

CHAPTER 265.

REPLEVIN.

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265.01 Replevin, plaintiff may claim delivery. The plaintiff in a replevin action may, at any time before answer, claim the immediate delivery of the property as provided in this chapter. [1935 c. 541 s. 60]

265.02 Replevin, affidavit, who to make; contents. Where an immediate delivery is claimed the complaint must show or an affidavit must be made by the plaintiff or on his behalf showing:

- (1) That the plaintiff is entitled to the possession of the property claimed, particularly describing it;
- (2) That the property is wrongfully detained by the defendant;
- (3) The alleged cause of detention according to his best knowledge, information and belief;
- (4) That the same has not been taken for a tax, assessment or fine or seized under an execution or attachment against the property of the plaintiff, or if so seized that it is exempt from such seizure; and,
- (5) The value of the property. [1935 c. 541 s. 61]

Note: The holder of all but two 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 mortgaged property by replevin for the benefit of all holders of the notes. *Muldorney v. McCoy Hotel Co.*, 223 W 62, 269 NW 655.

265.03 Requisition to sheriff. The plaintiff may, by an indorsement upon the complaint or the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant and deliver it to the plaintiff. [1935 c. 541 s. 62]

265.04 Bond; duty of sheriff. Upon the receipt of the complaint or affidavit so indorsed with a bond, executed by sufficient sureties, approved by the sheriff, to the effect that they are bound in a sum double the value of the property, as so stated, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may be recovered against the plaintiff, the sheriff shall take and retain the property if it be in the possession of the defendant or his agent. He shall without delay serve the complaint or affidavit and bond on the defendant if he can be found, or his agent from whose possession the property is taken in the manner a summons is served. [1935 c. 541 s. 63]

Note: 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. Ass'n v. Bowerman*, 202 W 618, 233 NW 639.

265.05 Proceedings if sureties excepted to. The defendant may, within three days after the service of the complaint or affidavit and bond, give notice to the sheriff that he excepts to the sureties. If he fails to do so he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice, as provided by section 265.08. And the sheriff shall be responsible for the sufficiency of the sureties until the objection is waived or until they shall justify or new sureties shall be substituted and justify. [1935 c. 541 s. 64]

265.06 Return of property to defendant. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon delivering to the sheriff a bond, executed by sufficient sureties, to the effect that they are bound in a sum double the value of the property (as stated in the complaint or affidavit of the plaintiff), for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may be recovered against the defendant. If a return of the property be not so required within three days after the taking and the service on the defendant it shall be delivered

to the plaintiff, except as provided in section 265.11. The sheriff shall promptly notify the plaintiff that the defendant has demanded a return of the property. [1935 c. 541 s. 65]

Note: 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 Justification of sureties. The plaintiff may within three days after he is notified by the sheriff that the defendant demands a return of the property notify the sheriff that he excepts to the defendant's sureties, otherwise he waives his right to except. If he excepts, the defendant's sureties shall justify as provided in section 265.08. Upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify or until justification is waived, and may retain the property until that time; but if they or others in their place fail to justify at the time and place appointed he shall deliver the property to the plaintiff. [1935 c. 541 s. 66]

265.08 Affidavit and justification of sureties. (1) The sureties, under this chapter, shall append to their bond their affidavits in which each shall swear that he is a resident freeholder and is worth the sum stated in the bond above his liabilities in property in this state not exempt from execution.

(2) The justification of sureties under this chapter shall be before a judge on not less than two nor more than six days' notice. Each surety must swear that he is a resident freeholder in this state and is worth the sum stated in his bond above his liabilities in property in this state not exempt from execution. But if there are more than two sureties on any bond they may be accepted if they shall justify severally in sums which aggregate double the sum named in the bond. [1935 c. 541 s. 67]

265.09 Property in building, how taken. If the property or any part thereof be in a building or inclosure the sheriff shall publicly demand its delivery; if it be not delivered he shall enter and take the property. [1935 c. 541 s. 68]

265.10 Property, how kept. The sheriff shall keep the property taken in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [1935 c. 541 s. 69]

265.11 Claims of third parties; indemnity to officer. If the property taken be claimed by a third person and such claimant shall make affidavit of his title and right to the possession, stating the facts as to such right and title, and serve the same upon the sheriff he shall not be bound to keep the property or deliver it to the plaintiff unless he shall indemnify the sheriff against such claim by a bond in double the value of the property as stated by the plaintiff executed by two sureties and no such claim to such property shall be valid against the sheriff unless made as aforesaid; and he may retain the property a reasonable time to demand such indemnity. [1935 c. 541 s. 70]

265.12 Papers filed. The sheriff shall file the replevin papers with proof of service and his doings therein with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein. [1935 c. 541 s. 71]

265.13 Verdict. Upon the trial the court or jury shall find: (1) Whether the plaintiff is entitled to possession of the property involved; (2) whether the defendant unlawfully took or detained the same; (3) the value thereof; (4) the damages sustained by the successful party from any unlawful taking or unjust detention of the property to the time of the trial. Judgment shall go in accordance with section 270.59. [Supreme Court Order, effective Jan. 1, 1934]

Note: In a replevin action 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 three years before and there was no sufficient proof that the inventory covered the same identical articles as did the mort-

gage. *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.