Survey of Wisconsin Pleading 1947-1954

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I

SCOPE

The last review of pleading was contained in a survey of procedure which covered decisions through July 1946.[1] This review covers the work of the Wisconsin Supreme Court in the August 1946 through August 1953 terms; decisions from 249 Wisconsin Reports, page 237, to 267 Wisconsin 330. We are also concerned with the work of the legislature in the field of pleading during the same period, and the work of the Supreme Court in the exercise of its rule-making power.[2]

The scope of this article is indicated by the preceding table of contents. Summary judgment is included because it is an attack on the action made in the pleading stage. Joinder of claims and parties is not treated here, since there is a comprehensive comment on joinder in this issue.[3]

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[1] Boardman, *Procedure*, 1947 WIS. L. REV. 44.

[2] WIS. STAT. § 251.18 (1953). Changes made under the rule-making power appear in vols. 251, 254, 255, 258, 259 and 262 of the Wis. Reports.

[3] Comment, 1955 WIS. L. REV. 458.

II

PLEADING

A. *Pleading in Relation to Trial and Judgment*

Two cases emphasize the necessity of looking ahead to trial and judgment before drafting pleadings. In Wisconsin, a major function of pleadings is to acquaint the parties with the actual issues and with the claims, defenses and cross demands. So, in an action to enjoin defendant from using a trade name, where both parties claimed that they derived their right to use the name from the same foreign corporation, the plaintiffs' failure to plead that the foreign corporation had not been licensed to do business precluded them from introducing evidence to prove that point, since "defendant cannot be said to have suspected that plaintiffs would attack the source of their title."[4] In *Schultz v. Schultz*,[5] where the plaintiff sought a judgment quasi-in-rem without attaching the property, but did not adequately describe the property in the complaint, the judgment was vacated. The defendant ought to be given notice that his interest in the property is to be impressed.

B. *Waiver of Defenses*

If pleading is interpreted narrowly as statements of claim and defense, and how those statements may be attacked by demurrer or by motion for judgment of the pleadings, there has been little to note. The most significant change came with the court's various amendments to chapter 263 by order effective September 1, 1954.[6] These say, in effect, that failure to demur or otherwise object to a statement of claim results in waiver of any right to further challenge the pleadings (except for court's lack of jurisdiction) until the trial stage, when the motion is made as a challenge to the sufficiency of the evidence.[7] The amendment was designed specifically to kill the demurrer ore tenus, but it has the additional effect of foreclosing the use of motion for judgment on the pleadings as a trial motion except to attack lack of jurisdiction. These changes, it will be noted, do not affect the statement of claim, or defense, but deal with the effect, at the trial, of failure to raise objections in the pleading stage.

C. *Affirmative Defenses*

The Wisconsin rule that noncompliance with the statute of frauds may be proved at the trial even though it was not affirmatively

[4] Aldrich v. Skycoach Air Lines Agency, 266 Wis. 580, 64 N.W.2d 199 (1954).
[5] 256 Wis. 139, 40 N.W.2d 515 (1949).
[6] 265 Wis. vi (1954).
[7] See especially WIS. STAT. § 263.12 (1953).

pleaded in the answer was reiterated.[8] The court speaks of the denial of the contract as a "general" denial, because it quotes from a case decided before the general denial was abolished in 1931.[9] The rule is the same, of course, where, as under our present statutes,[10] specific denials are called for.

In an equitable action for accounting, the defendant, to take advantage of a balance in his favor, need not plead set-off or counterclaim.[11] In another action for damages for breach of contract, the complaint alleged that plaintiff attorney was to receive 50% of the corporation's stock. On demurrer, the court held the complaint was not defective for failing to allege that P's services equalled the value of the stock. This defense was an affirmative defense, and should have been raised by answer.[12] In pleading negligence it is sufficient to relate the facts in some detail and state that they were negligently performed.[13]

D. *Conclusions of Law*

It may be helpful to list some of the statements which the court held were conclusions of law, instead of ultimate facts as demanded by statute[14] and therefore not admitted by demurrer: (1) allegations concerning legislative intent in enacting a statute;[15] (2) allegations that a defendant wife has or claims some interest in property, where other allegations of the complaint showed clearly that she had no interest;[16] (3) allegations that a city was attempting to take property for private rather than for public use;[17] (4) an allegation in an answer that fraud was committed;[18] and standing alone, an allegation that a contract was "entered into."[19] In the last case, however, the complaint was saved because consideration was clearly inferable from other allegations of the complaint. A statement in an answer which denies that plaintiff's alleged mortgage is "any lien whatsoever" is only a conclusion;[20] that plaintiff was proceeding "in his official capacity" as village marshal is not a conclusion, because it is a

[8] Holtan v. Bjornson, 260 Wis. 514, 51 N.W.2d 719 (1952).
[9] 204 Wis. vi (1931).
[10] WIS. STAT. § 263.13 (1) (1953).
[11] Miller v. Joannes, 262 Wis. 425, 55 N.W.2d 375 (1952).
[12] Conway v. Marachowsky, 262 Wis. 540, 55 N.W.2d 909 (1952).
[13] Colton v. Foulkes, 259 Wis. 142, 47 N.W.2d 901 (1951).
[14] WIS. STAT. § 263.03 (1953).
[15] Mitchell v. Horicon, 264 Wis. 350, 59 N.W.2d 469 (1953).
[16] Olsen v. Ortell, 264 Wis. 468, 59 N.W.2d 473 (1953).
[17] Milwaukee v. Schomberg, 261 Wis. 166, 52 N.W.2d 151 (1952).
[18] First & American Nat. Bank v. Conley, 249 Wis. 403, 24 N.W.2d 873 (1946).
[19] Pengra Bros. Inc. v. Peter Nelson & Sons, Inc., 256 Wis. 454, 41 N.W.2d 631 (1950).
[20] Virkshus v. Virkshus, 250 Wis. 90, 26 N.W.2d 156 (1947).

mixed matter of law and fact, the ultimate of which is, in broad sense, a fact.[21]

A negative pregnant is a defect of form only, and can not be attacked after trial.[22] *Neitge v. Severson*[23] held that a denial of plaintiff's ownership was the denial of a conclusion of law, and must therefore itself be held to be a conclusion. Nevertheless, the denial placed in issue the question of ownership and such issue cannot be determined in a demurrer. The court reached this result on the ground that a demurrer to an answer is permitted only when the answer contained new matter; not when an answer is only a denial of the allegations of the complaint. It would seem to have been simpler to reach the same result on the ground that allegations of ownership are not conclusions of law[24] and the denial was one of an allegation of fact, so that an issue not triable on demurrer was joined.

E. *Pleading on Information and Belief*

A statement that an allegation in a complaint is "on information sufficient to form a belief" is evasive and defective; the proper form is "on information and belief" as stated in section 263.25; further, if facts upon which the liability of the defendant is predicated are matters of public record, they must not be pleaded on information and belief.[25]

F. *End of Pleadings: "deemed controverted"*

An interesting application of the "deemed controverted" provision was made in *Wauwatosa v. Milwaukee*.[26] The complaint alleged that defendant city had proceeded in an annexation according to a named section of the statutes; the answer denied the city's allegations, and alleged that the city had proceeded according to a different section. Held, that under section 263.26 an issue was created because the allegations in the answer were new matter and hence deemed controverted; and further, that even though the matter of the city's compliance with the second section had not been tried below, it would be considered on appeal.

III

Successive Demurrers

Several decisions on demurrers and motions which attempted to attack pleadings were handed down. In *Nelson v. American Employ-*

[21] Larson v. Lester, 259 Wis. 440, 49 N.W.2d 414 (1951).
[22] Wauwatosa v. Milwaukee, 266 Wis. 59, 62 N.W.2d 718 (1954).
[23] 256 Wis. 628, 42 N.W.2d 149 (1950).
[24] See Latsch v. Bethke, 222 Wis. 485, 489, 269 N.W. 243, 245 (1936).
[25] Mineral Point v. Davis, 253 Wis. 270, 34 N.W.2d 226 (1948).
[26] 259 Wis. 56, 47 N.W.2d 442 (1951).

ers' Ins. Co.,[27] on the first trial defendants demurred on the ground that the complaint stated no cause of action; trial court's order overruling demurrer was affirmed. On return of the record, the defendant again attempted to demur on the ground that the complaint failed to state a cause of action; the demurrer was overruled; this action was affirmed by the Supreme Court, which said, "The defendants had their day in court and it was incumbent upon them to submit their complete argument in support of their position. The case cannot be heard again because counsel's subsequent [legal] research convinces them that more might be said."[27a]

IV

Motions to Strike

A motion to strike part of an answer is appealable or not on the same basis that an order on a similar demurrer would be appealable, *i.e.*, if the order strikes a separate defense, it is appealable, but if it strikes less, it is not appealable. Such a motion does not search the record, like a demurrer, but seeks a ruling on the relevance of the matter in question.[28]

If plaintiff fails to file his motion to strike the answer as required by section 263.23, but goes to trial on the merits, he waives his right to judgment by default.[29]

V

Counterclaims

Section 263.15(1) providing that the defendant may have relief against part of the plaintiff's claim if the relief involves or affects the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose, was held to permit defendant-purchaser to recover his earnest money from the plaintiff vendor's broker, who was also a plaintiff, even though no counterclaim as such had been made in the answer.[30] In an ejectment action the defendants could not defeat the plaintiff's right to relief by pleading in the answer and proving a mistake which would entitle the defendants to reformation. Reformation must be asked for in a counterclaim pleaded as such.[31] Where parties pro-

[27] 262 Wis. 271, 55 N.W.2d 13 (1952).

[27a] *Id.* at 274, 55 N.W.2d at 14 (1952).

[28] Bolick v. Gallagher, 266 Wis. 208, 63 N.W.2d 93 (1954).

[29] Frings v. Donovan, 266 Wis. 277, 63 N.W.2d 105 (1954).

[30] Ross v. Kunkel, 257 Wis. 197, 43 N.W.2d 26 (1950).

[31] Smith v. Vogt, 251 Wis. 619, 30 N.W.2d 617 (1947).

ceeded on the theory that allegations of a counterclaim were at issue, a formal reply was waived.[32]

VI

Cross-complaint

By order of the court effective September 1, 1954, section 263.15 was amended to provide that a defendant who wants affirmative relief against a codefendant or a third party must demand such relief by cross-complaint, and not merely by answer.[33]

VII

Amendment of Pleadings and Variance

Several cases were concerned with amendment of pleadings. Often the relation of amendment to the running of the statute of limitations can be troublesome. The rule in the simple case was stated in an assault and battery action, where the complaint was amended after the statute of limitations had run. If the amended complaint merely revises, condenses and realleges the allegations of the original complaint, it does not state a new cause of action, and is not barred by the running of the statute.[34] But what if there is a substantial change in the theory of the action?

Nelson v. American Employers' Ins. Co.[35] held that a pleading may be amended from ordinary negligence to gross negligence, even though the two years within which notice of injury must be given had run before the amendment. A contract case, however, came out with a different result.[36] Between the time the action was timely begun and the date of trial, the statute of limitations had run. The original complaint was based on express contract. On the day of trial the plaintiff tried to amend to add a count in *quantum meruit.* The court held, relying on *Meinshausen v. Gettelman Brewing Co.*,[37] that the amendment should have been denied. It should be noted, however, that the court's attention was not called to the fact that the statute dealing with amendments to pleadings (section 269.44) had been amended[37a] to provide that a pleading might be amended even if the amendment changed the action from one at law to one in equity, from contract to tort, or vice versa, provided that the amended pleading was related

[32] Kaiser v. Better Farms, Inc., 249 Wis. 302, 24 N.W.2d 621 (1946).
[33] 265 Wis. vi (1953); Wis. Stat. § 263.15 (1953).
[34] Fredrickson v. Kabat, 264 Wis. 545, 59 N.W.2d 484 (1953).
[35] 262 Wis. 271, 55 N.W.2d 13 (1952).
[36] Halvorson v. Tarnow, 258 Wis. 11, 44 N.W.2d 577 (1950).
[37] 133 Wis. 95, 113 N.W. 408 (1907).
[37a] Wis. Laws 1911, c. 353.

to the original subject matter. The latter qualification was restated by amendment in 1935 in the words of the present statute: "provided, the amended pleading states a cause of action arising out of the contract, transaction or occurrence or is connected with the subject of the action upon which the original pleading is based." Since the statute in its present form is held to permit a change from ordinary to gross negligence, permitting a change from express to implied contract would seem desirable.

In a variance case, where the statute of limitations had not run, there was, of course, no difficulty. Where the basic allegation in the complaint that an agency relationship between defendant and her son was not established on the trial, but the essential elements of quasi contract, showing plaintiff entitled to recover, had been established, the trial court erred in not permitting the plaintiff to amend complaint to conform to proof.[38]

A variation of the usual variance problem was shown in *Kuester v. Rowlands*[39] where it was held that pleadings may be amended to conform to the proof, even though the proof was received over objection, when the same fact was shown by defendant's evidence.

In *Rhodes v. Shawano Transfer Co.*,[40] amendment of pleadings after judgment to make them conform to facts found, so that plaintiffs could get judgment against an impleaded defendant was held error, since, if the plaintiffs had originally proceeded against the defendants, the defendants could have pleaded contributory negligence on the part of one plaintiff.

The refusal of the trial court to permit defendant to amend his answer, after the court had allowed plaintiff to file an amended complaint, was held an abuse of discretion in *Erickson v. Westfield Milling & Electric Light Co.*[41] A pleading may be amended after denial of motions for summary judgment.[42]

A formal defect in a pleading, which if allowed, would result in failure of the pleading to state a cause of action may not be raised for the first time on appeal, since the defect could readily have been corrected below.[43]

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[38] Nelson v. Preston, 262 Wis. 547, 55 N.W.2d 918 (1952).

[39] 250 Wis. 277, 26 N.W.2d 639 (1947).

[40] 256 Wis. 291, 41 N.W.2d 288 (1950).

[41] 263 Wis. 580, 58 N.W.2d 437 (1953).

[42] Grady v. Hartford Steam Boiler Insp. & Ins. Co., 265 Wis. 610, 62 N.W.2d 399 (1954).

[43] Mineral Point v. Davis, 253 Wis. 270, 34 N.W.2d 226 (1948).

VIII

Summary Judgment

There were many cases on summary judgment. Three, bearing on the relation of summary judgment to other procedural devices are of interest.

Mitchell v. Lewensohn[44] held that a motion for summary judgment was properly denied when made after the court had granted a motion to allow filing of supplemental pleading. Where the answer stated no defense, plaintiff was entitled to judgment on the pleadings, and it was immaterial that motion made was for summary judgment, and that the summary judgment statute was not strictly followed.[45]

In *Pelon v. Becco*[46] a personal injury action based on violation of the safe-place statute, the defendant examined the plaintiff adversely before trial. Defendant then moved for summary judgment, incorporating in his affidavit questions and answers from plaintiff's affidavit, on the theory that they disclosed no liability on the part of the defendant. The trial court's denial of the motion was affirmed on appeal on the grounds that: (1) the plaintiff, an adverse party, was only answering the question asked; (2) plaintiff might produce evidence of other witnesses at the trial. "It certainly is not anticipated that a plaintiff must affirmatively establish a cause of action in adverse proceedings before a court commissioner or be, in effect, subject to . . . application of the summary-judgment statute."[47]

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[44] 251 Wis. 424, 29 N.W.2d 748 (1947).

[45] Werner Transportation Co. v. Shimon, 249 Wis. 87, 23 N.W.2d 519 (1946).

[46] 253 Wis. 278, 34 N.W.2d 236 (1948).

[47] *Id.* at 281, 34 N.W.2d at 237.