

CHAPTER 264.

ARREST AND BAIL.

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264.01 In civil actions. No person shall be arrested in civil actions except as prescribed by this chapter, but this provision shall not apply to proceedings for contempt.

264.02 When arrests may be made. (1) The defendant may be arrested as hereinafter prescribed in the following cases:

(a) In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for seduction, or for criminal conversation, or for injuring, or for wrongfully taking, detaining or converting property, and in actions to recover damages for the value of property obtained by the defendant under false pretenses or false tokens.

(b) In an action for fine or penalty, or for money received, or for property embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counsel, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or any person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment.

(c) In an action to recover possession of personal property unjustly detained where the property or any part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff.

(d) The provisions of paragraphs (a) and (c) of this subsection shall not apply to any contract as defined in subsection (1) of section 122.01 of the statutes.

(2) But no female shall be arrested in any action except for a wilful injury to person, character or property.

Note: Woman who was imprisoned for violation of city ordinance held not entitled to habeas corpus because of this statute, since statute does not prohibit imprisonment of female who is convicted for violating city ordinance. *Janesville v. Tweedell*, 217 W 395, 258 NW 437.

264.03 Order of arrest, by whom made. An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge.

264.04 Order, when made. The order may be made where it shall appear by affidavit that a cause of action exists, and that it is one of those mentioned in section 264.02. [1935 c. 541 s. 42]

Revisor's Note, 1935: The complaint is an affidavit, i.e. it must be verified. (Bill No. 50 S, s. 42.)

264.05 Bond, liability of plaintiff for support. Before making the order for arrest the court or judge shall require a bond of the plaintiff, with or without sureties, to the effect that if the plaintiff fails to recover, he will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the bond, which shall be at least \$100. If the bond be executed by the plaintiff without sureties he shall annex thereto an affidavit that he is a resident and householder or freeholder within the state and worth double the sum specified in the bond above all his debts and liabilities in property in this state not exempt from execution. The plaintiff shall be liable for support of the defendant while he is in jail, as specified in section 336.14 (1). [1935 c. 541 s. 43; 1945 c. 256]

264.06 Order for arrest, what to contain. The order for arrest may be made at any time before judgment. It shall direct the sheriff of a particular county or generally the

sheriff of any county where the defendant may be found, and require him forthwith to arrest the defendant and hold him to bail in a specified sum. [1935 c. 541 s. 44]

Revisor's Note, 1935: 264.06 is amended to harmonize with 264.07. (Bill No. 50 S, s. 44.)

264.07 Execution of order of arrest. The affidavit, bond and order of arrest shall be delivered to the sheriff who, upon arresting the defendant, shall deliver to him copies thereof; and the sheriff shall, within five days after such arrest, indorse his return on and file the originals with the clerk of the court in which the action is brought. The sheriff shall promptly notify the plaintiff's attorney of the execution of the order of arrest. [Court Rule VII; Supreme Court Order, effective Jan. 1, 1934; 1935 c. 541 s. 45]

264.08, 264.09 [Repealed by 1935 c. 541]

264.10 Bail, how given. The defendant may give a bail bond executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that the defendant shall, at all times, render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment therein; or if he be arrested for the cause mentioned in section 264.02 (1) (c), a bond to the same effect as that required by section 265.06. [1935 c. 541 s. 48; 1943 c. 275 s. 60]

264.11 Deposit in lieu of bail. The defendant may, instead of giving a bond, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and release him. [1935 c. 541 s. 49]

264.12 Payment of deposit. The sheriff shall, within five days after the deposit, deliver it to clerk of the court, and shall take from him duplicate certificates of deposit one of which he shall deliver to the plaintiff and the other to the defendant. [1935 c. 541 s. 50]

264.13 Bail after deposit. If money be deposited as provided in section 264.11 bail may be given and justified upon notice as prescribed in section 264.16 any time before judgment, and thereupon the judge before whom the justification is had shall direct, in the order of allowance, that the money be refunded to the defendant. [1935 c. 541 s. 51]

264.14 Application of deposit. Where money remains on deposit at the time of judgment for the payment of money to the plaintiff, the clerk shall, under direction of the court, apply the same in satisfaction thereof, and refund the surplus to the defendant. If judgment be for the defendant the clerk shall return the deposit to him. [1935 c. 541 s. 52]

264.15 Sheriff's return to plaintiff; notice of nonacceptance. The sheriff shall at the time he notifies the plaintiff or his attorney of his execution of the order of arrest, deliver to him a certified copy of the bail bond. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability. [1935 c. 541 s. 53]

264.16 Notice of justification of bail. On receipt of such notice by the sheriff he or the defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed notice of justification of the same or other bail (specifying the places of residence and occupation of the latter), before a judge of the court at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given there shall be a new undertaking in the form prescribed in section 264.10.

264.17 Qualification of bail. Each surety must be a resident and freeholder within the state and be worth the amount specified in the order of arrest, above all his liabilities, in property within this state, not exempt from execution; but a judge, on justification, may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification equals twice the sum specified in the bond. [1935 c. 541 s. 54]

264.18 Justification of bail. For the purpose of justification each surety shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency. The examination shall be reduced to writing and subscribed by the surety, if required by the plaintiff. [1935 c. 541 s. 55]

264.19 Proceedings on justification. If the judge find the bail sufficient he shall annex the examination to the bond, indorse his allowance thereon and file them with the court. In such case, if the sureties annexed to their bond, at the time of its delivery to the sheriff, their affidavit showing sufficient qualifications as bail, according to section 264.17, the judge may, by order, require the costs of the justification before him, including fees to the sureties as witnesses, to be forthwith paid by the plaintiff. [1935 c. 541 s. 56]

264.20 Surrender of principal. At any time before a failure to comply with their bond the sureties may surrender the defendant in their exoneration or he may surrender

himself to the sheriff of the county where he was arrested. A certified copy of the bail bond shall be delivered to the sheriff, who shall detain the defendant in his custody, as upon an order of arrest, and shall, in writing, acknowledge the surrender. Upon the production of a copy of the bond and the sheriff's certificate a judge may, upon eight days' notice to the plaintiff, order that the bail be exonerated. But this section shall not apply to the arrest for the causes mentioned in section 264.02 (1) (c). [1935 c. 541 s. 57; 1943 c. 275 s. 60]

264.21 Arrest of principal by bail. For the purpose of surrendering the defendant the sureties, at any time before they are finally charged, may arrest him or by a written authority indorsed on a certified copy of the bond may empower any discreet person to do so. [1935 c. 541 s. 58]

264.22 Custody of principal. Every person surrendered in exoneration of his bail shall be kept in safe custody until he shall satisfy the judgment rendered against him or be discharged according to law.

264.23 Proceedings against bail. In case of breach of the bond the sureties may be proceeded against by action only. [1935 c. 541 s. 59]

264.24 Exoneration of bail. The bail may be exonerated either by the death of the defendant or his imprisonment in the state prison, or by his discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail or within such further time as may be granted by the court.

264.25 Sheriff's liability. If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail as provided in sections 264.16 to 264.19, at any time before process against the person of the defendant to enforce an order or judgment in the action.

264.26 Proceedings against sheriff. If a judgment be recovered against a sheriff upon his liability as bail and an execution thereon be returned unsatisfied in whole or in part the same proceedings may be had on the official bond of the sheriff, to collect the delinquency, as in other cases of delinquency.

264.27 Bail liable to sheriff. The bail taken upon the arrest shall, unless they justify or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

264.28 Vacation of order of arrest, etc. A defendant arrested may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest or to reduce the amount of bail.

264.29 Motion papers. If the motion be made upon affidavit on the part of the defendant but not otherwise, the plaintiff may oppose the same by affidavit or other proof, in addition to those on which the order of arrest was made.