issory note, moved to amend his answer so as to show that the note was procured by the fraud and misrepresentation of the payee, it is error to allow the amendment. Gregory v. Hart, 7 W 532.

An amendment setting up new matter, the allowance of which would deprive the defendant of the plea of the statute of limitations, is not allowed. Stevens v. Brooks, 23 W 196.

A much more liberal rule exists as to setting up of new defenses than in the case of amendments to the complaint, since the defendant cannot discontinue and commence de novo. Rogers v. Wright, 21 W 681; Harris v. Wicks, 28 W 199; Blodgett v. Hitt, 29 W 169; Bowman v. Van Kuren, 29 W 209; McIndoe v. Morman, 26 W 588.

An order granting leave to serve a supplemental answer required the payment of the costs of the action to that date within 10 days, and gave plaintiff 30 days after such payment to demur or reply; held, that if defendant took the benefit of such order he thereby elected to pay such costs and became liable therefor and plaintiff did not waive his right to such payment by accepting the supplemental answer and demurring thereto before such payment. Damp v. Dane, 33 W 430.

A new cause of action cannot be introduced by amendment unless by consent. Johnson v. Filkington, 39 W 62.

In an action to quiet title to land left by reliction it was proper for the court to allow an amendment alleging a further reliction and patent to plaintiff. Boorman v. Sunnuchs, 42 W 233.

Immaterial amendments should not be allowed; but it is not error to permit them, as an averment descriptio personae. Nary v. Henni, 45 W 473.

The trial court may permit any amendment of the answer if the facts constitute a defense, although they may be inconsistent with the grounds of defense first stated or bring in a new and distinct defense. Brown v. Bosworth, 62 W 542, 22 NW 521.

It is not an abuse of discretion to refuse an amendment offered for the purpose of taking the right to open and close from the plaintiff and giving it to the defendant after the plaintiff has proved his case and rested. Studebaker Brothers M. Co. v. Langson, 89 W 200, 61 NW 773.

There is no abuse of discretion in denying leave to amend a complaint when the amendment will virtually change the action from one to foreclose a subcontractor's lien into one to foreclose the lien of a principal contractor, the time for filing a claim for the latter having expired. Segelke v. Kohlhaus M. Co. 94 W 106, 68 NW 653.

A wife against whom a judgment of divorce has been entered should be allowed, if she applies within one year after the entry of the judgment, to file a supplemental answer alleging that since the trial the plaintiff has married another woman and committed adultery with her, either as a bar to a judgment in plaintiff's favor or by way of counterclaim for a judgment in defendant's favor. White v. White, 167 W 615, 168 NW 704.

Where a proposed alternative cause of action constituted an attempt to recover on employment theory, there was no abuse of discretion in denying leave to amend after plaintiff had maintained partnership theory through a substantial part of the trial. Maslowski v. Bitter, 7 W (2d) 167, 96 NW (2d) 349.

The trial court did not abuse its discretion in allowing an amendment to an answer to claim exemption of property for failure of a wife to sign 7 months after the commencement of a replevin action. Opitz v. Brawley, 10 W (2d) 93, 102 NW (2d) 117.

CHAPTER 264.

Arrest and Bail.

264.01 History: 1856 c. 120 s. 86; R. S. 1858 c. 127 s. 1; R. S. 1878 s. 2688; Stats. 1898 s. 2688; 1925 c. 4; Stats. 1925 s. 264.01.

264.02 History: 1856 c. 120 s. 87; R. S. 1858 c. 127 s. 2; 1860 c. 288; R. S. 1878 s. 2689; Stats. 1898 s. 2689; 1925 c. 4; Stats. 1925 s. 264.02; 1929 c. 44; 1953 c. 247; 1963 c. 158.

Revisers' Note, 1878: Section 2, chapter 127, R. S. 1858, as amended by chapter 228, Laws 1860; amended by including actions for seduction and criminal conversation. The former has been held not included within the definition (Wagner v. Lathers, 26 Wis. 436), and the latter is exposed to a similar risk. It seems both ought to be included, being, at least in some cases, grievous torts. The addendum made by chapter 98, Laws 1868, is omitted as clearly in violation of the constitution. Article I, section 16. It was copied from the New York statute, which is not there liable to the same invalidity, because there imprisonment for debt was regulated by statute and not forbidden by the constitution. The provision is omitted from the last New York revision.

Legislative Council Note, 1963: Language [of (1) (d)] revised and references corrected to conform to the commercial code. The net result may be a very slight restriction of the power of civil arrest because the present exemption relates only to purchase money security interests created by conditional sales contract while the commercial code does not distinguish between purchase money security interests created by conditional sales contract and those created by other instruments, such as a chattel mortgage. (Bill 1-S).

Where one of several partners unlawfully obtains possession of joint property and converts it to his own use he may be arrested and held to bail. Ilsley v. Harris, 10 W 95.

The action of ejectment is an action ex delicto, and where judgment has been obtained for damages for withholding real property and the rents and profits thereof, the claim therefor being united in the complaint in the action to recover the property, the plaintiff may have execution against defendant's body to enforce his judgment. Howland v. Needham, 10 W 495.

An attorney who bids off land of the judgment debtor at a sale on execution in favor of his client and takes the certificate of sale in his own name, afterwards selling it and converting the proceeds to his own use, is liable to arrest. Cotton v. Sharpstein, 14 W 226.

An order denying a motion to vacate an order of arrest is appealable; the right is not

waived by giving bail. Pratt v. Page, 18 W 337.

Where defendant, after his first arrest, told the sheriff that the order was void on its face, and on that ground was discharged, a second arrest, by virtue of a new order obtained upon the affidavit used to procure the original order, was valid, it having been obtained in good faith and it not having been made to vex and annoy the defendant. In re Bowen, 20 W 300.

Defendant in an action by personal representatives for injuries to the decedent is not liable to arrest. Gibbs v. Larrabee, 23 W 495.

A commission merchant who sells goods for his consignors, though he receive the proceeds in a fiduciary capacity, is liable to arrest in an action therefor, unless he has authority to use such proceeds in his own business. Williams M. & R. Co. v. Raynor, 38 W 119.

Defendant could be arrested and held to bail in an action for a penalty or forfeiture. Graham v. Chicago, M. & St. P. R. Co. 53 W 473, 10 NW 609.

The defendant in an action brought under sec. 4532, R. S. 1878, to recover money won by gambling may be arrested. Stoddard v. Burt, 75 W 107, 43 NW 737.

A person brought to the state upon a requisition who has been discharged as to the offense for which he was extradited may not be arrested on civil process until he has had reasonable opportunity to return to the state from which he was taken. Moletor v. Sinnen, 76 W 308, 44 NW 1099.

An order of arrest may be issued in a civil action where the defendant while treasurer of a corporation wrongfully converted moneys of the corporation to his own use and fraudulently misapplied its funds. State ex rel. Hellige v. Milwaukee Liedertafel, 166 W 277, 164 NW 1004.

A woman who was imprisoned for violation of a city ordinance was not entitled to habeas corpus because of this statute. It does not prohibit imprisonment of a female who is convicted for violating a city ordinance. Janesville v. Tweedell, 217 W 395, 258 NW 437.

264.03 History: 1856 c. 120 s. 88; R. S. 1858 c. 127 s. 3; R. S. 1878 s. 2690; Stats. 1898 s. 2690; 1925 c. 4; Stats. 1925 s. 264.03.

Judges of courts of record may make orders at chambers to hold to bail. In re Kingling, 39 W 35.

264.04 History: 1856 c. 120 s. 89; R. S. 1858 c. 127 s. 4; R. S. 1878 s. 2691; Stats. 1898 s. 2691; 1925 c. 4; Stats. 1925 s. 264.04; 1935 c. 541 s. 42.

Revisor's Note, 1935: The complaint is an affidavit, i.e. it must be verified. (Bill 50-S, s. 42)

If the affidavit shows that the action is barred by the statute of limitations it is not sufficient. Pratt v. Page, 18 W 337.

To justify an order of arrest in an action for malicious prosecution and false imprisonment the facts relied on by plaintiff as prima facie evidence of want of probable cause must be set forth in the affidavit for the order; mere statement of malice is insufficient. The requisite statement cannot be made by amendment on the hearing of the motion to vacate the order. Orton v. Noonan, 32 W 220.

If the facts alleged in the complaint are the same as the grounds stated in the affidavit for the arrest the order issued on the affidavit will not be set aside because such facts are denied by the defendant in the proofs presented on his motion to set the order of arrest aside. Neither should the order be set aside because it is made to appear that plaintiff cannot recover on part of his claim. Warner v. Bates, 75 W 278, 43 NW 857.

264.05 History: 1856 c. 120 s. 90; R. S. 1858 c. 127 s. 5; R. S. 1878 s. 2692; Stats. 1898 s. 2692; 1925 c. 4; Stats. 1925 s. 264.05; 1935 c. 541 s. 43; 1945 c. 256.

If the undertaking is signed by sureties the principal need not sign it. L. A. Shakman & Co. v. Koch, 93 W 595, 67 NW 925.

264.06 History: 1856 c. 120 s. 91; R. S. 1858 c. 127 s. 6; R. S. 1878 s. 2693; Stats. 1898 s. 2693; 1925 c. 4; Stats. 1925 s. 264.06; 1935 c. 541 s. 44.

Revisers' Note, 1878: Section 6, chapter 127, R. S. 1858, amended to conform to decision in Ilsley v. Harris, 10 W 95.

Revisor's Note, 1935: 264.06 is amended to harmonize with 264.07. (Bill 50-S, s. 44)

An order of arrest is a writ of process within sec. 17, art. VII, of the constitution and should run in the name of "the state of Wisconsin"; but such style is matter of form and the order may be amended. Ilsley v. Harris, 10 W 95.

264.07 History: 1856 c. 120 s. 92; R. S. 1858 c. 127 s. 7; R. S. 1878 s. 2694; Stats. 1898 s. 2694; 1925 c. 4; Stats. 1925 s. 264.07; Court Rule VII; Sup. Ct. Order, 212 W x; 1935 c. 541 s. 45.

Revisers' Note, 1878: Section 7, chapter 127, R. S. 1858, amended to require the undertaking to be delivered to the sheriff and by him served and filed in conformity to the practice in attachment, as amended. It is desired to make the practice upon these provisional remedies as nearly alike as may be.

An order of arrest will not be vacated because the officer making the arrest does not serve the copy of the affidavit for 2 hours after it is made. Ilsley v. Harris, 10 W 95.

264.10 History: 1856 c. 120 s. 95; R. S. 1858 c. 127 s. 10; R. S. 1878 s. 2697; Stats. 1898 s. 2697; 1925 c. 4; Stats. 1925 s. 264.10; 1935 c. 541 s. 48; 1943 c. 275 s. 60.

A complaint on an undertaking for bail which alleges that it was filed in the proper office by the plaintiff shows that the bail was accepted, and it is not necessary to allege that the sheriff delivered the order of arrest, with his return indorsed thereon, with a certified copy of the undertaking to the plaintiff or his attorney. Reeg v. Adams, 113 W 175, 87 NW 1067.

Where an officer allows a prisoner to leave his custody except in the manner provided by law, the officer is guilty of an escape. Gebhardt v. Holmes, 149 W 428, 135 NW 861.

264.11 History: 1856 c. 120 s. 105; R. S. 1858 c. 127 s. 21; R. S. 1878 s. 2698; Stats. 1898 s.

2698; 1925 c. 4; Stats. 1925 s. 264.11; 1935 c. 541 s. 49.

264.12 History: 1856 c. 120 s. 106; R. S. 1858 c. 127 s. 22; R. S. 1878 s. 2699; Stats. 1898 s. 2699; 1925 c. 4; Stats. 1925 s. 264.12; 1935 c. 541 s. 50.

264.13 History: 1856 c. 120 s. 107; R. S. 1858 c. 127 s. 23; 1859 c. 91 s. 4; R. S. 1878 s. 2700; Stats. 1898 s. 2700; 1925 c. 4; Stats. 1925 s. 264.13; 1935 c. 541 s. 51.

Revisers' Note, 1878: Section 23, chapter 127, R. S. 1858, as amended by section 4, chapter 91, Laws 1859, omitting the words "by the sheriff," so that the direction shall be simply that the money be refunded. The sheriff may have paid it to the clerk before the bail be given.

In an action on an undertaking given to discharge defendant from arrest the complaint alleged that such undertaking was filed in the proper office by the plaintiff, without stating that the sheriff delivered the order of arrest to the plaintiff with his return indorsed thereon, together with a certified copy of the undertaking. The complaint was good, it being inferred that the plaintiff accepted the bail. Reeg v. Adams, 113 W 175, 87 NW 1067.

264.14 History: 1856 c. 120 s. 108; R. S. 1858 c. 127 s. 24; R. S. 1878 s. 2701; Stats. 1898 s. 2701; 1925 c. 4; Stats. 1925 s. 264.14; 1935 c. 541 s. 52.

264.15 History: 1856 c. 120 s. 100; R. S. 1858 c. 127 s. 16; R. S. 1878 s. 2702; Stats. 1898 s. 2702; 1925 c. 4; Stats. 1925 s. 264.15; 1935 c. 541 s. 53.

Under secs. 16 and 27, ch. 127, R. S. 1858, in case actual justification becomes unnecessary and the bail is perfected either by acceptance or lapse of time, the defendant has the right to move to vacate the order of arrest at any time before the expiration of the 10 days within which plaintiff might give notice that he did not accept. Orton v. Noonan, 32 W 220.

264.16 History: 1856 c. 120 s. 101; R. S. 1858 c. 127 s. 17; R. S. 1878 s. 2703; Stats. 1898 s. 2703; 1925 c. 4; Stats. 1925 s. 264.16.

264.17 History: 1856 c. 120 s. 102; R. S. 1858 c. 127 s. 18; R. S. 1878 s. 2704; Stats. 1898 s. 2704; 1903 c. 159 s. 1; Supl. 1906 s. 2704; 1925 c. 4; Stats. 1925 s. 264.17; 1935 c. 541 s. 54.

Justification of the sureties on an undertaking pursuant to sec. 3092, Stats. 1898, is sufficient if made in conformity with sec. 2704. Newland v. Morris, 115 W 207, 91 NW 664.

264.18 History: 1856 c. 120 s. 103; R. S. 1858 c. 127 s. 19; R. S. 1878 s. 2705; Stats. 1898 s. 2705; 1925 c. 4; Stats. 1925 s. 264.18; 1935 c. 541 s. 55.

264.19 History: 1856 c. 120 s. 104; R. S. 1858 c. 127 s. 20; R. S. 1878 s. 2706; Stats. 1898 s. 2706; 1925 c. 4; Stats. 1925 s. 264.19; 1935 c. 541 s. 56.

264.20 History: 1856 c. 120 s. 96; R. S. 1858 c. 127 s. 11; R. S. 1878 s. 2707; Stats. 1898 s. 2707; 1925 c. 4; Stats. 1925 s. 264.20; 1935 c. 541 s. 57; 1943 c. 275 s. 60.

264.21 History: 1856 c. 120 s. 97; R. S. 1858 c. 127 s. 12; R. S. 1878 s. 2708; Stats. 1898 s. 2708; 1925 c. 4; Stats. 1925 s. 264.21; 1935 c. 541 s. 58.

264.22 History: R. S. 1858 c. 127 s. 13; R. S. 1878 s. 2709; Stats. 1898 s. 2709; 1925 c. 4; Stats. 1925 s. 264.22.

264.23 History: 1856 c. 120 s. 98; R. S. 1858 c. 127 s. 14; R. S. 1878 s. 2710; Stats. 1898 s. 2710; 1925 c. 4; Stats. 1925 s. 264.23; 1935 c. 541 s. 59.

264.24 History: 1856 c. 120 s. 99; R. S. 1858 c. 127 s. 15; R. S. 1878 s. 2711; Stats. 1898 s. 2711; 1925 c. 4; Stats. 1925 s. 264.24.

264.25 History: 1856 c. 120 s. 109; R. S. 1858 c. 127 s. 25; R. S. 1878 s. 2712; Stats. 1898 s. 2712; 1925 c. 4; Stats. 1925 s. 264.25.

A release by the sheriff of a prisoner by virtue of a discharge void for want of jurisdiction is probably an escape. Getzlaff v. Seliger, 43 W 301. See also Grace v. Mitchell, 31 W 533.

264.26 History: 1856 c. 120 s. 110; R. S. 1858 c. 127 s. 26; R. S. 1878 s. 2713; Stats. 1898 s. 2713; 1925 c. 4; Stats. 1925 s. 264.26.

264.27 History: 1856 c. 120 s. 111; R. S. 1858 c. 127 s. 27; R. S. 1878 s. 2714; Stats. 1898 s. 2714; 1925 c. 4; Stats. 1925 s. 264.27.

264.28 History: 1856 c. 120 s. 112; R. S. 1858 c. 127 s. 28; R. S. 1878 s. 2715; Stats. 1898 s. 2715; 1925 c. 4; Stats. 1925 s. 264.28.

A defendant may move to vacate an order of arrest although plaintiff accepted the bail tendered. Orton v. Noonan, 32 W 220.

264.29 History: 1856 c. 120 s. 113; R. S. 1858 c. 127 s. 29; R. S. 1878 s. 2716; Stats. 1898 s. 2716; 1925 c. 4; Stats. 1925 s. 264.29.

CHAPTER 265.

Replevin.

265.01 History: 1856 c. 120 s. 114; R. S. 1858 c. 128 s. 1; R. S. 1878 s. 2717; Stats. 1898 s. 2717; 1925 c. 4; Stats. 1925 s. 265.01; 1935 c. 541 s. 60.

Where it was alleged that defendant wrongfully took certain property and afterwards unlawfully converted it to his own use, the action was replevin. Enos v. Bemis, 61 W 656, 21 NW 812.

The right to maintain replevin against the fraudulent vendee is not waived as to the portion of the goods seized by bringing an action of conversion for the remainder. Neither is the right to replevin affected because the vendee made an assignment for the benefit of his creditors, and the vendor filed a claim for the balance of the goods with the assignee. Singer v. Schilling, 74 W 369, 43 NW 101.

Where both parties claim title and the right of possession incident thereto, no demand is necessary. Byrne v. Byrne, 89 W 659, 62 NW 413.

Where the possession of property is tortiously interfered with, replevin may be maintained without making a previous demand. Perkins v. Best, 94 W 168, 68 NW 762.