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.

A tenant in common cannot maintain replevin against the other tenant, nor against a mortgagee for delivering the property to such other. Trustees of Ashland Lodge v. Williams, 100 W 223, 75 NW 954.

A vendee may maintain replevin against the vendor after payment or tender of the purchase price when the goods have been set apart for delivery and a partial delivery made. Abraham v. Karger, 100 W 387, 76 NW 330.

An action may be maintained to recover possession of personal property without claiming its immediate delivery. Hart v. Moulton, 104 W 349, 80 NW 599.

A complaint stating plaintiff's ownership and that he is entitled to possession, and that defendant has wrongfully taken and unlawfully detains the same, is good although it does not allege that the plaintiff is entitled to the immediate possession. Smith v. Wisconsin I. Co. 114 W 151, 89 NW 829.

A defendant in attachment cannot maintain replevin for property taken under a lawful writ of attachment. Irey v. Gorman, 118 W 8, 94 NW 658.

The code has entirely eliminated the ancient common-law action of replevin as a means of regaining possession of chattels and substituted the procedure in ch. 123, R. S. 1878. The gravamen of the modern action is the unlawful detention thereof by the defendant. The allegation of an unlawful taking is mere surplusage, although the unlawful taking may still support an action to recover damages caused thereby. Miller v. Hackbarth, 126 W 50, 105 NW 311.

265.02 History: 1856 c. 120 s. 115; R. S. 1858 c. 128 s. 2; R. S. 1878 s. 2718; Stats. 1898 s. 2718; 1925 c. 4; Stats. 1925 s. 265.02; 1935 c. 541 s. 61.

Mineral severed from the soil by a person not authorized by the landowner does not vest in the licensee of such owner the right to maintain replevin therefor. Gillett v. Treganza, 6 W 343.

To support the action in the cepit the plaintiff must prove that at the time of the caption he had the general or special property in the goods taken and the right of immediate and exclusive possession. Gillett v. Treganza, 6 W 343; Child v. Child, 13 W 17; Beckwith v. Phillеo, 15 W 223.

Where an officer is possessed of chattels under an execution in a manner sufficient to enable him to maintain trespass the real owner, if a stranger to the writ, may maintain replevin against him. Gallagher v. Bishop, 15 W 276.

Replevin may be maintained by each owner for his share of grain stored in mass. Young v. Miles, 20 W 615.

The owner of chattels which have been converted by mistake may reclaim them. Single v. Schneider, 24 W 299.

Replevin will lie against an officer who has taken property upon a warrant void upon its face. Dudley v. Ross, 27 W 679.

Plaintiff in replevin for logs taken from unoccupied land must prove that he was owner of the land. Hungerford v. Redford, 29 W 345.

In case of severance and seizure of the exempt property of one of 2 tenants in common the debtor may maintain replevin. Newton v. Howe, 29 W 531.

Replevin may be maintained by the landowner for a building removed from his land after eviction of one who erected it as part of his adverse enjoyment of the land. Huebschmann v. McHenry, 29 W 655.

Replevin will not lie against one who has never had the goods in his possession or under his control though he may be liable in trespass de bonis asportatis. Grace v. Mitchell, 31 W 533.

Replevin lies only in behalf of one entitled to possession against one in actual or constructive possession and control. Timp v. Dockham, 32 W 146.

Replevin will not lie against one not in actual possession and control and one who disclaims title and right of possession, although the property was in his dwelling. Johnson v. Garlick, 25 W 705; Timp v. Dockham, 32 W 146.

Replevin may be maintained for logs intermixed. Stearns v. Raymond, 26 W 74; Eldred v. Oconto Co. 33 W 133.

One who distrains a beast for doing damage cannot be deprived of its possession within the time fixed for making application for the appointment of appraisers. Pettit v. May, 34 W 666.

A distrainor of beasts cannot maintain replevin for them if forcibly taken from him by their owner. Taylor v. Welbey, 36 W 42.

Replevin will not lie against an officer in possession of property under a valid writ. Union L. Co. v. Tronson, 36 W 126.

Replevin cannot be maintained where the property was restored to plaintiff before the summons was served. Kiefer v. Carrier, 53 W 404, 10 NW 562.

The affidavit is not conclusive of the fact that the property has not been taken for a tax. If the evidence discloses that it was so taken plaintiff has no right to a delivery on a final judgment, or, if a delivery has been had, to retain the property after such judgment. Kaehler v. Dobberpuhl, 60 W 256, 18 NW 841.

An officer who has taken property under a tax warrant and justified thereunder is not bound to show that the sale under the warrant was valid. Enos v. Bemis, 61 W 656, 21 NW 812.

Any person other than the assignor in a voluntary assignment may try title with the assignee in an action of replevin. "The rule is, even where property is in the actual custody of the law, as in the hands of an officer on execution or attachment, that any person, other than the defendant in the execution or attachment, may maintain an action of replevin against the officer." Matthews v. Ott, 87 W 399, 58 NW 774.

Where the officer arresting a person for larceny takes possession of the property under sec. 4624, R. S. 1878, and before trial, by order of court, the property is restored to defendant upon his giving bond conditioned for its return, such order providing that the right of the owner of the property to replevy it should not be affected thereby, replevin lies. Byrne v. Byrne, 89 W 659, 62 NW 413.

The owner of lumber manufactured from

logs which the manufacturer had mingled with his own logs of the same quality may replevy out of the common mass of lumber manufactured from all such logs a quantity equal to that contributed thereto by his own logs. Bent v. Hoxie, 90 W 625, 64 NW 426.

Where the title and right of possession rest entirely upon a bill of sale which is a mere security, and which has not been filed as required by sec. 2313, R. S. 1878, replevin cannot be maintained against an officer who, before the filing thereof, takes the property under an execution against the debtor. Wagg-Anderson W. Co. v. Dunn, 92 W 409, 66 NW 354.

Where the right to cut timber is conveyed by a license under which title to the timber does not pass until it is cut, and the cutting is wrongfully done by a trespasser while the license is in force, the licensee may assume possession of the timber and maintain replevin for it against the trespasser; he must, however, reimburse the latter for his reasonable expenditure. Keystone L. Co. v. Kolman, 94 W 465, 69 NW 165.

The provision that goods taken for a tax, assessment or fine cannot be replevied is for the protection of the officer and does not prevent such action against the purchaser of the property at a sale under the tax warrant. Wisconsin O. L. Co. v. Laursen, 126 W 484, 105 NW 906.

The holder of all but 2 of unpaid notes secured by a chattel mortgage, as a tenant in common with the unknown holders of the other notes, was entitled, on the mortgagor's default, to recover possession of the mortgage property by replevin for the benefit of all holders of the notes. Muldowney v. McCoy Hotel Co. 223 W 62, 269 NW 655.

Where plaintiff failed to prove value, the complaint should be dismissed on motion, and the fact that value was stipulated as part of defendant's case does not affect the rule. First Nat. Bank v. Sheriff of Milwaukee County, 34 W (2d) 535, 149 NW (2d) 548.

Where persons had a lien upon lumber manufactured for all amounts which should be unpaid on the contract and had the right to take possession, and to sell the property to reimburse themselves for the expenses incurred and the amount due, a refusal of such possession would be a case of unlawful detention and replevin could be maintained. Sutherland v. Brace, 71 F 469, and 73 F 624.

265.03 History: 1856 c. 120 s. 116; R. S. 1858 c. 128 s. 3; R. S. 1878 s. 2719; Stats. 1898 s. 2719; 1925 c. 4; Stats. 1925 s. 265.03; 1935 c. 541 s. 62.

265.04 History: 1856 c. 120 s. 117; R. S. 1858 c. 128 s. 4; R. S. 1878 s. 2720; Stats. 1898 s. 2720; 1925 c. 4; Stats. 1925 s. 265.04; 1935 c. 541 s. 63.

The officer may seize and hold the property for a reasonable time in order that plaintiff may give security. If he fails to do so the property should be redelivered to defendant. If the officer holds it without an undertaking, beyond a reasonable time, he will be liable in damages. Morris v. Baker, 5 W 389.

If plaintiff fails to give the undertaking he cannot claim damages for the depreciation of his property while in the hands of the officer. Williams v. Phelps, 16 W 80.

It seems that the principal need not sign the undertaking. L. A. Shakman & Co. v. Koch, 93 W 595, 67 NW 925.

The sureties undertake that the plaintiff will pay such sums as may be recovered against the plaintiff as the result of a replevin action, such as damages sustained by the seizure under the writ of replevin and perhaps other items. Judgment upon the counterclaim is a distinct and separate matter which does not grow out of the replevin action and its payment is not secured by the undertaking. Wisconsin L. S. Asso. v. Bowerman, 202 W 618, 233 NW 639.

See note to 271.04, citing Confidential Loan & Mortgage Co. v. Hardgrove, 259 W 346, 48 NW (2d) 466.

265.05 History: 1856 c. 120 s. 118; R. S. 1858 c. 128 s. 5; R. S. 1878 s. 2721; Stats. 1898 s. 2721; 1925 c. 4; Stats. 1925 s. 265.05; 1935 c. 541 s. 64.

By excepting to the sufficiency of the sureties on a replevin bond a defendant thereby waives all claim to a return. LeMay v. Renier, 183 W 320, 197 NW 736.

265.06 History: 1856 c. 120 s. 119; R. S. 1858 c. 128 s. 6; 1872 c. 25; R. S. 1878 s. 2722; Stats. 1898 s. 2722; 1925 c. 4; Stats. 1925 s. 265.06; 1935 c. 541 s. 65.

If the sheriff has redelivered the property to the defendant the action may be discontinued on paying the costs and entering an order to that effect. When such order is entered in term time the presumption is that it was done by the court, and the signature of the judge or commissioner is not essential. On obtaining a redelivery of the property the defendant's possession is not qualified by the undertaking he gave, and on dismissal of the action no order for its return is necessary. Hackett v. Bonnell, 16 W 471.

In replevin for property, all of which was returned to defendant upon his giving the requisite bond, the failure of the judgment to expressly determine the title to all the property seized is not error; and the fact that plaintiff proved title to only part of the property seized did not defeat his right to tax costs. Stradling v. Nelson, 186 W 308, 202 NW 691.

Where the mortgagee brings an action of replevin to recover the car and the car is delivered to defendant purchaser on his filing an undertaking under the statute, title to the car having been awarded the purchaser, the mortgagee is not entitled to recover on the undertaking. Bernhagen v. Marathon F. Corp. 212 W 495, 250 NW 410.

265.07 History: 1856 c. 120 s. 120; R. S. 1858 c. 128 s. 7; R. S. 1878 s. 2723; Stats. 1898 s. 2723; 1925 c. 4; Stats. 1925 s. 265.07; 1935 c. 541 s. 66.

265.08 History: 1856 c. 120 s. 121; R. S. 1858 c. 128 s. 8; R. S. 1878 s. 2724; Stats. 1898 s. 2724; 1925 c. 4; Stats. 1925 s. 265.08; 1935 c. 541 s. 67.

The sureties must justify in strict conformity with the statute. Whitney v. Jenkinson, 3 W 407.

265.09 History: 1856 c. 120 s. 122; R. S. 1858 c. 128 s. 9; R. S. 1878 s. 2725; Stats. 1898 s. 2725; 1925 c. 4; Stats. 1925 s. 265.09; 1935 c. 541 s. 68.

265.10 History: 1856 c. 120 s. 123; R. S. 1858 c. 128 s. 10; R. S. 1878 s. 2726; Stats. 1898 s. 2726; 1925 c. 4; Stats. 1925 s. 265.10; 1935 c. 541 s. 69.

265.11 History: 1856 c. 120 s. 124; R. S. 1858 c. 128 s. 11; R. S. 1878 s. 2727; Stats. 1898 s. 2727; 1925 c. 4; Stats. 1925 s. 265.11; 1935 c. 541 s. 70.

There is no statute authorizing a person not a party to the replevin suit to acquire the property by giving an undertaking under sec. 2727, R. S. 1878. The undertaking was given by an assignee for the benefit of creditors, conditioned that if the property was adjudged to be delivered to the plaintiff, a mortgagee, such delivery should be made or any judgment in his favor paid to an amount not exceeding the sum which the assignee might receive from the sale of the property. The assignee's liability to the plaintiff was discharged by payment of the proceeds of the sale of the property, amounting to more than the mortgage debt and interest, notwithstanding the amount of the plaintiff's special interest was not found by the verdict nor fixed by the judgment. Gage v. Allen, 84 W 323, 54 NW 627.

265.12 History: 1856 c. 120 s. 125, 326; R. S. 1858 c. 128 s. 12; R. S. 1858 c. 140 s. 49; R. S. 1878 s. 2728; 1883 c. 6; Ann. Stats. 1889 s. 2728; Stats. 1898 s. 2728; 1925 c. 4; Stats. 1925 s. 265.12; 1935 c. 541 s. 71.

The failure of the sheriff to file plaintiff's papers in a replevin action within 20 days after taking possession of the property as required by sec. 2728, Stats. 1919, is not ground for dismissal where the defendant was not injured by delay, such delay not impairing the court's jurisdiction. Behling v. Posorske, 172 W 608, 179 NW 738.

265.13 History: Sup. Ct. Order, 212 W xvii; Stats. 1933 s. 265.13.

In replevin by the holder of notes secured by a chattel mortgage on hotel property, which did not cover after-acquired property, the trial court erred in allowing judgment for all the personal property located in the hotel as shown by an inventory taken on the day before the trial, where the mortgage had been executed more than 3 years before and there was no sufficient proof that the inventory covered the same identical articles as did the mortgage. Muldowney v. McCoy Hotel Co. 223 W 62, 269 NW 655.

In the absence of exceptional circumstances, in actions for the tortious taking or conversion of goods, the plaintiff is entitled to recover as damages the value of the chattels at the time and place of the wrongful taking or conversion, with interest to the time of trial. Topzant v. Koshe, 242 W 585, 9 NW (2d) 136.

CHAPTER 266.

Attachment.

266.01 History: R. S. 1849 c. 112 s. 1; R. S. 1858 c. 130 s. 1; R. S. 1878 s. 2729; Stats. 1898 s. 2729; 1925 c. 4; Stats. 1925 s. 266.01; 1935 c. 541 s. 72.

Revisers' Note, 1878: Section 1, chapter 130, R. S. 1858, amended by inserting after debtor, words which show unequivocally a corporation may be so proceeded against; section 1, chapter 130, R. S. 1858, being otherwise substantially embraced in the next section. Also forbids expressly an attachment against a municipal corporation.

Revisor's Note, 1935: Title XXV (chapters 260 to 274) relate to actions in courts of record. 260.01. The proper county is determined by chapter 261. The addition of "as defined in 67.01" is to cover towns, counties and school districts. That is now the law, we believe. (Bill 50-S, s. 72)

The statute must be substantially, if not strictly and exactly, complied with. Whitney v. Brunette, 15 W 61.

Attachment is an ancillary or provisional remedy in or dependent upon the principal action. Cummings v. Tabor, 61 W 185, 21 NW 72; Evans v. Virgin, 69 W 153, 33 NW 569.

A trading corporation, so long at least as it deals with others in its ordinary course of business, is subject to the remedy by attachment; and a lien acquired will not be affected by sequestration proceedings subsequently instituted. Ballin v. Merchants' Ex. Bank, 89 W 278, 61 NW 1118.

No fraud being shown by the vendee, the vendor who has accepted his notes and assigned them cannot maintain attachment against their maker. Landauer v. Espenhain, 95 W 169, 70 NW 287.

See note to sec. 12, art. I, on impairment of contracts, citing Second Ward Savings Bank v. Schranck, 97 W 250, 73 NW 31, and other cases.

An attachment reaches only the interest which the debtor has in the property attached. An attachment is inferior to a prior conveyance although such conveyance is not recorded. Karger v. Steele-Wedeles Co. 103 W 286, 79 NW 216.

An attachment lien on real estate may be lost by laches. The lien will be deemed waived in case of neglect to seasonably obtain full jurisdiction of the subject of the levy by service of the summons upon the defendant. Barth v. Loeffelholtz, 108 W 562, 84 NW 846.

While property or money is in custodia legis, the officer holding it is the mere hand of the court and his possession is the possession of the court and it is not subject to levy either in attachment or by way of execution. Guardianship of Kohl, 221 W 385, 266 NW 800.

266.02 History: 1856 c. 120 s. 139; R. S. 1858 c. 130 s. 4; 1859 c. 101 s. 3; 1864 c. 393 s. 2; R. S. 1878 s. 2730; Stats. 1898 s. 2730; 1925 c. 4; Stats. 1925 s. 266.02; 1935 c. 541 s. 73; 1957 c. 181.

Revisers' Note, 1878: Section 3, chapter 101, Laws 1859, as amended by section 2, chapter 393, Laws 1864, and section 4, chapter 130, R. S. 1858, as amended by chapter 101, Laws 1859, combined and amended to direct the writ to run in the name of the state.

The writ of attachment can only be issued at or after the commencement of the action. Jarvis v. Barrett, 14 W 591.