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 and, in the contents if known, the addresses of the parties to the action, if such addresses are not specified in the body of the complaint.

(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.

History: 1961 c. 518.

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 891.29 and 891.31.

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

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

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

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

Where the complaint showed that all of the facts from which estoppel arises were duly pleaded, it was not incumbent on the plaintiff to specially plead estoppel. Yurmanovich v. Johnston, 19 W (2d) 494, 120 NW (2d) 707.

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

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

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

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

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.

See note to 260.11, citing Rogers v. Oconomowoc, 16 W (2d) 621, 115 NW (2d) 635.

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

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

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

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.

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

263.06 Demurrer to complaint. There shall be but a single demurrer to the complaint in which the defendant subject to the provisions of ss. 263.11 and 263.12 shall join any or all of the following objections to defects appearing upon the face of the complaint:

(1) That the court lacks jurisdiction over (a) the person of the defendant, or (b) the subject matter; 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.

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

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

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

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

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

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

See note to 263.13, citing Szuszka v. Milwaukee, 15 W (2d) 241, 112 NW (2d) 699.

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

See note to 101.01, citing Rogers v. Oconomowoc, 16 W (2d) 621, 115 NW (2d) 635.

An allegation in the complaint, that a judgment was entered "without authority of law," is a conclusion of law which a de-

murrer does not admit, as is also an allegation that "said judgment is void." Barrett v. Pepoon, 19 W (2d) 360, 120 NW (2d) 149.

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

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

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

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

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 complaint to be stated. The demurrer shall distinctly specify the grounds of objection to the complaint, in the language of s. 263.06 relied upon, adding, if based upon the first, second or fourth subsection, 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 does so, the demurrer may be stricken.

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.

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

263.11 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. Except as provided in s. 262.16, if not interposed by demurrer or answer, the defendant waives the objections to the complaint except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action.

History: 1961 c. 33, 622.

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

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

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

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

263.13 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.

(3) The address of the defendant.

History: 1961 c. 518.

With reference to a plaintiff's failure to exercise reasonable care and thereby being contributorily negligent, the defendant must allege such failure in his answer, except that, where the plaintiff alleges that he was in the exercise of due care at the time he was injured, then the issue of contributory negligence is sufficiently raised by a specific denial that the plaintiff was exercising due care. [Statement in Arneson v. Buggs, 231 W 499, so far as to the contrary, is withdrawn.] Kennedy-Ingalls Corp. v. Meissner, 11 W (2d) 371, 105 NW (2d) 748.

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

491, 109 NW (2d) 131.

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

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

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

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

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

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

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.

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) The court or the judge thereof may make such orders for the service of the pleadings, the proceedings in the cause, and the trial of the issues as are just.

(3) The provisions of this chapter with respect to demurrers and answers to complaints apply to and govern pleadings to cross complaints and third-party complaints, except that no answer need be made to a cross or third-party complaint seeking only contribution, the allegations thereof being deemed controverted.

(4) A cross complaint may be served without leave of court within 40 days after issue is joined in the original action. Thereafter leave of court on notice and hearing or stipulation of the parties must be obtained.

History: Sup. Ct. Order, 16 W (2d) xi.

Cross Reference: See 260.185 for provision as to adding new defendants.

Comment of Judicial Council, 1963: (As to sub. (2)) Orders for bringing new parties are now covered in 260.19. The order should not cover the determination of the rights of the parties. The first complete stricken sentence is in new 263.15 (3). The last complete stricken sentence is unnecessary, since the usual relief against default is adequate. [Re Order effective May 1, 1963]

(As to sub. (3)) Old 263.15 (2) (2nd sentence) with provision added that no answer is required if the cross complaint or third party complaint seeks only contribution.

(As to sub. (4)) Sets limit on service of cross complaint to prevent delay.

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.

263.17 Demurrer to answer or counterclaim. There shall be but a single demurrer to the answer. The plaintiff may, within 20 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 lacks jurisdiction of the subject matter; 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.

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

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

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

263.175 Demurrer to answer; ground to be stated. The demurrer shall distinctly specify the grounds of objection to the answer, in the language of s. 263.17 relied upon, adding, if to a counterclaim and based upon s. 263.17 (2) or (4), a particular statement of the defect, and if based on s. 263.17 (7), a reference to the statute claimed to limit the right to sue. Unless it does so, the demurrer may be stricken.

263.18 Demurrer to answer; demurrer and reply to counterclaim. The plaintiff may demur to one or more of the defenses and may demur to one or more of the counterclaims and reply to the residue of the counterclaims. When any of the matters enumerated in s. 263.17 do not appear upon the face of the counterclaim, the objection may be taken by reply; and the objection that the counterclaim is barred by the statute of limitations may in any case be taken by reply.

263.19 Waiver by not demurring or replying. If not raised by demurrer or reply, the plaintiff waives all objections to a counterclaim except the objection to the jurisdiction over the subject matter, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a cause of action on a counterclaim. If not raised by demurrer, the plaintiff waives the objection that the answer or any alleged defense therein fails to state a defense, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense.

263.20 Reply; what to contain. (1) When the answer contains a counterclaim, the plaintiff may, within 20 days, if he does not demur thereto, reply to the counterclaim, except that no reply need be made to a counterclaim seeking only contribution, the allegations thereof being deemed controverted. Such reply must contain:

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

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

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

History: Sup. Ct. Order, 16 W (2d) xi.

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

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; waiver. 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. The demurrer shall distinctly specify the grounds of objection to the reply, and unless it does so, the demurrer may be stricken. If not raised by demurrer, the defendant waives objection to the failure of the reply to state a defense, but such waiver shall not preclude any challenge to the sufficiency of the evidence to establish a defense to the counterclaim.

263.225 Demurrer; stipulation. Where a demurrable objection does not appear on the face of the complaint, cross complaint or counterclaim, the parties to the action by their respective attorneys may stipulate in writing that the issues of fact and law with respect thereto shall be determined by the court in advance of the trial on the merits.

Cross Reference: Decision on stipulated matter is appealable under 274.33 (3).

263.227 Judgment on the pleadings. Judgment on the pleadings may be entered in any civil action or special proceeding. Notice of motion for judgment on the pleadings and the documents in support thereof shall be served within 40 days after issue is joined, subject to enlargement of time as provided in s. 269.45.

History: Sup. Ct. Order, 35 W (2d) vii.

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.

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 ch. 262 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.

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

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

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

263.27 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.

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.

A complaint for the recovery of an alleged unlawful property tax paid, so far as alleging that the circuit court in a certiorari proceeding had found by a written opinion that there was jurisdictional error in the assessment and ordered the assessment vacated, but not alleging that a judgment was ever entered, was defective. Waukesha Development Corp. v. Waukesha, 10 W (2d) 621, 103 NW (2d) 668.

263.34 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.

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.

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.

An amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is made; and this rule applies although the two causes of action arise out of the same transaction. Johnson v. Bar-Mour, Inc. 27 (2d) 271, 133 NW (2d) 748.

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.

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.