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. [*1935 c. 541 s. 2; Supreme Court Order, effective July 1, 1945*]

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

Note: Civil procedure rules extend also to criminal cases in some matters, e. g., 357.01, 357.14, 358.11.

On principle, a court of concurrent jurisdiction should not take jurisdiction of a matter which is properly involved in a proceeding then pending in another court which is competent to render adequate relief in the premises. This rule rests on public policy, and prevents multiplicity of actions involving the same statement of facts. Kusick v. Kusick, 243 W 135, 9 NW (2d) 607.

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. [*1935 c. 541 s. 3*]

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

A juvenile delinquency proceeding under chapter 48 is neither a criminal nor a civil action, but is a special proceeding. Lueptow v. Schraeder, 226 W 437, 277 NW 124.

A proceeding for the vacation of a plat under 236.17 and 236.18, which is commenced by a petition and the service of a notice of the application instead of by summons, is a "special proceeding" and not an "action," under the definition of those terms in 260.03, Stats. 1941, and the provision in 262.01 as to how an "action" is commenced. In re Henry S. Cooper, Inc., 240 W 377, 2 NW (2d) 866.

See note to 274.33, citing In re Farmers Exchange Bank, 242 W 574, 8 NW (2d) 535.

260.04 [*Renumbered section 260.03 by 1935 c. 541 s. 3*]

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. [*1935 c. 541 s. 4*]

Note: An action under an ordinance for a penalty for street obstruction is a "civil action," and the statutory rules of pleading and practice in civil actions are applicable thereto. Neenah v. Krueger, 206 W 473, 240 NW 402.

The sixty-day requirement for acting on a motion for a new trial under 270.49 is applicable in a bastardy action because it is a civil action. State ex rel. Zimmerman v. Euclide, 227 W 279, 278 NW 535.

An action prosecuted by a city for violation of a city ordinance is a "civil action" and not a "criminal action," notwithstanding that the ordinance provides for both fine and imprisonment, or either. Waukesha v. Schlessler, 239 W 82, 300 NW 498.

260.06, 260.07 [*Renumbered section 260.05 by 1935 c. 541 s. 4*]

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. [*1935 c. 541 s. 5*]

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

260.09 [*Renumbered section 260.08 by 1935 c. 541 s. 5*]

260.10 Who may be joined as plaintiffs. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, except as otherwise provided by law.

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

Note: Until insurer's right of subrogation on paying loss is abandoned or waived in insured's favor, insurer should be party to insured's action against tortfeasor. Where insurer paid loss, and, during trial of insured's action against tortfeasor, disclaimed right of subrogation, error in not joining insurer held harmless. Leonard v. Bottomley, 210 W 411, 245 NW 849.

The mortgagor, under the court's order in the foreclosure action, had the right as conservator of the rents to maintain an action, if necessary, to recover them; and the mortgagor, after subsequently assigning a lease of a portion of the mortgaged building to the trustee under the trust deed as collateral security, was entitled as pledgor to maintain an action against the tenant for rent due, with the consent of the trustee as pledgee. In such action the trustee under the trust deed was a proper party plaintiff. Zimmermann v. Walgreen Co., 215 W 491, 255 NW 534.

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

A city treasurer and general taxpayers had standing to question the constitutionality of a curative act under authority of which the city council had adopted a resolution directing payment for street paving, done under a void paving contract, and validating special assessments levied on abutting properties, since the resolution directing the treasurer to pay was conditioned on the lawfulness of the resolution itself, and since if that portion of the resolution ordering payment out of general city funds was void, so also were the validated assessments, and the loss would fall on general taxpayers unless they could recover on the treasurer's bond. Federal Paving Corp. v. Prudisch, 235 W 527, 293 NW 156.

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. [*1931 c. 375*]

Cross Reference: As to insurers being made defendants, see 85.93.

Note: Causes of action against a corporation and its agent to enjoin such agent from soliciting persons to breach contracts with plaintiff, and against others to require them to perform contracts, were improperly joined; but no objection to the misjoinder having been taken by demurrer or otherwise, the cases are deemed properly before the court on the joint appeal. Wisconsin Creameries Inc. v. Johnson, 208 W 444, 243 NW 498.

A provision of an automobile liability policy that no action should be brought upon it until after the liability of the insured had been determined by judgment, or by agreement with the written consent of the insurer, secured a valuable right, and was improperly applied to a policy issued before the enactment because impairing the obligation of the contract. Pawlowski v. Eskofski, 209 W 189, 244 NW 611.

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

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

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

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

Where automobile liability insurer was joined as defendant in action against insured, cross-examination of nonresident witness for defendants as to whether adjusters asked witness to come down, whether witness came because "they" wanted witness to testify, and whether insurer was paying witness' expenses held not prejudicial, where no contention was made that damages found were excessive, and witness lacked frankness of disinterested witness, and since plaintiff's counsel had right to show witness' interest. Joinder of automobile liability insurer does not authorize plaintiff's counsel to ask witnesses for insured questions containing invidious insinuations against insurer, nor questions asked solely to unduly emphasize fact that defendant is insured. Doepke v. Reimer, 217 W 49, 258 NW 345.

Action against insured and casualty insurer and contingent liability insurer for death in automobile collision was not abatable as to insurers on ground that insurers' policies contained "no action" clause, in view of statute, enacted before issuance of policies, nullifying effect of "no action" clauses, and of provisions in policies that statutes prevail over policy conditions. Sheehan v. Lewis, 218 W 588, 260 NW 633.

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

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

The insurer in an automobile liability policy, written in Illinois on an Illinois car and containing a "no-action" clause deferring action against the insurer until adjudication of liability against the insured, was improperly joined as a party defendant in an action against the insured for injuries caused by negligent operation of his automobile, since 260.11 is deemed inapplicable to a policy written in another state. Byerly v. Thorpe, 221 W 28, 265 NW 76.

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

Under the provision authorizing a plaintiff to 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, mere inconsistencies between facts separately stated in support of one of two alternative theories of liability were not to be deemed to render facts alleged in support of the other theory insufficient to constitute a cause of action. Riley v. United Finance Co., 234 W 389, 291 NW 392.

260.12 Parties united in interest to be joined. 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 person makes a separate claim for damage against the same person or persons based upon the same alleged negligence, they may unite in prosecuting their claims in one action. [*Supreme Court Order, effective Sept. 1, 1931*]

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

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

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

An unincorporated labor union or association has no entity or existence apart from that of its members, and the rule permitting that the group comprising the union be sued in the name adopted by the association is merely one of procedure, not in any way changing the status of the group or its substantive liabilities. Hromek v. Freie Gemeinde, 238 W 204, 298 NW 587.

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. [*1935 c. 541 s. 8*]

Note: The assignee of a town order is not entitled to sue remote assignors on implied warranty of genuineness because there is no privity of contract and such privity is essential. Wrenshall State Bank v. Shutt, 202 W 281, 232 NW 530.

A private carrier waived its lien by transferring possession of goods to the consignee. An agent cannot maintain an action in his own name on a contract made by his principal with a third party. Having transferred possession the private carrier could not maintain an action for repossessing itself of the goods to cover the freight or in behalf of its principal for the purchase price of the goods. Madden Bros. v. Jacobs, 204 W 376, 235 NW 780.

The husband having lived over an hour after the accident and suffered pain, an action for pain and suffering lies in favor of his estate, and under 331.04 the cause of action for his death lies only in his personal representative. Objection that such cause of action cannot be maintained by the widow in her own name goes to the sufficiency of the complaint and not to want of capacity to sue, and hence was not waived under 263.06, 263.11 and 263.12 by failure to raise it by answer or demurrer. Neuser v. Thelen, 209 W 262, 244 NW 801.

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

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

In a private action to enjoin a county from flowing certain lands of the plaintiff, wherein the county established its right to flow the lands, the plaintiff could not raise questions as to the invalidity of proceedings leading up to the construction of the dam and as to the want of power in the county to maintain it, since these related to an alleged wrong which did not concern the plaintiff in her private right but only taxpayers as a class, and which, therefore, was not redressable in a private action. McFaul v. Eau Claire County, 234 W 542, 292 NW 6.

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

An action for the benefit of an incompetent should be brought in the name of the ward as plaintiff, by guardian, and not in the name of the guardian as plaintiff; but errors in designating the guardian as plaintiff in the title of the action, and in the complaint and the prayer for judgment, do not go to the cause of action, nor to the jurisdiction of the court, but constitute, at most, merely matter in abatement. Gleixner v. Schulkewitz, 244 W 169, 11 NW (2d) 500.

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

260.14 Assignment of cause of action not to affect set-off. In case of an assignment of a thing in action the action of the assignee shall be without prejudice to any set-off 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.

Revisor's Note, 1935: The rights of holder, in due course, of a negotiable instrument are defined in the uniform negotiable instruments act. See 116.62. (Bill No. 50 S, s. 9)

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

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. [*1943 c. 527*]

260.16 [*Repealed by 1931 c. 79 s. 26*]

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.

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

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

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 costs as the court shall determine to be equitable. [*Supreme Court Order, effective Jan. 1, 1936*]

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. [*1935 c. 541 s. 10*]

Note: Two judgments may be entered in the same action. Where the issue between the plaintiff and the defendant and the issue between defendants were litigated together, judgment for plaintiff may be affirmed and judgment between the defendants reversed for further litigations. Scharine v. Huebsch, 203 W 261, 234 NW 358.

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

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

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

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

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

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

Court commissioner has no power to grant order of interpleader, since application for such order must be made "to the court," implying that only "the court" can grant the application. State ex rel. Nelson v. Grimm, 219 W 630, 263 NW 583.

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

Where the defendant's attorneys, claiming a lien on the fund garnished were not interpleaded, they were not entitled to the payment of their lien claim in the garnishment proceeding. Liberty v. Liberty, 226 W 136, 276 NW 121.

Where the plaintiff had obtained a final judgment for personal injuries against a hotel company reorganized under sec. 77B of the Bankruptcy Act, the circuit court in subsequent proceedings on the application

of the hotel company to compel satisfaction of the judgment by tender of stock in the reorganized corporation, properly ordered, on its own motion, that the liability insurer of the hotel company be made a party for the purpose of motions then pending or which might thereafter be made. Burling v. Schroeder Hotel Co., 238 W 17, 298 NW 207.

260.20 Proceedings after new parties made. Whenever any party shall cause it to appear by his affidavit or answer, duly verified, that additional parties ought to be brought in according to section 260.19 the court shall make an order that the summons and complaint be amended as shall be necessary, and that the same, with a copy of such order, shall, if such additional parties be defendants, be served on them within a prescribed time according to law; and the action shall be continued as may be necessary and further proceedings had therein as if such additional parties had been originally proceeded against.

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. [*1935 c. 541 s. 12*]

Revisor's Note, 1935: The changes are verbal only. The last sentence of (1) is from 281.14. (Bill No. 50 S, s. 12)

Note: The provisions in 260.21 (3) do not apply where no partnership but only joint adventurers are involved, nor where the summons and complaint merely run against individual defendants by name, and do not allege a partnership or suggest that the names of any persons are unknown. Eide v. Skerbeck, 242 W 474, 8 NW (2d) 282.

260.22 Minors by guardian. When a minor is a party he must appear by guardian ad litem, who may be appointed by the court or by a judge thereof. [*Supreme Court Order, effective Jan. 1, 1934*]

Note: Service on plaintiffs' attorneys of a notice of retainer and appearance by an attorney for a minor defendant, who at the time had no guardian ad litem or general guardian, did not waive an ineffectual service of summons made on the father of such defendant nor give the court jurisdiction of such defendant, since, a minor must appear by guardian ad litem. Caskey v. Peterson, 220 W 690, 263 NW 658.

260.23 Guardians, appointment. The guardian ad litem shall be appointed as follows:

(1) MINOR PLAINTIFF. When the plaintiff is a minor, upon his application, if he be of the age of fourteen years; or if under that age or 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 such guardian if he have one in this state; if he have none, then to the person with whom such minor resides.

(2) MINOR DEFENDANT. When the defendant is a minor, upon his application, if he be of the age of 14 years and apply within 20 days after the service of the summons; if he be under the age of 14 or neglect to so apply, then upon the application of any other party or of a relative or friend of the minor, after notice to his guardian, if he have one in this state; and if he have none, then to the minor, if over 14 years of age; or if under that age and within this state, to the person with whom he resides.

(3) NONRESIDENT MINOR. If such minor is not a resident of this state and has no guardian in this state, the court or a judge thereof may order that notice of an application for the appointment of a guardian ad litem for the minor be served upon him, if over fourteen years of age, by mailing a copy of said notice and order to him; if under fourteen years of age, by mailing a copy of said notice and order to the person with whom such minor resides. If his residence cannot with reasonable diligence be learned the court or a judge thereof may order the service of said notice by publication in a newspaper, to be designated in such order once a week for not less than three weeks.

(4) COMPROMISE OR SETTLEMENT. A compromise or settlement of a pending action or proceeding in which a minor is a party may be made by the guardian ad litem of such minor with the approval of the court in which such action or proceeding is pending.

(5) VOLUNTARY APPEARANCE OR WAIVER. No guardian ad litem for any minor being a party to any civil action or special proceeding may enter a voluntary appearance for such minor or waive for such minor the service of any process or notice required by law to obtain jurisdiction of such minor. [*Supreme Court Order, effective Jan. 1, 1934; Su-*

preme Court Order, effective July 1, 1942; Supreme Court Order, effective July 1, 1945]

Comment of Advisory Committee: Subsections (4) and (5) of 260.23 were promulgated Feb. 13, 1942, effective July 1, 1942. (4) furnishes a definite rule for the settlement of the rights of minors who are parties to an action. Formerly the practice varied and the power of the guardian ad litem to compromise or settle a claim was uncertain. (5) furnishes a definite rule against waiver of the service of jurisdictional process or notice upon a minor. Here again the practice has varied and the authority of the guardian ad litem was open to question. Heretofore some courts have litigated the rights of minors where jurisdiction over them was acquired or assumed solely by the appointment of guardians ad litem, without notice, and the appearance of the minors entered by such guardians. The title to lands is frequently involved. The service of a summons upon a minor or an incompetent is prescribed by 262.08 (1), (2). The committee is of the opinion that no waiver of that service should be authorized, and this should be true as to the service of any process which is needed or intended to confer jurisdiction of the person of a minor or an incompetent.

See Comment of Advisory Committee under 260.01.

Note: The court intimates very plainly (without deciding) that there is no warrant in the law for the prevalent practice of appointing a guardian ad litem for unknown minors or incompetents; and if appointed he has no standing in court. See note to 324.29, citing Will of Knoepfle, 243 W 572, 11 NW (2d) 127.

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

260.24 Guardian ad litem for incompetents. (1) APPOINTMENT. When any party to an action or proceeding in court is mentally incompetent to have charge of his affairs and has no guardian, the court or judge shall appoint a guardian ad litem to represent him in the action or proceeding.

(2) COMPROMISE OR SETTLEMENT. A compromise or settlement of a pending action or proceeding in which an incompetent person is a party may be made by the general guardian or by the guardian ad litem of the incompetent with the approval of the court in which such action or proceeding is pending.

(3) VOLUNTARY APPEARANCE OR WAIVER. No general guardian and no guardian ad litem appointed for any incompetent person being a party to any civil action or proceeding may enter a voluntary appearance for or waive any service of process or notice to such incompetent person required by law to obtain jurisdiction of such person. [*Supreme Court Order, effective Jan. 1, 1934; Supreme Court Order, effective July 1, 1942*]

Comment of Advisory Committee: What is said relating to the new rule for minors, 260.23 (4), (5), applies equally to the rule for acquiring jurisdiction of incompetents [Re Order effective July 1, 1942.]

260.25 Guardian, how appointed. Such guardian ad litem may be appointed upon the application of any party or of any relative or friend of the incompetent, upon such notice of the application as the court or judge shall direct. Upon the hearing upon such application the court or judge may order such incompetent party to appear or be brought before him. [*Supreme Court Order, effective Jan. 1, 1934.*]

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. [*Supreme Court Order, effective July 1, 1945*]

Comment of Advisory Committee: See Comment of Advisory Committee under 260.01.

260.28 [*Repealed by 1935 c. 541 s. 13*]