise them by answer. Lack of jurisdiction over the subject matter can never be waived; otherwise the objections enumerated in this section are waived under the provisions of 263.12 if the defendant fails to raise them in the manner just described. (Re Order effective Sept. 1, 1956)

1. Court lacks jurisdiction.
2. Want of capacity to sue.
3. Another action pending.
4. Defect of parties.
5. Misjoinder of causes of action.
6. No cause of action.
7. Statute of limitation.
8. Procedure in demurring.
9. Attempt to demur on nonstatutory ground.

1. Court Lacks Jurisdiction.

After a demurrer has been sustained on the ground of want of jurisdiction and the complaint is amended so as to obviate the objection a second demurrer on the same ground should not be sustained. Posten v. Miller, 60 W 494, 19 NW 540.

An allegation in the complaint, that a prior action for a divorce was commenced in "this" court and was dismissed by it, was not a compliance with the requirement of 247.14; hence a demurrer to the complaint should be sustained, but the complaint should not be dismissed and the plaintiff should be permitted to amend it. Eule v. Eule, 5 W (2d) 543, 93 NW (2d) 438.

A demurrer can be used only to raise the issue of lack of personal jurisdiction when the defect appears on the face of the complaint. Pavalon v. Thomas Holmes Corp. 25 W (2d) 540, 131 NW (2d) 331.

See note to 267.02, citing Moskowitz v. Mark, 41 W (2d) 87, 163 NW (2d) 175.

2. Want of Capacity to Sue.

If a receiver has not been regularly appointed it is a matter of capacity and does not affect the cause of action. Manseau v. Mueller, 45 W 430. See also Vincent v. Starks, 45 W 458.

A general demurrer does not reach the objection that the plaintiff has no legal capacity to sue. Cornish v. Tuttle, 53 W 45, 9 NW 791.

A demurrer on the ground that the plaintiff has not the legal capacity to sue implies a legal disability to sue and does not go to the cause of action. Weirich v. Dodge, 101 W 621, 77 NW 906.

Where a complaint alleges that a cause of action against defendant was sold and assigned to the plaintiff as administrator for a valuable consideration, it sufficiently alleges plaintiff's legal capacity to sue. Brossard v. Williams, 114 W 89, 89 NW 832.

A demurrer under sec. 2649 (2), Stats. 1898, reaches only personal disability as infancy, coverture, idiocy, and the like, or want of title to the charter in which the plaintiff sues, as in case of an executor or administrator not having complied with the statutory requisites of his qualification, or an assignee not having fully qualified as such and the like. It does not deal with the sufficiency of the complaint as stating a cause of action in favor of the plaintiff. McKenney v. Minahan, 119 W 651, 97 NW 489.

An objection that no guardian ad litem was appointed for an infant plaintiff raises the question of legal capacity to sue and is waived unless taken by demurrer or answer. Fey v. I.O.O.F. M. L. Ins. Society, 120 W 358, 98 NW 206.

3. Another Action Pending.

The defense of another action pending must be pleaded, or it cannot be considered. E. M. Fish Co. v. Young, 127 W 149, 106 NW 795.

A demurrer that "there are other actions pending in the above-named court in which the validity of the contracts named in this complaint are at issue" is insufficient and not equivalent to "there is another action pending between the same parties for the same cause." Iverson v. Union Free High School Dist. 186 W 342, 202 NW 788.

See note to 287.17, citing Holty v. Landauer, 264 W 463, 59 NW (2d) 679.

4. Defect of Parties.

The objection that the wife is made a co-plaintiff with her husband when she has no interest in the cause of action may be taken by demurrer. Read v. Sang, 21 W 678.

In an action upon an insurance policy providing that the loss, if any, was payable to a mortgagee to the extent of his mortgage interest, a complaint on the policy, not making the mortgagee plaintiff, does not show a defect of parties plaintiff, if it alleges that his interest had ceased, without showing how it ceased. Great Western C. Co. v. Aetna Ins. Co. 40 W 373.

A demurrer for this cause does not raise the objection that no cause of action is stated. Arzbacher v. Mayer, 53 W 380, 10 NW 440.

If the objection be not taken by demurrer or answer it is waived. Hallam v. Stiles, 61 W 270, 21 NW 42.

After a trial on the merits it is too late, upon a new trial, to raise for the first time by new answer the objection that there is a defect of parties plaintiff, nor can a demurrer for defect of parties be embodied in an answer upon the merits. Jones v. Foster, 67 W 296, 30 NW 697.

A defect of parties is waived unless taken advantage of by demurrer of answer. Radant v. Werheim M. Co. 106 W 600, 82 NW 562.

Where demurrer fails to state wherein the defect of parties occurs, it is not sufficient. Emerson v. Schwindt, 108 W 167, 84 NW 186.

A demurrer for misjoinder of causes does not raise objection of misjoinder of parties. Somervaill v. McDermott, 116 W 504, 93 NW 553.

A demurrer for defect of parties goes only to the question of whether persons not parties should be brought in, and does not concern the rights of parties already before the court. McKenney v. Minahan, 119 W 651, 97 NW 489.

A demurrer based on a defect of parties defendant must, as a general rule, show the parties to be joined; but where the plaintiff can readily ascertain the names of the necessary parties the demurrer need not state them. Buerger v. Buerger, 178 W 352, 190 NW 126.

There is no demurrer for an excess of parties. A motion to strike out allegations respecting one not a proper party is a proper remedy. State ex rel. Kratche v. Civil Court of Milwaukee County, 179 W 270, 191 NW 507.

There is no misjoinder of parties in equity by demanding different relief as to each, where all are in fact affected. Burke v. Universal G. Co. 180 W 520, 193 NW 517.

Unless one is a necessary party rather than a proper party defendant, a complaint is not demurrable on that ground. Elliott v. Indemnity Ins. Co. 201 W 445, 230 NW 87.

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. Angers v. Sabatinelli, 235 W 422, 293 NW 173.

The complaint in an action for specific performance of an alleged contract, joining as defendants with the executors certain corporations controlled by the executors under the will, was not demurrable on the ground of misjoinder of parties. A demurrer for defect of parties goes only to the question of whether persons not parties should be brought in and does not concern the rights of parties already before the court. Holty v. Landauer, 264 W 463, 59 NW (2d) 679.

See note to 260.10, citing Marshfield Clinic v. Doege, 269 W 519, 69 NW (2d) 558.

5. Misjoinder of Causes of Action.

A complaint for several breaches of the same contract includes but one cause of action. Fisk v. Tank, 12 W 276.

An action by heirs against A. and B. as executors and A. as administrator for the fraud of A., and also A. and B., is not multifarious where it was impossible to determine with what amount A. should be charged as administrator without a settlement of the accounts of A. and B. as executors. McLachlan v. Staples, 13 W 448.

A complaint in the nature of a creditor's bill against A., and to set aside a fraudulent deed from A. to B., and another from A to C., is valid. Winslow v. Dousman, 18 W 456.

If 2 or more persons, each having a right to sue, join in an action when they should bring several suits, a demurrer will lie. Barnes v. Beloit, 19 W 93.

A cause of action against one defendant for the erection of a dam on the north branch of a river cannot be united with a cause of action against another for the erection of a dam on the south branch, both dams causing flowage of plaintiff's land. Lull v. Fox & Wisconsin I. Co. 19 W 112.

A complaint to compel an agent to account and to set aside conveyances of lands purchased with plaintiff's moneys, taken by co-defendants, is valid. Blake v. Van Tilborg, 21 W 672.

A complaint for an accounting by A, and to set aside his fraudulent conveyance to B, and compel a reconveyance by the heirs of the latter, is not multifarious. Bassett v. Warner, 23 W 673.

Causes of action for a nuisance maintained by successive tenants, each being liable only for the time he held, cannot be joined. Greene v. Nunnemacher, 36 W 50.

Causes of action against several defendants, arising out of a series of transactions forming one course of dealing and tending to one end, may be joined. Hungerford v. Cushing, 8 W 332; Douglas County v. Walbridge, 38 W 179.

Where the action affects lands in different counties and involves separate causes of action they cannot be joined; and a demurrer for misjoinder is proper. Hackett v. Carter, 38 W 394.

Where the complaint sets out a cause of action against an administrator and others and a cause of action against the administrator alone, the administrator as well as the other defendants may demur on the ground of such misjoinder. Hoffman v. Wheelock, 62 W 434, 22 NW 713 and 716.

A cause of action against an administrator and others growing out of the fraudulent sale of land by the administrator cannot be joined with a cause of action against him alone for

waste committed prior to the sale. Hoffman v. Wheelock, 62 W 434, 22 NW 713, 716.

A complaint charging separately conversion of personal property by one defendant by a sale thereof to the other, and conversion by the latter by his purchase from the former, states a joint conversion and but one cause of action. Smith v. Briggs, 64 W 497, 25 NW 558.

In an action by riparian owners to restrain the diversion of water from their lands an allegation that the defendant entered upon the land of one of the plaintiffs and committed injuries thereto does not state a cause of action so as to create an improper joinder, it being made for the purpose of showing the means employed in diverting the water. Grand Rapids W. P. Co. v. Bensley, 75 W 399, 44 NW 640.

A complaint does not improperly unite several causes of action which relate to matters of the same nature, all connected with each other, and in which all the defendants are concerned, though their rights in respect to the general subject of the action may be different, and some may be directly interested only in a part of the general claim. Ellis v. Northern P. R. Co. 77 W 114, 45 NW 811.

If a cause of action upon a contract for the agreed price of work is united with a cause of action for the reasonable value of it the objection that the causes of action are not separately stated is waived by not moving to make the complaint more definite. Beers v. Kuehn, 84 W 33, 54 NW 109.

The objection that several causes of action are improperly joined may be first raised in a case appealed from a justice court by demurrer in the circuit court. Wirth v. Bartell, 84 W 209, 54 NW 399.

New matter added to a complaint by amendment does not make an improper joinder of causes if such matter does not state a cause of action. North Hudson B. & L. Asso. v. Childs, 86 W 292, 56 NW 870.

If a plaintiff sues in a dual representative capacity and has a cause of action in one capacity only, he may maintain an action. Geilfuss v. Gates, 87 W 395, 58 NW 742.

A complaint which contains several separate causes of action is not subject to demurrer because of the absence of a formal allegation that each cause is separate. Gunderson v. Thomas, 87 W 406, 58 NW 750.

The objection of misjoinder of causes of action may be taken by a defendant affected by both causes of action or by only one of them. Plankinton v. Hildebrand, 89 W 209, 61 NW 839.

Where one of the plaintiffs in an action to enforce a pledge had not exhausted his legal remedy and the others had no interest in the bond as a pledge, but only in any surplus which might remain after the pledgees were paid, the causes of action did not affect all the parties. Hughes v. Hunner, 91 W 116, 64 NW 887.

A complaint does not improperly unite causes when they all relate to matters of the same nature all connected with each other, and in which all the defendants are concerned, though their rights in respect to the subject of the action may be different, and some may be directly interested only in a part of the general claim. Blake v. Van Tilborg, 21 W 673; Grady v. Maloso, 92 W 666, 66 NW 808.

Where acts are charged as having been committed by one of the defendants before the formation of the conspiracy and the accomplishment of its object was the gist of the action, the statement as to such acts will be regarded as historical and forming the groundwork of the cause of the action, and not as stating a cause of action against such defendant independently of his codefendants. Miller v. Bayer, 94 W 123, 68 NW 869.

A joint general demurrer is bad if the complaint states a cause of action against any defendant. Mark Paine L. Co. v. Douglas County I. Co. 94 W 322, 68 NW 1013.

A complaint to set aside an exchange of lands on the ground that it was induced by the fraud of one of the defendants who threatens to convey it to his codefendant, who also threatens to convey it, does not join causes of action by praying for a recission, damages and an injunction against the conveyance of the land by either defendant. Menz v. Beebe, 95 W 383, 70 NW 468.

Where plaintiffs claim to have been deprived of land by a void decree of a probate court, they may join a claim to recover the land with rents and profits for its detention with a claim to set aside such decree. Kruczinski v. Neuendorf, 99 W 264, 74 NW 974.

"As has often been said by this court, the test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication." South Bend Chilled Plow Co. v. George C. Cribb Co. 105 W 443, 446, 81 NW 675, 676. See also Davidson v. Davidson, 35 W (2d) 401, 411, 151 NW (2d) 53, 57.

An action by taxpayers against the school district to rescind a contract of purchase by the school board as fraudulent and return to the treasury the consideration therefor, and praying for an injunction against the erection of the schoolhouse, is not objectionable for misjoinder. Egaard v. Dahlke, 109 W 366, 85 NW 369.

Foreclosure and suit on the personal liability may be joined if they grow out of the same transaction, provided no one other than the debtor is made defendant. If another person is joined or the causes of action are not separately stated such defects are waived by answering. Endress v. Shove, 110 W 133, 85 NW 653.

Where the single primary right sought to be enforced is the right of a judgment lien upon certain lands the complaint is not rendered multifarious because it seeks to minimize to the utmost other liens apparently superior, the holders of such other liens being made parties. Level L. Co. v. Sivyer, 112 W 442, 88 NW 317.

In foreclosure the allegation of the existence of a prior mortgage and that the mortgagee had purchased the legal title and asking that such mortgage be extinguished and plaintiff's lien declared the first mortgage does not

state 2 causes of action. Herman v. Felthousen, 114 W 423, 90 NW 432.

A partnership and an individual made an order for goods which was accepted. In an action for the unpaid balance of the whole order brought against the partnership and individual jointly, the complaint was demurrable for misjoinder of causes of action, on the ground that the contract directed the goods be charged one-half to the partnership and one-half to the individual. Racine W. Co. v. Liegeois, 120 W 497, 98 NW 218.

An action by taxpayers for the purpose of preserving public funds from dissipation by public officers presents but one subject for adjudication, although it is necessary to bring in parties whose rights may be distinct as between themselves. Carpenter v. Christianson, 120 W 558, 98 NW 517.

All of a series of acts for the consummation of a single fraudulent purpose, regardless of the number of persons concerned, are parts of one subject matter, which may be brought into one action for adjudication. Harrigan v. Gilchrist, 121 W 127, 99 NW 909.

A cause of action against an administrator on a note alleged to constitute a claim against the estate cannot be joined with the claim against him personally. Tyler v. Still, 127 W 379, 106 NW 114.

Each utterance of slanderous words constitutes a separate cause of action which should be made the subject of a separate suit or a separate count in the complaint. Earley v. Winn, 129 W 291, 109 NW 633.

Where the complaint does not declare a separation of any cause of action it signifies an intention to plead but one. Brahm v. Gehl Co. 132 W 674, 112 NW 1097.

In misjoinder of causes of action, there must be 2 or more good causes of action pleaded which cannot be joined in order to sustain a demurrer under the statute. White v. White, 132 W 131, 111 NW 1116; Chicago, St. P. M. & O. R. Co. v. Douglas County, 134 W 197, 114 NW 511.

The action to review the order of the railroad commission cannot be joined with one to prevent another party from complying with such order. Superior v. Douglas County T. Co. 141 W 363, 122 NW 1023.

Sec. 2647, Stats. 1913, requires that all causes of action united in a complaint must affect all the parties. A recovery cannot be had in a single action for the amount due from a contractor for materials and from the owner on his express promise to pay therefor if plaintiff would waive his lien, together with a recovery for the same debt from the contractor and the surety on his contract bond. Midland T. C. Co. v. Illinois S. Co. 163 W 190, 157 NW 785.

A cause of action against a surety company on a bond furnished by a jitney driver may be joined with a cause of action against him for injuries resulting from his negligent driving. Ehlers v. Automobile L. Co. 166 W 185, 164 NW 845.

A libel may be the joint act of several persons who may be sued jointly or separately at the plaintiff's election. Morse v. Modern Woodmen of America, 166 W 194, 164 NW 829.

A complaint alleging that 3 of 5 defendants made fraudulent representations inducing plaintiff to purchase land, and charging that all of the defendants planned and conspired to conceal material facts and helped to plan the ways and means by which the fraud was consummated, states a cause of action against the 2 defendants who did not participate in the misrepresentations, and states a single cause of action against all of them. Booker v. Pelky, 173 W 24, 180 NW 132.

See note to 274.33, on orders not appealable under 274.33 (entire), citing Rohloff v. Folkman, 174 W 504, 182 NW 735.

Sec. 2647, Stats. 1919, does not authorize the uniting of an action by an heir for specific performance and a claim by an administrator for a recovery of damages for a conversion. Weinzirl v. Weinzirl, 176 W 420, 186 NW 1021.

A demurrer for misjoinder of causes of action will not be sustained where the complaint sets forth various transactions constituting a conspiracy by several defendants to defraud, and intermingled with them are statements of fact which, taken by themselves, might constitute a separate and distinct cause of action against one or more, but not all, of the defendants. July v. Adams, 178 W 375, 190 NW 89.

The separate causes of action of several persons for the same fraud may be united in one action, even though different relief is required of different defendants; and the court having jurisdiction for some purposes will retain it for all purposes, including both legal and equitable relief. Woelfel v. New England Mut. Life Ins. Co. 182 W 45, 195 NW 871.

A complaint by the widow of a subcontractor, which set out 2 causes of action, the first being for the amount due plaintiff's husband for work and materials under the contract, and the second being for damages resulting from the death of her husband, was demurrable as to another subcontractor against whom no cause of action was alleged in the first cause of action. Cochrane v. C. Hennecke Co. 186 W 149, 202 NW 199.

There is not a misjoinder of causes of action in a complaint which prays an accounting in equity by a trustee, although such accounting will involve matters relating to personal property and matters relating to real estate, and the fact that plaintiff in her individual capacity was made a party plaintiff as well as in her capacity of an executrix does not prejudicially affect the rights of the defendant. Bjorkquist v. Reuteman, 191 W 173, 210 NW 361.

Causes of action may be joined in a pleading even though they are inconsistent in the sense that a finding as to the existence of one may exclude the existence of the other. Where plaintiff unites inconsistent causes of action, the determination of how the issues shall be disposed of is within the sound discretion of the trial court. Bischoff v. Hustisford S. Bank, 195 W 312, 218 NW 353.

Defendants being severally liable under an agreement to pay shares of a loan a complaint against several defendants was demurrable for misjoinder of causes of action. Ernest v. Schmidt, 199 W 440, 223 NW 559.

Nonjoinable causes of action cannot be united, either in separate or in single counts, such complaint being demurrable. Ernest v. Schmidt, 199 W 440, 223 NW 559.

In an action by a holder of notes of an offi-

cer 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 an 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, 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.

A complaint alleging that 3 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 3 bills of sale to his sons, and 3 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.

A plaintiff may join in the same complaint causes of action for recovery on the ground of both gross and ordinary negligence, and pleading ordinary negligence alone in effect pleads that gross negligence did not exist. Kuchenreuther v. Chicago, M., St. P. & P. R. Co. 225 W 613, 275 NW 457.

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 mingles several causes of action which might properly be joined, the remedy of a defendant is by motion to make more definite. Where, however, the separate causes of action are intermingled in one count and the causes of action 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, involving the same parties and the same place of trial, were properly united in the same complaint. 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 all that was done was done by some one of the defendants acting in concert with the others. 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 2 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.

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 the latter's 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. Marston Brothers Co. v. Oliver W. Wierdsma Co. 244 W 394, 12 NW (2d) 748.

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 2 causes of action are improperly united, it must be found that 2 causes of action are pleaded. If 2 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 complaint setting forth 5 alleged fraudulent transfers extending over a period of years, each of which affected some but none of which affected all of the defendants, did not describe 5 separate and distinct causes of action resulting in a misjoinder of causes of action but stated only one cause of action, namely, the conspiracy to defraud and the various ways in which it was consummated. The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. Uihlein v. Rosenberg, 255 W 412, 39 NW (2d) 389.

An heir's personal causes of action against a former administrator and the estate's cause of action against the former administrator could not be united, since neither the estate nor the new administrator had any interest in nor were affected by the heir's personal causes of action, and they were triable in the circuit court, while the estate's cause of action was maintainable only by the new administrator, for the general benefit of creditors and the heirs of the estate, and was triable solely in the county court. Kontominas v. Popp, 256 W 169, 40 NW (2d) 512.

A complaint of a co-operative association against a canning company, alleging a cause of action for breach of contract based on 185.08 (5), Stats. 1949, and also alleging a cause of action in tort based on 185.08 (6), was not subject to demurrer on the ground of

improper joinder of causes of action, where such causes of action affected the same parties, who constituted all of the parties to the action, and did not require different places of trial and were stated separately. Cash Crops Co-op. v. Minnesota Valley C. Co. 257 W 619, 44 NW (2d) 563.

Where the primary object of the action was to enforce specific performance of an alleged contract, and other matters set up in the complaint were incidental and ancillary thereto, the complaint was not demurrable on the ground of setting forth separate and distinct causes of action. Holty v. Landauer, 264 W 463, 59 NW (2d) 679.

A complaint against a sales corporation and its president for failure to account for property coming into the defendants' possession as real estate brokers under a listing contract running to them whereby they were to sell a business property for the plaintiff, and for damages negligently caused by the defendants to the property when acting under the contract, is not subject to demurrer as improperly uniting causes of action or as failing to contain facts sufficient to constitute a cause of action. Laehn Coal & Wood Co. v. Clintonville Sales Corp. 267 W 471, 66 NW (2d) 199.

The test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief or objects sought, but is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. Even though individual plaintiffs may be unnecessarily joined as parties, this does not make the complaint subject to objection for misjoinder of causes of action. The fact that a cause of action at law is sought to be joined with one in equity does not of itself make the complaint demurrable. Minocqua Resort Asso. v. Stack, 271 W 472, 74 NW (2d) 142.

Where an equitable cause of action is asserted, many different kinds of relief may be demanded even though the different kinds of relief do not affect all of the parties to the action, so long as the relief is incidental, auxiliary, or germane to the principal controversy, and promotes the administration of justice and a complete determination of the controversy. The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. Whaling v. Stone Construction Co. 5 W (2d) 113, 92 NW (2d) 278.

Where a complaint by a minority stockholder and former director in separate corporations having the same controlling directors, against the corporations and the remaining controlling directors, and also against 2 of the latter as partners in a partnership in which the plaintiff was a member, asserted but one primary right or purpose, which was to seek an accounting from the plaintiff's business associates, and other relief sought was incidental, auxiliary, and germane to the principal controversy, it is deemed that the administration of justice will be best promoted by trying in one action the issues presented in the complaint, and hence an order overruling a demurrer based on the ground of improperly uniting several causes of action will be affirmed. Whaling v. Stone Construction Co. 5 W (2d) 113, 92 NW (2d) 278.

An unemancipated minor cannot maintain an action in tort against its parent or the parent's insurer for personal injuries sustained in an automobile accident due to the negligence of the parent. Since such a minor had a cause of action only against a county, it was improper to join her cause of action with the cause of action brought by her mother and involving an additional defendant. Schwenkhoff v. Farmers Mut. Auto. Ins. Co. 6 W (2d) 44, 93 NW (2d) 867.

There is no improper joinder of causes of action where the complaint alleges a cause of action for conspiracy involving 2 different elements of damage, where all of the parties are affected by the action. Mendelson v. Blatz Brew. Co. 9 W (2d) 487, 101 NW (2d) 805.

A complaint stating one cause of action for attractive nuisance and one for violation of the safe-place statute states only one cause of action for negligence. While the safe-place allegations should not be stated as a separate cause of action, the complaint is not demurrable. Thiel v. Bahr Construction Co. 13 W (2d) 196, 108 NW (2d) 573.

There was no misjoinder by pleading alternative causes of action, one on contract and the other on quantum meruit. Inconsistency, if any, between successive complaints does not make a later complaint vulnerable to demurrer, nor is a plaintiff estopped in drafting a new complaint merely because the new one is inconsistent with positions taken earlier. Kramer v. Stewart, 15 W (2d) 354, 112 NW (2d) 911.

In an action for injuries sustained by the plaintiff 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 the city lifeguard and the city recreational director parties defendant for their own negligence, was not demurrable by the city on the ground of misjoinder of causes of action. Rogers v. Oconomowoc, 16 W (2d) 621, 115 NW (2d) 635.

Where the primary action is to prevent construction and use of a slaughterhouse and rendering plant, issues may be joined which question the right to office of municipal officials and the validity of a zoning ordinance. Boerschinger v. Elkay Enterprises, Inc. 26 W (2d) 102, 132 NW (2d) 258, 133 NW (2d) 333.

Plaintiff cannot join in one cause of action 2 alleged tort-feasors for injuries resulting from 2 separate accidents 5 months apart on the claim that the trauma was single and indivisible. Caygill v. Ipsen, 27 W (2d) 578, 135 NW (2d) 284.

A complaint in a single action for personal injuries arising out of 2 successive autmobile accidents — the first occurring when the car in which plaintiff was a passenger was struck from the rear, and the second following thereafter when the ambulance in which she was being transported was struck by an-

other car—could not withstand demurrer because of improper joinder of causes of action against the alleged tort-feasor drivers (and their insurers) involved in both accidents, since the 2 causes of action improperly united as one did not affect all parties who were joined as defendants. Fitzwilliams v. O'Shaughnessy, 40 W (2d) 123, 161 NW (2d) 242.

263.04 and 260.10 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.

While 263.04 provides in part that causes of action otherwise properly united in the same complaint be separately stated, failure to do so is not fatal to the sufficiency of the complaint. Ledges Construction Co. v. Butler, 42 W (2d) 227, 166 NW (2d) 202.

A complaint by an attorney against 2 individuals and a corporation, seeking to recover a balance allegedly due for legal and accounting services rendered "at the special instance and request of the defendants", was not subject to challenge for misjoinder of several causes of action, for but one cause of action against all of the defendants was stated. Weinstein v. McCabe, 43 W (2d) 76, 168 NW (2d) 210.

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

What identifies a "cause of action"; joinders. Kenny, 50 MLR 101.

Joinder of consecutive tort-feasors. Strassburg, 52 MLR 568.

Joinder of causes of action in Wisconsin. Rotter, 1955 WLR 458.

6. No Cause of Action.

An allegation that a note "was duly presented, and duly protested for nonpayment," and "notice thereof duly given," is sufficient, without further statement of the manner of presentation. Frankfort Bank v. Countryman, 11 W 398.

A complaint against a defendant for not delivering goods received by him as a warehouseman, which contains no allegation that the goods belonged to the plaintiff, or that the defendant was under any obligation to deliver them to him, does not state a cause of action. Thurber v. Jones, 14 W 16.

An allegation that certain railroad companies were by law authorized to consolidate and did consolidate and become one corporation is sufficient without alleging the various steps of such consolidation. Collins v. Chicago, St. P. & F. du L. R. Co. 14 W 492.

Where a complaint for an injunction against the collection of a special tax alleges that the acts under which the tax was levied and assessed are unconstitutional a general demurrer raises the question whether such acts are valid. Howland v. Kenosha County, 19 W 247.

A matter of defense need not be stated in the complaint. Ruggles v. Fond du Lac, 53 W 436, 10 NW 565; Benedict v. German Ins. Co. 78 W 77, 47 NW 176; Street v. Johnson, 80 W 455, 50 NW 395. See also Potter v. Chicago & N. W. R. Co. 20 W 533; Cunningham v. Lyness, 22 W 251.

A complaint on a treasurer's bond which did not allege the receipt by him of taxes, but stated that he had not accounted for or paid them over, does not state facts constituting a breach. Wolff v. Stoddard, 25 W 503.

A complaint stating that plaintiff worked for the defendant at the agreed price of $26 per month was good without alleging a request. Joubert v. Carli, 26 W 594.

Facts and not legal conclusions or evidence are to be stated. Gunn v. Madigan, 28 W 158.

If any one of several counts in the complaint is good a general demurrer to a counterclaim does not reach the complaint. Noonan v. Orton, 30 W 356.

An allegation that a certain dam belongs to the class mentioned in a statute is a conclusion of law. Arimond v. Canal Co. 31 W 316.

When actual possession is a part of the cause of action it must be alleged. Wals v. Grosvenor, 31 W 681.

A statement that the party is the owner in fee is a sufficient averment of title. Wals v. Grosvenor, 31 W 681.

The allegation that the plaintiff is the owner and holder of the note sued on is sufficient. Reeve v. Fraker, 32 W 243.

In an action to restrain the collection of illegal taxes an averment that the lands in question were exempt is the statement of a conclusion of law. Quinney v. Stockbridge, 33 W 505.

A demurrer to a counterclaim or defense reaches back to an insufficient complaint, so that defendant may object that it states no cause of action. Dietrich v. Kock, 35 W 627; Lawton v. Howe, 14 W 241; Lawe v. Hyde, 39 W 355.

In an action by one town against another for pauper support, an averment that the person cared for was a pauper is a sufficient averment that he had no means of supporting himself; and an averment that he belonged to and had a settlement in the defendant town is a sufficient averment of a lawful settlement. Pine Valley v. Unity, 40 W 682.

An averment that a mistake in a will is apparent on the face thereof, without referring to any clause in the will which supports the averment, is a conclusion of law and is not confessed by a demurrer. Sherwood v. Sherwood, 45 W 357.

An allegation that a sheriff's failure to execute process was without fault on his part stated a legal conclusion. Elmore v. Hill, 46 W 618, 1 NW 235.

It is sufficient to plead the plaintiff's title in trespass and the presumption of possession follows. Leihy v. Ashland L. Co. 49 W 165, 5 NW 471.

The statement that a note is held either by one of the defendants, naming him, or by the other, followed by allegations that the former is the holder, states no cause of action against the latter. Leidersdorf v. Second Ward S. Bank, 50 W 406, 7 NW 306.

A general demurrer does not reach the ob-

jection that one defendant is not interested in one of the causes of action. Bronson v. Markey, 53 W 98, 10 NW 166.

An allegation that a mortgage was not delivered was a conclusion of law when it was admitted that it was delivered to the agent of the mortgagee. Conrad v. Schwamb, 53 W 372, 10 NW 395.

One of several defendants may demur on the ground that no cause of action is stated against him. Arzbacher v. Mayer, 53 W 380, 10 NW 440.

An allegation in a complaint against a husband and wife, to enforce a contract made by them jointly, stating that they were the owners of the land, is sufficient. Dreutzer v. Lawrence, 58 W 594, 17 NW 423.

In an action against plaintiff's principal, stating that he has converted the plaintiff's share of the crops to his own use and refused to deliver plaintiff's share to him, the cause of action was upon contract. Whereatt v. Ellis, 58 W 625, 17 NW 301.

In an action upon a fraudulent warranty where scienter is alleged the action is in tort. Sweeney v. Vroman, 60 W 278, 19 NW 46.

Mere general allegations of nonexistence or illegality or want of organization of a town are insufficient without a statement of the facts from which such conclusions may be drawn. Pratt v. Lincoln County, 61 W 62, 20 NW 726.

Where a promise and agreement are alleged it will be presumed that they were so made as to be valid. Griswold v. Wright, 61 W 195, 21 NW 44.

Where a complaint charged overpayments upon false and fraudulent accounts, and, in a separate count, payment by mistake of such sums, the cause of action was upon contract for money had and received. Fifield v. Sweeney, 62 W 204, 22 NW 416.

A complaint alleging the sale and delivery of property to the defendant at an agreed price, and demanding judgment for such price, is sufficient, although it does not allege that no part of the purchase price has been paid. Rossier v. Schultz, 62 W 655, 22 NW 839.

In an action on contract the complaint must contain an allegation that the contract was made, stating its substance or a clear statement of facts upon which a contract can be predicted. Martin v. Atkinson, 64 W 493, 25 NW 655.

Where money has been obtained by false representations the tort may be waived and recovery had upon implied contract. Western Ins. Co. v. Towle, 65 W 247, 26 NW 104.

In an action to oust a person from a school district office it is sufficient to allege the existence of the district in general words. A complaint alleging that defendant intruded into, usurped and is exercising the functions of the office is not demurrable. State ex rel. Ackerman v. Dahl, 65 W 510, 27 NW 343.

Allegations of a forcible entry and detainer of leased premises by the landlord show a cause of action in tort. Medcraft v. Dartt, 67 W 115, 30 NW 223, 31 NW 476.

In an action for personal injuries against a railroad company, where the cause of action depends upon plaintiff's ignorance of certain defects, the complaint need not aver ignorance of such defects, they being defensive matter. Cole v. Chicago & Northwestern R. Co. 67 W 272, 30 NW 600.

A sufficient statement of the insufficiency of a ladder upon a freight car was set out in the complaint. Carey v. Chicago & Northwestern R. Co. 67 W 608, 31 NW 163.

An allegation of a refusal is equivalent to an allegation of demand and refusal. Divan v. Loomis, 68 W 150, 31 NW 760.

Where the only averment directly affecting the question of negligence is that a person did an act negligently, or the opposite, such averment is one of fact. Washburn v. Chicago & Northwestern R. Co. 68 W 474, 32 NW 234.

An allegation that defendant procured plaintiff to sign a certain writing, without any consideration, falsely and fraudulently representing the writing to be a mere matter of form, or will and testament, is bad on demurrer. Riley v. Riley, 34 W 372; Landauer v. Vietor, 69 W 434, 34 NW 229.

In quo warranto the complaint need not allege that certain steps required in the preservation of ballots were taken, as it will be presumed that the officers performed their duty. State ex rel. Anderton v. Kempf, 69 W 470, 34 NW 226.

An allegation that a city intended to use certain property precisely as if it was a private corporation and had erected the same with its private corporate funds, was a mere conclusion from other facts alleged. Stone v. Oconomowoc, 71 W 155, 36 NW 829.

In an action upon an insurance policy the complaint need not show that the fire was the result of accident or misfortune, and not from any fraud or evil practice on the part of the assured. Bank of River Falls v. German Am. Ins. Co. 72 W 535, 40 NW 506.

An allegation that a contract of insurance was entered into for a valuable consideration is not a mere opinion of the pleader, but is a statement of the facts. Bank of River Falls v. German Am. Ins. Co. 72 W 535, 40 NW 506.

A complaint in an action to enforce a lien need not show that there are no other lien claims. Frederickson v. Riebsam, 72 W 587, 40 NW 501.

An action against a physician for malpractice is in tort where the gravamen of the action is the wrongful dereliction of duty, though the contract be stated by way of inducement. Nelson v. Harrington, 72 W 591, 40 NW 228.

In an action for injuries sustained from a defective sidewalk a general allegation that the walk was defective or out of repair at the place named, or at most stating briefly in what the defect consisted, is sufficient. Barney v. Hartford, 73 W 95, 40 NW 581.

An allegation of the wrongful conversion of money collected by a consignee does not render the action one of tort. Potter v. Van Norman, 73 W 339, 41 NW 524.

In foreclosure an allegation of transfer to the plaintiff, to the effect that the right, title and interest of the assignor in the contract and mortgage and in the amount due thereon had been sold, etc., is sufficient. Morris v. Peck, 73 W 482, 41 NW 623.

A complaint which sets forth facts constituting a cause of action at law does not make the action an equitable one because, in addi-

tion to praying for judgment for a specified sum, it asks "for such other or further order, judgment or relief as may be equitable." Bailey v. Aetna Ins. Co. 77 W 336, 46 NW 440.

The performance of conditions subsequent need not be alleged. Johnston v. Northwestern L. S. Ins. Co. 94 W 117, 68 NW 868. See also: Redman v. Aetna Ins. Co. 49 W 431, 4 NW 591; Schobacher v. Germantown F. M. Ins. Co. 59 W 86, 17 NW 969; Benedix v. German Ins. Co. 78 W 77, 47 NW 176.

A complaint in an action on a several contract which was not executed by all the persons named in the body of it as parties is good as against one who signed the contract if it is alleged that such person "for a good and valuable consideration made, executed and delivered to this plaintiff" the said contract. Taylor v. Coon, 79 W 76, 48 NW 123.

A complaint in an action on a contract indemnifying against loss must allege some payment made or some loss or damage sustained by plaintiff. Taylor v. Coon, 79 W 76, 48 NW 123.

The general rule that it is sufficient in pleading an act done by an agent as the act of the principal is not changed by the fact that the defendant has a class of agents, i. e., coemployes, for whose negligence he is not responsible. Lessard v. Northern P. R. Co. 81 W 189, 51 NW 321.

If the complaint against a carrier is the breach of its duty in negligently transporting the property the action was not on contract. Rideout v. Milwaukee L. S. & W. R. Co. 81 W 237, 51 NW 439.

An allegation that notice of a special town meeting was not posted in 3 of the most public places in the town is good. McVichie v. Knight, 82 W 137, 51 NW 1094.

General averments in a pleading are of no avail when inconsistent with facts specially averred in the same pleading. Stein v. Benedict, 83 W 603, 53 NW 891.

A complaint in an action to recover for the seduction of an adult imbecile child sufficiently shows that the relation of master and servant existed between her and her father by alleging her imbecility, that because thereof she had never been manumitted and that the plaintiff has the right to reclaim the services of his daughter at all times, etc. Hahn v. Cooper, 84 W 629, 54 NW 1022.

A complaint in an action based upon false representations is defective if it fails to allege that defendant knew or had reason to know that plaintiff was ignorant of the fact stated, or to allege that plaintiff was in fact induced to act on the representations. Sheldon v. Davidson, 85 W 138, 55 NW 161.

A complaint in an action to recover because of the breach of a contract to insure property must show a consideration. Stadler v. Trever, 86 W 42, 56 NW 187.

A demurrer by one defendant should be sustained if the complaint does not state a cause of action as to him. Cummings v. Town of Lake Realty Co. 86 W 382, 57 NW 43.

An allegation showing title in plaintiff, as assignee, to the notes sued on, and that he is the lawful owner and holder of them, shows a right to recover on the notes. Geilfuss v. Gates, 87 W 395, 58 NW 742.

In pleading an assignment required to be in writing it is sufficient to aver that such assignment was made, as this will be held to imply a valid assignment. Gunderson v. Thomas, 87 W 406, 58 NW 750.

A complaint based on the violation of a contract claimed to be void because in restraint of trade must show that the restraint was reasonable. Richards v. American D. & S. Co. 87 W 503, 58 NW 787.

Damages for mental suffering, if they result from a serious personal injury, are not special and need not be specially pleaded or proved. McCoy v. Milwaukee S. R. Co. 88 W 56, 59 NW 453.

If a complaint states facts sufficient to constitute a cause of action at common law for the flowing of lands, but not sufficient under the milldam act, it will be assumed that the intention was to plead the former notwithstanding the statement of matters immaterial to it. Irwin v. Richardson, 88 W 429, 60 NW 786.

A complaint which shows that the prosecution complained of was finally determined against plaintiff and which does not allege that the judgment was obtained by fraud, misrepresentation, deceit or circumvention practiced upon plaintiff is insufficient. Lawrence v. Cleary, 88 W 473, 60 NW 793.

If the presentation of a claim to a municipal body is made a condition precedent to the right of action performance of it must be alleged. Steltz v. Wausau, 88 W 618, 60 NW 1054.

Allegations of facts sufficient to constitute a cause of action for breach of an oral contract to renew a policy of insurance are not rendered insufficient because of a statement that, after such contract was made and before loss, the defendant's agent told plaintiff that the policy had been renewed. Schwahn v. Michigan F. & M. Ins. Co. 89 W 84, 61 NW 78.

The seal upon a bond imports consideration; hence it need not be alleged that the bond was executed upon a consideration. Northern A. Co. v. Hotchkiss, 90 W 415, 63 NW 1020.

All that is required is that the facts be stated so that they may be understood by the defendant, the jury and the court. Dishneau v. Newton, 91 W 199, 64 NW 879.

An action of conversion for money collected and converted is on contract in the absence of an allegation that the conversion was wrongful or unlawful. Casgrain v. Hamilton, 92 W 179, 66 NW 118.

An allegation that the attorney of a corporation, whose business included the making of loans to its members on real estate security, "by virtue of his office" was given a check payable to his order, which he was to deliver to a borrower as soon as the latter executed a mortgage, and that he converted the check to his own use, shows that he received the check by virtue of his office. Germania S. & B. Verein v. Flynn, 92 W 201, 66 NW 109.

A complaint in an action on a foreign judgment need not allege jurisdictional facts. Kunze v. Kunze, 94 W 54, 68 NW 391.

The complaint in an action for damages need not negative the lawfulness of the act which caused the injury. Miller v. Bayer, 94 W 123, 68 NW 869.

Compliance with conditions precedent to the right of action must be alleged. Boden v. Maher, 95 W 65, 69 NW 980.

A complaint in an action to recover for personal injuries is defective unless it directly alleges that the conduct complained of was the proximate cause of such injuries. Ean v. Chicago, M. & St. P. R. Co. 95 W 69, 69 NW 997.

A charter provision that no action in tort shall be maintained against a city unless a claim be presented to the council does not as to common-law causes of action make such presentation a condition precedent to the right of action but merely postpones the right to sue until the claim is presented. If the objection is not raised by proper pleading it is waived. Bunker v. Hudson, 122 W 43, 100 NW 448.

Allegations on belief of the existence or nonexistence of a public record, the truth of which is readily ascertainable, are not sufficient on demurrer. Steinberg v. Saltzman, 130 W 419, 110 NW 198.

In a creditor's bill it is a sufficient allegation of the exhaustion of a remedy at law to show that judgment was rendered and entered in an appropriate jurisdiction. Hyman v. Landry, 135 W 598, 116 NW 236.

A rule requiring in a creditor's action the pleading to state the amount actually and equitably due upon the judgment is sufficiently complied with by the usual allegations that the action was not brought by collusion, that execution was duly issued to enforce the judgment and that the same was returned wholly unsatisfied. Lehr v. Murphy, 136 W 92, 116 NW 893.

The question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against the defendants, cannot be raised by a demurrer under sec. 2649 (6). Kucera v. Kucera, 86 W 416, 57 NW 47; Wunderlich v. Chicago & Northwestern R. Co. 93 W 132, 66 NW 1144; Cummings v. C. W. Noble Co. 143 W 175, 126 NW 664.

A general demurrer should be overruled if any one of many items set out as grounds of recovery is well pleaded. Such a demurrer reaches all defects of the complaint, and any defect appearing cannot be aided by extrinsic facts, even though appearing in the record. Nelson v. Eau Claire, 175 W 387, 185 NW 168.

In an action to recover penalties for acting as employment agent for profit, without a license, the defendant, by demurring to the complaint, admitted that he had no license. State v. Howard W. Russell, Inc. 181 W 76, 194 NW 43.

Where a complaint consists of 3 causes of action, each cause must stand or fall on its allegations; and, unless allegations from preceding causes are expressly incorporated in the third cause, they do not become a part thereof. McGovern v. Eckhart, 192 W 558, 213 NW 332.

If it appears from the title of the case that one of the parties is a corporation or a partnership and there is no allegation in the pleadings to that effect, the omission cannot be reached by a general demurrer, but by a motion to make more definite and certain, or by special demurrer where the party objecting will be required to state the grounds of his objection. Young v. Juneau County, 192 W 646, 212 NW 295.

A plea in abatement cannot be raised by demurrer. Stephens v. Wheeler, 193 W 164, 213 NW 464.

The objection that a pleader in equity has an adequate remedy at law cannot be raised by a demurrer, as the objection is not one of the grounds specified by the statute. McIntyre v. Carroll, 193 W 382, 214 NW 366.

The pleader does not comply with the statute when, in order to sustain the pleading, inferences based on inferences must be resorted to to spell out the indispensable allegations of fact. Bergmann v. Roll, 195 W 120, 217 NW 746.

The complaint must inform the court regarding facts from which a resulting injury has sprung. Defendant cannot by demurrer compel plaintiff to set up and anticipate defenses as part of complaint. Flambeau River L. Co. v. Lake Superior D. P. Co. 200 W 31, 227 NW 276.

The mere want of detail or precision in allegations which are not challenged by a motion to make more definite and certain do not go to their sufficiency on demurrer; and allegations that salary increases were "excessive and unreasonable" or "unlawful" were mixed conclusions of fact and law in view of the facts stated, affording some basis for such conclusions, and were properly pleaded according to their legal effect. Thauer v. Gaebler, 202 W 296, 232 NW 561.

A defendant by answering of 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.

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 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.

For a complaint which attempts but fails to allege libel, see 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 the 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. Elmor R. Co. v. Community Theatres, 208 W 76, 241 NW 632.

A 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 a cause of action. Madison v. Schott, 211 W 23, 247 NW 527.

A motion to dismiss a complaint for want of equity is equivalent to demurrer on the ground the complaint fails to state a 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.

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.

A 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; 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. 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.

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 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 answer, where failure of the electors to authorize the action did not appear 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. Woods v. Sentinel-News Co. 216 W 627, 258 NW 166.

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

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

A final judgment rendered upon the merits without fraud or collusion by a 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 & Co. 219 W 6, 261 NW 672.

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 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 Wisconsin Trust Co. v. State, 221 W 215, 265 NW 229.

On demurrer to the complaint in an original action for a declaratory judgment the 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 Comm. 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 assets, 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.

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, 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 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 as insufficiently alleging proximate cause. Nicolai v. Wisconsin P. & L. Co. 222 W 605, 269 NW 281.

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. Dept. 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.

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

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 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 Ind. 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, subject to outstanding listed debts against the business, and that the plaintiff was a creditor for a listed debt, stated a cause of action to charge the property with a lien, and was not demurrable. 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 10% of their salaries 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.

A complaint alleging the plaintiff's execution of a mortgage note to the defendants, one defendant's possession of the note and mortgage, the plaintiff's readiness and offer to pay in full to both defendants, one defendant's claim to 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 the entire interest and refusal to release except on payment of the full amount to her, and the plaintiff's inability to pay because of the dispute between the defendants, and seeking judgment determining the matter and directing the plaintiff to pay to the proper parties, stated facts sufficient to constitute a cause of action. Foljahn v. Wiener, 233 W 359, 289 NW 609.

Allegations of the mortgagor's complaint, that the defendant county judge colluded with the sheriff and the mortgagees in a 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, and 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 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 allegations that such was not the case, the complaint was demurrable 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.

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 defective, import into it allegations contained in another pleading. Ryan v. First Nat. Bank & Trust Co. 236 W 226, 294 NW 832.

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.

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 P. & L. Co. 242 W 434, 8 NW (2d) 272.

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, will not sustain an action for malicious prosecution. 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. Baraboo Nat. Bank v. Corcoran, 243 W 386, 10 NW (2d) 112.

Where the first cause of action alleged is good, a second cause of action, re-alleging 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.

Where a cause of action depends on a statute, the constitutionality of that statute may be raised by a demurrer. Ocean A. & G. Corp. v. Poulsen, 244 W 286, 12 NW (2d) 129. See also: Ritholz v. Johnson, 244 W 494, 12 NW (2d) 738, and State v. Texaco, 14 W (2d) 625, 111 NW (2d) 918.

The sufficiency of the facts alleged in the amended complaint to constitute a cause of action must be determined solely on its allegations. The facts appearing in the original complaint cannot be considered in passing on a demurrer to the amended complaint. Larson v. Equity Co-op. Elevator Co. 248 W 132, 21 NW (2d) 253.

A demurrer will not lie to mere surplusage, to a sentence or 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.

A motion to quash an alternative writ of mandamus is regarded as a 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.

See note to 133.01, citing State v. Golden Guernsey Dairy Co-operative, 257 W 254, 43 NW (2d) 61.

In pleading negligence and setting forth the facts constituting the alleged negligence, only ultimate facts and not matters of evidence should be pleaded; but the pleading is sufficient if it fairly informs the opposite party of what he is called on to meet by alleging the specific acts which resulted in injury, and includes a general statement that the defendant negligently performed the acts complained of. In actions against an employer and his employes for injuries sustained by the owner of a residence in falling when a porch railing which the defendant employer had contracted to repair broke and gave way, the complaint in each case sufficiently stated a cause of action in tort, although some of the allegations were on information and belief. Colton v. Foulkes, 259 W 142, 47 NW (2d) 901.

In an action to enjoin the issuance of housing bonds by a housing authority on the ground that 66.40 is contrary to sec. 1, art. XI, allegations of the complaint, together with attached exhibits, disclosing that the proposed housing project does not contemplate the construction of accommodations for persons of low income or for slum clearance, the 2 purposes for which the law was created, must be considered as verities on a general demurrer to the complaint, requiring that such demurrer be overruled. Jolly v. Greendale Housing Authority, 259 W 407, 49 NW (2d) 191.

A complaint for damages, alleging that the defendant village marshal was being proceeded against in his official capacity, and that such defendant while acting as village marshal made an unlawful and wilful assault on the plaintiff, but that the defendant acted in good faith, believing that he was carrying out his duty as a police officer, stated a cause of action against such defendant in his official capacity. The allegation as to such defendant being proceeded against "in his official capacity" is not properly subject to criticism for being merely a conclusion of law. The question of inconsistency or repugnancy in the allegations of "wilful" or "unlawful" assault "in good faith" is one for the court or jury to determine before the municipality can be held liable under 270.58 for the payment of a judgment against the defendant village marshal. Larson v. Lester, 259 W 440, 49 NW (2d) 414.

In shifting from ordinary negligence in the first complaint, served within the 2-year period for the service of notice of claim for injury, to gross negligence in the amended complaint after the 2-year period, whether there was intent to mislead or actual misleading of the defendant is a question of fact to be resolved on a trial, not on demurrer or motion for summary judgment. Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

A complaint against a corporation and its stockholders to recover damages for breach of a contract, alleging an agreement with the individual defendants whereby the plaintiff took part in promoting, developing and organizing the corporation and was to receive for his services 50 of the shares of its stock on its final organization, and alleging that the plaintiff's services to the corporation were of great value, and that the plaintiff demanded his shares of stock, but that the defendants refused to recognize any rights of the plaintiff therein or to issue or transfer any stock to him, was good as against a general demurrer thereto. Conway v. Marachowsky, 262 W 540, 55 NW (2d) 909.

A complaint in an action to recover for the death of a child who was drowned in a swimming pool owned and operated by the defendant city, so far as alleging that the city was operating the pool for profit in its proprietary capacity, and alleging certain negligent acts of the agents of the city, stated a cause of action

as against demurrer. Flesch v. Lancaster, 264 W 234, 58 NW (2d) 710.

A complaint against a telephone company to recover for a loss of merchandise destroyed by fire in a building occupied by the plaintiffs, alleging among other things, that an unnamed person discovered the fire and immediately called the defendant's operator and advised her of the fire and its location for the purpose of communicating such facts to the city fire department, that the fire department was a subscriber to telephone service from the defendant and that the defendant held out to the public that warning of the existence of a fire might be given by anyone having access to a telephone by obtaining a connection through the defendant's telephone exchange so as to so inform the fire department, and that the defendant was negligent in that its operator unduly delayed in answering the telephone and failed and refused to make a connection with the fire department or notify it of the fire, stated a cause of action as against demurrer. Christenson & Arndt, Inc. v. Wisconsin Tel. Co. 264 W 238, 58 NW (2d) 682.

Allegations in a complaint, concerning the legislative intent in enacting a statute, are conclusions not admitted by demurrer, and are not binding on the courts, which may search for the purpose of the legislature without restriction. Mitchell v. Horicon, 264 W 350, 59 NW (2d) 469.

A demurrer to a complaint admits all the facts therein well pleaded, but it does not admit erroneous conclusions drawn from such facts by the pleader even though the conclusions bear the semblance of statements of fact. Olsen v. Ortell, 264 W 468, 59 NW (2d) 473.

An allegation that the wife has or claims to have some lien on the property must be considered a mere conclusion of law in view of the true facts set forth in the complaint. Olsen v. Ortell, 264 W 468, 59 NW (2d) 473.

Allegations of defendant's fraud in obtaining a judgment on a note were conclusions of law which raised no issue and did not state facts sufficient to constitute a cause of action. O'Brien v. Hessman, 265 W 63, 60 NW (2d) 719.

Where a corporation which sold accounts receivable to the plaintiff bank agreed in writing that if the corporation was adjudged bankrupt it would pay plaintiff the amount of all unpaid accounts, there was created a contingent liability on the corporation's part which became absolute when the corporation was adjudged bankrupt, making the debts represented by the accounts those of the corporation and not merely of its debtors; and the complaint stated a cause of action against defendants who had guaranteed payment of the debts and contingent liabilities of the corporation to the bank. Bank of America Nat. Trust & Sav. Asso. v. Burhans, 265 W 108, 60 NW (2d) 725.

A complaint for damages sustained by the defendant's breach of duty to the plaintiff, alleging that the defendant, as attorney for the plaintiff, made the highest bid for certain property sold at sheriff's sale, and that the defendant knew that the property was being sold subject to real estate taxes and other existing liens, but did not disclose the existence of such liens until after the plaintiff ratified the bid, was fatally defective in failing to allege that the plaintiff relied on the defendant to disclose all information the latter possessed with regard to the property or that the concealment was a moving inducement to the plaintiff's ratification of the bid. Laehn Coal & Wood Co. v. Koehler, 267 W 297, 64 NW (2d) 823.

A complaint alleging that the plaintiff consulted with the defendant as its attorney with respect to disposing of certain real estate and that the defendant recommended that the plaintiff employ a certain corporation, in order to benefit the defendant as a stockholder and officer thereof, in violation of his duty to advise solely on the basis of the plaintiff's best interest, was fatally defective in failing to allege that any acts of the defendant, as distinguished from acts of the corporation, were the proximate cause of injury to the plaintiff. Laehn Coal & Wood Co. v. Koehler, 267 W 297, 64 NW (2d) 823.

A complaint, containing an allegation which was merely a statement of an opinion that the lease was entered into by the city without proper resolution or adoption, and not citing any statute that had been violated, and not alleging fraud or bad faith on the part of the city officials, was subject to demurrer. Kranjec v. West Allis, 267 W 430, 66 NW (2d) 178.

In the husband's stated cause of action for care and medical expenses for the wife, recitals that he had been obliged to furnish such care and medical expenses were not mere conclusions of law, there being a presumption that the wife's medical expenses, etc., were incurred by him in accordance with his duty to his wife. (Palmisano v. Century Ind. Co. 225 W 582, distinguished.) Olson v. Johnson, 267 W 462, 66 NW (2d) 346.

An allegation in a complaint against a town and a utility district, that the action of the district in changing the grade of a town highway was illegal, was a conclusion of law, not admitted by demurrer. Zache v. West Bend, 268 W 291, 67 NW (2d) 301.

When the sufficiency of a complaint is challenged by demurrer, every reasonable intendment and presumption is to be made in favor of the complaint, and the plaintiff is entitled to all reasonable inferences which can be drawn from the facts pleaded. Conrad v. Evans, 269 W 387, 69 NW (2d) 478.

Required allegations in a complaint based on attractive nuisance are set forth in Nechodomu v. Lindstrom, 269 W 455, 69 NW (2d) 608.

A demurrer to a libel complaint admitted that the words were published as alleged therein, but did not admit the meaning which the plaintiffs ascribed to them. Meier v. Meurer, 8 W (2d) 24, 98 NW (2d) 411.

A cause of action for malicious prosecution is not stated by a complaint which does not allege interference with either the plaintiff's person or his property inflicting special damage to him, and an allegation that the plaintiff incurred expense in defending himself against the prosecution alleged to be malicious is not an allegation of such special damage within the contemplation of law. Schier v. Denny, 9 W (2d) 340, 101 NW (2d) 35.

Unless a proceeding instituted before an administrative agency causes the agency to take some action that directly interferes with the person or property of the party complained against, there can be no special damages recoverable in an action for malicious prosecution grounded on such proceeding. Schier v. Denny, 12 W (2d) 544, 107 NW (2d) 611.

The constitutionality of a statute may be raised by general demurrer where a cause of action depends on that statute, but whether this court, when confronted with an issue of the constitutionality of a statute, will require a judicial investigation through trial of facts, or whether it will inform itself through an independent research and the taking of judicial notice, lies entirely within the court's sound discretion. State v. Texaco, 14 W (2d) 625, 111 NW (2d) 918.

An allegation in the complaint, that a judgment was entered "without authority of law," is a conclusion of law which a demurrer does not admit, as is also an allegation that "said judgment is void." Barrett v. Pepoon, 19 W (2d) 360, 120 NW (2d) 149.

In an action for damages against a union for failure to represent plaintiff against discharge by the employer, the complaint is demurrable unless it alleges an exhaustion of remedies within the union. Cheese v. Afram Brothers Co. 32 W (2d) 320, 145 NW (2d) 716.

It is fundamental for the purpose of examining a complaint challenged by demurrer that the facts stated therein are assumed to be true, and the complaint must be liberally construed in a determination of whether its facts are sufficient to state a cause of action. Volk v. McCormick, 41 W (2d) 654, 165 NW (2d) 185.

Where the sufficiency of a complaint for libel is challenged on demurrer, the demurrer must be sustained if the communication cannot reasonably be considered defamatory or to be so understood. In determining whether the language complained of is defamatory, the words must be reasonably interpreted and must be construed in the plain and popular sense in which they were used and the circumstances under which they were uttered. Waldo v. Journal Co. 45 W (2d) 203, 172 NW (2d) 686.

7. Statute of Limitation.

A demurrer on the ground that the statute has run cannot be sustained by the mere fact that the complaint was verified after the statute had fully run; and no fact dehors the complaint, though appearing from the record, will be considered. Zaegel v. Kuster, 51 W 31, 7 NW 781; Smith v. Janesville, 52 W 680, 9 NW 789.

Where the allegation is that an act was done on a certain day the presumption is that the action was commenced thereafter. Prentice v. Ashland County, 56 W 345, 14 NW 297.

The rule that, to be available, the statute of limitations must be pleaded, applies only to cases in which there is an opportunity for such pleading. Dreutzer v. Baker, 60 W 179, 18 NW 776.

On demurrer to a complaint that the action was not commenced within the time limited by law, the return of the officer as to the time of serving the summons cannot be resorted to for fixing the time when the action was begun. O'Dell v. Burnham, 61 W 562, 21 NW 635.

An averment that a demand for services rendered between September 1 and December 1, 1873, "became due sometime in September, 1884," is a conclusion of law on a demurrer setting up the statute of limitations. Tucker v. Lovejoy, 73 W 66, 40 NW 627.

A demurrer cannot be aided by facts in the record which do not appear in the complaint. Benedix v. German Ins. Co. 78 W 77, 47 NW 176.

Admission of service upon the back of the summons and complaint cannot be considered upon a demurrer. Anderson v. Douglas Co. 98 W 393, 74 NW 109.

In demurring under sec. 2649 (7), Stats. 1898, it is necessary that a reference to a particular section, or subdivision of a section applicable to the case, be given to satisfy the statute. Whereatt v. Worth, 108 W 291, 84 NW 441.

Although the requirement of sec. 4222, Stats. 1898, that notice be given of injury is in the nature of a statute of limitations rather than a condition precedent, yet such objection cannot be raised by demurrer under sec. 2649 (7), but must be by answer. Troschansky v. Milwaukee E. R. & L. Co. 110 W 570, 86 NW 156.

To sustain a demurrer on the ground of the statute of limitations it must appear that the whole right of action is barred. State ex rel. Attorney General v. Norcross, 132 W 534, 112 NW 40.

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

Under 263.06 (7) it is proper to demur when it appears from the face of the affirmative pleading attacked that the opposing party has been in adverse possession of the subject real property for the limitation period. Marky Investment v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

If the defense of the statute of limitations is to be raised upon demurrer, the basis must appear on the face of the complaint and the ground must be expressly stated in the demurrer. Peters v. Peters Auto Sales, Inc. 37 W (2d) 346, 155 NW (2d) 85.

8. Procedure in Demurring.

A demurrer to relator's answer to the return in mandamus is treated as a demurrer to the relation. State ex rel. Cuppel v. Chamber of Commerce, 47 W 670, 3 NW 760. See also State ex rel. Orton v. McArthur, 23 W 427.

It is irregular to file 2 demurrers to the same pleading without leave, but if done without objection both are treated as a single demurrer for all the causes alleged in them. Hackett v. Carter, 38 W 394.

Upon the return to a writ of habeas corpus a motion to discharge the prisoner is in fact a demurrer and the return must be treated as a verity. In re Milburn, 59 W 24, 17 NW 965.

A complaint is not demurrable by reason of any fact which appears only by the verification. Gage v. Wayland, 67 W 566, 31 NW 108.

A "demurrer by way of answer" is not a pleading authorized by the code. Smith v. Kibling, 97 W 205, 72 NW 869.

A motion to strike out part of an answer cannot be treated as a demurrer, and the rule that a pleading reaches back to the first defective pleading is applicable. Smith v. Kibling, 97 W 205, 72 NW 869.

A party has a right to rely upon the copy of the pleading served upon him as being a true copy, and for the purposes of his demurrer that copy and not the original on file will be considered the pleading demurred to. Hunt v. Miller, 101 W 583, 77 NW 874.

Where a complaint, in each of several separately stated causes of action, shows a breach of the same primary right, it in fact pleads but a single cause of action, although there may be alleged several minor matters constituting independent grounds for relief, and demurrers to each of said causes of action except the first should have been sustained. Matson v. Dane County, 172 W 522, 179 NW 774.

A demurrer admits all facts well pleaded, but does not admit erroneous conclusions drawn from such facts by the pleader, though given the appearance of statements of fact. Northwestern Mut. Life Ins. Co. v. State, 173 W 119, 180 NW 138.

A demurrer to the plaintiff's reply reached back to test the counterclaim. Ireland v. Tomahawk L. T. & I. Co. 185 W 148, 200 NW 642.

Upon a demurrer to a complaint the facts alleged are controlling and recourse cannot be had to a supposed state of facts. Cochrane v. C. Hennecke Co. 186 W 149, 202 NW 199.

Where objections are raised to a pleading which may be remedied by a motion to make more definite and certain a demurrer will not lie. Lawver v. Lynch, 191 W 99, 210 NW 410.

Defendants by answering waived their right of appeal from an order overruling a demurrer. Seideman v. Sheboygan L. & T. Co. 198 W 97, 223 NW 430.

On demurrer, each defense to which demurrer is interposed must stand on its own allegations. Integrity S. B. & L. Asso. v. Nixdorf, 198 W 139, 223 NW 433.

For the distinction between demurrer and summary judgment see Fredrickson v. Kabat, 260 W 201, 50 NW (2d) 381.

The pleadings and affidavits on the plaintiff's motion for summary judgment in an action to recover on a promissory note presented issues of fact which could not be determined on such a motion. The sufficiency of a pleading is not determined on a motion for summary judgment where it appears that issues of fact are presented. Schneeberger v. Dugan, 261 W 177, 52 NW (2d) 150.

Successive demurrers on the same ground to the same pleading cannot be permitted if pending actions are to be disposed of. A holding of the supreme court, on a former appeal from an order overruling a demurrer to the complaint of a wife suing her husband for injuries received while a passenger in an automobile driven by him in New Mexico, that the plaintiff had pleaded a cause of action under the law of New Mexico, became the law of the case on a subsequent appeal from an order overruling a second demurrer to the complaint on the same ground. Nelson v. American Employers' Ins. Co. 262 W 271, 55 NW (2d) 13.

The right to demur is not guaranteed by the constitution but is a matter of procedure. Gray Well Drilling Co. v. State Board of Health, 263 W 417, 53 NW (2d) 64.

A demurrer admits all facts well pleaded in the complaint to which it is interposed, but it does not admit mere propositions of law which may be set forth therein. Miller v. Welworth Theatres, 272 W 355, 75 NW (2d) 286.

A landowner's demurrer to a condemnation petition presented to a judge by a municipality pursuant to 32.04, Stats. 1955, is not a proper pleading. Madison v. Tiedeman, 1 W (2d) 136, 83 NW (2d) 694.

A demurrer is not to be used as a substitute for a motion to make the answer more definite and certain, nor for a demand to admit or refuse to admit in writing the existence of any material fact, nor for a discovery examination. Boek v. Wagner, 1 W (2d) 337, 83 NW (2d) 916.

Although the general rule is that on demurrer a court ordinarily is limited to consideration of the pleading demurred to and may not look to other instruments or documents not forming part of such pleading, an exception to such rule exists in a situation where the other pleading resorted to is contained in the same document as the pleading demurred to and is subscribed or verified by the same party, or parties, as the latter pleading. Marky Investment, Inc. v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

A prayer for relief is no substantive part of a complaint, and the fact that the plaintiff asks for more relief than that which his pleaded facts entitle him to have is not reached by demurrer. D'Angelo v. Cornell P. P. Co. 19 W (2d) 390, 120 NW (2d) 70. See also Estate of Mayor, 26 W (2d) 671, 133 NW (2d) 322.

9. Attempt to Demur on Nonstatutory Ground.

The objection that plaintiff had an adequate and exclusive remedy in proceedings pending in another forum is not one which can be raised by demurrer, as no such ground appears in the statute. Hill v. American S. Co. 107 W 19, 81 NW 1024, 82 NW 691.

Under 263.06 (1), Stats. 1925, providing that a complaint is demurrable for lack of jurisdiction of the subject of the action, defendant cannot add to his demurrer the words "because plaintiff has an adequate and complete remedy at law", not found in the statute, and thus add a substantial element to the specified grounds of demurrer. McIntyre v. Carroll, 193 W 382, 214 NW 366.

263.07 History: 1911 c. 354; Stats. 1911 s. 2649a; 1925 c. 4; Stats. 1925 s. 263.07.

Where the complaint prayed for strict foreclosure and it appeared that a deed was in fact a mortgage so that the plaintiff was entitled to a statutory foreclosure, a demurrer was properly overruled. Von Oehsen v. Brown, 148 W 236, 134 NW 377.

On a general demurrer, the allegations of the complaint must be construed most favorably to the plaintiff. Lewko v. Chas. A. Krause M. Co. 179 W 83, 190 NW 924.

If on any reasonable theory the facts stated in a complaint justify a recovery, a general demurrer must be overruled. Olson v. Skroch, 182 W 448, 196 NW 767.

Under sec. 2649a, created by ch. 354, Laws 1911, it is not a requisite to secure relief formerly denominated equitable that a complaint show that adequate legal remedies do not exist. A complaint is good if it appears that the plaintiff is entitled to some measure of judicial redress. McIntyre v. Carroll, 193 W 382, 214 NW 366.

A complaint which alleges breach of a contract wherein the defendant promised to bid enough on a foreclosure to protect a plaintiff if they acquired a mortgage, states a cause of action. Such contract is not breached prior to the 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.

A demurrer to a complaint for specific performance of a land contract cannot be sustained because the remedy of specific performance is discretionary with the court, where plaintiff was entitled to other relief under allegations of the complaint. Big Bay R. Co. v. Rosenberg, 212 W 33, 248 NW 782.

Where plaintiff made a partnership the sole party defendant, and where complaint was insufficient as against the partnership, although it may have been sufficient as against one of partners, a demurrer on behalf the partnership should have been sustained. 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, and hence the complaint is good as against his 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.

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.

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 motion is in substance a general demurrer, is properly denied if the petition sets out facts entitling the plaintiff to some form of relief, irrespective of whether it shows that he is entitled to a writ of mandamus. State ex rel. Dame v. LeFevre, 251 W 146, 28 NW (2d) 349.

As a general rule, in pleading negligence, only ultimate facts rather than evidentiary facts need to be pleaded. A complaint, when attacked by demurrer, should be liberally construed, and sustained if it expressly, or by reasonable inference, states any cause of action. Bembinster v. Aero Auto Parts, 7 W (2d) 54, 95 NW (2d) 778.

263.08 History: 1856 c. 120 s. 50, 57; R. S. 1858 c. 125 s. 6, 13; R. S. 1878 s. 2650; Stats. 1898 s. 2650; 1925 c. 4; Stats. 1925 s. 263.08.

A demurrer does not lie to a part of a cause of action. Vorvilas v. Vorvilas, 252 W 333, 31 NW (2d) 586; Blooming Grove v. Madison, 5 W (2d) 73, 92 NW (2d) 224.

A motion to strike a portion of a complaint is not the equivalent of a demurrer, because it does not seek to strike the whole or entirety of the cause of action stated in the pleading. Glomstead v. Chicago & N. W. Ry. 40 W (2d) 675, 162 NW (2d) 630.

263.09 History: 1856 c. 120 s. 50; R. S. 1858 c. 125 s. 6; R. S. 1878 s. 2651; Stats. 1898 s. 2651; 1925 c. 4; Stats. 1925 s. 263.09; Sup. Ct. Order, 271 W viii.

Revisers' Note, 1878: First sentence of section 6, chapter 125, R. S. 1858, amended to require the statement of the grounds of objection to be more particular than the language of section 2649, in case it is based on the statute of limitations or on the want of capacity to sue, or a defect of parties, in accordance with decisions.

A demurrer to the answer to a complaint in an action to cancel tax certificates on the ground "that the action was not commenced within the time limited by law by sec. 7, ch. 334, laws of Wisconsin for 1878," was a sufficient reference to the statute. Clarke v. Lincoln County, 54 W 578, 12 NW 20.

A demurrer upon the ground that there is a defect of parties plaintiff is not good if it fails to give a particular statement of the defect complained of. Gunderson v. Thomas, 87 W 406, 58 NW 750.

It is sufficient to plead the section of the statutes relied upon. Any subdivision of such section may be taken advantage of. Kuhl v. Chicago & N. W. R. Co. 101 W 42, 77 NW 155.

A demurrer raising the statute of limitations will not be considered if it fails to refer to the statute relied on. Whereatt v. Worth, 108 W 291, 84 NW 441.

A demurrer failing to point out defect of parties is insufficient. White v. White, 132 W 121, 111 NW 1116.

A demurrer which reads "that there is a nonjoinder of necessary parties plaintiff" is insufficient. Wilcox v. Scanlon, 133 W 521, 113 NW 948.

The grounds of demurrer are sufficiently stated if the complaint in an action to determine and quiet title against a company states that a large number of notes taken by the company had been sold to the plaintiff, and that duplicates of the notes had been sold to other parties who were collecting payments from the makers, the demurrer being for a defect of parties. Since the makers may

safely make payments to the party adjudged to be the lawful owner there is no apparent necessity for such makers to be made parties and a defect, if there be one, does not appear on the face of the complaint, and the objection should be taken by answer under sec. 2653, Stats. 1913. Franke v. H. P. Nelson Co. 157 W 241, 147 NW 13.

A demurrer is an entity, and its grounds are separate and not joint, and it should be sustained if any of its grounds presented is good. 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 History: 1856 c. 120 s. 51; R. S. 1858 c. 125 s. 7; R. S. 1878 s. 2652; Stats. 1898 s. 2652; 1925 c. 4; Stats. 1925 s. 263.10.

If an amended answer be not served the original stands as the answer to the amended complaint. Knips v. Stefan, 50 W 286, 6 NW 877.

See note to 270.145, citing Gunnison v. Kaufmann, 271 W 113, 72 NW (2d) 706.

Where plaintiff failed to plead over and judgment on the merits was entered, the judgment is res adjudicata. O'Brien v. Hessman, 16 W (2d) 455, 114 NW (2d) 834.

263.11 History: 1856 c. 120 s. 52; R. S. 1858 c. 125 s. 8; R. S. 1878 s. 2653; Stats. 1898 s. 2653; 1925 c. 4; Stats. 1925 s. 263.11.

On contents of the answer see notes to 266.13.

On demurrer to the complaint, the court is aware only of the facts stated in the complaint. Matters relied on by the defendant, where not appearing in 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.

Where the defect of parties plaintiff did not appear on the face of the pleadings, a demurrer would not lie and the objection was properly raised by the answer, as required by 263.11. Truesdell v. Roach, 11 W (2d) 492, 105 NW (2d) 871. See also Bottomley v. Bottomley, 38 W (2d) 150, 156 NW (2d) 447.

263.12 History: 1856 c. 120 s. 53; R. S. 1858 c. 125 s. 9; R. S. 1878 s. 2654; Stats. 1898 s. 2654; 1925 c. 4; Stats. 1925 s. 263.12; 1935 c. 541 s. 32; Sup. Ct. Order, 265 W vi; Sup. Ct. Order, 271 W viii; 1961 c. 33, 622.

If no objection to misjoinder be taken it is waived. Cary v. Wheeler, 14 W 281.

If none of the objections enumerated in sec. 2649, R. S. 1878, be taken either by demurrer or answer, the defendant is deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and to the sufficiency of the facts stated to constitute a cause of action. Jones v. Foster, 67 W 296, 30 NW 697.

Where the ownership and value of chattels and their unlawful conversion and disposition by the defendant to the damage of the plaintiff are alleged, the failure to allege their possession by plaintiff or his immediate right of possession is immaterial after a trial involving the question of title. Brinkley v. Walker, 68 W 563, 32 NW 773.

The objection that there is no jurisdiction to restrain the enforcement of a judgment in a second action brought for that purpose is properly raised by the demurrer of one whose presence as a party is indispensable to the relief sought by plaintiff. Stein v. Benedict, 83 W 603, 53 NW 891.

By failing to plead a defect of parties defendant a defendant whose liability was joint waives the right to object to the judgment against him on the ground that it should have been joint. Evens & Howard F. B. Co. v. Hadfield, 93 W 665, 68 NW 395, 468.

The objection that an action for the benefit of a minor cannot be maintained in his name by his general guardian is waived unless taken by demurrer or answer. Webber v. Ward, 94 W 605, 69 NW 349.

The objection that the complaint fails to state a cause of action cannot be raised for the first time on appeal. Bigelow v. Washburn, 98 W 553, 74 NW 362.

A defendant personally served and not appearing cannot raise the objection that the complaint does not state facts sufficient to constitute a cause of action against him for personal liability for the first time in the supreme court, especially where the complaint is sufficient to inform him that the plaintiff claims such liability. Richards v. Land & R. I. Co. 99 W 625, 75 NW 401.

Where a demurrer for defect of parties fails to state whether such defect is in the omission of a party plaintiff or defendant or to name the person who should be made a party, the objection is waived, but where it appears that a complete determination of the controversy cannot be had without the presence of other parties, such other parties should be brought in under sec. 2610, Stats. 1898. Emerson v. Schwindt, 108 W 167, 84 NW 186.

The failure to demur for multifariousness does not waive the objection where the complaint does not seek to join actions but where evidence is offered tending to support an additional cause of action and not until such evidence is offered does the duty to object arise. Luther v. C. J. Luther Co. 118 W 112, 94 NW 69.

An objection that one of the plaintiffs is a minor and no guardian ad litem has been appointed must be taken by demurrer or answer. Fey v. I. O. O. F. M. L. Ins. Society, 120 W 358, 98 NW 206.

Sec. 2654, Stats. 1898, does not prevent the bringing in of necessary parties under sec. 2610. McDougald v. New Richmond R. M. Co. 125 W 121, 103 NW 244.

Where an action is brought by a guardian, an objection that the cause of action is in favor of the ward alone cannot be raised after answer. Randall v. Lonstorf, 126 W 147, 105 NW 663.

Where an action was brought by a guardian ad litem and it was alleged in the complaint that such guardian was duly appointed, failure to take the objection as to the regularity of such appointment by the answer waived

the right to object. Hughes v. St. P. M. & O. R. Co. 126 W 525, 106 NW 526.

The defendants, who answered the original complaints in actions subsequently consolidated, waived the right to demur on the ground that the amended complaint involved improper uniting of causes of action. Wahl v. Kelly, 194 W 559, 217 NW 307.

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.

On waiver by defendant of defect of plaintiffs, see Estate of Nitka, 208 W 181, 242 NW 504.

In an action on bonds secured by a trust deed, where plaintiff was the holder of all outstanding bonds and her title was admitted, objection to plaintiff's failure to allege demand on the trustee to sue, which was required by the trust deed, was waived by defendant's failure to raise objection by demurrer or answer. Wasielewski v. Racke, 225 W 245, 273 NW 819.

An objection that the defendant's wife was a necessary party to the foreclosure of a mechanic's lien, since the record showed the premises to be the defendant's homestead, was waived by failure to raise the matter either by demurrer or by answer. Sterba v. Klevisha, 253 W 15, 33 NW (2d) 173.

Where a complaint of an automobile guest against her host for injuries sustained in a collision sounded wholly in tort, and the defendant host's answer raised no contractual questions, a claim that there was a contractual or consensual relationship between guest and host requiring an allegation of breach of a contractual duty, and a motion to require the plaintiff to elect whether her remedy be in tort or in contract, were properly overruled. Whirry v. Rural Mut. Cas. Ins. Co. 267 W 302, 64 NW (2d) 841.

A defect of parties is waived by failure to assert it by answer or demurrer. Blooming Grove v. Madison, 275 W 328, 81 NW (2d) 713.

A guardian ad litem for defendant minors is not a party to the action, and he is not required as such guardian to demur to the complaint, or interpose a verified answer or verify the pleadings. Steel v. Ritter, 16 W (2d) 281, 114 NW (2d) 436.

See note to 263.05, citing Poehling v. La Crosse Plumbing Supply Co. 24 W (2d) 339, 128 NW (2d) 419.

Nonjoinder of an indispensable party is not an objection to the complaint which is waived by failure to demur or raise the issue by answer. Karp v. Coolview of Wisconsin, Inc. 25 W (2d) 299, 130 NW (2d) 790.

A motion for judgment on the pleadings is still proper despite the abolition of a demurrer ore tenus. Buckley v. Park Building Corp. 31 W (2d) 626, 143 NW (2d) 493.

263.13 History: 1856 c. 120 s. 54; R. S. 1858 c. 125 s. 10; R. S. 1878 s. 2655; Stats. 1898 s. 2655; 1925 c. 4; Stats. 1925 s. 263.13; Sup. Ct. Order, 204 W vi; Sup. Ct. Order, 262 W x; 1961 c. 518.

Comment of Judicial Council, 1952: 263.13 (2) (Stats. 1951), in effect since 1931, in conjunction with the introductory paragraph of the section, indicates that an answer must contain a statement of any matter constituting a counterclaim. In 1937 in Nehring v. Niemerowicz, 226 W 285, 291, the court held that although a defendant could have litigated his counterclaim in an action, if he did not do so he could thereafter bring a separate action upon it. [Re Order effective May 1, 1953]

Editor's Note: Formerly 263.13 permitted a defendant to answer by pleading a general denial. But a general denial of the allegations of the complaint was abolished by Supreme Court Rule, effective September 1, 1931. Since that date, a general denial is not permitted. The answer must contain a "specific denial of each material allegation of the complaint controverted by the defendant", otherwise those allegations stand admitted. Hence the decisions which considered the effect of a general denial no longer apply. There are many such cases digested under 263.13 in the Wis. Annotations, 1930. Those cases are now omitted because no longer applicable.

A statement by the common council, in their return to an alternative mandamus, that they have no knolwedge of the judgment mentioned in the writ sufficient to form a belief, and therefore deny the same, is not sufficient. State ex rel. Soutter v. Madison, 15 W 30.

Where a complaint against a corporation alleges facts necessarily within the knowledge of the officers of the corporation, or evidenced by the records and papers under their official control, a denial of any knowledge or information sufficient to form a belief is evasive and does not raise an issue. Mills v. Jefferson, 20 W 50.

In a complaint against an officer to try his title, alleging that on a certain day he was duly removed, etc., the precise date is immaterial, and a denial that on that day he was duly removed, etc., is insufficient. State ex rel. Kennedy v. McGarry, 21 W 496.

A denial in the words of the complaint that the property was destroyed on a certain day is an admission that it was destroyed on some other day. Schaetzel v. Germantown F. M. Ins. Co. 22 W 412.

An admission made upon a mistaken theory of law does not prevent the defendant from availing himself of other defenses, though inconsistent. Doney v. Hastings, 23 W 475.

A denial that defendant ever received choses in action as collateral security is not inconsistent with the defense that if received by him they were lost without his fault. Willard v. Giles, 24 W 319.

The averment in an answer that defendant "has no knowledge or information sufficient to form a belief" was a denial, where the defendant was a city and the allegation of the complaint was that the city assessors had knowingly and intentionally assessed certain kinds of property at less than its true value. Smith v. Janesville, 26 W 291.

If there be no opportunity to plead the estoppel, as when it could only be set up by reply, and that is not allowed, it is admissible. Waddle v. Morrill, 26 W 611; Gans v. St. Paul F. & M. Ins. Co. 43 W 108.

In an action on a bond an answer that de-

fendant did not execute such bond to the plaintiff states no defense. Joint School Dist. v. Lyford, 27 W 506.

The defense of insanity is new matter and must be specially pleaded. Whitman v. Lake, 32 W 189.

The statute of limitations is new matter, and is waived if not specially pleaded. Tarbox v. Adams County, 34 W 558.

The denial of any knowledge or information of the character in which plaintiff sues meets an averment of his capacity to sue, and he must show his authority. Wittman v. Watry, 37 W 238.

In foreclosure where the sum due is stated, a denial of any information thereof sufficiently denies that any sum is due. Collart v. Fisk, 38 W 238.

The statutory bar to an action of divorce is new matter and must be specially pleaded. Dutcher v. Dutcher, 39 W 651.

Where plaintiff sues as guardian, an objection to his right to act as such is matter in abatement, which defendant cannot avail himself of under a general denial or other defense in bar, but must plead specially. Plath v. Braunsdorff, 40 W 107. See also Vincent v. Starks, 45 W 458.

A plea of an agreement to discontinue the action is in abatement. Brown County v. Van Stralen, 45 W 675.

In an action against a county board of supervisors to avoid taxes as illegal, defendants cannot deny on information and belief averments of facts appearing from the public records of the county and its towns. Union L. Co. v. Chippewa County, 47 W 245, 2 NW 281.

The objection that leave to sue on an administrator's bond has not been obtained can only be taken by plea in abatement. Johannes v. Youngs, 48 W 101, 4 NW 32.

A denial that defendant agreed in writing is not responsive to an allegation of express agreement and is a negative pregnant. Crane Brothers M. Co. v. Morse, 49 W 358, 5 NW 865.

A plea in bar is one which, if sustained, defeats the action and any other for the same cause; a plea in abatement merely sets up that the action is misconceived and that some other action should be brought. Both may be joined in the same answer; but the same defense cannot be pleaded both in bar and abatement, the former overriding the latter. Hooker v. Greene, 50 W 271, 6 NW 816.

An estoppel must be pleaded. Warder v. Baldwin, 51 W 450, 8 NW 257.

In slander and libel actions evidence in mitigation is not admissible unless specially pleaded. Reiley v. Timme, 53 W 63, 10 NW 5.

A denial, in an answer, of everything between certain specified words and folios of a complaint is not a compliance with sec. 2655, R. S. 1878. Collins v. Singer Mfg. Co. 53 W 305, 10 NW 477.

An answer which squarely meets the allegations of the complaint may be sufficient though stating no legal defense. Cleveland v. Burnham, 55 W 598, 13 NW 680.

Except in cases in which the defendant is conclusively presumed to have positive knowledge as to the existence or nonexistence of a fact alleged in the complaint, he may deny upon information and belief. Stacy v. Bennett, 59 W 234, 18 NW 26.

An allegation that possession was adverse can have no weight in qualifying admissions of fact which show that it could not have been so. Forcy v. Leonard, 63 W 353, 24 NW 78.

The fact that an action is prematurely brought should be pleaded in abatement. Collett v. Weed, 68 W 428, 32 NW 753.

In trespass an answer denying knowledge or information sufficient to form a belief as to the ownership of the land puts the plaintiff's title in issue. Maxim v. Wedge, 69 W 547, 35 NW 11.

A surviving partner who answers in an action for the recovery of the price of goods sold that certain goods were purchased from plaintiff, that the purchase was made by the deceased partner, and that he is ignorant of the nature, etc., of the purchase, is insufficient to require plaintiff to make proof of the sale. Sweet v. Davis, 90 W 409, 63 NW 1047.

In an action of foreclosure the denial by a subsequent purchaser or incumbrancer of knowledge or information concerning the payment of taxes and insurance by the mortgagee, which the mortgagor had covenanted to pay, raises a material issue. Pearson v. Neeves, 92 W 319, 66 NW 357.

The nonperformance of a condition of the right to enforce a complete cause of action must be taken advantage of by plea in abatement if the fact does not appear from the complaint; if it does so appear, then by demurrer. Wells v. Milwaukee, 96 W 116, 70 NW 1071.

A plea in abatement of the pendency of another action is not available if such action is discontinued before the trial of the second action. Winner v. Kuehn, 97 W 394, 72 NW 227.

Where a complaint alleges that a road is a public highway in the defendant town, a denial of knowledge or information sufficient to form a belief as to whether such road is a legal highway is insufficient, nor is such a denial a denial of the allegation that it was a public highway. Carpenter v. Rolling, 107 W 559, 83 NW 953.

As a general rule, subject to exception in case of a plea of former action pending, a plea in abatement is effective if shown to have been true when made. Winneconne v. Winneconne, 111 W 10, 86 NW 589.

In an action by a guardian the objection that the cause of action is in favor of the ward alone is in abatement and not available after defendant has pleaded in bar. Randall v. Lonstorf, 126 W 147, 105 NW 663.

Where a portion of an answer is alleged to be a further defense it must be complete in itself. Kipp v. Gates, 126 W 566, 105 NW 947.

A defense that the town has not authorized the action must be taken by plea in abatement or it is waived. Beloit v. Heineman, 128 W 398, 107 NW 334.

Defendant is not bound to anticipate that a contract invalid under the statute of frauds will be established by the evidence, under a complaint alleging an agreement to indorse the note of a third person. Such a defense is

not waived by failing to plead the statute. Kaufer v. Stumpf, 129 W 476, 109 NW 561.

Where an amended complaint is served and no further answer is served by the defendant, the original answer stands as the answer to the amended complaint. White v. Smith, 133 W 641, 114 NW 106.

Failure to deny is an admission, in actions against other than infants and nonresidents. Wisconsin N. L. & B. Asso. v. Pride, 136 W 102, 116 NW 637.

Abrogation of a contract is new matter and must be pleaded specially. Maxon v. Gates, 136 W 270, 116 NW 758.

In trespass to try title the defendant may counterclaim for damages for trespass by the plaintiff upon the same land. Wille v. Maas, 156 W 274, 145 NW 783.

A former adjudication should be pleaded as defense, and not set up by way of a motion to dismiss. Lowe v. Laursen, 201 W 309, 230 NW 75.

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

While, generally, the parties to the 2 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. Asso. 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.

See note to 263.05, citing Binsfeld v. Home Mut. Ins. Co. 245 W 552, 15 NW (2d) 828.

Fraud must be separately pleaded as a defense to be available. 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.

The defendants were not required to plead to a fact which the plaintiffs had not alleged in their complaint and which was not clearly to be inferred from such allegations as were made. Ryan v. Berger, 256 W 281, 40 NW (2d) 501.

Where the answer merely denied that an insurance policy was in effect, but the defense actually was that the policy excluded coverage while the car was subject to a mortgage not listed in the policy, the answer did not sufficiently inform the plaintiff of the issue. Lowe v. Cheese Makers Mut. Cas. Co. 265 W 365, 61 NW (2d) 317.

An answer which is a negative pregnant is defective as to form only, and cannot be attacked for the first time either after trial or on appeal. Wauwatosa v. Milwaukee, 266 W 59, 62 NW (2d) 718.

See note to 893.01, citing Mead v. Ringling, 266 W 523, 64 NW (2d) 222, 65 NW (2d) 35.

Assumption of risk is an affirmative defense and must be specially pleaded. Catura v. Romanofsky, 268 W 11, 66 NW (2d) 693.

Payment is an affirmative defense and must be pleaded, or evidence of the fact will be excluded. Bolick v. Gallagher, 268 W 421, 67 NW (2d) 860.

An answer alleging that the defendant "does not have sufficient knowledge or information upon which to form a belief," etc., although not in the exact language prescribed by 263.13 (1), Stats. 1953, was sufficient as amounting in substance to the same thing as the statutory language. Wisconsin P. & L. Co. v. Berlin T. & M. Co. 275 W 554, 83 NW (2d) 147.

The defendant's denial of knowledge or information sufficient to form a belief as to the truth of allegations in the complaint was an insufficient denial where the truth of such allegations was a matter of public record or otherwise readily ascertainable by the defendant. Wisconsin P. & L. Co. v. Berlin T. & M. Co. 275 W 554, 83 NW (2d) 147.

Where, between an answer and a counterclaim, there appeared a statement that "by way of further answer to said complaint and by way of counterclaim," the defendant alleges, etc., the allegations of the counterclaim were thereby incorporated in the answer by reference, and hence the trial court could properly consider them as a part of the answer in determining the sufficiency of the answer on demurrer thereto. Boek v. Wagner, 1 W (2d) 337, 83 NW (2d) 916.

The defense that another's negligence is imputed to the plaintiff because they were engaged in a joint enterprise is an affirmative defense and must be pleaded. Lewis v. Letterman, 4 W (2d) 592, 91 NW (2d) 89.

With reference to a plaintiff's failure to exercise reasonable care and thereby being contributorily negligent, the defendant must allege such failure in his answer, except that, where the plaintiff alleges that he was in the exercise of due care at the time he was injured, then the issue of contributory negligence is sufficiently raised by a specific denial that the plaintiff was exercising due care.

(Statement in Arneson v. Buggs, 231 W 499, so far as to the contrary, is withdrawn.) Kennedy-Ingalls Corp. v. Meissner, 11 W (2d) 371, 105 NW (2d) 748.

An answer need allege only ultimate facts and hence an allegation that the insurer's liability was limited without setting forth the policy limits was sufficient in the absence of a motion to make the answer more definite and certain. Nichols v. United States F. & G. Co. 13 W (2d) 491, 109 NW (2d) 131.

A defendant's motion made before issue was joined, to dismiss an action on the ground that the plaintiff had elected to follow a remedy inconsistent with the remedy sought in the case, could not be treated as equivalent to a demurrer to the complaint, since election of remedies is an affirmative defense which must be properly pleaded by answer. Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

Where defendant insurer admitted insurance coverage but denied all liability to plaintiff and did not allege that the policy liability was limited, it cannot show the policy for the first time on motions after verdict for the purpose of limiting the judgment against it, unless it has been permitted to amend its answer. Jansa v. Milwaukee Auto. Mut. Ins. Co. 18 W (2d) 145, 118 NW (2d) 149.

See note to 263.03, citing Schneck v. Mutual Service Cas. Ins. Co. 18 W (2d) 566, 119 NW (2d) 342.

All defenses must be pleaded in the answer and not seriatim, and a defendant has no right to try its defense in steps, first by demurrer, then a plea in abatement (a common-law plea, the subject matter is now required to be pleaded by demurrer or by answer), and finally by answer; and although some separate defenses may be brought on for hearing separately, the right to plead separate defenses consecutively in point of time as the prior ones are disposed of does not exist under our practice. Poehling v. La Crosse P. S. Co. 24 W (2d) 239, 128 NW (2d) 419.

The existence of a joint enterprise is an affirmative defense to be pleaded and proved by the party asserting it. Bailey v. Hagen, 25 W (2d) 386, 130 NW (2d) 773.

An answer was sufficient where it contained specific denials of material allegations and set up an affirmative defense. Bornemann v. New Berlin, 27 W (2d) 102, 133 NW (2d) 102, 133 NW (2d) 328.

In an action for damages for wrongful discharge against an employer (as distinguished from an action for reinstatement or an action against a union), the employer must plead failure to exhaust remedies as an affirmative defense. Cheese v. Afram Brothers Co. 32 W (2d) 320, 145 NW (2d) 716.

If an equitable defense is set up in an action to recover possession of land the grounds set forth must be sufficient to entitle the defendant to a decree that the property be transferred to him from the plaintiff or that the latter be enjoined from prosecuting the action for possession. Cornelius v. Kessel, 128 US 456, affirming Cornelius v. Kessel, 58 W 237, 16 NW 550.

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

263.14 History: 1856 c. 120 s. 55; R. S. 1858 c. 125 s. 11; 1868 c. 4; R. S. 1878 s. 2656; Stats. 1898 s. 2656; 1925 c. 4; Stats. 1925 s. 263.14; Sup. Ct. Order, 212 W viii; Sup. Ct. Order, 242 W v.

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]

In an action on a note defendant may set up by way of counterclaim a breach of a contemporaneous parol contract that plaintiff would redeem in gold the bills in which the note was discounted. Racine County Bank v. Keep, 13 W 233.

A cause of action for specific performance of a parol agreement to convey may be set up in an action of ejectment. Fisher v. Moolick, 13 W 321.

Breach of covenant of good right to convey may be set up as a counterclaim in an action of foreclosure of a mortgage from grantee to grantor. Walker v. Wilson, 13 W 522; Hall v. Gale, 14 W 54. See also: Akerly v. Vilas, 15 W 401; Flanders v. McVickar, 7 W 372.

Where, in an action to quiet title the answer set up a tax deed and demanded judgment, this amounted to a counterclaim. Jarvis v. Peck, 19 W 74.

If a third person would be a necessary party to the determination of the issues raised by the counterclaim it is not proper as such. McConihe v. Hollister, 19 W 269.

A demand due from a firm to defendant cannot be set up as a counterclaim in an action by the executrix of one of the partners, the other having assigned his interest to her. Lawrence v. Vilas, 20 W 390.

In an action for the purchase money of land, breaches of the grantor's covenants are grounds of counterclaim. Akerly v. Vilas, 21 W 88 and 23 W 207.

In an action on a note defendant cannot maintain a counterclaim upon plaintiff's note to the wife of the defendant. Dolph v. Rice, 21 W 590.

A cause of action for reforming a mistake is a counterclaim and not a defense. Gunn v. Madigan, 28 W 165.

In an action on a note against an accommodation indorser he cannot counterclaim a defense peculiar to the maker, as failure of consideration, without alleging the maker's insolvency. Hiner v. Newton, 30 W 640.

In an action by one joint contractor against the other for contribution a counterclaim for contribution under another like joint contract is proper. Heath v. Heath, 31 W 223.

In an action by one partner against another for an individual claim a counterclaim for a balance which would be due to defendant on settlement of the partnership accounts cannot be set up. Sprout v. Crowley, 30 W 187; Linderman v. Disbrow, 31 W 465.

In an action on a note it is not a defense, but a counterclaim, that plaintiff has sold defendant's property, agreed to be applied on the note. Dudley v. Stiles, 32 W 372.

The defense in an action of ejectment, was that the deed under which plaintiff claimed, given by defendant to him, was a mortgage and not an absolute deed; but such matter was not pleaded as a counterclaim. The court says: "* * * In order to make an equitable issue to be tried by the court alone, such matters must be pleaded as a counterclaim and not as a defense * * * merely." Dobbs v. Kellogg, 53 W 448, 10 NW 623.

In an action on a note against the maker and the indorser a separate judgment may be rendered between plaintiff and each defendant and either defendant may plead a counterclaim in his own favor alone. Boyd v. Beaudin, 54 W 193, 11 NW 521.

If a plaintiff treats the answer as a counterclaim by demurring and, after the demurrer is overruled, by interposing a reply, he waives his right to object that it does not contain a counterclaim because it is not so denominated. Voechting v. Grau, 55 W 312, 13 NW 230.

Upon demurrer to a counterclaim the defensive portion of the answer will not be considered, except for the purpose of making certain what might otherwise be regarded as indefinite and uncertain in the counterclaim. Weatherby v. Meiklejohn, 56 W 73, 13 NW 697.

In ejectment the subject of the action in the land in question, and facts showing the equitable title to be in the defendant and that plaintiff's title was wrongfully obtained are pleadable as a counterclaim. Cornelius v. Kessel, 58 W 237, 16 NW 550.

In a sale an oral warranty and representations made as an inducement thereto constitute a good counterclaim. (Hubbard v. Marshall, 50 W 322, 6 NW 497, distinguished.) Red Wing M. Co. v. Moe, 62 W 240, 22 NW 414.

In an action by an administrator upon a contract, made by himself as such, to recover in his representative capacity the defendant cannot set off or counterclaim a debt due him from the deceased nor can he set up the appropriation by the administrator of the assets in suit to the payment of such debt unless he shows that such appropriation was made under such circumstances that it could not prejudice the rights or interests of any other persons interested in the estate. McLaughlin v. Winner, 63 W 120, 23 NW 402.

A set-off should not be pleaded as a counterclaim, but a counterclaim alleging facts which constitute a valid set-off but do not constitute a cause of action against the plaintiff is not demurrable although it demands an affirmative judgment. Schumacher v. Seeger, 65 W 394, 27 NW 30.

Upon the death of a person the rights of his creditors become fixed and the law of distribution applies to his estate. No creditor can by counterclaim or otherwise obtain more than his pro rata share of his claim. Union Nat. Bank v. Hicks, 67 W 189, 30 NW 234.

In an action upon a note, given for a machine, which expressly states that the defendant waives all defenses thereto he may nevertheless counterclaim for a breach of warranty of the machine. Osborne v. McQueen, 67 W 392, 29 NW 636.

Where a matter properly pleaded as a defense, but not as a counterclaim, because not a cause of action in favor of both defendants, has been pleaded as a counterclaim and a verdict rendered thereon for damages in favor of the defendants, the error may be cured by the trial court striking out such damages from the verdict and rendering judgment dismissing the complaint. Washburn v. Dosch, 68 W 436, 32 NW 551.

In an action by an assignee to foreclose a mortgage assigned to him as collateral and in which the mortgagee is not made a party the mortgagor cannot set off or counterclaim the amount of a note against the mortgagee purchased by him subsequent to the transfer of the mortgage. Blakely v. Twining, 69 W 238, 34 NW 132.

In an action by a married woman for the use of and for an injury to a wagon which she claims to have bought from her husband the defendant cannot counterclaim a demand against the husband on the ground that he had no notice of the sale of the wagon to her. Sloteman v. Thomas & Wentworth M. Co. 69 W 499, 34 NW 225.

In an action for the contract price of building materials the defendant may counterclaim for damages on account of delay in the delivery, and a failure to deliver a part of the quantity contracted for, notwithstanding he received and used what was delivered without objection or notice that he would claim damages. Schweickhart v. Stuewe, 71 W 1, 36 NW 605.

If the defendant has properly pleaded a counterclaim the plaintiff cannot, by dismissing his action, prevent a trial of the issue raised by the counterclaim. Grignon v. Black, 76 W 674, 45 NW 122 and 938.

The counterclaim is, in substance, an action by the defendant against the plaintiff, and its sufficiency must be determined, upon demurrer, by the same rule as it would have been had the defendant been the plaintiff in the action and his complaint was made up of the facts stated in the counterclaim. Grignon v. Black, 76 W 674, 45 NW 122 and 938.

The real party in interest may maintain a counterclaim though the law provides that the money shall be paid to one of its officers as a county for money payable to its treasurer.

Lincoln County v. Oneida County, 80 W 267, 50 NW 344.

Where the invalidity of the plaintiff's claim appears in an action at law the court will not interfere upon a counterclaim to set it aside or enjoin it. Sheldon Co. v. Mayers, 81 W 627, 51 NW 1082.

In an action by the assignee of a claim against an insurance company, the assignment being made after the amount due the insured had been agreed upon, the insurer cannot counterclaim that the settlement was procured by the fraud of the insured, and have it declared void or be surcharged and reformed. Commercial Bank of Milwaukee v. Fire Ins. Co. 84 W 12, 54 NW 997.

The defendant in an action on a contract of indemnity cannot set up a counterclaim for an accounting by plaintiff because of ultra vires acts done by him as president of a corporation which is not a party to the action. Taylor v. Matteson, 86 W 113, 56 NW 829.

In an action for the dissolution of a partnership neither party can assert and enforce any individual claim against his copartner, no matter how such claim arose or what the state of the accounts of each partner with the firm may be. A partner has no claim against his copartner individually on account of partnership transactions. Smith v. Diamond, 86 W 359, 56 NW 922.

The defendant cannot recover unless the facts which form his counterclaim be pleaded as such, the pleading be denominated a counterclaim and affirmative relief prayed. Rood v. Taft, 94 W 380, 69 NW 183.

Where no counterclaim is expressly pleaded but the prayer for damages asked judgment against the plaintiff by way of counterclaim, the answer as a counterclaim is demurrable. Brauchle v. Nothelfer, 107 W 457, 83 NW 653.

In an action for goods sold, a counterclaim to the effect that the purchase was made from another corporation with an agreement that an agency should be given for the sale of the goods and claiming damages for breach of such agreement cannot be pleaded as a counterclaim because it does not exist against the plaintiff. Computing S. Co. v. Churchill, 109 W 303, 85 NW 337.

In an action of ejectment the statute of limitations and facts tending to show an estoppel in pais are not pleadable as a counterclaim as they constitute additional defenses to the action. Appleton M. Co. v. Fox River P. Co. 111 W 465, 87 NW 453.

The better form of counterclaim is "the defendant by way of counterclaim herein alleges"; but where the facts are first set up and the sum claimed is then pleaded as a counterclaim, it is considered as a counterclaim. Rylander v. Laursen, 113 W 461, 89 NW 488.

Where the principal defendant appealed to the circuit court from a judgment by default against the garnishee, the amount of which he had paid into court, and filed an answer and a counterclaim alleging that the money was exempt from execution, although a counterclaim was not then authorized, there was no abuse of discretion in permitting the answer to stand. Eastlund v. Armstrong, 117 W 394, 94 NW 301.

Where it appears that the defendant intended to counterclaim, matter stated in the answer outside of that portion devoted specially to counterclaim or stated in the complaint and referred to for that purpose is regarded as incorporated in the counterclaim. Manning v. School Dist. 124 W 84, 102 NW 356.

Where facts pleadable as a defense were so pleaded, and also as an equitable counterclaim, and there was a general verdict for plaintiff, it was not error to grant a motion for judgment on the verdict before formal disposal of the counterclaim by findings against defendant. Bruger v. Princeton & St. M. M. F. Ins. Co. 129 W 281, 109 NW 95.

Where the relief demanded in the counterclaim is identical with that which is demanded upon a complaint, the matter is not pleadable as a counterclaim. White v. Smith, 133 W 641, 114 NW 106.

A counterclaim may be disregarded where it was the subject of a separate suit which went to judgment at the same time. Jacobs v. Lakeside L. Co. 134 W 179, 114 NW 443.

On an action on a contract for the sale of various grades of lumber the answer alleged that only the inferior grades of lumber provided for were delivered so that the value of the total delivered was less than the contract price. This was a defense and not a counterclaim. Rib Falls L. Co. v. Lesh & M. L. Co. 144 W 362, 129 NW 595.

The fact that a defendant has a court counterclaim that he might have interposed, but did not, does not prevent him from bringing an action on his counterclaim. Failure to litigate a counterclaim which has been interposed is a withdrawal of the counterclaim, and judgment for the plaintiff does not bar the counterclaim in a subsequent action. Nehring v. Niemerowicz, 226 W 285, 276 NW 325; Linker v. Batavian Nat. Bank of La Crosse, 244 W 459, 12 NW (2d) 721.

In an action of ejectment to recover land to which the plaintiffs had the record title but to which the defendants claimed title from the same grantor, the defendants could not defeat the plaintiffs' title merely by alleging and proving that the defendants were entitled to reformation of their deed, but they must plead a counterclaim and demand the judgment to which they supposed themselves entitled. Smith v. Vogt, 251 W 619, 30 NW (2d) 617.

In an action by a city to condemn certain land for streets, an allegation in the so-called counterclaim of the defendant property owners, that the city was attempting to take private property for private rather than public purposes, was a mere legal conclusion not admitted by demurrer. Milwaukee v. Schomberg, 261 W 166, 52 NW (2d) 151.

See note to 893.49, citing Miller v. Joannes, 262 W 425, 55 NW (2d) 375.

Counterclaims are not required to be asserted "at the first opportunity," and failure to do so does not waive them. In an action for breach of a contract involving an exchange of units for generating electricity, where the plaintiff, when the case was called for trial, was allowed to file an amended complaint standing on a second contract as the one governing the transaction, the defendant was entitled to reconsider its position in the light of the facts newly alleged by the plaintiff, and to

make a new defense if that appeared to be desirable, and the trial court's refusal to allow the defendant to file an amended answer and counterclaim was an abuse of discretion. Erickson v. Westfield M. & E. L. Co. 263 W 580, 58 NW (2d) 437.

Where the defendant's counterclaim for damages must be dismissed for failure of proof, the defendant has not been prejudiced by its dismissal on another, although erroneous, theory. Stammer v. Mulvaney, 260 W 244, 58 NW (2d) 671.

Where a purchaser, who had entered into possession of purchased farm property but had left, brought an action against the vendor for rescission of the contract and recovery of the earnest money paid, the vendor could have counterclaimed in such action for damages done to the property and waste committed by the purchaser while in possession, but the vendor was not obliged to do so, and his failure to do so did not bar the bringing of a subsequent action by him against the purchaser for recovery of such damages. Kassion v. Menako, 270 W 309, 70 NW (2d) 670. See also Wm. H. Heinemann Creameries v. Milwaukee Auto. Ins. Co. 270 W 443, 71 NW (2d) 395.

A counterclaim for reformation may be interposed in an action on the warranty in a warranty deed, an independent action to reform not being necessary. Lang v. Andrus, 1 W (2d) 13, 83 NW (2d) 140.

See note to 263.15, citing Essock v. Mawhinney, 3 W (2d) 258, 88 NW (2d) 659.

A corporation, which is a nominal defendant and against whom no relief is asked and on behalf of whom the relief is sought by a plaintiff stockholder in a representative suit, is not a party defendant within the contemplation of 263.14 (1), and may not interpose a counterclaim against the plaintiff in his individual or representative capacity. Wesolowski v. Erickson, 5 W (2d) 335, 92 NW (2d) 898.

Under 263.14 (1) the right asserted by way of counterclaim may be totally unrelated to the subject matter of the action if it constitutes a claim upon which defendant could commence a separate action against plaintiff in the same court. Arthur v. State Conservation Comm. 33 W (2d) 585, 148 NW (2d) 17.

In an action by a foreign voluntary assignee for creditors to recover the purchase price of goods sold by the assignor damages resulting from the malicious prosecution of a former suit for the same cause of action, before the money was due, under the same contract, cannot be set up as a counterclaim. There could be no several judgment between the parties, since the plaintiff sues in a representative capacity. Gelshennen v. Harris, 26 F 680.

263.15 History: Stats. 1898 s. 2656a; 1925 c. 4; Stats. 1925 s. 263.15; Sup. Ct. Order, 212 W ix; Sup. Ct. Order, 265 W vi; Sup. Ct. Order, 16 W (2d) xi.

Comment of Judicial Council, 1963: (As to sub. (2)) Orders for bringing new parties are now covered in 260.19. The order should not cover the determination of the rights of the parties. The first complete stricken sentence is in new 263.15 (3). The last complete stricken sentence is unnecessary, since the usual relief against default is adequate. (As to sub. (3)) Old 263.15 (2) (2nd sentence) with provision added that no answer is required if the cross complaint or third party complaint seeks only contribution. (As to sub. (4)) Sets limit on service of cross complaint to prevent delay. [Re Order effective May 1, 1963]

The counterclaim of the code, in equitable actions, is a substitute for the crossbill of the former equity practice where the affirmative relief sought by the defendant is against the plaintiff; and the provision of law permitting defendants to litigate between themselves matters germane to the subject of the complaint carries with it the right of the defendant seeking relief in that regard to serve an answer in the action in the nature of a crossbill setting up the facts and claiming such relief. Such an answer is a code pleading, and though the court may require it to be served on the defendant affected thereby, such service is not necessary unless so ordered to preserve the right of the party to have the questions presented by such answer tried and settled by the decree, if the codefendant affected is before the court. Kollock v. Scribner, 98 W 104, 73 NW 776.

Sec. 2656a, Stats. 1898, does not apply to the foreclosure of mechanics' liens under secs. 3321-3326. Dusick v. Green, 118 W 240, 95 NW 144.

Persons who wrongfully and knowingly received town money from the treasurer, he being insolvent, may be made parties in an action brought by sureties on town bonds. Washburn v. Lee, 128 W 312, 107 NW 652.

Where an action is brought to prevent sale of property under a street improvement tax, affirmative relief may be given to a defendant who is the holder of the tax certificate. Dahlman v. Milwaukee, 130 W 468, 110 NW 483.

In an action on a note a cross complaint which asked that relief first be had against one of the defendants was a proper subject for cross complaint. The plaintiff may demur to a cross complaint. First Nat. Bank v. Frank, 131 W 416, 111 NW 526.

A cross complaint may properly be interposed by defendant when he is entitled to affirmative relief against a codefendant, or against a codefendant and a plaintiff or other party, and such relief involves or affects the contract or transaction of property which is the subject matter of the action. Cawker v. Central B. P. Co. 133 W 29, 113 NW 419.

Where a defendant claims that there has been a novation between the plaintiff and a third party, the proper procedure would be to require the defendant to serve an answer or cross complaint under sec. 2656a, Stats. 1898, but a failure to do so is not necessarily fatal. Hemenway v. Beecher, 139 W 399, 121 NW 150.

The defendant in an action to recover commissions upon a sale of real estate cannot require the bringing in as a party of a third person who is suing to recover commissions for procuring the same purchaser, because the defendant is not entitled to any affirmative relief against such third person. Schenck v. Sterling E. & C. Co. 151 W 266, 138 NW 637, and 769.

In an action against a railroad company by a lumber manufacturer for the value of lumber consigned to itself at another place but

delivered by the railroad to a third party who claimed to be the owner, such third party was interpleaded and was properly allowed by cross complaint to assert his title and demand damages for a breach of his contract with the plaintiff for getting out the lumber. McCollom v. Minneapolis, St. P. & S. S. M. R. Co. 152 W 435, 139 NW 1129.

In an action against a street car company for a malicious assault upon a passenger by one of its conductors it would have been proper, upon defendant's motion, to require the conductor to be made a party and to permit a cross complaint to be served upon him. Schmuhl v. Milwaukee E. R. & L. Co. 156 W 585, 146 NW 787.

The practice of bringing in new parties and allowing them to plead cross demands does not deprive them of their rights to trial by jury. Miley v. Heaney, 163 W 134, 157 NW 515.

Filing a cross complaint does not necessarily require an amendment of the complaint; and the new defendant brought in need generally to answer only the cross complaint. He may answer the original complaint if he chooses, but should not file a demurrer thereto. Lumbermen's Nat. Bank v. Corrigan, 167 W 82, 166 NW 650.

In an action for injuries sustained in moving a loaded car on an industrial spur track of one defendant, by an employe of a codefendant railroad, in which recovery is sought against both defendants as joint tort-feasors, a defendant may file a cross complaint against a codefendant alleging that the latter's negligence alone caused the injuries and asking judgment over against the codefendant in case the plaintiff recovered. A plaintiff may not demur to a cross complaint interposed by one defendant against another. An objection that the cross complaint alleges a cause of action which could not be pleaded in the action should be raised by motion. O'Connor v. Pawling & Harnischfeger Co. 185 W 226, 201 NW 393.

One of 2 joint tort-feasors requested that the other be interpleaded in an action brought by the injured party, and while neither joint tortfeasor has a complete cause of action against the other until he has been legally compelled to pay more than his equitable share of the joint liability, his rights against the other may be settled in the action contingent upon such payment. Wait v. Pierce, 191 W 202, 209 NW 475, 210 NW 822.

In a foreclosure action, a mortgagor's cross complaint attempting to show title in her where record title was in another was pleadable. Martens v. Vogt, 198 W 506, 224 NW 480.

One who is alleged to be a joint tort-feasor may by cross complaint have the issue of contribution settled in the same action in which his liability to plaintiff is determined in case he is found to be liable to plaintiff. That one who is alleged to be a joint tort-feasor may by cross complaint have the issue of contribution settled in case he is found to be liable to plaintiff does not change the fundamental law that there is no right to contribution in the absence of a finding that both defendants are jointly liable. Where joint liability of defendants in an action for injuries resulting from an automobile collision was not established either in a previous action between defendants or in the present action, the former judgment was not res judicata as to the right to contribution. Defendant, whose liability for injuries was established, was not entitled to contribution from a codefendant. Michel v. McKenna, 199 W 608, 227 NW 396.

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

In an action for partition, a cross complaint of the interpleaded executor, praying for judgment against one of the plaintiffs in relation to property in Michigan and the income and proceeds thereof acquired from his decedent by alleged wrongful conduct and transactions of such plaintiff in that state, was not permissible under 263.15, in that the facts thus alleged did not affect the property or transaction which was the subject of the action and were not related to the occurrence out of which such action arose. Piper v. Strohn, 253 W 503, 34 NW (2d) 859.

Where the vendors' broker was before the trial court as a party plaintiff in their action for specific performance, the defendant purchasers' specific demand in their answer for the return of earnest money deposited by them with the broker was sufficient to entitle them to affirmative relief under 263.15 (1), and hence the trial court should not have denied such relief on the ground that the purchasers in their answer did not counterclaim for the return of this money. Ross v. Kunkel, 257 W 197, 43 NW (2d) 26.

In a replevin action against a plumbing contractor who had removed fixtures which he had previously installed in the plaintiffs' tourist cabins but for which he had not been paid, wherein the contractor claimed that the plaintiffs and the impleaded defendant bank which was financing the plaintiff had made false and fraudulent representations which induced the defendant to complete the job, the defendant's cause of action was connected with the subject of the action so that he was entitled to assert a cross complaint against the impleaded defendant, as well as to assert a counterclaim against the plaintiffs. Elder v. Sage, 257 W 214, 42 NW (2d) 919.

Where, in actions by guest occupants of an automobile for injuries sustained when such car, after colliding with a preceding car, was struck in the rear by a following car, the defendant driver of the host car moved during

the trial for leave to file a cross complaint for contribution against the defendant driver of the preceding car alleging an act of negligence not previously alleged in the case, the action of the trial court, over objection, in granting leave to file such cross complaint and proceeding with the trial without granting the objecting defendant sufficient time to file an answer to such cross complaint and prepare to meet the issues raised thereby, was error entitling such defendant to a new trial in relation to the issues raised by such cross complaint. Puccio v. Mathewson, 260 W 258, 50 NW (2d) 390.

Where it did not appear from anything in the record in a divorce action, that the husband was without property which might be available to meet the demands of any judgment awarded to the wife, nor that the wife had been prejudiced by any dealings between the husband and a certain corporation, an order denying the wife's motion to implead the corporation and striking from the record the amended complaint seeking to join such corporation as a party defendant, was not an abuse of discretion. Dobbert v. Dobbert, 264 W 641, 60 NW (2d) 378.

In a contract between a manufacturer of liquefied gas and a distributor, a provision that no claim of the distributor on account of shortage or "quality" of the product, or for any other cause, should be allowed unless he gave the manufacturer notice on receipt of shipment and was given authority to unload, applied as to any claims of the distributor based on failure to supply gas sufficiently odorized to give warning of an escape of gas; the distributor, if held liable for damages caused by an explosion of escaping gas, would be precluded from claiming contribution against the manufacturer in the absence of having given the notice required by the contract. Cernohorsky v. Northern Liquid Gas Co. 268 W 586, 68 NW (2d) 429.

263.15, in authorizing the granting of affirmative relief in favor of one defendant and against another, and providing that "such relief may be demanded by a cross complaint or counterclaim," did not abrogate the rule that an action seeking an accounting in equity is a recognized exception to the ordinary rule that affirmative relief will not be granted to a defendant unless he demands the same by set-off or counterclaim, and hence in such excepted case a defendant may ask for affirmative relief in an answer. Essock v. Mawhinney, 3 W (2d) 258, 88 NW (2d) 659.

263.16 History: 1856 c. 120 s. 56; R. S. 1858 c. 125 s. 12; R. S. 1878 s. 2657; Stats. 1898 s. 2657; 1925 c. 4; Stats. 1925 s. 263.16; 1935 c. 541 s. 33.

There can be no misjoinder of defenses. The defendant may plead as many as he has. If they are not properly stated the remedy is by motion, not by demurrer. Akerly v. Vilas, 25 W 704.

In an action on an award the defendant may set up any matter which shows the award invalid. McCabe v. Sumner, 40 W 386.

Defenses based on inconsistent legal theories may be pleaded by a defendant unless they are so repugnant in fact that proof of one disproves the other. A defense seeking a rescission of the contract sued on may be set up together with a counterclaim for breach of such contract, if it is not rescinded. South Milwaukee B. Co. v. Harte, 95 W 592, 70 NW 821.

Plaintiff in his reply to defendant's counterclaim may set up defenses based on inconsistent legal theories. Kerslake v. McInnis, 113 W 659, 89 NW 895.

Claims of title by adverse possession under the 10 and 20 years' statute of limitations may be so pleaded. Roberts v. Decker, 120 W 102, 97 NW 519.

Where facts are relied on which in equity simply defeat the plaintiff's cause of action and go no further they may be set up by equitable defense but in those cases where the action at law can only be defeated by virtue of the affirmative judgment by a court of equity such as the reformation of a contract sued on at law the equitable defense must be made by counterclaim. A release from damages for death by wrongful act may be pleaded as a simple defense. Chicago & N. W. R. Co. v. McKeigue, 126 W 574, 105 NW 1030.

Defendant may plead as many defenses and counterclaims as he may have, and cannot be compelled to elect between them. In an action on notes, consideration of which was the sale of a patent right, the defendant may counterclaim for damages because of false representations and also ask for a rescission of the sale on tendering back the rights purchased. Clark County v. Rice, 127 W 451, 106 NW 231.

Defendant may set forth among his defenses such facts as would formerly support an injunction against further prosecution. Washburn v. Lee, 128 W 312, 107 NW 649.

Where the defendant's admissions in his pleadings were consistent with and a part of his alleged defense, he did not, by such admission, waive his right to prove the rest of the oral agreement which he relied on as a defense. Borg v. Fain, 260 W 190, 50 NW (2d) 387.

263.17 History: 1856 c. 120 s. 59; R. S. 1858 c. 125 s. 15; R. S. 1878 s. 2658; Stats. 1898 s. 2658; 1925 c. 4; Stats. 1925 s. 263.17; Sup. Ct. Order, 217 W vi; Sup. Ct. Order, 271 W viii.

Revisers' Note, 1878: Part of section 15, chapter 125, R. S. 1858, amended to distinguish a demurrer to the defenses in an answer from a demurrer to counterclaims, and to provide the grounds of demurrer to a counterclaim similar to those prescribed for demurring to a complaint. The counterclaim has come to be understood to be, although the idea was originally somewhat indefinite, a cause of action which the defendant may prosecute against the plaintiff in the same action in which he is sued. There is no reason why there should be any substantial difference in the treatment of the defendant's complaint from that prescribed for the plaintiff's complaint, * * *.

Comment of Judicial Council, 1956: 263.17 (1) previously permitted a demurrer to a counterclaim on the ground that the court "has not jurisdiction thereof." This is now made consistent with the comparable provision in 263.06 (1) by providing that objection

may be taken to lack of jurisdiction over the "subject matter" of the counterclaim. This amendment also incorporates the requirement of a single demurrer, altering the previous practice which allowed successive demurrers to the answer. See comment under 263.06. [Re Order effective Sept. 1, 1956]

1. Demurrer to answer.
2. Demurrer to counterclaim.

1. Demurrer to Answer.

If any part of an answer states a defense a general demurrer is bad. Roberts v. Johannas, 41 W 616.

A demurrer to the allegations pleaded as a separate answer is proper. Marsh v. Harris M. Co. 63 W 276, 22 NW 516.

In trespass an answer denying knowledge or information sufficient to form a belief as to the ownership of the land puts the plaintiff's title in issue. Maxim v. Wedge, 69 W 547, 35 NW 11.

A demurrer will not reach the question of irrelevant and redundant matter in the pleadings. This must be by motion to strike out. Gooding v. Doyle, 134 W 623, 115 NW 114.

Where a third defense in a libel action setting up privilege referred to the second defense setting up justification and made such second defense a part of the third defense, a demurrer to the latter on the ground that the facts alleged did not show privilege cannot be sustained, because the court cannot disregard the incorporation of the second defense into the third nor treat it on demurrer as surplusage. Finnegan v. Eagle P. Co. 173 W 5, 179 NW 788.

A motion by plaintiff for judgment on the pleadings is equivalent to a general demurrer to the answer and its averments must be taken as true. Madregano v. Wisconsin G. & E. Co. 181 W 611, 195 NW 861.

In testing the sufficiency of defensive matter on demurrer, denials must be disregarded, since a demurrer to an answer does not reach denials. Selts I. Co. v. Promoters, 202 W 151, 231 NW 641.

A demurrer to an answer presents also for consideration the sufficiency of the complaint. State ex rel. Williams v. Kaempfer, 176 W 283, 187 NW 215; Nickoll v. Racine C. & S. Co. 194 W 298, 216 NW 502; Watertown M. O. Asso. v. Van Camp P. Co. 199 W 379, 226 NW 378; Whitewater v. Richmond, 204 W 388, 235 NW 773.

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. Asso. 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.

An order holding that defenses were not stated in certain paragraphs of an answer, based on motion to strike such paragraphs as irrelevant and a stipulation between the parties that a motion should be considered as a demurrer to each such paragraph, is not appealable, the stipulation not making such motion the equivalent of a demurrer and not making such order the equivalent of an order sustaining a demurrer. 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. McCarthy v. Steinkellner, 223 W 605, 270 NW 551.

The rule as to opening up the record and searching the complaint is inapplicable to the complaint of a plaintiff who has not demurred 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 from an order sustaining a demurrer to the return in a mandamus, exhibits in aid of the pleadings, not made a part of the pleadings 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.

A defense in a libel action is not demurrable 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 Pub. Co. 247 W 382, 20 NW (2d) 568.

A sentence taken out of its context in an affirmative defense is not demurrable. Schneider v. Journal-Times Co. 247 W 391, 20 NW (2d) 572.

In an action to quiet title, the answer's denial that the plaintiff was the owner of the premises was a denial of a conclusion of law and was itself a conclusion of law, but it placed in issue the allegations of the complaint alleging ownership by the plaintiff and was not "new matter constituting a defense," and hence was not subject to attack by demurrer to the answer. Neitge v. Severson, 256 W 628, 42 NW (2d) 149.

When allegations are made a part of the answer which is pleaded in its entirety as an answer to a complaint, a motion to strike does not have the essentials of a demurrer, and an order made thereon is not an appealable order. Although an order striking out a portion of an answer pleaded as a separate defense may be reviewed on appeal on the ground that it is in effect an order sustaining a demurrer, an order striking out a portion of an answer not so pleaded is not appealable, since a demurrer does not lie to a portion not so pleaded. Bolick v. Gallagher, 266 W 208, 63 NW (2d) 93.

The rule, that a motion to strike in its entirety a separately stated defense in an answer is in its legal effect a demurrer, was not changed by 263.17, 263.175, and 263.19 as respectively amended, created, and re-created

by order of the supreme court effective September 1, 1956. Lounsbury v. Eberlein, 2 W (2d) 112, 86 NW (2d) 12.

With reference to proceedings on the village of Brown Deer's complaint asking declaratory judgment that certain annexations of town of Granville territory by Brown Deer are valid, and the city of Milwaukee's answer, the trial judge is deemed to have acted within the bounds of proper discretion in construing his own order as granting leave to Brown Deer both to demur to parts of certain separate defenses and answer the rest of them, and in permitting the demurrer notwithstanding the general denials of invalidity of the annexation ordinances and of Milwaukee's right to challenge their validity in answer to the separate defenses, no new facts being alleged in connection with these general denials, and the latter being capable of reasonably being construed to assert matters of law not inconsistent with demurrer to certain specific defenses based on allegations of fact. Brown Deer v. Milwaukee, 2 W (2d) 441, 86 NW (2d) 487.

See note to 263.06, on procedure in demurring, citing Marky Investment v. Arnezeder, 15 W (2d) 74, 112 NW (2d) 211.

A plea in abatement is an answer, and is subject to demurrer when it does not state a defense; and a motion to dismiss a plea in abatement on such ground amounts to a demurrer. Sonotone Corp. v. Ladd, 17 W (2d) 580, 117 NW (2d) 591.

A motion to strike an answer or reply, or a portion thereof, as sham, frivolous, or irrelevant is the equivalent of a demurrer only when, (1) the motion is to strike the entire answer or reply, or the whole of one or more defenses separately stated therein, (2) when the motion accepts as true for the purpose of the motion all the allegations of fact in the defense attacked and the motion is not supported by affidavits tending to establish facts diffent from or in addition to those alleged, and when (3) the only issue raised by the motion is the issue of law of whether the defense attacked states a defense; and an order granting or denying such a motion is appealable under 274.33 (3) as an order sustaining or overruling a demurrer. State v. Chippewa Cable Co. 21 W (2d) 598, 124 NW (2d) 616.

While a demurrer to a pleading admits all material facts properly pleaded, conclusions of law as opposed to matters of fact are not deemed admitted. Sipple v. Zimmerman, 39 W (2d) 481, 159 NW (2d) 706.

Permitting plaintiff to demur to the amended answer after successfully demurring to the original pleading did not contravene 263.17, Stats. 1967, for the amended answer was a new pleading superseding the old, its sufficiency being determinable by testing its allegations alone. Lease v. Zarndt, 41 W (2d) 667, 165 NW (2d) 145.

2. Demurrer to Counterclaim.

A demurrer to a counterclaim reaches back to a defective complaint, so that the merits of the case are raised. Lawe v. Hyde, 39 W 355, and cases cited.

An error in sustaining a demurrer to a counterclaim is immaterial if the facts stated therein are pleaded as a defense and are negatived by the findings. Wendlandt v. Cavanaugh, 85 W 256, 55 NW 408.

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 Cas. Co. 207 W 589, 242 NW 201.

263.175 History: Sup. Ct. Order, 271 W viii; Stats. 1957 s. 263.175.

Since 263.175 only permits striking the demurrer if distinct grounds are not specified, 269.43 will justify disregarding the omission since the defendant had his plea in bar determined and was heard on appeal. Lounsbury v. Eberlein, 2 W (2d) 112, 86 NW (2d) 12.

263.18 History: 1856 c. 120 s. 59; R. S. 1858 c. 120 s. 15; R. S. 1878 s. 2659; Stats. 1898 s. 2659; 1925 c. 4; Stats. 1925 s. 263.18; 1935 c. 541 s. 34; Sup. Ct. Order, 271 W ix.

Comment of Judicial Council, 1956: This section previously contained a general requirement that a demurrer should specify the grounds of objection to the answer, a provision now covered in 263.175. The provision permitting a reply to a counterclaim to raise grounds for a demurrer not appearing on the face of the counterclaim was previously contained in 263.19. It is here restated in a form comparable to that in 263.11 dealing with the answer to the complaint. [Re Order effective Sept. 1, 1956]

The reason for the rule, that a demurrer to an answer or a counterclaim containing only defensive matters raised the sufficiency of the complaint, was that if the complaint did not state a good cause of action there was no obligation to defend and it was immaterial whether such answer or counterclaim was good or bad; but such reason fails when a demurrer is interposed to a counterclaim alleging an affirmative cause of action. Wesolowski v. Erickson, 5 W (2d) 335, 92 NW (2d) 898.

263.19 History: R. S. 1878 s. 2660; Stats. 1898 s. 2660; 1925 c. 4; Stats. 1925 s. 263.19; 1935 c. 541 s. 35; Sup. Ct. Order, 265 W vii; Sup. Ct. Order, 271 W ix.

Revisers' Note, 1878: New. See last note. There seems to be the same reason for considering an objection that the counterclaim is not within one of the prescribed classes to be waived if not demurred to, that there is for holding the waiver of an objection that causes of action joined in a complaint are not within one of the classes of joinable actions for a similar omission; and as the point has been in dispute, it seems best to make it certain.

Plaintiff cannot after verdict raise for the first time the point that a counterclaim was not pleadable as such. Randall v. Link, 134 W 280, 114 NW 498.

Where a trial proceeded from beginning to end on the theory on both sides that the counterclaim was in issue, a formal reply was

waived. Kaiser v. Better Farms, Inc. 249 W 302, 24 NW (2d) 621.

See note to 263.17, citing Lounsbury v. Eberlein, 2 W (2d) 112, 86 NW (2d) 12.

263.20 History: 1856 c. 120 s. 59; R. S. 1858 c. 125 s. 15; R. S. 1878 s. 2661; Stats. 1898 s. 2661; 1925 c. 4; Stats. 1925 s. 263.20; Sup. Ct. Order, 212 W ix; Sup. Ct. Order, 16 W (2d) xi.

Revisers' Note, 1878: Part of section 15, chapter 125, R. S. 1858, amended to conform to similar provisions concerning the answer. The phrase "when the answer contains new matter constituting a counterclaim" is abbreviated to read "when the answer contains a counterclaim" to correspond to the requirement that the counterclaim must be so designated and be pleaded separately, and to avoid the idea that matter pleaded in an answer of a character to entitle to affirmative relief, but not pleaded as a counterclaim, requires reply; such matter being intended to be regarded only as defensive, as ruled in Stowell v. Eldred, 39 W 614.

Comment of Judicial Council, 1963: Makes universal the rule that if a pleading after a complaint seeks only contribution, no response is necessary. (Re Order effective May 1, 1963)

A cause of action for reformation is a counterclaim, but if not pleaded as such, no reply is necessary. Gunn v. Madigan, 28 W 165.

A reply alleging that plaintiff has sold the land since the commencement of the action is invalid in an action by the lessor for rent. Orton v. Noonan, 30 W 611.

A counterclaim must be denominated as such, and a reply is waived unless it is so denominated. Resch v. Senn, 31 W 138.

The reply to a counterclaim cannot make a new case or cause of action against the defendant. Campbell v. Mellen, 61 W 612, 21 NW 864. See also P. C. Hanford O. Co. v. Findley, 80 W 91, 49 NW 19.

A reply to an answer which contained no counterclaim is superfluous, but if treated as a pleading it binds the plaintiff by its admission. Sims v. Mutual Fire Ins. Co. 101 W 586, 77 NW 908.

When a defendant counterclaims, asking that the contract sued on be annulled, the plaintiff must by reply plead any estoppel of which he desires to avail himself. Pratt v. Hawes, 118 W 603, 95 NW 965.

Where defendant treats the allegations of his counterclaim as at issue by proceeding with the trial until the close of the evidence, he waives a reply. My Laundry Co. v. Schmeling, 129 W 597, 109 NW 540.

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

Under 263.20, Stats. 1965, no reply is permitted to an answer unless the answer raises a counterclaim. D'Angelo v. Cornell P. P. Co. 33 W (2d) 218, 147 NW (2d) 321.

263.21 History: 1856 c. 120 s. 60; R. S. 1858 c. 125 s. 16; R. S. 1878 s. 2662; Stats. 1898 s. 2662; 1925 c. 4; Stats. 1925 s. 263.21.

Revisers' Note, 1878: Section 16, chapter 125, R. S. 1858, amended in the beginning; see last note; and by an addition to express the practice sanctioned in Jarvis v. Peck, 19 W 74, and generally used.

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. My Laundry Co. v. Schmeling, 129 W 597, 109 NW 540; Kaiser v. Better Farms, Inc. 249 W 302, 24 NW (2d) 621.

263.22 History: 1856 c. 120 s. 61; R. S. 1858 c. 125 s. 17; R. S. 1878 s. 2663; Stats. 1898 s. 2663; 1925 c. 4; Stats. 1925 s. 263.22; Sup. Ct. Order, 265 W vii; Sup. Ct. Order, 271 W ix.

Receiving without objection and retaining a pleading served out of time is a consent to service and a waiver of the default. Moore v. Ellis, 89 W 108, 61 NW 291.

In conformity with the rule that a demurrer to one pleading searches the record and will be carried back to the first substantial defect in prior pleadings, a demurrer to a reply will on proper motion be carried back to the defendant's pleading and will question its legal sufficiency, and a demurrer to a reply also puts in issue the sufficiency of the plaintiff's complaint. Peterson v. Wisconsin River P. Co. 264 W 84, 58 NW (2d) 287.

263.225 History: Sup. Ct. Order, 271 W ix; Stats. 1957 s. 263.225.

263.227 History: Sup. Ct. Order, 35 W (2d) vii; Stats. 1967 s. 263.227.

263.23 History: 1856 c. 120 s. 62; 1859 c. 174 s. 1, 18; R. S. 1878 s. 2664; Stats. 1898 s. 2664; 1925 c. 4; Stats. 1925 s. 263.23; Sup. Ct. Order, 217 W vi.

In proceeding to trial on the merits, even if no answer had in fact been served, or filed, the plaintiff waived the right to a judgment by default. Frings v. Donovan, 266 W 277, 63 NW (2d) 105.

263.24 History: 1856 c. 120 s. 62; R. S. 1858 c. 125 s. 18, 19; R. S. 1878 s. 2665; Stats. 1898 s. 2665; 1925 c. 4; Stats. 1925 s. 263.24; Sup. Ct. Order, 204 W vii; Sup. Ct. Order, 238 W v; 1959 c. 226.

Comment of Advisory Committee, 1951: "Unless amended" is necessary so that where the statute of limitations has run, as in 330.19 (5), the right to sue will be preserved. [Re Order effective July 1, 1951]

The copy of the complaint served must include a copy of the verification, and if the latter be made in another state, before an officer thereof, a copy of the certificate required by sec. 4203, R. S. 1878. Knowles v. Fritz, 58 W 216, 16 NW 621.

The objection that the amendment to a

pleading was not verified cannot be first made in the supreme court. Orton v. Scofield, 61 W 382, 21 NW 261.

Error in allowing an unverified amendment to a verified complaint will be disregarded. Pfeiffer v. Radke, 142 W 512, 125 NW 934.

A complaint in a civil action is a material matter in the proceeding; and an oath verifying it is an oath in a matter before a court and, if falsely and corruptly made, will support a prosecution for perjury. In such a prosecution the complaint in the civil action may be received in evidence, not "as evidence of a fact admitted or alleged in such pleading," but to show that the defendant swore that the facts therein alleged were true. Lappley v. State, 170 W 356, 174 NW 913.

The affidavit filed as a basis for an adverse examination was not privileged as a pleading. Rubin v. State, 194 W 207, 216 NW 513.

After filing of an amended answer, allegations in the original answer, admitting facts against defendant's interests, constituted admissible evidence against him. Williams v. Jensen, 202 W 19, 231 NW 276.

A defect in the verification of a complaint would be ground for a motion to strike the pleading, but if permitted to stand, it is a valid complaint. G. M. C. Hotels, Inc. v. Hanson, 234 W 164, 290 NW 615.

The proceeding relating to judgments by confession, 270.69, is not a civil action, and there is no requirement that the complaint or answer in special proceedings 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 History: 1856 c. 120 s. 63; R. S. 1858 c. 125 s. 19; R. S. 1878 s. 2666; Stats. 1898 s. 2666; 1905 c. 150 s. 1; Supl. 1906 s. 2666; 1925 c. 4; Stats. 1925 s. 263.25; Sup. Ct. Order, 245 W vii.

Revisers' Note, 1898: Amended to conform to Moreley v. Guild, 13 W 576, and Frish v. Reigelman, 75 W 499, 507, where verifications by attorneys merely on belief, stating its grounds, were sustained. The words "for the payment of money only" were struck out by the joint committee of 1898.

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]

A verification by an attorney in the form required in verification by a party, in an action on a note, with a statement that his belief was founded on the possession of the note and the defendant's signature, with which he was acquainted, is sufficient. Mills v. Houghton, 8 W 311.

It seems that in all cases, whether or not the action be upon an instrument, the verification may be made by attorney. Gillett v. Houghton, 8 W 311; Bates v. Pike, 9 W 224.

An affidavit of verification by an attorney stated that he was such, that the plaintiff was a nonresident and unable to make it; that the action was founded on bonds and mortgages for the payment of money only, in the possession of such attorney; that the material allegations were founded on such instruments or communications of the plaintiff to him, which he believed to be true; that he had read the complaint and believed it to be true. The allegations were partly in positive form and partly on information and belief. The legislature did not intend to prescribe a form of oath which must at all times be followed; the verification was good. Morley v. Guild, 13 W 576. See also Frisk v. Reigelman, 75 W 499, 43 NW 1117, 44 NW 766.

The affidavit must state the grounds of affiant's knowledge and belief; and where the allegations were all upon knowledge and the verification did not show the grounds thereof, but simply that the note was in his possession and that plaintiff did not reside in the county, it was insufficient. Crane v. Wiley, 14 W 658.

An affidavit may be made by the attorney of a corporation. Possession of the instrument is a sufficient ground of belief. If it states that the pleading is true of the knowledge of the attorney, except, etc., following the prescribed language, and all the averments are on information and belief, the verification upon knowledge may be rejected as surplusage. Market Nat. Bank v. Hogan, 21 W 317.

In an action on account for goods the verification may be made by the attorney; if the allegations are positive he may state his belief of their truth and the grounds thereof without saying that they were true to his knowledge. Taylor v. Robinson, 26 W 545.

Where a complaint on promissory notes averred all the facts positively, and the verification by the attorney stated that his knowledge was derived from the notes and the admissions of the plaintiff (probably meaning defendant), the verification was probably defective so that judgment could not be entered before the clerk in default of an answer without an assessment of damages. Bonnell v. Gray, 36 W 574.

If the verification by an agent does not state what knowledge he had of the facts the complaint may be treated as unverified. Reichert v. Lonsberg, 87 W 543, 58 NW 1030.

An affidavit of verification made by an agent in an action for rent, the complaint being mainly made on knowledge, is sufficient where it shows that deponent had acted as agent in collecting rents for some years. Roosevelt v. Ulmer, 98 W 356, 74 NW 124.

A guardian ad litem may verify a complaint positively and from his own knowledge. He verifies as a party and not as an agent of the plaintiff and it is not necessary that the grounds of his knowledge be stated. Phillips v. Portage T. Co. 137 W 189, 118 NW 539.

The allegations of a complaint upon promissory notes being all positive, the verification thereof by an attorney stating that "the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true," followed by a further statement of the nature of the action, that the notes were in his possession and the reason why the verification was not made by the plaintiff, was insufficient because there was no statement of the affiant's knowledge or the grounds of his belief. Hecht v. Chase, 158 W 342, 149 NW 29.

A verification by an agent or attorney made upon belief containing a statement of legitimate grounds for such belief was valid even though the verification stated that the pleading was true instead of that he believed it to be true. Closson v. Chase, 158 W 346, 149 NW 26.

The objection that a bill of particulars served with a verified complaint is not verified is waived by retaining it instead of returning it within a reasonable time. Feldmeir v. Springfield F. & M. Ins. Co. 171 W 377, 177 NW 583.

The service of a summons by publication was ineffectual where the order of publication was based upon the verified complaint and the verification was by a person other than the plaintiff and did not set forth the affiant's knowledge or the grounds of his belief, as required by sec. 2666, Stats. 1921. State ex rel. Bergougnan R. Corp. v. Gregory, 179 W 98, 190 NW 918.

A verification of a complaint by an officer of a corporation, which would have been sufficient if such corporation had been the sole plaintiff, was sufficient in an action in which 10 corporations had properly joined as plaintiffs. Trade Press P. Co. v. Milwaukee T. Union, 180 W 449, 193 NW 507.

As a general rule, facts which are presumptively within the knowledge of the party pleading should be alleged positively and not upon information and belief. State ex rel. Harvey v. Plankinton Arcade Co. 182 W 20, 195 NW 903.

Allegations followed by the words "as plaintiff verily believes," are improperly pleaded, and cannot be considered on demurrer because of the requirement of 263.25, Stats. 1929. Thauer v. Gaebler, 202 W 296, 232 NW 561.

An answer of an automobile liability insurer denying on information and belief that the policy issued by it was in force and effect on the date of the accident, and likewise denying that by virtue of the terms, conditions, and limitations contained in the policy it was liable to the insured or to any other person, was insufficient to raise such questions as that the policy had expired, or that the premium had not been paid, since those facts were necessarily within its knowledge. Krueger v. Shufeldt, 253 W 192, 23 NW (2d) 227.

An allegation based only on "information sufficient to form a belief" is a defective pleading in a complaint. Where the facts on which the liability of a defendant is to be predicated are all matters of public record, they are not to be pleaded on information and belief. Mineral Point v. Davis, 253 W 270, 34 NW (2d) 226.

An allegation or denial based on information and belief with respect to any matter of public record is a nullity. Ferguson v. Kenosha, 5 W (2d) 556, 93 NW (2d) 460.

263.26 History: 1856 c. 120 s. 75, 76; R. S. 1858 c. 125 s. 31, 32; R. S. 1878 s. 2667; Stats. 1898 s. 2667; 1925 c. 4; Stats. 1925 s. 263.26; 1935 c. 541 s. 36.

Revisers' Note, 1878: Sections 31 and 32, chapter 125, R. S 1858, amended with respect to counterclaims to conform to the provisions for a more distinct pleading of such a cause of action before introduced.

Although the admissions of the averments of the complaint are made in connection with denials, and though such averments are denied by other parts of the answer, the latter are treated as admitted and need not be proved. Dickson v. Cole, 34 W 621.

When the defendant sets up new matter by answer the plaintiff need not amend his complaint in order to reply to such new matter, but "replies in the evidence." The statute interposes a denial of its validity without the plaintiff spreading an express denial upon the record. Canfield v. Watertown Fire Ins. Co. 55 W 419, 13 NW 252.

A complaint in an action for injuries sustained on a town highway alleged service of a sufficient notice of the injury; the answer stated that "defendant admits that a notice of injury was some time served upon the chairman of the defendant, but it now cannot state the nature of the notice or the date of it or the time it was served." The allegation of the complaint was admitted. Althouse v. Jamestown, 91 W 46, 64 NW 423.

As the matter set up in an answer not being pleaded as a counterclaim is deemed to be denied without a reply, it is error to strike a cause from the calendar upon such allegation in the absence of proof. Ashland v. Wisconsin C. R. Co. 114 W 104, 89 NW 888.

Where an answer alleged that the condition of a highway was due to an unusual and extraordinary accumulation of water upon the same, due to ice in a culvert and the existence of the ice was unknown to the supervisors or citizens of the town before the accident, such allegations of new matter in the answer were deemed to have been controverted. Jenewein v. Irving, 122 W 228, 99 NW 346, 903.

Allegation in an answer that certain necessary parties are wanting is deemed to be denied without a reply. Payne v. Payne, 129 W 450, 109 NW 105.

Where an intervener in a garnishment action filed an answer claiming to own the indebtedness admitted by the garnishees, and at the trial offered no evidence, relying on the failure of the plaintiff to traverse his answer, the answer was not a counterclaim and need not be traversed; and the intervener, charged with the burden of proof, had no ground to complain of a judgment for plaintiff. Kindinger v. Behnke, 150 W 557, 137 NW 777.

If the answer admits the complaint and alleges no facts constituting a defense, the plaintiff is entitled to judgment on the pleadings. Madregano v. Wisconsin G. & E. Co. 181 W 611, 195 NW 861.

Where, after remittitur from the supreme court, which had overruled a demurrer to the answer, the defendant moved for judgment on the pleadings, the motion was properly denied as allegations in the answer constituting defensive matters are deemed constructively denied without further pleading. Mertz v. Fleming, 191 W 305, 210 NW 716.

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 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.

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

Where a town's complaint alleged that the defendant city had proceeded in annexation proceedings pursuant to the provisions of 62.07 (1), and the answer denied this and also alleged that the proceedings were taken pursuant to 926-2, Stats. 1898, the latter was an allegation of new matter not pleaded as a part of a counterclaim and was deemed controverted, so that the issue whether 62.07 (1) or 926-2 applied, as well as whether there had been compliance with the section invoked by the city, was made. Wauwatosa v. Milwaukee, 259 W 56, 47 NW (2d) 442.

Where the complaint alleged that the defendant driver negligently backed the vehicle over the child's body, causing injury, and the answer did not deny that the defendant backed his vehicle over the child's body, the fact that he did so was thereby admitted, and the plaintiff was not required to offer proof of the fact in order to support the jury's finding that the defendant's vehicle struck or ran over the child. Bair v. Staats, 10 W (2d) 70, 102 NW (2d) 267.

It was not error to dismiss the lessor's cross complaint seeking indemnity against the lessee although there was no responsive pleading thereto, where the same issue was joined by the lessee's cross complaint and the lessor's answer thereto, and the trial court determined the issue based upon the latter pleadings, for there was no requirement that issue again be joined with respect to the second pleading raising an identical issue. Herchelroth v. Mahar, 36 W (2d) 140, 153 NW (2d) 6.

Pleading estoppel and the "deemed controverted" rule. 1964 WLR 347.

263.27 History: 1856 c. 120 s. 65; R. S. 1858 c. 125 s. 21; R. S. 1878 s. 2668; Stats. 1898 s. 2668; 1925 c. 4; Stats. 1925 s. 263.27.

A complaint alleging that a contract for the sale of lands was "executed" by the party, instead of alleging that it was "subscribed" by him, is good. Cheney v. Cook, 7 W 413.

"Express understanding" is equivalent to "express agreement." Spence v. Spence, 17 W 448.

An averment that an execution "duly issued," implies that it issued after necessary leave of court. Cornell v. Radway, 22 W 260; Jones v. Davis, 22 W 422.

In an action for injury on a highway an averment in the answer that the highway was not dangerous to travelers exercising ordinary care is not a sufficient denial that it was out of repair. Cuthbert v. Appleton, 24 W 383.

An averment in a complaint for assault and battery that plaintiff had by reason thereof necessarily paid out a large sum of money in endeavoring to be cured admits evidence of expenses for medical services. Schmidt v. Pfeil, 24 W 452.

An allegation that a certain board of public works was authorized to make the contract in suit and that the city ratified such contract is insufficient. Lauenstein v. Fond du Lac, 28 W 336.

An allegation that A. B. was the owner of certain land and afterward conveyed it to the plaintiff is construed to mean that A. B. was the absolute owner and continued to be until he conveyed to the plaintiff. Teetshorn v. Hull, 30 W 162.

An averment of adverse possession "for the full term of 20 years" is not equivalent to an allegation of such possession next preceding commencement of the action. Haag v. Delorme, 30 W 521.

A general averment of a breach of a bond and that its conditions were not performed is insufficient. Iowa County v. Vivian, 31 W 217.

When objection is not made until the trial a greater latitude of presumption is admitted to sustain a complaint than on demurrer. Hazelton v. Union Bank, 32 W 34. See also Evan v. Chicago, M. & St. P. R. Co. 95 W 69, 69 NW 997.

Where a complaint on a note set out several indorsements but not one to plaintiff, it being averred that he was the lawful owner and holder of the note, it was sufficient. Reeve v. Fraker, 32 W 243.

A general averment that a party acted fraudulently or made fraudulent representations is insufficient. Riley v. Riley, 34 W 372.

An averment that plaintiff, for a valuable consideration, extended the time for the payment of the demand in suit is good. Ready v. Sommer, 37 W 265.

An averment of the settlement of a pauper implies a legal settlement; of due notice, a sufficient notice in all respects; and of an indebtedness accruing to plaintiff from defendant for things furnished such pauper, that plaintiff incurred the expense. Pine Valley v. Unity, 40 W 680.

An averment in a complaint on a county treasurer's bond that defendant became a confessed public defaulter in his office does not import that he had failed, under lawful demand, to pay over public funds or committed any breach of his bond. Washington County v. Semler, 41 W 374.

An averment that a certain sum has been collected, which defendant believes to be $100, is a good averment, and proof of the amount collected is admissible. Strong v. Hooe, 41 W 659.

An allegation that an injury occurred through defendant's negligence imports the absence of contributory negligence. Jones v. Sheboygan & F. du L. R. Co. 42 W 306.

An averment that an instrument is "lawfully possessed and owned by said administrator" shows that he holds it in a representative capacity. Hyde v. Kenosha County, 43 W 129.

An averment that an agreement was made imports the making of a valid agreement. Pettit v. Hamlin, 43 W 314.

An averment that defendant made the contract by its duly authorized agent is sufficient without a statement of the facts showing the agent's authority. Smith v. Barron County, 44 W 686.

An allegation of the making of a note imports a delivery, which need not be further stated. Wochoska v. Wochoska, 45 W 423.

After an allegation of plaintiff's ownership on a certain day, an averment of trespass "on or about" the same day is sufficient on demurrer. Leihy v. Ashland L. Co. 49 W 165, 5 NW 471.

An averment that, when A. delivered a note to B., C. indorsed it, amounts to an allegation that it was indorsed before delivery. Frederick v. Winans, 51 W 472, 8 NW 301.

A requirement that a street commissioner should have actual notice of defects in streets is sufficiently met by an allegation that the city had due notice of a defect. Kusterer v. Beaver Dam, 52 W 146, 8 NW 726.

An allegation that corporate stock was transferred is construed to mean that it was so assigned as to pass the title. Arzbacher v. Mayer, 53 W 380, 10 NW 440.

The allegation that plaintiffs are resident taxpayers and voters, etc., means that they pay taxes upon property subject to taxation in the district. Nevil v. Clifford, 55 W 161, 12 NW 419.

A complaint alleging that the plaintiff delivered to the defendant, for safekeeping and collection, "the following list of promissory notes," giving their description, that they were worth a certain amount at the time of said delivery, and that the said plaintiff was the owner thereof "at the time of the delivery thereof to the defendant as aforesaid," alleges the delivery of the notes and not of the mere list thereof. Horton v. Horton, 66 W 32, 27 NW 619.

If a complaint does not set out in full the contract sued upon it will be assumed that it was in writing and valid under the statute of frauds. Britton v. Erickson, 80 W 466, 50 NW 342.

If the complaint discloses that the action is brought by an administrator, allegations which indicate that he is suing in his individual capacity should be disregarded, the answer being drawn on the theory the complaint was understood to proceed upon. Chandos v. Edwards, 86 W 493, 56 NW 1098.

If, notwithstanding the uncertainty of important allegations in the complaint, it can still be seen that a substantial cause of action is stated, a demurrer will not lie, the remedy, if any, being by motion to make more definite and certain. Johnston v. Northwestern Live Stock Ins. Co. 94 W 117, 68 NW 868.

Collusion, as used in the complaint, charged defendants with forming an unlawful combination to injure plaintiff. Miller v. Bayer, 94 W 123, 68 NW 869.

The allegations of a petition in condemnation are liberally construed so far as consistent with reasonable certainty of information to the opposite party and the court. Babcock v. Chicago & N. W. R. Co. 107 W 280, 83 NW 316.

Allegation that the plaintiff was a Wisconsin corporation is sufficient to indicate that it was a corporation organized under the laws of Wisconsin. Milwaukee T. Co. v. Van Valkenburgh, 132 W 638, 112 NW 1083.

A complaint on contract to recover money collected by an attorney, which also alleged that the attorney by false statements had led the plaintiff to delay until his right of action on contract was barred by the statute of limitation, stated a cause of action for fraud. Ott v. Hood, 152 W 97, 139 NW 762.

Of 2 permissible constructions of a complaint, that which will support a cause of action will be adopted rather than another which would not. Highway T. Co. v. Janesville E. Co. 178 W 340, 190 NW 110.

Every reasonable presumption will be indulged to uphold a pleading. July v. Adams, 178 W 375, 190 NW 89.

In construing a pleading, if the essential facts can be discovered either by express statement or by reasonable inference, it must be held good, although the allegations be in form uncertain, defective and incomplete. Palmersheim v. Hertel, 179 W 291, 191 NW 567.

Liberality in construing a pleading should not warrant carelessness or unskillfulness on behalf of a pleader. Rosenthal v. First Bohemian B. & L. Asso. 192 W 326, 212 NW 526.

In order to properly plead a bona fide purchase, the consideration and the nature thereof need not be specifically set forth, as the term "bona fide purchaser" is one well known in the law; and the adversary party may, if he desires a more specific allegation, obtain relief by a motion to make more definite and certain. Simpson v. Cornish, 196 W 125, 218 NW 193.

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

A pleader is entitled to all reasonable inferences that can be drawn from the facts pleaded, but he cannot be aided by mere surmise as to what the evidence will disclose. Lange v. Andrus, 1 W (2d) 13, 83 NW (2d) 140.

On demurrer, an answer, like other pleadings, is to be liberally construed with a view to substantial justice between the parties, doubts are to be resolved in its favor where it is uncertain and ambiguous, and it is entitled to all reasonable inferences that can be drawn from the facts pleaded. This liberality is particularly in order where uncertainties are criticized but no motion to make more definite and certain has been made. An answer is not subject to general demurrer if it states even a partial defense. Boek v. Wagner, 1 W (2d) 337, 83 NW (2d) 916.

263.28 History: 1856 c. 120 s. 77, 78; R. S. 1858 c. 125 s. 33, 34; R. S. 1878 s. 2669, 2670; Stats. 1898 s. 2669, 2670; 1925 c. 4; Stats. 1925 s. 263.28, 263.30; 1935 c. 541 s. 37; Stats. 1935 s. 263.28.

An amendment is a matter of right, even where the other party will be misled, in which case it is the duty of the court to allow the amendment upon such terms as shall be just. If the court is not satisfied that he has been misled, evidence should be admitted without

amendment or the amendment allowed without cost. Fox River V. R. Co. v. Shoyer, 7 W 364.

Entitling the summons and judgment in the wrong county is a mere irregularity. Boyd v. Weil, 11 W 58.

A variance between the complaint and judgment in the name of the plaintiff is variance for which the judgment will be reversed. Reeves v. Lee, 6 W 80; Witte v. Meyer, 11 W 295.

Where a pleader attempted to plead an estoppel, but the allegation was so drawn as to show no estoppel when strictly construed, the court should not have admitted evidence under such allegation without first requiring the pleading to be amended. But where the evidence was received without amendment, against objection, the appellant not being taken by surprise, there was no basis for renewal. Gill v. Rice, 13 W 549.

Conditions in a contract not alleged may be shown, as well as their performance. Gee v. Swain, 12 W 450; Bonner v. Home Ins. Co. 13 W 677.

Under a plea of tender of a certain sum, which turns out to be $1 less than the amount due, it is error not to permit evidence that the amount due was tendered. Rublee v. Tibbetts, 26 W 399.

An averment of express warranty of quality is satisfied by proof of facts showing implied warranty. Giffert v. West, 33 W 617.

The objection that the evidence tends to prove a different cause of action or defense from that pleaded must be made so as to direct the attention of the court to the precise ground of inadmissibility. Bowman v. Van Kuren, 29 W 209.

In an action for damage by the unlawful construction of sewers the failure to allege negligence is immaterial if it appears that the manner of their construction was unlawful. Harper v. Milwaukee, 30 W 365.

When it appears that the contract counted on has not been fully performed quantum meruit and quantum valebant counts may be allowed on the trial. Trowbridge v. Barrett, 30 W 661. See also Monaghan v. School Dist. 38 W 100.

A plea of payment is satisfied by proof of delivery, through a third person, of the amount of the price. Cody v. Bemis, 40 W 666.

On an averment of quantum meruit a special contract may be shown without variance. Delaplaine v. Turnley, 44 W 42.

Facts not alleged in the complaint, but set up in the answer and appearing in the proof, are regarded as pleaded. Goff v. Outagamie County, 43 W 55.

When a different issue from that made by the pleadings is tried without objection, this amounts to an amendment of the pleadings and the variance is disregarded on appeal. Russell v. Loomis, 43 W 545.

Where evidence is admitted without objection facts which it tends to prove are regarded as having been alleged when the opposite party is not misled to his prejudice. Aschermann v. Philip Best B. Co. 45 W 263.

A mistake not disclosed by the pleadings may be shown when the opposite party will not be misled. Waldeck v. Springfield F. & M. Ins. Co. 53 W 129, 10 NW 88.

A variance in the description of the property between the affidavit and writ of replevin is immaterial and may be cured, where there was no uncertainty as to the property and the right property was taken. McCourt v. Bond, 64 W 596, 25 NW 532.

Where a complaint alleged a balance due plaintiff for work and labor performed, and the proof showed this and also an agreement that defendant should retain such balance and pay it on demand with interest, there was no variance. Otte v. McLean, 67 W 242, 30 NW 367.

The complaint must set out the slanderous words in the language in which they were uttered, with an English translation; otherwise the variance will be fatal. Pelzer v. Benish, 67 W 291, 30 NW 366.

Where complaint alleged that a defendant was indebted for property sold to him, but the evidence showed a wrongful conversion, there was an immaterial variance, as plaintiff had a right to waive the tort and sue upon contract. Walker v. Duncan, 68 W 624, 32 NW 689.

It is immaterial that the petition shows a sale to husband and wife and the proof a sale to the husband alone. North v. La Flesh, 73 W 520, 41 NW 633.

A variance is immaterial where the complaint alleges the speaking of the slanderous words in certain German words and gives an English translation of them, and the evidence shows that somewhat different German words were spoken, but that the English translation thereof was as alleged, it not appearing that the translation was incorrect. Schild v. Legler, 82 W 73, 51 NW 1099.

If the proof established a contract substantially like that alleged, and a breach of it and damages resulting therefrom are proven, the defendant cannot escape liability because of technical variances between the allegations and the proof. Lawrence v. Milwaukee, L. S. & W. R. Co. 84 W 427, 54 NW 797.

An answer by a person interpleaded alleging the ownership of notes, etc., by purchase does not constitute a variance from evidence showing that title was acquired by gift, at least where the adverse party knew the nature of the claim to the title. McNally v. McAndrew, 98 W 62, 73 NW 315.

Secs. 2669 and 2670, Stats. 1898, do not limit the power of amendment under sec. 2830 and defenses not amendable may be disregarded on appeal. Gates v. Paul, 117 W 170, 94 NW 55.

Where fraud was not pleaded but was found by the court and sustained by the evidence, the pleadings will be considered as having been amended to conform to the facts proved. Rule v. J. L. Gates L. Co. 121 W 544, 99 NW 333.

In an action for slander it is not necessary that the precise words alleged in the complaint be proven, but proof of the substance of the charge made but in different words is sufficient. Kloths v. Hess, 126 W 587, 106 NW 251.

Where there is no conflict of testimony as to the facts of a proposed amendment to a petition for mandamus a variance between the pleading and the proof is not material, and the court may find the facts in accordance with

the evidence, or order an amendment to the petition. State ex rel. Dresser v. District Board, 135 W 619, 116 NW 232.

Where there has been a fair trial, without objection, of all controversies involved in the action, a variance between the allegations and the evidence is immaterial and the complaint may be amended to correspond with the proofs or, on appeal, may be deemed to have been so amended. Klaus v. Klaus, 162 W 549, 156 NW 963.

Where a claim for a lien filed by a materialman stated that lumber was 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 2 sons of the landowners and with no one else, there was a fatal defect in the claim for lien, within 289.08, Stats. 1929, 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.

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 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.

In respect to certain variances between allegations of the city's complaint and its proof, orderly procedure suggests an amended complaint to set out the relief which the city desires and can prove on a new trial. Lake Mills v. Veldhuizen, 263 W 49, 56 NW (2d) 491.

Where the complaint does not allege a failure of duty in some particular respect, such omission generally precludes proof of acts constituting such failure, but such proof may be received if it does not operate to the disadvantage of the defendant on the trial. Cook v. Wisconsin Tel. Co. 263 W 56, 56 NW (2d) 494.

Where the trial proceeded on the original complaint and answer, and there was no issue of fraud on either side but only the issue of whether the defendant had failed to deliver a complete generating unit to the plaintiff under a first contract, the plaintiff's testimony that the defendant's agent had induced the plaintiff to sign a second contract by certain false representations was immaterial and irrelevant, and its admission, over objection, was prejudicial and constituted reversible error. In such action for damages for the defendant's breach of its contract to deliver a complete generating unit to the plaintiff, the exclusion of the defendant's evidence, that the unit delivered by the plaintiff to the defendant in the transaction was worthless, was proper, in that the plaintiff had not promised a unit in good operating order, and the allegation in the defendant's answer that such unit was worthless was not pleaded as a setoff or counterclaim but appeared as a mere fugitive statement, not within the issues. Erickson v. Westfield M. & E. L. Co. 263 W 580, 58 NW (2d) 437.

Even where defendants do not file a cross complaint asking judgment for contribution, the court treats the pleadings as amended and grants such relief if the record shows that the parties are entitled to it. Security Nat. Bank v. Plymouth Cheese Co. 3 W (2d) 40, 87 NW (2d) 780.

Under 263.28, Stats. 1963, a variance is not deemed material unless it misleads the adverse party to its prejudice, entailing proof to the satisfaction of the court that the opposing party has been so misled and demonstrating in what respect he has been misled. Lisowski v. Chenenoff, 37 W (2d) 610, 155 NW (2d) 619.

Where a good cause of action appears from the proof received without objection, a variance between the allegations of the complaint and the evidence is not material, and the pleadings may be taken as amended to conform to the proofs. Lake Geneva v. States Imp. Co. 45 W (2d) 50, 172 NW (2d) 176.

263.31 History: 1856 c. 120 s. 79; R. S. 1858 c. 125 s. 35; R. S. 1878 s. 2671; Stats. 1898 s. 2671; 1925 c. 4; Stats. 1925 s. 263.31.

An allegation of performance of a contract is not supported by proof of facts excusing such performance. Warren v. Bean, 6 W 120.

Where a cause of action founded on fraud and breach of confidence was alleged, and judgment was rendered upon the theory that contractual relations existed between the parties, there was not a mere variance, but a failure of proof. Kruschke v. Stefan, 83 W 373, 53 NW 679.

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

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. See also Forkenbridge v. Excelsior Mut. B. & L. Asso. 240 W 82, 2 NW (2d) 702.

263.32 History: 1856 c. 120 s. 64; R. S. 1858 c. 125 s. 20; 1865 c. 192 s. 1; R. S. 1878 s. 2672; Stats. 1898 s. 2672; 1925 c. 4; Stats. 1925 s. 263.32; Sup. Ct. Order, 212 W ix.

In an action to enforce a trust, where plaintiff has rendered services in the protection and management of the trust property, he may be compelled to give a bill of particulars if it becomes material to ascertain the extent of such services. Horn v. Ludington, 28 W 81.

A bill of particulars may be set out in the complaint in the first instance or furnished afterwards or on demand. Kewaunee County v. Decker, 28 W 669.

A bill may be amended at the trial, as a general rule, in a proper case. The objection that it is not verified is waived by retaining it without objection. Paine v. Smith, 32 W 335.

If a counterclaim in an action by architects to recover for services in the erection of a building alleges that the defendant was dam-

aged by reason of breaches of duty and mistakes on plaintiff's part, the defendant may be required to furnish a bill of particulars specifying the breaches and mistakes, with an itemized statement of the expenses resulting to him by reason thereof. Conover v. Knight, 84 W 639, 54 NW 1002.

Under 263.32, Stats. 1955, relating to the ordering of a bill of particulars on the claim of either party, the claim to be particularized is that which may be stated on an account, and not a claim stated in any and every type of action. A motion for a bill of particulars is distinct from one for a discovery and from an examination before trial, and should not be extended to encroach on the office of the latter motions, the purpose of a bill of particulars being merely to give the items of a party's claim, not his evidence. Midwest Broadcasting Co. v. Dolero Hotel Co. 273 W 508, 78 NW (2d) 898.

263.33 History: 1856 c. 120 s. 67; R. S. 1858 c. 125 s. 23; R. S. 1878 s. 2673; Stats. 1898 s. 2673; 1925 c. 4; Stats. 1925 s. 263.33.

In pleading a justice's judgment it is sufficient to aver that proceedings were had which "terminated by a judgment being duly rendered." Roys v. Lull, 9 W 324.

Sec. 23, ch. 125, R. S. 1858, applies to judgments of courts of special jurisdiction in other states as well as to those of like courts in this state. Archer v. Romaine, 14 W 375.

The court will take judicial notice of the fact that certain courts of other states are courts of general jurisdiction. Jarvis v. Robinson, 21 W 523.

An allegation that the plaintiff recovered a judgment against the defendant and that the judgment was duly docketed by the clerk of the court which rendered it is equivalent to stating that the judgment had been duly given or made. Pierstoff v. Jorges, 86 W 128, 56 NW 735.

Formerly a complaint on a justice's judgment was not good if it failed to allege the necessary facts showing that he had jurisdiction. Under sec. 2673, R. S. 1878, there cannot be a recovery upon such a judgment if the docket of the justice fails to show that he had jurisdiction. Jones v. Hunt, 90 W 199, 63 NW 81.

A complaint upon a judgment rendered in another state is good if it alleges that the judgment was rendered by a court of general jurisdiction, though it does not allege the jurisdictional facts. Kunze v. Kunze, 94 W 54, 68 NW 391.

Where a complaint alleges the obtaining of a judgment in the municipal court in a foreign state, and such allegation is denied, the plaintiff must establish the validity of the judgment. Christiansen v. Kriesel, 133 W 508, 113 NW 980.

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, as well as of the defendant, where the defendant alleged in his answer that the municipal court was without jurisdiction; and the plaintiff lifted its burden by the certified transcript of the proceedings in the municipal court and by proof of the Illinois statutes relating to the jurisdiction of that court. Weathered Misses Shop, Inc. v. Coffey, 240 W 474, 3 NW (2d) 693.

A complaint for the recovery of an alleged unlawful property tax paid, so far as alleging that the circuit court in a certiorari proceeding had found by a written opinion that there was jurisdictional error in the assessment and ordered the assessment vacated, but not alleging that a judgment was ever entered, was defective. Waukesha Development Corp. v. Waukesha, 10 W (2d) 621, 103 NW (2d) 668.

263.34 History: 1856 c. 120 s. 68; R. S. 1858 c. 125 s. 24; R. S. 1878 s. 2674; Stats. 1898 s. 2674; 1925 c. 4; Stats. 1925 s. 263.34.

In an action on an insurance policy it is enough to state generally that plaintiff has performed all conditions therein precedent to recovery in a suit thereon. Boardman v. Westchester Fire Ins. Co. 54 W 364, 11 NW 417.

An allegation that the plaintiff has fully performed all of the conditions of the contract upon his part to be performed is sufficient. Reif v. Paige, 55 W 496, 13 NW 473.

An averment of the due performance of conditions precedent is sufficient when the only condition precedent is immediate notice of the loss, and Carberry v. German Ins. Co. 51 W 605, 8 NW 406, applies only when the money becomes due in a certain time after a condition is performed, when it is necessary to allege not only performance but the time of performance. Scheiderer v. Travelers' Ins. Co. 58 W 13, 16 NW 47.

In an action upon a policy an allegation of the performance of conditions precedent shows that the written notice and proofs of loss were given in the time and manner required. Schobacher v. Germantown F. M. Ins. Co. 59 W 86, 17 NW 969.

An allegation in a complaint upon a policy that it was agreed that the the loss should be paid 60 days after notice and proofs and that plaintiff fully complied with all the conditions of the contract and rendered a particular account and proof of loss is sufficient. Bank of River Falls v. German American Ins. Co. 72 W 535, 40 NW 506.

An allegation that immediately after the fire the plaintiff forthwith gave defendant notice of the loss, and that he has duly performed all the conditions of the policy on his part, shows that proofs of loss were forwarded within 60 days. Benedix v. German Ins. Co. 78 W 77, 47 NW 176.

In an action to recover damages for the breach of a contract to convey land, it not appearing that any particular time was fixed for paying the purchase money, an allegation that a conveyance was demanded and the balance of the consideration tendered the same month the contract was made shows a sufficient performance. Britton v. Erickson, 80 W 466, 50 NW 342.

An allegation that more than 90 days have elapsed since notice and proofs were furnished is good as against a demurrer where it does not appear when the loss was payable. Johnston v. Northwestern L. S. Ins. Co. 94 W 117, 68 NW 868.

Conditions precedent to contract liability

may be pleaded according to their legal effect, and other mere conditions of fact not going to the foundation of a cause of action may be so pleaded. South Milwaukee Co. v. Murphy, 112 W 614, 88 NW 583.

In an action by brokers to recover commissions, allegations that the defendants entered into a contract with the purchaser procured by the brokers after a careful investigation of the purchaser's financial ability to consummate the purchase, and that the brokers have performed every obligation under their contract with the defendant, are sufficient to show that the purchaser was ready, willing and able to buy. Grieb & Erickson v. Estberg, 186 W 174, 202 NW 331.

A general allegation of performance of conditions precedent is sufficient; it is not necessary to specify the time of tender or items tendered. Boek v. Wagner, 1 W (2d) 337, 83 NW (2d) 916.

263.34, Stats. 1967, does not require a particularization of conditions precedent that have been met by the plaintiff, but merely requires the allegation that they have been met. Gamma Tau Ed. Found. v. Ohio Cas. Ins. Co. 41 W (2d) 675, 165 NW (2d) 135.

263.35 History: 1856 c. 120 s. 68; R. S. 1858 c. 125 s. 24; R. S. 1878 s. 2675; Stats. 1898 s. 2675; 1925 c. 4; Stats. 1925 s. 263.35.

A note for money, with exchange on New York, is for the payment of money only. Legett v. Jones, 10 W 34.

A money bond or coupon is an instrument for the payment of money only. Veeder v. Lima, 11 W 419.

A guardian's bond is not an instrument for the payment of money only. Carrington v. Bayley, 43 W 507.

A contract of indemnity against loss is not an instrument for the payment of money only. Taylor v. Coon, 79 W 76, 48 NW 123.

"Sec. 263.35, Stats., provides a short forum for pleading. Its intent is to simplify pleadings where an instrument, standing alone, indicates a sum of money is due and owing. Such a purpose would not be served by permitting pleadings to incorporate a note which states on its face that it is subject to the terms of an agreement, the terms of which are unknown and not alleged." Milwaukee Acceptance Corp. v. Kuper, 42 W (2d) 515, 518, 167 NW (2d) 256, 258.

263.37 History: 1856 c. 120 s. 70; R. S. 1858 c. 125 s. 26; R. S. 1878 s. 2677; Stats. 1898 s. 2677; 1925 c. 4; Stats. 1925 s. 263.37.

If the words are per se ambiguous then their application to the plaintiff must be enlarged. Sec. 70, ch. 120, Laws 1856, applies only when the words are clear in meaning. Van Slyke v. Carpenter, 7 W 173.

If the words were spoken in a foreign language it must be averred that they were understood by those who heard them. K——— v. H———, 20 W 239.

The office of the innuendo "is not to enlarge the meaning of the words, but to point their meaning to some precedent matter, expressed or necessarily understood". Weil v. Schmidt, 28 W 137; Langton v. Hagerty, 35 W 150; Cottrill v. Cramer, 43 W 245; Bradley v. Cramer, 59 W 309, 18 NW 268.

A general averment that an alleged libel was published dispenses with allegations of such extrinsic facts as would otherwise be necessary to show the application to plaintiff of the words employed; but it does not dispense with the necessity of an averment, colloquium or innuendo where they are essential to show the meaning of the words used. Bradley v. Cramer, 59 W 309, 18 NW 268.

It is for the court to decide whether a publication is capable of the meaning ascribed to it by the innuendo and for the jury to decide whether such meaning is truly ascribed to it. Bradley v. Cramer, 59 W 309, 18 NW 268.

The words must be set out in the language in which they were uttered, with an English translation. Simonsen v. Herold Co. 61 W 626, 21 NW 799.

If an exact translation be not given, but only the English signification, the complaint must further allege that those to whom the libel was published understood it in that sense. Simonsen v. Herold Co. 61 W 626, 21 NW 799.

Where the complaint alleges that the defendant published of and concerning the plaintiff the article set forth, quoting such article in full, such colloquium need not be prefixed to each paragraph of the article. Gauvreau v. Superior P. Co. 62 W 403, 22 NW 726.

A certain innuendo does not enlarge the meaning of the spoken words. Singer v. Bender, 64 W 169, 24 NW 903.

Where spoken words are claimed to be actionable because tending to prejudice plaintiff in his business, the complaint must show business in which he was injured or concerning which the words were spoken and must claim damages on account thereof. Geary v. Bennett, 65 W 554, 27 NW 335.

No facts were alleged showing that the words were to be given other than their ordinary meaning (they not being actionable per se), and no special damages were alleged, it does not state a cause of action. Benz v. Wiedenhoeft, 83 W 397, 53 NW 686.

On demurrer, a complaint in an action for slander is good though it did not allege that the words said to have been spoken were false or defamatory, the concluding part averring that "all of said words were false and defamatory," and that "by reason of the speaking of said false, slanderous and defamatory words" the plaintiff was damaged. Born v. Rosenow, 84 W 620, 54 NW 1089.

Where a complaint alleged that a paper presented to a board of supervisors for the purpose of obtaining a revocation of plaintiff's license as a saloon keeper, "was maliciously written and published," this allegation rebutted the idea that the paper was privileged because it was simply presented to the board. Werner v. Ascher, 86 W 349, 56 NW 869.

In an action for slander the particular words spoken must be alleged. Schubert v. Richter, 92 W 199, 66 NW 107.

An allegation that the German words set out in the complaint, and constituting the libel, "being translated into the English language read as follows," setting out the alleged translation, is good. Dr. Shoop F. M. Co. v. Wernich, 95 W 164, 70 NW 160.

Writing a message and delivering it to a telegraph company for transmission is a publication. Munson v. Lathrop, 96 W 386, 71 NW 596.

For a complaint which did not affect plaintiff's profession or occupation and was insufficient because it did not allege special damages, see Gilan v. State Journal P. Co. 96 W 460, 71 NW 892.

The words "meaning the plaintiff" in parentheses after the name of the person regarding whom the words were published or spoken were sufficient, as alleging that the words were published or spoken concerning the plaintiff. Dabold v. Chronicle P. Co. 107 W 357, 83 NW 639.

Where the complaint fails to allege that the words were published or spoken concerning the plaintiff and no objection was made at the trial to such omission, an amendment correcting this mistake is proper. Robinson v. Eau Claire B. & S. Co. 110 W 369, 85 NW 983.

The gist of an action of slander is the effect of the natural and reasonable import of the words used upon hearers, hence, the necessity of alleging that slanderous words were heard and understood by others. Lubcke v. Teckham, 179 W 543, 191 NW 968.

If the slander of a bank is such as to relate to its business so as to affect the confidence of the public and drive away its customers, or where it affects its credit, it is slanderous per se. Where the utterances complained of are elicited by the plaintiff either by a trick or for the purpose of bringing an action thereon, the plaintiff should not recover. Ridgeway S. Bank v. Bird, 185 W 418, 202 NW 170.

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. 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, on no cause of action, citing Woods v. Sentinel-News Co. 216 W 627, 258 NW 166.

263.38 History: 1856 c. 120 s. 71; R. S. 1858 c. 125 s. 27; R. S. 1878 s. 2678; Stats. 1898 s. 2678; 1925 c. 4; Stats. 1925 s. 263.38; 1935 c. 541 s. 39.

Mitigating circumstances cannot be shown without having pleaded them unless there was no opportunity to do so. But where the plaintiff gives evidence of a fact not pleaded by him to show express malice defendant may rebut the same by explanatory evidence. Reiley v. Timme, 53 W 63, 10 NW 5. See also Wilson v. Noonan, 35 W 321.

The object of the statute was to relieve the hardship of the old rule that a plea of the truth of the defamatory matter was an aggravation of the offense. The defendant may now show the truth if he can, and if he fails he may show mitigating circumstances. Eviston v. Cramer, 54 W 220, 11 NW 556.

Mitigating circumstances are such as tend to show that, although mistaken, defendant believed, on reasonable grounds, that the charge made was true; and any such facts may be pleaded and proved, though they are particular and unrelated. Adamson v. Raymer, 94 W 243, 68 NW 1000.

This section was a literal copy of sec. 165 of the New York Code. Candrian v. Miller, 98 W 164, 73 NW 1004.

263.39 History: 1856 c. 120 s. 72; R. S. 1858 c. 125 s. 28; R. S. 1878 s. 2679; Stats. 1898 s. 2679; 1925 c. 4; Stats. 1925 s. 263.39.

263.40 History: Stats. 1898 s. 2845a; 1925 c. 4; Stats. 1925 s. 270.10; Court Rule XXIX s. 1, 2, 3; Sup. Ct. Order, 212 W xii; Stats. 1933 s. 263.40.

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.

263.42 History: 1856 c. 120 s. 58; R. S. 1858 c. 125 s. 14; R. S. 1878 s. 2682; 1879 c. 194 s. 2 sub. 21; Ann. Stats. 1889 s. 2682; Stats. 1898 s. 2682; 1925 c. 4; Stats. 1925 s. 263.42; Sup. Ct. Order, 204 W vii; Sup. Ct. Order, 217 W vi.

Revisers' Note, 1878: Section 14, chapter 125, R. S. 1858, omitting the word "irrelevant" because it serves no purpose in connection with the word "sham," and is sufficiently provided for in the preceding and next following sections. A sham answer is one so unmistakably false, that the party is not entitled to demand the delay of a trial. An irrelevant one must be frivolous, one would think. If not, the irrelevant matter may be struck out as provided in the next section. The section is also amended by providing that a sham denial may be struck out, and by also declaring that the affidavit of a single witness (which includes a party and implies ability to testify) shall be sufficient to require a jury trial. There has been much dispute in New York, resulting in contradictory opinions from the court of appeals, as to whether a denial could be struck out: People v. McCumber, 18 N. Y. 315; Wayland v. Tysen and another—cases 45 N. Y. 281, 468, 676. See, also, Cottna v. Cramer, 40 W 555. We think a party has a constitutional right to try an issue which really exists, but not to impose a false one on the court, and have no doubt a definition to that effect ought to stand. The practice designed to be indicated by the section is, that when a defense is verified in such a manner as that the material allegations derive support from the statement of the affiant that they are true, it cannot be struck out. But when a clear case is made by opposing affidavits, of so strong a character that there can be no reasonable doubt of the facts, and the pleading is not so verified, the party ought to make the showing of a witness, or not pretend an issue when there is none. The power is one which requires to be exercised with sound discretion.

An answer setting up usury by an agree-

ment subsequent to the one sued on, affecting the latter, is not frivolous. Grubb v. Remington, 7 W 349.

An answer in foreclosure, setting up that the debt is not due by the terms of the bond though it may be by the mortgage, is not frivolous. Martin v. Weil, 8 W 220.

A demurrer to a complaint on a note payable with exchange on New York, on the ground that the note is an instrument for the payment of money only, is frivolous. Leggett v. Jones, 10 W 34.

An answer which sets up a defense which cannot be sustained without proof of a tender is frivolous if it does not allege a tender. Platt v. Robinson, 10 W 128.

A demurrer to a complaint on an undertaking in attachment, setting out the instrument in full, with proper inducement is frivolous. Coe v. Straus, 11 W 72.

A demurrer raising the question of the liability of a bank upon notes signed by its president alone is not frivolous. McConihe v. McClurg, 13 W 454.

An answer alleging that the note in suit was made payable in Minnesota for the purpose of avoiding the Wisconsin usury law is not frivolous. Moyer v. Strahl, 10 W 83; Gillmore v. Woolcock, 13 W 589.

A demurrer on the ground that 2 out of 6 makers of a joint and several note were not made parties is not frivolous. Clapp v. Preston, 15 W 543.

An answer on information and belief as to the record of a mortgage in the proper office is sham and may be stricken out as such. Hathaway v. Baldwin, 17 W 616.

A motion to strike out an answer as sham is properly denied if any part thereof is good. Jarvis v. McBride, 18 W 316.

A demurrer to a complaint to enjoin the collection of taxes on the ground that the acts authorizing collection are void raises the question of their validity, and is not frivolous. Howland v. Kenosha County, 19 W 247.

An allegation on information and belief of matters which clearly should be stated positively is frivolous. Milwaukee v. O'Sullivan, 25 W 666.

If the defendant does not ask to plead over, the judgment will not be reversed if the demurrer is bad though not frivolous. Weishaupt v. Weishaupt, 27 W 621.

To a complaint on a note the defendants answered that it was given in renewal of older notes, agreed to be surrendered, but which were still retained by plaintiff; the answer was not frivolous. Braley v. Pickett, 28 W 598.

Where, from the facts stated in the complaint, there may perhaps be a presumption that the plaintiff is entitled to a life estate in land, a demurrer is not frivolous. Sage v. McLean, 37 W 357.

A demurrer to a complaint setting up a sale of goods to a partnership, and incidentally an acceptance of a bill for them by one partner in his own name, for misjoinder of causes of action, is frivolous. Tolman v. Hanrahan, 44 W 133.

A complaint alleged that a libelous letter was sent to "R. Dunn & Co., in Milwaukee, Wis." A demurrer on the ground that the letter was not sent to any person is frivolous. Benedict v. Westover, 44 W 404.

A statement that defendant has not sufficient information to form a belief, "and therefore denies," where specific denial is required, is frivolous. Crane Brothers M. Co. v. Morse, 49 W 368, 5 NW 815.

Where a reply merely denies a counterclaim a demurrer is frivolous. Beggs v. Beggs, 50 W 443, 7 NW 339.

An answer setting up no defense to an action on a policy, as that a large number of other policyholders have agreed to scale down their policies, is frivolous. Lerdall v. Charter Oak Life Ins. Co. 51 W 426, 8 NW 280.

Upon a motion to strike out a pleading as frivolous the court may consider and determine the sufficiency of the pleading as on a demurrer. Madgeburg v. Uihlein, 53 W 165, 10 NW 363.

If a pleading is bad it may be stricken out as frivolous. Krall v. Libbey, 53 W 292, 10 NW 386.

Where the allegation is indefinite but not frivolous the remedy is by motion to make more definite. State ex rel. Green Bay & M. R. R. Co. v. Jennings, 56 W 113, 14 NW 28.

If the demurrer was not well taken an order striking it out as frivolous, with leave to answer, will be affirmed on appeal. Straka v. Lander, 60 W 115, 18 NW 641.

An order striking out a pleading as frivolous is appealable; but the only question on appeal is whether such pleading was good. Hoffman v. Wheelock, 62 W 434, 22 NW 713, 716.

A motion for judgment upon a frivolous demurrer is, in effect, a motion to strike out the demurrer. Guth v. Lubach, 73 W 131, 40 NW 681.

Granting a motion to strike an answer as frivolous is the same in effect as sustaining a demurrer on the ground that the answer does not state a defense. Milwaukee S. Co. v. Milwaukee, 83 W 590, 53 NW 839.

There can be no distinction between striking out a demurrer as frivolous and overruling it. Geilfuss v. Gates, 87 W 395, 58 NW 742.

A verified answer, whether by way of denial or avoidance, is not open to a motion to strike out as sham, while an unverified answer, in any case, is open to such motion, but may be saved by affidavit of one witness in opposition to such motion. Pfister v. Wells, 92 W 171, 65 NW 1041; Pearson v. Neeves, 92 W 319, 66 NW 357.

A counterclaim pleaded in defense of an action on a note, alleging that defendant gave a mortgage to secure the payment of the note and that plaintiff retained the mortgage notwithstanding the action to recover on the note, is frivolous. Wilson v. Burhans, 96 W 550, 71 NW 879.

A motion to strike out parts of the answer as irrelevant and frivolous is not equivalent to a demurrer thereto. Smith v. Kibling, 97 W 205, 72 NW 869.

Allegations in a verified answer cannot be stricken out as sham but where they do not constitute a defense the error is immaterial. Moore v. May, 117 W 192, 94 NW 45.

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 History: 1856 c. 120 s. 66; R. S. 1858 c. 125 s. 22; R. S. 1878 s. 2683; 1879 c. 194 s. 2 sub. 22; Ann. Stats. 1889 s. 2683; Stats. 1898 s. 2683; 1925 c. 4; Stats. 1925 s. 263.43; 1935 c. 541 s. 40; Sup. Ct. Order, 251 W vi.

Revisers' Note, 1878: Section 22, chapter 125, R. S. 1858, amended to embrace scandalous matter, and to enable the court to require the costs to be paid by the responsible author.

1. Irrelevant, redundant or scandalous matter.
2. Indefinite or uncertain pleading.

1. Irrelevant, Redundant or Scandalous Matter.

On motions to strike out an answer or reply see notes to sec. 263.44.

Irrelevant and redundant matter as to which a demurrer has been sustained may be stricken out. Vliet v. Sherwood, 38 W 162.

Where, in an action on a note the answer set up that the plaintiff was not the real party in interest and also payment, further allegations as to the fraudulent practices by which the plaintiff had obtained the note were redundant. Carpenter v. Reynolds, 58 W 666, 17 NW 300.

An order striking redundant matter from an answer is not appealable. Carpenter v. Reynolds, 58 W 666, 17 NW 300.

On ordering matters to be struck out as redundant the court may direct the service of an amended complaint. Durch v. Chippewa County, 60 W 227, 19 NW 79.

It is proper to deny a motion to make more definite and certain allegations which are unnecessary and redundant. Spensley v. Janesville C. Co. 62 W 549, 22 NW 574.

Motions to strike matter from pleadings, except where its retention would affect the substantial rights of the adverse party or it is scandalous, are discouraged. Brachman v. Kuehnmuench, 64 W 249, 24 NW 902.

Upon ordering portions of a complaint struck out it is proper to impose costs upon plaintiff and allow defendants a certain time after payment thereof to serve their answer. Joint School Dist. v. Kemen, 65 W 282, 27 NW 31.

The exercise of discretion by the court in refusing to strike out matter as scandalous will not be disturbed for technical reasons, where no substantial rights are affected. Burnham v. Milwaukee, 69 W 379, 34 NW 389.

A court commissioner has no power to strike out irrelevant, redundant or scandalous matter from a pleading. Balkins v. Baldwin, 84 W 212, 54 NW 403.

In an action to recover for goods sold the fact that the plaintiff was a member of an unlawful trust or combination whose object was to acquire a monopoly of the trade in goods of that class, and that there was an agreement between plaintiff and defendant that the latter should receive a rebate of the purchase price if he bought all his goods from the trust or members thereof, is irrelevant. National D. Co. v. Cream City I. Co. 86 W 352, 56 NW 864.

An allegation in the complaint in an action for breach of promise of marriage that since the promise defendant had married is unnecessary, and a motion to make it more definite as to the time of the marriage is properly denied. McCarville v. Boyle, 89 W 651, 62 NW 517.

A motion to strike out portions of a pleading should be denied unless such portions be clearly irrelevant or scandalous or redundant. The pleading should be construed most favorably to the pleader; and on appeal from the decision the supreme court should be less ready to disturb a denial of the motion than an order granting it. Home A. Co. v. Swenson-Dibble L. Co. 179 W 556, 192 NW 42.

Pleadings in an action if relevant are absolutely privileged, and an action for libel will not lie, even though allegations therein are false and malicious. Bussewitz v. Wisconsin T. Asso. 188 W 121, 205 NW 808.

2. Indefinite or Uncertain Pleading.

Where it is alleged that defendant is a trustee and an enforcement of the trust is sought a motion to make the complaint more definite by stating the facts which make him trustee will be sustained. Horn v. Ludington, 28 W 81.

When the pleading is defective in form or it is doubtful what the precise nature of the allegations is, the remedy is by motion to make more certain and not by demurrer. Flanders v. McVikar, 7 W 372; Bach v. Bell, 7 W 433; Bateman v. Johnson, 10 W 1; Markwell v. Waushara County, 10 W 74; Newman v. Kershaw, 10 W 333; Learmonth v. Veeder, 11 W 138; Clark v. Langworthy, 12 W 441; Kuehn v. Wilson, 13 W 104; Morse v. Gilman, 16 W 504; Grannis v. Hooker, 29 W 65; Riemer v. Johnke, 37 W 258; Ready v. Sommer, 37 W 265; Marsh v. Waupaca County, 38 W 250.

The failure to definitely plead a lease and conveyance can only be made available on motion to make more definite. Bishop v. Aldrich, 48 W 619, 4 NW 775.

Demurrer will not lie to a pleading by reason of its containing uncertain matter. Redmon v. Phoenix Fire Ins. Co. 51 W 292, 8 NW 226.

When the allegation is indefinite but not frivolous the remedy is by motion to make more definite and certain. State ex rel. Green Bay & M. R. Co. v. Jennings, 56 W 113, 14 NW 28.

A complaint which, in describing premises, makes exceptions of the body of the lands and certain appurtenant rights, and then alleges injuries to "the said premises," was neither uncertain nor defective. Bastian v. Eau Claire, 56 W 172, 14 NW 55.

It is too late to make a motion to have a pleading made more definite and certain after having gone to trial on the pleadings. Nischke v. Wirth, 66 W 319, 28 NW 342.

General allegations of negligence should be made more specific unless from the nature of the case the plaintiff cannot make them so; although they may be sufficient on demurrer

or when denied. Young v. Lynch, 66 W 514, 29 NW 224.

A motion to make the complaint more definite and certain may be made at any time within the period allowed for answering. Young v. Lynch, 66 W 514, 29 NW 224.

An allegation that, in pursuance of a conspiracy already described, B refused to furnish any coal to carry out certain contracts made by plaintiff, especially such contracts with members of a certain society, is not so indefinite as to justify an order to specify with what particular members he made such contract. Murray v. McGarigle, 69 W 483, 34 NW 522.

Where the cause of action is indefinite the remedy is by motion to make more definite and not by demurrer. Schweickhart v. Stuewe, 71 W 1, 36 NW 605.

If the complaint by an administrator to recover damages for the killing of his intestate fairly advises the defendant of the facts a motion to require it to be made more definite and certain by specifying for what distance from the place where the accident occurred a view of the train was obscured may be denied because the defendant, through its agents and employes, was present when the injury was done. Schneider v. Wisconsin C. Co. 81 W 356, 51 NW 582; Monohan v. Northwestern C. Co. 84 W 596, 54 NW 1025.

It is correct practice to combine in a single motion as many objections as the plaintiff supposes the answer is subject to, with a view of having them all determined at the same time. Hence, where it was moved to strike out one defense and to make the other more definite and certain, it was error not to determine the latter. National D. Co. v. Cream City I. Co. 86 W 352, 56 NW 864.

A complaint which states facts which may constitute a cause of action for either a legal or equitable relief, and which does not specify the particular judgment to which the plaintiff supposes himself entitled, is ambiguous; and on a motion to make it more definite and certain the court will require him to make "the precise nature of the charge"—the cause of action—"apparent" upon the face of the complaint. Johns v. Northwestern M. R. Asso. 87 W 111, 58 NW 76.

See note to 263.27, citing Johnston v. Northwestern Live Stock Ins. Co. 94 W 117, 68 NW 868.

A motion to make an answer more definite and to strike out certain parts thereof cannot be treated as a demurrer. It is error to decide, on such a motion, that it reaches back to the first defective pleading. Smith v. Kibling, 97 W 205, 72 NW 869.

Defects in pleading which may be cured by making the pleading more accurate, definite, or certain should be cured by appropriate motions, under 263.43 and 263.44, Stats. 1925, rather than by demurrer. McIntyre v. Carroll, 193 W 382, 214 NW 366.

An adverse examination is not a substitute for a motion to make the complaint more definite and certain, and in the absence of such a motion, the plaintiff was free at the trial to offer any evidence bearing on management and control of the plane covered by the general allegation that the operator failed to operate the plane so as to gain sufficient altitude to clear trees in his path. Maxwell v. Fink, 264 W 106, 58 NW (2d) 415.

263.44 History: R. S. 1878 s. 2684; 1879 c. 194 s. 2 sub. 23; Ann. Stats. 1889 s. 2684; Stats. 1898 s. 2684; 1925 c. 4; Stats. 1925 s. 263.44.

Revisers' Note, 1878: New section, to enable parts of a pleading, improper for different reasons, to be struck out on one motion, and to enable frivolous parts to be so struck out.

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.

A motion to strike irrelevant matter from portions of a pleading is not the equivalent of a demurrer. The sufficiency of a pleading, in matters of substance, must be tried on demurrer, and not on a motion to strike. Paraffine Companies v. Kipp, 219 W 419, 263 NW 84.

A motion to strike certain allegations from the complaint "on the grounds that the complaint does not state a cause of action for these damages," was in effect a challenge to that part of the complaint as irrelevant to the cause of action which the complaint set forth, and was not equivalent to a demurrer, and an order granting such motion to strike was not actually an order sustaining a demurrer, which latter would be an appealable order. Britz v. Chilsen, 273 W 392, 78 NW (2d) 896.

See note to 274.33, on orders not appealable under 274.33 (entire), citing Blooming Grove v. Madison, 5 W (2d) 73, 92 NW (2d) 224.

A motion to strike parts of a counterclaim as frivolous, irrelevant, and redundant, which motion incorporated matters extrinsic to the pleadings, is not the equivalent of a demurrer and cannot be treated as a demurrer for the purpose of appeal. A motion to strike out a separate defense in its entirety is in legal effect a demurrer; but a motion to strike matters from portions of a pleading as irrelevant is not the equivalent of a demurrer. A motion to strike, to be considered appealable as the equivalent of a demurrer, must be made within the time allowed for a demurrer. Stafford v. General Supply Co. 5 W (2d) 137, 92 NW (2d) 267.

A motion to strike out a separate defense in its entirety, on the ground that it does not constitute a defense, is in its legal effect a demurrer, for the reason that such motion raises the sufficiency of the pleading. A motion to strike out an entire counterclaim based on irrelevancy as not pleadable as a counterclaim against the plaintiff, may be considered in legal effect a demurrer; but this demurrer does not permit the court to search the record back to the complaint to see whether the complaint is defective. Wesolowski v. Erickson, 5 W (2d) 335, 92 NW (2d) 898.

263.45 History: 1856 c. 120 s. 80; R. S. 1858 c. 125 s. 36; R. S. 1878 s. 2685; Stats. 1898 s.

2685; 1925 c. 4; Stats. 1925 s. 263.45; Sup. Ct. Order, 217 W vi.

It is an abuse of discretion to allow the filing of an amended complaint which does not state a cause of action, and the sufficiency of the complaint may be determined on an appeal from the order allowing it to be filed. Smith v. Gould, 61 W 31, 20 NW 369.

A party has the right to amend as of course without costs and this right cannot be affected by the service of a motion to strike out within the period allowed for amendment. Sutton v. Wegner, 72 W 294, 39 NW 775.

An answer consisting of a general denial merely is not amendable of course; but if an amended answer is received without objection and retained consent is given to the amendment; and the original answer is superseded. Whitfoot v. Leffingwell, 90 W 182, 63 NW 82.

On appeal from a justice's court plaintiff may make any reasonable amendment of the complaint in respect to the cause of action, but cannot amend by adding an independent cause of action. Carlson v. Stocking, 91 W 432, 65 NW 58.

After amendment to a complaint has been allowed, amendment of an answer is proper. Deveraux v. Peterson, 126 W 558, 106 NW 249.

Where a complaint sets forth all the facts warranting equitable relief the prayer may be amended to demand other and further relief consistent with the cause of action originally described within the period limited by sec. 2685, Stats. 1898. North Side L. & B. Society v. Nakileski, 127 W 539, 106 NW 1097.

Where an amended complaint is served and no further answer is served by the defendant, the original answer stands as the answer to the amended complaint. Ellison v. Straw, 119 W 502, 97 NW 168; White v. Smith, 133 W 641, 114 NW 106.

See note to 893.19, on any other contract, citing Halvorson v. Tarnow, 258 W 11, 44 NW (2d) 577.

An amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is made; and this rule applies although the two causes of action arise out of the same transaction. Johnson v. Bar-Mour, Inc. 27 W (2d) 271, 133 NW (2d) 748.

263.46 History: 1856 c. 120 s. 80; R. S. 1858 c. 125 s. 36; R. S. 1878 s. 2686; Stats. 1898 s. 2686; 1925 c. 4; Stats. 1925 s. 263.46.

When there is an appeal from an order overruling a demurrer and granting a stay of proceedings, it is irregular to take judgment for want of an answer. Ackerman v. Horicon I. M. Co. 16 W 155.

The demurrant may be allowed to move to make the complaint more certain, as well as to answer, within some reasonable time. But it is irregular to set no time for such motion or pleading. Boyd v. Vollmar, 18 W 449.

After a demurrer to the complaint is sustained and an amended complaint is served an appeal cannot be taken from the order sustaining the demurrer. Hooker v. Brandon, 66 W 498, 29 NW 208.

Where leave to plead was omitted from an order sustaining a demurrer but imposing costs, the payment thereof, subsequent service of an amended complaint and the retention of both cured the omission. Schoenleber v. Burkhardt, 94 W 575, 69 NW 343.

In sustaining a demurrer it is error to enter an order providing for judgment in favor of the defendant and for costs. The order should be for costs as a condition for pleading over and a reasonable time should be allowed. Schmidt v. Joint School Dist. 146 W 635, 132 NW 583.

An order that causes of action improperly joined be severed is discretionary and will not be disturbed on appeal unless there was a manifest abuse of discretion. Rohloff v. Folkman, 174 W 504, 182 NW 735.

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.

See note to 274.34, citing Cohan v. Associated Fur Farms, Inc. 261 W 584, 53 NW (2d) 788.

Whether an amendment to a pleading relates back to the bringing of the action, for determining the application of the statute of limitations, depends principally on the nature of the matter asserted by the amendment, that is, whether the amendment states a new cause of action or merely restates in different form the cause stated in the original pleading; and if the latter is the case, the amendment may be made even after the statute of limitations has run. In an action for damages for injuries sustained in an assault and battery alleged to have been committed on the plaintiff by the defendants pursuant to a conspiracy between the defendants, an amended complaint, which substantially realleged certain allegations in the original complaint and revised and condensed certain other allegations, does not state a new cause of action but merely restates in a different form the cause stated in the original complaint, so that the cause set forth in the amended complaint was not barred by the statute of limitations, 330.21 (2). Fredrickson v. Kabat, 264 W 545, 59 NW (2d) 484.

Where it appears that a sufficient complaint cannot be framed, the trial court, on sustaining a demurrer, may in its discretion deny to the plaintiff the opportunity to plead over and order him to pay costs. Pedrick v. First Nat. Bank of Ripon, 267 W 436, 66 NW (2d) 154.

263.47 History: 1856 c. 120 s. 85; R. S. 1858 c. 125 s. 41; 1859 c. 91 s. 2; R. S. 1878 s. 2687; Stats. 1898 s. 2687; 1925 c. 4; Stats. 1925 s. 263.47.

Where a defendant, in an action on a prom-

issory note, moved to amend his answer so as to show that the note was procured by the fraud and misrepresentation of the payee, it is error to allow the amendment. Gregory v. Hart, 7 W 532.

An amendment setting up new matter, the allowance of which would deprive the defendant of the plea of the statute of limitations, is not allowed. Stevens v. Brooks, 23 W 196.

A much more liberal rule exists as to setting up of new defenses than in the case of amendments to the complaint, since the defendant cannot discontinue and commence de novo. Rogers v. Wright, 21 W 681; Harris v. Wicks, 28 W 199; Blodgett v. Hitt, 29 W 169; Bowman v. Van Kuren, 29 W 209; McIndoe v. Morman, 26 W 588.

An order granting leave to serve a supplemental answer required the payment of the costs of the action to that date within 10 days, and gave plaintiff 30 days after such payment to demur or reply; held, that if defendant took the benefit of such order he thereby elected to pay such costs and became liable therefor and plaintiff did not waive his right to such payment by accepting the supplemental answer and demurring thereto before such payment. Damp v. Dane, 33 W 430.

A new cause of action cannot be introduced by amendment unless by consent. Johnson v. Filkington, 39 W 62.

In an action to quiet title to land left by reliction it was proper for the court to allow an amendment alleging a further reliction and patent to plaintiff. Boorman v. Sunnuchs, 42 W 233.

Immaterial amendments should not be allowed; but it is not error to permit them, as an averment descriptio personae. Nary v. Henni, 45 W 473.

The trial court may permit any amendment of the answer if the facts constitute a defense, although they may be inconsistent with the grounds of defense first stated or bring in a new and distinct defense. Brown v. Bosworth, 62 W 542, 22 NW 521.

It is not an abuse of discretion to refuse an amendment offered for the purpose of taking the right to open and close from the plaintiff and giving it to the defendant after the plaintiff has proved his case and rested. Studebaker Brothers M. Co. v. Langson, 89 W 200, 61 NW 773.

There is no abuse of discretion in denying leave to amend a complaint when the amendment will virtually change the action from one to foreclose a subcontractor's lien into one to foreclose the lien of a principal contractor, the time for filing a claim for the latter having expired. Segelke v. Kohlhaus M. Co. 94 W 106, 68 NW 653.

A wife against whom a judgment of divorce has been entered should be allowed, if she applies within one year after the entry of the judgment, to file a supplemental answer alleging that since the trial the plaintiff has married another woman and committed adultery with her, either as a bar to a judgment in plaintiff's favor or by way of counterclaim for a judgment in defendant's favor. White v. White, 167 W 615, 168 NW 704.

Where a proposed alternative cause of action constituted an attempt to recover on employment theory, there was no abuse of discretion in denying leave to amend after plaintiff had maintained partnership theory through a substantial part of the trial. Maslowski v. Bitter, 7 W (2d) 167, 96 NW (2d) 349.

The trial court did not abuse its discretion in allowing an amendment to an answer to claim exemption of property for failure of a wife to sign 7 months after the commencement of a replevin action. Opitz v. Brawley, 10 W (2d) 93, 102 NW (2d) 117.

CHAPTER 264.

Arrest and Bail.

264.01 History: 1856 c. 120 s. 86; R. S. 1858 c. 127 s. 1; R. S. 1878 s. 2688; Stats. 1898 s. 2688; 1925 c. 4; Stats. 1925 s. 264.01.

264.02 History: 1856 c. 120 s. 87; R. S. 1858 c. 127 s. 2; 1860 c. 288; R. S. 1878 s. 2689; Stats. 1898 s. 2689; 1925 c. 4; Stats. 1925 s. 264.02; 1929 c. 44; 1953 c. 247; 1963 c. 158.

Revisers' Note, 1878: Section 2, chapter 127, R. S. 1858, as amended by chapter 228, Laws 1860; amended by including actions for seduction and criminal conversation. The former has been held not included within the definition (Wagner v. Lathers, 26 Wis. 436), and the latter is exposed to a similar risk. It seems both ought to be included, being, at least in some cases, grievous torts. The addendum made by chapter 98, Laws 1868, is omitted as clearly in violation of the constitution. Article I, section 16. It was copied from the New York statute, which is not there liable to the same invalidity, because there imprisonment for debt was regulated by statute and not forbidden by the constitution. The provision is omitted from the last New York revision.

Legislative Council Note, 1963: Language [of (1) (d)] revised and references corrected to conform to the commercial code. The net result may be a very slight restriction of the power of civil arrest because the present exemption relates only to purchase money security interests created by conditional sales contract while the commercial code does not distinguish between purchase money security interests created by conditional sales contract and those created by other instruments, such as a chattel mortgage. (Bill 1-S).

Where one of several partners unlawfully obtains possession of joint property and converts it to his own use he may be arrested and held to bail. Ilsley v. Harris, 10 W 95.

The action of ejectment is an action ex delicto, and where judgment has been obtained for damages for withholding real property and the rents and profits thereof, the claim therefor being united in the complaint in the action to recover the property, the plaintiff may have execution against defendant's body to enforce his judgment. Howland v. Needham, 10 W 495.

An attorney who bids off land of the judgment debtor at a sale on execution in favor of his client and takes the certificate of sale in his own name, afterwards selling it and converting the proceeds to his own use, is liable to arrest. Cotton v. Sharpstein, 14 W 226.

An order denying a motion to vacate an order of arrest is appealable; the right is not