TITLE XXV.

Procedure in Civil Actions.

CHAPTER 260.

CIVIL ACTIONS, AND PARTIES THERETO.

260.01 Scope of title XXV. Title XXV relates to civil actions in the circuit courts and other courts of record, having concurrent jurisdiction therewith to a greater or less extent, in civil actions, and to special proceedings in such courts except where its provisions are clearly inapplicable or inappropriate to special proceedings.

260.02 Remedies divided. Remedies in the courts of justice are divided into:
(1) Actions.
(2) Special proceedings.

260.03 Action defined; special proceeding. An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding.

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

260.05 Kinds of actions. Actions are of two kinds, civil and criminal. A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action.

260.08 One form of action; designation of parties. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished and there is but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action. The party complaining is the plaintiff and the adverse party is the defendant.

An action in equity is not changed to an action at law by the fact that a money judgment is also demanded or may result. An action for money had and received is one at law, although ruled by equitable principles. Trempealeau County v. State, 260 W 602, 51 NW (2d) 499.

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

260.10 Who may be joined as plaintiffs. All person having an interest in the subject of the action or in obtaining the relief demanded may be joined as plaintiffs.

History: Sup. Ct. Order, 271 W vi.

Cross Reference: See 262.10, providing that the state may be made a party in an action to quiet title to land.

Comment of Judicial Council, 1956: The change of "and" to "or" has two results: (1) It permits plaintiffs with different interests in the same subject of the action to join, and to ask for the same, or for different kinds of relief; (2) It permits plaintiffs who

are interested in common relief to join, even though there is no common subject of the action. [Re Order effective Sept. 1, 1956]

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

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

260.11 Who as defendants. (1) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other; and in all such actions the recovery of costs by any of the parties to the action shall be in the discretion of the court. In any action for damages caused by the negligent operation, management or control of a motor vehicle, any insurer of motor vehicles, which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend the action brought by the plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action, or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff on account of any claim against the insured.

(2) When any insurer shall be made a party defendant pursuant to this section and it shall appear at any time before or during the trial that there is or may be a cross-issue between the insurer and the insured or any issue between any other party and the insurer involving the question whether the insurer would be liable if judgment should be rendered against the insured, the court may, upon motion of any defendant in any such action, cause the person, who may be liable upon such cross-issue, to be made a party defendant to said action and all the issues involved in said controversy determined in the trial of said action. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting first a trial as to whether or not the insured is liable to the plaintiff or other party and directing a separate trial on the issues involving the question whether under its policy the insurer is liable for the payment in whole or in part of any judgment against the insured or the amount of such liability.

Cross Reference: As to insurers being made defendants, see 204.30 (4).

The usual "no-action" clause in an automobile liability policy, issued in Massachusetts where such clause is valid, is effective in Wisconsin to postpone action against the insurer until after adjudication of liability against the insured, although the policy specifically covers the vehicle of a Wisconsin resident ordinarily kept and used in Wisconsin, and the accident happened in Wisconsin, and although Wisconsin may be the place of performance of the insurance contract. Ritterbusch v. Sexmith, 256 W 507, 41 NW (2d) 611.

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

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

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

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

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

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

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

A "no action clause" in an automobile liability policy issued in a state in which such clause is good, to a Wisconsin taxicab company prevents direct suit against the insurer. Klabacka v. Midwestern Mutual Automobile Ins. Co. 146 F. Supp. 243.

260.12 Parties united in interest to be joined; class actions; alternative joinder. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. And when more than one per-

son makes a separate claim for damage against the same person or persons based upon the same alleged tortious conduct, they may unite in prosecuting their claims in one action.

History: Sup. Ct. Order, 271 W vi.

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

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

See note to 263.04, citing De Witte v. Kearney & Trecker Corp. 265 W 132, 60 NW (2d) 748.

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

260.13 Real party in interest must prosecute. Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 260.15.

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

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

260.14 Assignment of cause of action not to affect setoff. In case of an assignment of a thing in action the action of the assignee shall be without prejudice to any setoff or other defense existing at the time or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.

260.15 Nonjoinder of person for whose benefit action brought. An executor or administrator, a trustee of an express trust or a person expressly authorized by statute may sue or be sued without joining with him the person for or against whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

See note to 260.13, citing Marshfield Clinic v. Doege, 269 W 519, 69 NW (2d) 558.
See note to 66.029, citing Blooming Grove v. Madison, 275 W 328, 81 NW (2d) 713.

260.17 Joinder of parties to negotiable paper. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument or by a party thereto to recover against other parties liable over to him, and persons severally liable for the same demand and, without reckoning offsets or counterclaims, in the same amount, although upon different obligations or instruments, may all or any of them be included in the same action at the option of the plaintiff.

260.18 Defendants in actions on insurance policies. In an action to recover on property insurance loss by fire, lightning, hail, cyclone or other casualty the plaintiff may join as defendants all of the insurance companies liable for the loss or any part thereof, and all the issues shall be tried together and the verdict or finding shall fix the amount for which each defendant is liable. If the plaintiff recovers, a separate judgment shall be rendered against each defendant for the sum for which it is liable, together with such proportion of the cost as the court shall determine to be equitable.

260.19 Parties interpleaded. (1) When a complete determination of the controversy in court cannot be had without the presence of other parties, or when persons not parties have such interests in the subject matter of the controversy as require them to be

parties for their protection, the court shall order them brought in; and when in an action for the recovery of property a person not a party has an interest therein and makes application to the court to be made a party it may order him brought in.

(2) A defendant in an action for debt or for specific property or for the conversion thereof may, if a person, not a party to the action and without collusion with him makes against him a demand for the same debt or property, apply and the court may on due application substitute such person in his place and discharge him from liability on his depositing in court the amount of the debt or delivering the property or its value as the court may direct.

(3) A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may apply for an order making such person a party defendant and the court may so order.

(4) Application for an order bringing in an additional party shall be made by motion or order to show cause supported by affidavit together with a proposed cross complaint and served on the plaintiff on or before 40 days after the service of the summons and complaint on the applicant. The time limit for the making of such applications may be extended by the court for cause either before or after the expiration of said 40 days.

History: Sup. Ct. Order, 271 W vi.

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

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

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

See note to 66.029, citing Fish Creek Park Co. v. Bayside, 273 W 89, 76 NW (2d) 557.

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

260.20 Proceedings after new parties added. Where the court orders the addition of another party under s. 260.19, the order shall provide that the summons and the title of the action be amended as necessary, and that the amended summons, together with a copy of the original complaint, the order, and the answer and cross complaint with the title amended, be served by the applicant on the additional party within a prescribed time. The order shall also be served within such time on all other parties to the action. Within 20 days after such service of the order, any party may serve amended or responsive pleadings.

History: Sup. Ct. Order, 271 W vi.

260.21 Suing by fictitious name or as unknown; partners' names unknown. (1) When the name or a part of the name of any defendant, or when any proper party defendant to an action to establish or enforce, redeem from or discharge a lien or claim to property is unknown to the plaintiff, such defendant may be designated a defendant by so much of the name as is known, or by a fictitious name, or as an unknown heir, representative, owner or person as the case may require, adding such description as may reasonably indicate the person intended. But no person whose title to or interest in land appears of record or who is in actual occupancy of land shall be proceeded against as an unknown owner.

(2) When the name of such defendant is ascertained the process, pleadings and all proceedings may be amended by an order directing the insertion of the true name instead of the designation employed.

(3) In an action against a partnership, where the names of the partners are unknown to the plaintiff, all proceedings may be in the partnership name until the names of the partners are ascertained, whereupon the process, pleadings and all proceedings shall be amended by order directing the insertion of such names.

260.22 Appearance by guardian or guardian ad litem. When a party to an action or proceeding is a minor, or when the court or judge has reason to believe that a party is mentally incompetent to have charge of his affairs, he must appear either by the general guardian of his property or by a guardian ad litem who is an attorney appointed by the court or by a judge thereof. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where such general guardian fails to appear on his behalf, or where the interest of the minor or incompetent is adverse to that of such general guardian.

History: 1953 c. 298.

260.23 Guardian ad litem. (1) APPOINTMENT. The guardian ad litem shall be appointed as provided by this section.

(2) FOR PLAINTIFF. When the plaintiff is a minor 14 years of age, upon his application; or if the plaintiff is under that age or is mentally incompetent, upon application of his guardian or of a relative or friend. If made by a relative or friend, notice thereof must first be given to his guardian if he has one in this state; if he has none, then to the person with whom the minor or mentally incompetent resides or who has him in custody.

(3) FOR DEFENDANT. When the defendant is a minor 14 years of age, upon his application made within 20 days after the service of the summons or other original process; if the defendant is under that age or neglects to so apply or is mentally incompetent, then upon the court's own motion or upon the application of any other party or any relative or friend or his guardian upon such notice of the application as the court or judge directs or approves.

History: 1955 c. 210.

260.26 Guardian's bond. No guardian appointed under the provisions of this chapter shall be permitted to receive any money or property of the ward, except costs and expenses allowed to the guardian or recovered for his ward, until he has executed to the ward and filed with the clerk a bond, in a sum not less than double the value of the property to be received, with sufficient surety approved by the court or judge, to account for and apply the same, under the direction of the court; except he be also the general guardian of such ward, in which case additional security may be required in the discretion of the court. And the court may, upon application, or upon its own motion at any time, require additional security of any such guardian.

260.27 Guardian's consent and liability. No person shall be appointed but upon his written consent as guardian for a plaintiff; and no guardian of a defendant shall be liable personally for costs unless by special order of the court for some misconduct therein.