

## CHAPTER 305.

## REPLEVIN.

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**305.01 Replevin; how commenced; warrant.** Actions of replevin shall be commenced by warrant, returnable not less than 6 days nor more than 15 days after issue, substantially in the following form:

## WARRANT OF REPLEVIN.

State of Wisconsin, }  
 .... County. }  
 In Municipal Court  
 Before ...., Municipal Justice

The State of Wisconsin, to the sheriff or any constable of said county:

Whereas, .... complains that .... unjustly detains (here particularly describe the property), you are commanded to seize said property and hold it subject to further order; and also to summon said .... to appear before me, a municipal justice in said county, at my office at .... on the .... day of ...., 19.., at .... o'clock in the .... noon, to answer the complaint.

Dated ...., 19...

...., Municipal Justice.

**History:** 1967 c. 276 ss. 39, 40.

Municipal justices have no jurisdiction in replevin. Attorney General Opinion dated 2-14-68.

**305.02 Replevin, when not maintainable.** No replevin action shall be maintained for property taken by virtue of a warrant for the collection of a tax in pursuance of statute; nor to recover nonexempt property seized on execution or attachment; nor at the suit of any person unless he has at the time the right to possession.

**305.03 Affidavit for warrant.** No warrant in replevin shall issue until an affidavit, made by the plaintiff or some one in his behalf, is filed with the justice stating that the plaintiff is lawfully entitled to the possession of personal property (giving a particular description thereof, and the value thereof) and that the same is unjustly detained by the defendant (naming him) and that the same has not been taken for any tax levied under any law of this state nor seized under an execution or attachment against the property of the plaintiff, or if so seized, stating that the same is exempt and specifying the reason. Such affidavit may be amended as provided in section 304.02.

**305.04 Warrant, how served.** The warrant shall be served on the defendant by delivering a copy to him personally, if he can be found; if he cannot be found it may be served by leaving a copy at his usual place of abode, with some member of his family of proper age, at least 2 days before the return day.

**305.05 Concealed property, how taken.** If any part of the property to be seized is in any building or inclosure, the officer shall publicly demand delivery thereof and if it is not delivered he shall break into such place and seize the property according to the warrant.

**305.06 Warrant, when returned.** The officer shall return the warrant immediately after service, stating fully how he served and executed it; and shall keep the seized property in his possession until the action is decided.

**305.07 Constable, when to execute warrant.** When a replevin action is by or against the sheriff of the county the warrant shall be served and executed by a constable of the county.

**305.08 Proceedings if property not seized.** If the property specified in the warrant is not seized the plaintiff may proceed in the action for its recovery or its value.

**305.09 Pleadings.** The affidavit is the complaint in the action. The defendant may answer as in other cases.

**305.10 General rules apply; adjournment; undertaking for costs.** The action shall be subject to the same rules as other actions, as far as applicable, but no adjournment shall be allowed except for cause and on condition that the applicant gives to the opposite party an undertaking as provided in section 305.11, conditioned that the applicant will pay all costs and damages which shall be adjudged against him on the trial.

**305.11 Undertaking.** The undertaking may be entered on the docket in substantially the following form:

I hereby agree to pay all costs and damages which shall be adjudged against . . . . . in this action, but not exceeding \$200.

(Signed) . . . . .

I hereby approve the surety, he having justified (or been accepted by . . . . .).  
. . . . ., Justice.

**305.12 Complaint proved; judgment; execution.** (1) The plaintiff, to recover, must prove all the material allegations of his complaint; and on such proof the finding shall be as follows:

(a) That the plaintiff is entitled to the possession of the property specified in the complaint or some part thereof, specifying the same;

(b) That the defendant unjustly took or unlawfully detained the same;

(c) The value thereof;

(d) The damages which the plaintiff sustained by the defendant's acts.

(2) The justice shall immediately enter judgment requiring the officer to deliver the property to the plaintiff and that he recover the damages and the costs of the action.

**305.13 Judgment on failure to recover or lack of jurisdiction.** If the plaintiff fails to prosecute his action to final judgment, or if the justice or jury finds for the defendant, or finds the property to be of a greater value than \$200, then the justice or jury shall assess the damages for the seizing and detention of the property; and the justice shall immediately enter judgment that the officer deliver the property to the defendant and that he recover his damages and costs.

**305.14 Recovery of part of property; judgment.** If the justice or the jury finds that the plaintiff is entitled to possession of part of the property seized and that the defendant is entitled to the residue, the value of the portions belonging to each party and the damages sustained by him by the unjust taking or detention thereof by the other shall be separately found and assessed; and the justice shall immediately enter judgment requiring the officer to deliver to each party the property to which he is entitled; and in favor of the party to whom the greatest amount of damages was assessed for the excess of his damages above the amount assessed to the other party; or upon the demand of the defendant the justice may enter judgment that all the property be delivered to the plaintiff; and for the defendant for the value of his portion of the property seized and interest thereon from time of seizure, and deducting therefrom the amount of the plaintiff's damages. Costs shall be awarded in the discretion of the justice.

**305.15 Proceedings if lien on property.** Upon the trial, if it appears that one party has a lien upon the property seized or a part thereof, to a part of its value only, and the right of possession, and that the title to the property, subject to such lien, is in the other party, the amount of such lien shall be found; and upon demand of the lienor, he shall have judgment for the amount thereof with interest and costs, and the property (subject to such lien) shall be ordered delivered to the other party; otherwise judgment shall be for delivery of the property to the lienor and for his damages and costs unless the lien is forthwith discharged and the costs of the action paid by the other party.

**305.16 Notice when defendant does not appear.** If the officer returns on the warrant that the defendant has not been summoned in either of the modes prescribed and that he has seized the property mentioned in the warrant then, if the defendant does not appear at the return of the warrant, the justice shall enter an order in his docket requiring the plaintiff to give notice to the defendant as provided in ss. 304.12 to 304.14; such

notice shall contain a description of the property seized, and its publication may be proved by an affidavit as provided by s. 985.12; and the cause shall be continued to the time and place mentioned in the order.

**History:** 1961 c. 622.

**305.17 Proceedings on default.** When the defendant has been notified as provided in section 305.16 and does not answer, those facts shall be entered in the docket and the plaintiff may proceed to judgment as if the defendant had been duly summoned; but no execution shall issue nor shall any order be made for the delivery of the property to the plaintiff until a surety, approved by the justice, executes, on behalf of the plaintiff, an undertaking to the defendant, conditioned that if the defendant, within one year from the rendition of the judgment, appears and disproves the same the plaintiff will return said property, if return is adjudged, or will pay the value thereof and all costs and damages which may be adjudged against him on a new trial, but not exceeding \$400.

**305.18 Judgment for plaintiff where goods not seized.** If the property specified in the affidavit is not seized the plaintiff, in case he recovers judgment, shall be entitled, in addition to judgment for his damages and costs, to judgment that such property be seized and delivered to him without further delay; or in default thereof that the plaintiff recover from the defendant the value of the property as assessed by the jury or justice on the trial.

**305.19 Execution.** The execution upon the judgment shall command the officer to levy the plaintiff's damages and costs of the personal property of the defendant, as in other executions against property, and also to seize the personal property described in the complaint, which shall also be described in the execution, and deliver it to the plaintiff, if it can be found within his county; and if it cannot be so found, then that he levy the value thereof, specifying the same, together with the said damages and costs, of the property of the defendant.

**305.20 Duty of officer.** The officer shall proceed in the same manner to collect any moneys directed to be collected upon such execution as upon executions against property in personal actions, and he shall possess the same powers in respect to the seizing of the property described therein as are herein provided upon the execution of warrants to seize property. If the goods and chattels described in the execution are seized and delivered to the plaintiff they shall not be liable to seizure in an action by the defendant to recover the possession thereof.

**305.21 Execution of judgment for delivery.** When judgment is entered in a replevin action for the delivery of property to either party, it shall not be delivered until 24 hours after the entry thereof.

**305.22 Compensation of officer.** When property is seized the justice may allow the officer reasonable compensation for keeping and maintaining the same; and when the officer keeps the property pending an appeal the appellate court may allow such compensation. Such compensation may be taxed as disbursements against the losing party.

**305.23 Return of property to defendant.** At any time before judgment, the defendant may require the return of the property upon delivering to the officer 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 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. Upon the receipt of such bond the officer shall promptly notify the plaintiff that the defendant has demanded a return of the property.

**305.24 Justification of sureties.** The plaintiff may within 3 days after he is notified by the officer that the defendant demands a return of the property notify the officer 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 305.25. Upon such justification the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify or until justification is waived, and may retain the property until that time.

**305.25 Affidavit and justification of sureties.** (1) The sureties under sections 305.23 and 305.24 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 sections 305.23 and 305.24 shall be before a justice on not less than 2 nor more than 6 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 2 sureties on any bond they may be accepted if they shall justify severally in sums which aggregate double the sum named in the bond.