court may require additional proof. Said proof shall be conclusive in all collateral actions and proceedings.

(2) Service of the summons by publication shall consist of its publication in a newspaper, published in this state, likely to give notice to the defendant once a week for 3 successive weeks, and in case the defendant's post-office address is known or can with reasonable diligence be ascertained, by mailing him a copy of the summons and complaint, or a notice of the object of the action, as the case may require. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(3) The summons and a verified complaint shall be filed prior to the first publication, and prior to the mailing.

(4) In the cases specified in ss. 262.08 (4), 262.09 (12) or 262.12 the plaintiff may, at his option and in lieu of service by publication, cause to be delivered to any defendant personally without the state (or municipal court area in a proper case) a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing. If such defendant be a corporation, delivery may be made to the president, vice president, secretary, treasurer or general manager thereof.

History: 1951 c. 247 s. 52; Sup. Ct. Order, 262 W ix; 1955 c. 366.

Comment of Judicial Council, 1952: Under 262.13 (1) (Stats. 1951) it seems impossible to make proof of service on Wisconsin residents who are absent from the state for a protracted period, since proof must be made and filed any defendant served by publication or without the state is a nonresident. [Re Order effective May 1, 1953]

262.14 Service in special proceedings. Service and proof of service of any process or notice in any special proceeding, except probate proceedings, may be made in the manner provided for service of summons and proof thereof.

History: Sup. Ct. Order, 262 W ix.

Cross Reference: See 32.05 re publication of notice of hearing in condemnation proceedings.

Comment of Judicial Council, 1952: This change makes it clear that service and proof of service in special proceedings is like service and proof thereof in actions and that in the proper situations there may be service outside of the state or publication as well as personal service within the state. [Re Order effective May 1, 1953]

262.16 Proof of service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same shall be as follows:

(1) If served by the sheriff, his certificate thereof showing place, time and manner of service.

(2) If by any other person, his affidavit thereof showing place, time and manner of service, that he knew the person served to be the defendant mentioned in the summons and left with, as well as delivered to, him a copy; and if the defendant was not personally served he shall state in such affidavit when, where and with whom such copy was left.

(3) The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) In case of publication, the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the summons, with the complaint or notice, as prescribed by law if such mailing shall be required, made by the person who mailed the same.

262.17 General appearance. A general appearance of a defendant is equivalent to a personal service of the summons upon him. No guardian or guardian ad litem may waive a personal service of the summons upon a defendant under disability, but service of a demurrer or answer by a guardian ad litem followed by hearing or trial shall cure any defect in service of summons actually attempted.

History: Sup. Ct. Order, 265 W vi.

The question of want of jurisdiction, because of lack of service of process on the defendant, may and must be raised by special appearance, since a general appearance would give the court the jurisdiction it might not previously have had, and would cure any defect in the original attempted service of process. Where the issue of jurisdiction is raised by special appearance, the trial court has the discretionary power to require the defendant, who claims he was not the driver of an automobile involved in an accident, to appear personally in court and confront witnesses to the accident, and if questions of fact are raised, the trial court may require the taking of testimony in open court in lieu of relying entirely on affidavits and counter affidavits, so that the trial court, by the employment of such means, can prevent fraud from being perpetrated in cases of this kind in which the jurisdiction of the court over the person of the defendant is challenged by special appearance. Plovey v. Vogele, 264 W 416, 59 NW (2d) 495.

In proceeding on a motion to vacate a cognovit judgment for want of service of process on the defendant, but also requesting an order dismissing the cognovit proceedings on the records, files, and proceedings therein, the defendant made a general appearance and waived whatever jurisdictional defect might have existed in the cognovit proceedings, although he attempted to limit the effect of his appearance by a recital in his notice of motion that he appeared specially for the purpose of the motion only and for no other purpose. Ozaukee Finance Co. v. Cedarburg Lime Co. 268 W 20, 66 NW (2d) 686.

CHAPTER 263.

PLEADINGS.

263.01 Forms. The forms of pleading in civil actions in courts of record and the rules by which the sufficiency of the pleadings are determined are prescribed by chapters 260 to 297.

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

263.03 Complaint, contents. The complaint shall contain:

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

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

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

(4) In an action by or against a corporation the complaint must aver its corporate existence and whether it is a domestic or a foreign corporation.

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

As to the effect of not denying an allegation in the complaint of corporate or partnership existence, see 328.29 and 328.31.

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.

For definition of cause of action as related to theory of res adjudicata, see notes to 269.25, citing Pautsch v. Clark Oil Co. 264 W 207, 58 NW (2d) 638.

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. On demurrer to a complaint, every reasonable intendment and presumption is to be made in favor of the complaint, and the plaintiffs are entitled to all reasonable inferences which can be drawn from the facts pleaded. Christenson & Arndt, Inc. v. Wisconsin Tel. Co. 264 W 238, 58 NW (2d) 682.

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.

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. Olson v. Johnson, 267 W 462, 66 NW (2d) 346.

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

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

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 under this section 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), 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-operative v. Minnesota Valley C. Co. 257 W 619, 44 NW (2d) 563.

The fact that labor union officers each had a cause of action arising out of circulation by defendant of letter containing allegedly false and defamatory statements concerning them did not entitle them to unite as plaintiffs and join their separate causes of action in the same complaint. De Witte v. Kearney & Trecker Corp. 265 W 132, 60 NW (2d) 748.

The guest's bringing of a separate action against the insurer to recover under the medical-payments provision of the policy, after having recovered damages in a tort action against the insured, the insurer and another party, did not violate the rule against splitting causes of action, since the second action did not affect the same parties and was not an alternative action but was one on a separate contract, and therefore involved no splitting of causes of action. Severson v. Milwaukee Automobile Ins. Co. 265 W 488, 61 NW (2d) 872.

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.

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 held not subject to demurrer as improperly uniting causes of action nor 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.

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

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

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

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

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

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

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

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

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

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 nor 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.

Liberally construed, as required by 263.27, 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 held 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.

For distinction between demurrer and summary judgment see note to 270.635,

citing 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.

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 per cent 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.

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, 58 NW (2d) 64.

A complaint 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. See also note to 101.06, citing this case. Flesch v. Lancaster, 264 W 234, 58 NW (2d) 710.

A demurrer to a complaint concedes the truth of material statements of fact alleged in the complaint. 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.

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.

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. An order rescinding a temporary restraining order directed to the defendant corporations in such action, inferably based on the ground that the complaint was fatally defective, is reversed for the purpose of permitting the trial court to review its action in the light of the instant decision that the complaint pleads an equitable cause of action and is not demurrable on any of the grounds pleaded by the defendants. Holty v. Landauer, 264 W 463, 59 NW (2d) 679.

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

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.

Where corporation which sold accounts receivable to plaintiff bank agreed in writing that if 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 corporation was adjudged bankrupt, making the debts represented by the accounts those of the corporation and not merely of its debtors. Complaint stated cause of action against defendants who had guaranteed payment of debts and contingent liabilities of corporation to 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. The defendant was not performing any professional services in merely recommending certain brokers during consultation with 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 under (6). 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 Indemnity 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.

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

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

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

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

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

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

263.12 Waiver by not demurring or answering. If not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction of the court but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action.

History: Sup. Ct. Order, 265 W vi.

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 demurrer ore tenus based on the erroneous contention 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. Casualty Ins. Co. 267 W 302, 64 NW (2d) 841.

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

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

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

History: Sup. Ct. Order, 262 W x.

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]

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, and a new trial was ordered under 251.09. Lowe v. Cheese Makers Mut. Casualty 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.

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.

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

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

(3) This section does not extend to or include claims assigned to a defendant after he was served with the summons.

Cross Reference: For counterclaims by parties other than defendant, see 331.07 to 331.12. Pleading set-off is covered by 331.13.

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 330.49, 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 Milling & Electric Light 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. Kassien v. Menako, 270 W 309, 70 NW (2d) 670.

263.15 Cross complaint and third party actions. (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. Such relief may be demanded by a cross complaint or counterclaim, served upon the party against whom the relief is asked or upon such person not a party, upon his being brought in.

(2) In all cases the court or the judge thereof may make such orders for the service of the pleadings, the bringing in of new parties, the proceedings in the cause, the trial of the issues and the determination of the rights of the parties as shall be just. The provisions of this chapter with respect to demurrers and answers to complaints shall apply to and govern pleadings to cross complaints. Relief from inadvertent default of answer to a cross complaint shall be granted liberally by the court.

History: Sup. Ct. Order, 265 W vi.

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 (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 been 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.

263.16 Several defenses allowed. The defendant may set forth, by answer, all defenses and counterclaims he has, whether legal or equitable, or both; they must be separately stated.

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

(1) The court has no jurisdiction thereof; or

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

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

(4) There is a defect of parties; or

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

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

(7) The counterclaim is barred by the statutes of limitations.

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.

See note to 133.01, citing State v. Golden Guernsey Dairy Co-operative, 257 W 254, 43 NW (2d) 31.

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.

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

263.19 Answer; waiver; reply. If not taken by demurrer, the plaintiff waives any objection to the failure of the answer or any alleged defense therein to state a defense, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense. When any objection to a counterclaim mentioned in s. 263.17 does not appear upon the face thereof the objection may be taken by reply. If not taken by demurrer or reply, the plaintiff waives the same, excepting only the objection to the jurisdiction of the court, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action.

History: Sup. Ct. Order, 265 W vii.

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

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

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

(2) The plaintiff may set forth by reply as many defenses to the counterclaims as he may have; they must be separately stated and refer to the counterclaims which they are intended to answer in such manner that they may be intelligibly distingished.

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

263.22 Demurrer to reply. The defendant may, within 20 days, demur to the reply or any defense therein, when, upon the face thereof, it does not state facts sufficient to constitute a defense, stating such grounds. If not taken by demurrer the defendant waives the same, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense.

History: Sup. Ct. Order, 265 W vii.

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 Power Co. 264 W 84, 58 NW (2d) 287.

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

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

263.24 Verification of pleading. Every pleading, except a demurrer, must be verified; but the verification may be omitted when an admission of the allegations might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as evidence of a fact admitted or alleged in such pleading. Where service is made either pursuant to section 262.13 or otherwise, no defect or irregularity in a verification shall defeat the jurisdiction of the court but shall be ground for a timely motion to strike the pleading unless amended.

History: Sup. Ct. Order, 238 W v.

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]

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

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

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

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

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.

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

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

(2) When the variance is not material, the fact shall be found in accordance with the evidence and the court may order an amendment without costs.

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 Telephone 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 Milling & Electric Light Co. 263 W 580, 58 NW (2d) 437.

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

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

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

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

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

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

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

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

263.40 Pleadings in special proceedings. In special proceedings pending on appeal, the court may direct an issue of fact to be made up between the parties by complaint and answer, and such issue shall be tried by the court, or by the jury, as the court shall prescribe.

263.42 Sham pleadings may be stricken out. A sham or frivolous answer, reply or defense may be stricken out on motion and upon such terms as the court may impose.

263.43 Irrelevant, scandalous and indefinite pleadings. If any pleading contains irrelevant, redundant or scandalous matter it may be struck out, with costs, on motion,

and the court may order the attorney who signed the same to pay costs. When a pleading is so indefinite or uncertain that the precise nature of the charge or defense is not apparent the court may on motion order the pleading to be made definite and certain. The time to serve a required responsive pleading is extended 10 days after the service of notice of entry of an order made upon the motion, unless the order fixes a different time.

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

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.

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

See note to 330.19, citing Halvorson v. Tarnow, 258 W 11, 44 NW (2d) 577.

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

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, is held not to state a new cause of action but merely to restate 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 Supplemental pleadings. The plaintiff and defendant, respectively, may be allowed, on motion and on such terms as may be just, to make a supplemental complaint, answer or reply alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.