

CHAPTER 306.

APPEALS.

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306.01 Appeals in justice court. Any party to a final judgment rendered by a justice of the peace, and when a judgment shall be rendered against a garnishee the defendant in the original action, may appeal therefrom to the circuit court or other court having jurisdiction of the appeal in the cases and manner hereinafter provided.

306.02 Notice of and affidavit for appeal; fees and suit tax. (a) The appellant or some person authorized by him must, within 20 days after being served with written notice that judgment has been rendered, make and present to the justice before whom the action was tried, or his successor in office, or any other justice then lawfully having custody of the docket containing such judgment, a notice of appeal, together with an affidavit that the appeal is made in good faith and not for the purpose of delay; and the appellant must, at the time of presenting such notice and affidavit to the justice, pay him his fees in the action, together with \$1 for his return and \$1 for state tax and \$2 for clerk's fees for the clerk of the court appealed to. In no case shall an appeal be taken after the expiration of 2 years after the entry of the judgment, and in no case where the judgment is rendered by default shall an appeal be taken after the expiration of 20 days after the entry of such default judgment.

(b) Service of such written notice that judgment has been rendered shall, when a party shall have appeared by an attorney, be made upon such attorney in the manner provided in section 269.34 (2) for service of other papers, otherwise service thereof shall be made upon the party in the manner prescribed in sections 262.08 and 262.09 for the service of a circuit court summons, or, if the address of the party to be served is known; by mailing a copy of the notice to such party by registered mail. When service is made by registered mail the copy of the notice to be served must be properly inclosed in a post-paid wrapper (which may bear the sender's name and address) addressed to the party on whom it is to be served at his proper post-office address. Such notice shall state the title of the action, the name of the justice of the peace rendering the judgment, the time and place of rendering the judgment, the amount of damages and costs and other redress for which judgment was rendered and the names of the parties in favor and against whom the judgment was rendered. [1941 c. 309; 1943 c. 554]

306.03 Notice, where filed. When by reason of the death of a justice of the peace, or his absence from the county or any other cause the notice of appeal and affidavit cannot be presented to him they may be filed with the clerk of the court to which the appeal is taken within the time aforesaid.

306.04 Stay of execution. If the appellant desires a stay of execution of the judgment, except in actions of replevin, a written undertaking must be executed on the part of the appellant, by one or more sufficient sureties, to be approved by the judge of the appellate court or by the justice, to the effect that if the appeal shall be dismissed or if judgment be rendered against the appellant and execution on the judgment be returned unsatisfied in whole or in part the sureties will pay the amount unsatisfied.

306.05 Stay on certiorari. In proceedings on certiorari to a justice of the peace if the relator desires a stay of execution of the judgment of the justice a written undertaking must be executed on his part with one or more sufficient sureties, to be approved by the judge of the court issuing the writ or by the justice, to the effect that if the writ shall be quashed or superseded, or if the judgment shall be affirmed and execution thereon be returned unsatisfied in whole or in part the sureties will pay the amount unsatisfied.

306.06 Undertaking, effect of. The delivery of the undertaking to the court below shall stay the issuing of execution; or if it have been issued, then service of a copy of the undertaking, certified by the court below, upon the officer holding the execution shall stay further proceedings thereon.

306.07 Filing undertaking. When by reason of the death of a justice of the peace, or his removal from the county or any other cause the undertaking on the appeal cannot be delivered to him it shall be filed with the clerk of the appellate court and notice thereof given to the respondent, or his attorney or agent, and it shall thereupon have the same effect as if delivered to the justice; and in such case the undertakings required to be filed to prevent or secure the delivery of property after judgment in actions of replevin may be filed with the clerk, who may make the orders which the justice of the peace should have made.

306.08 Affidavit and undertaking for stay in replevin. If any party to an action of replevin shall, within twenty-four hours after entry of any order therein requiring the officer to deliver the property seized or any part thereof to the opposite party, make and file with the justice an affidavit stating that he intends to appeal therefrom according to law, then such property shall not be so delivered unless the party in whose favor such order is entered shall, before the time for taking such appeal expires, cause a written undertaking to be executed on his part, with one or more sufficient sureties, and filed with the justice, to the effect that if, on appeal by the opposite party, the judgment shall be reversed in the appellate court as to any part of said property ordered to be delivered to him he will return such property or so much thereof as shall be adjudged to be returned to the appellant and pay any judgment which may be rendered against him on such appeal, and abide any other order or judgment of the appellate court. Upon making and filing such undertaking the property shall be forthwith delivered according to the order of the justice without regard to the appeal.

306.09 Undertaking by appellant. If the party making such affidavit shall perfect his appeal within the time required by law and the successful party shall not have given the undertaking required by section 306.08, within the time therein prescribed, the appellant may, within five days after the expiration of the time for taking the appeal, cause an undertaking to be executed upon his part, with one or more sufficient sureties, and filed with the justice, to the effect that if the judgment appealed from be affirmed in the appellate court as to any part of said property ordered to be delivered to the opposite party or if the appeal shall be dismissed he will return such property or as much thereof as shall be adjudged to be returned, and pay all costs and damages awarded against him in the action, and abide any other order or judgment of the appellate court, and upon the filing of such undertaking the justice shall enter an order in his docket requiring the officer who has the custody of such property to deliver the same to the appellant, who, upon being served with a copy of such order, shall deliver the same accordingly. The filing of such undertaking with the justice shall stay the issue of execution on the judgment for costs and damages; or if it has been issued, then service of a copy of such undertaking, certified by the court below, upon the officer holding the execution shall stay further proceedings thereon.

306.10 Custody of property; stay of execution. If the appellant shall have filed his affidavit as required by section 306.08 and have perfected his appeal within the time prescribed by law, and neither party shall have made and filed an undertaking as above required within the time prescribed, then such property shall remain in the custody of the officer who seized the same, pending the appeal, subject at all times to the order of the appellate court. In all cases where the appellant shall not have made and filed the undertaking prescribed in section 306.09 the appellant may stay the execution as to damages and costs by giving the undertaking required in section 306.04 at any time within five days after the expiration of the time of taking the appeal.

306.11 Justification of sureties. Either undertaking mentioned in sections 306.08 and 306.09 shall be of no effect unless it be approved by the justice and accompanied by the affidavit of the sureties, in which each surety shall state that he is worth a sum to be therein stated, not less than double the value of the property ordered to be delivered as found by the justice or jury, over and above all his debts and liabilities in property within this state not by law exempt from execution.

306.12 Return on appeal; certiorari; amended return; leave to answer. (1) Within ten days after any appeal shall be perfected, the justice shall make a return to the appellate court of the testimony, proceedings and judgment and pay to the clerk the state tax and the two dollars clerk's fees. If any return be defective the appellate court may direct a further or amended return and may compel such return by attachment.

(2) Motions to amend a return of any appeal or to any writ of certiorari or for leave to answer shall be served and filed within ten days after service of notice of trial and a copy of the proposed answer must accompany the notice of motion for leave to answer.

The court may order an immediate hearing of the motion. [*Court Rule XXIX s. 4; Supreme Court Order, effective Jan. 1, 1934*]

306.13 Return when justice not in office. When a justice of the peace by whom a judgment appealed from was rendered shall have gone out of office or removed to another county in the state before return was ordered he shall nevertheless make return, and may be compelled to do so by attachment in the same manner and with like effect as if he were still in office.

306.14 Appeal, how determined without return. If a justice of the peace whose judgment is appealed from shall die, become insane or removed from the state the appellate court may examine witnesses on oath to the facts and circumstances of the trial or judgment and determine the appeal as if the facts had been returned by the justice.

306.15 Appeals from justice courts; affirmation, if both parties neglect hearing. If neither party shall bring the appeal to a hearing in the appellate court before the end of the second term after filing the return of the justice therein such court shall unless such cause be continued by special order, for good cause shown, affirm the judgment of the justice with costs.

306.16 Appeal, how heard. The appeal shall be heard on the original papers and the return of the justice, containing all the material evidence and his rulings in the action, in case the judgment, exclusive of costs, does not exceed fifteen dollars, except as otherwise provided in section 306.17.

306.17 Trial of appeal. The appeal shall be tried in the appellate court as actions originally brought there in the following cases:

(1) When the judgment appealed from shall exceed fifteen dollars, exclusive of costs;
 (2) When the plaintiff appeals from a judgment against him or in his favor for a sum not exceeding fifteen dollars, exclusive of costs, if, at the time of appealing, he shall make an affidavit that he has a valid claim, as he verily believes, against the defendant, as set forth in his complaint, exceeding the sum of fifteen dollars;

(3) When the defendant appeals from a judgment in favor of the plaintiff for a sum not exceeding fifteen dollars, exclusive of costs, the plaintiff shall make an affidavit, as above prescribed, and file the same with the clerk of the court in which the appeal is pending and serve a copy thereof on the defendant or his attorney eight days prior to the term at which the case is first noticed for trial;

(4) When judgment shall be rendered against the defendant or in his favor for a sum not exceeding fifteen dollars, exclusive of costs, if the defendant, at the time of appealing, shall make an affidavit that he has a valid claim, as he verily believes, against the plaintiff, as set forth in his answer, exceeding the sum of fifteen dollars;

(5) If the appeal be from a judgment rendered in an action of replevin and the value of the property in controversy, as found by the justice or jury, shall exceed the sum of fifteen dollars.

306.18 Judgment without new trial. Upon the hearing of the appeal, when there is no new trial, the appellate court shall give judgment according to the weight of the evidence and the justice of the case, without regard to technical errors which do not affect the merits and without regard to the finding of the justice, and may, if necessary, amend the pleadings therein, render an affirmative judgment or affirm or reverse the judgment in whole or in part, either as to damages or costs, or both, as to any or all of the parties, and for errors of law or fact. To the copy of every such judgment upon appeal there shall be annexed the return upon which it was heard, which shall be filed with the clerk of the court and constitute the judgment roll. The judgment shall be docketed in, and be executed by the process of, the appellate court.

Note: On an appeal from a judgment of justice court. *Bass v. Nofsinger*, 222 W 480, a justice court, there is no presumption in 269 NW 303. favor of the findings or judgment of the jus-

306.19 Papers to be sent justice if case dismissed. Whenever any appeal from a judgment of a justice's court shall for any reason be dismissed the clerk of the appellate court shall, as soon as may be after the time shall have expired to appeal from the order of dismissal, transmit all the papers in the case on said appeal to the justice from whose judgment the appeal was taken; and the said justice shall thereupon proceed to enforce the collection of said judgment in the same manner as though no appeal had been taken.

306.20 Judgment against appellant also against sureties. In every case where the appellate court shall give judgment against a party appealing, who shall have given an undertaking to stay execution in the court below, such judgment shall be entered against the appellant and his sureties jointly; but it shall not be collected of the sureties by the officer to whom the execution is directed, if he can find sufficient property of the principal to satisfy the same, and the party issuing the execution shall indorse a direction thereon to

that effect. In any case where the party appealing shall have given an undertaking, with a surety or sureties, to stay execution in the court below, and shall subsequently, by amendment, supplemental pleading or otherwise, set forth and prove a discharge in bankruptcy obtained after the giving of such undertaking, the appellate court shall hear and determine all the issues of said action, and if the court shall find that judgment would have been rendered against the appellant, except for such new defense of a discharge in bankruptcy obtained subsequently to the giving of such undertaking, the appellate court shall give judgment against the appellant and his surety or sureties, jointly, with a perpetual stay of execution of said judgment against the appellant, and that execution as to him be returned wholly unsatisfied.

306.21 Restitution, when ordered. If any justice's judgment or any part thereof be collected and the judgment be afterwards reversed the appellate court shall order the amount collected to be restored with interest from the time of the collection; such order may be obtained upon proof of the facts, upon notice and motion, and may be enforced as a judgment.

306.22 Fees on certiorari. At the time of serving a writ of certiorari upon a justice of the peace the party in whose favor the writ shall issue shall not be required to pay any costs or fees to the justice nor for a return to such writ. Such justice of the peace shall file such writ and his return thereto with the clerk of the court issuing the same within ten days after service thereof on such justice. If the return so made is defective the court may direct a further or amended return as often as may be necessary. And such court may compel an original or further return by attachment.