

CHAPTER 306.

APPEALS.

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306.01 Appeals in justice court. Any party to a judgment in justice court, and, when a judgment is against a garnishee, the defendant in the original action, may appeal therefrom as provided by this chapter; except that s. 66.12 relating to municipal regulations shall govern where inconsistent with this chapter.

306.02 Notice and affidavit on appeal; fees and suit tax. (1) The appellant must, within 20 days after being served with written notice of entry of judgment, but not more than 90 days after such entry, present to the justice having custody of the docket, a notice of appeal, and an affidavit that the appeal is made in good faith and not for the purpose of delay; and he must pay him his fees in the action, and \$2 for his return, plus state tax and clerk's fees.

(2) Service of notice of entry of judgment may be made either upon the party or his attorney in the manner provided in section 269.34; otherwise service shall be by registered mail. The notice must state the title of the action, the name of the justice rendering the judgment, the date of entry of the judgment, the amount thereof and the names of the judgment creditor and debtor.

306.03 Notice, where filed, justice not found. When the notice of appeal and affidavit cannot be presented to the justice they may be filed with the clerk of the court to which the appeal is taken.

306.04 Stay of execution on appeal. The appellant may stay execution of the judgment (except in actions of replevin) by an undertaking executed, in his behalf by a surety approved by the judge of the appellate court or by the justice, that if the appeal is dismissed or if judgment is rendered against the appellant and execution on the judgment is returned unsatisfied in whole or in part the surety will pay the amount unsatisfied.

306.05 Stay on certiorari. In proceedings on certiorari to a justice the relator may stay execution of the judgment by an undertaking executed in his behalf by a surety, approved by the judge of the court issuing the writ or by the justice, that if the writ is quashed or superseded, or if the judgment is affirmed and execution is returned unsatisfied in whole or in part, the surety will pay the amount unsatisfied.

306.06 Undertaking, effect of. The delivery of the undertaking to the justice shall stay execution. If execution has issued, service of a copy of the undertaking, certified by the justice, upon the officer holding the execution shall stay further proceedings thereon.

306.07 Filing undertaking on appeal. When the undertaking cannot be delivered to the justice it shall be filed with the clerk of the appellate court and notice thereof given to the respondent, or his attorney; and 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 should have made.

306.08 Affidavit and undertaking for stay in replevin. If a party to an action of replevin, within 24 hours after entry of an order therein requiring the officer to deliver the property seized or any part thereof to the opposite party, files with the justice an

affidavit stating that he intends to appeal, the property shall not be so delivered unless the opposite party, before the time for appeal expires, files with the justice an undertaking executed in his behalf by a surety, approved by the justice, to the effect that if, on such appeal, the judgment is reversed as to any part of the property ordered to be delivered to him, he will return the property or so much thereof as is adjudged to be returned to the appellant and pay any judgment rendered against him on the appeal, and abide any order or judgment of the appellate court. Upon filing such undertaking the property shall be delivered according to the order of the justice.

306.09 Undertaking by appellant in replevin. If an appeal is perfected and the undertaking required by section 306.08 has not been given, within the time therein prescribed, the appellant may, within 5 days after the appeal is perfected, file with the justice an undertaking executed in his behalf by a surety approved by the justice, to the effect that if the judgment is affirmed as to any part of the property ordered to be delivered to the opposite party or if the appeal is dismissed he will return the property or as much thereof as is adjudged to be returned, and pay all costs and damages awarded against him, and abide any order or judgment of the appellate court. The justice shall thereupon enter an order in his docket requiring the officer who has the property to deliver it to the appellant and, upon being served with a copy of the order, he shall deliver it accordingly. Filing the undertaking with the justice shall stay execution; or if it has issued, service of a copy of the undertaking, certified by the justice, upon the officer holding the execution shall stay further proceedings thereon.

306.10 Custody of property; stay of execution. If the appellant has filed his affidavit as required by section 306.08 and has duly perfected his appeal, and neither party has filed an undertaking as required, the property shall remain in the custody of the officer pending the appeal, subject to the order of the appellate court. Where the appellant has not filed the undertaking prescribed in section 306.09 he may stay the execution as to damages and costs by giving the undertaking required in section 306.04 at any time within 5 days after the appeal is perfected.

306.12 Return on appeal; certiorari; amended return; leave to answer. (1) Within 10 days after any appeal is 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 \$5 clerk's fees. If any return is defective the appellate court may order a further or amended return.

(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 10 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.

306.13 Return when justice not in office. If the justice who rendered the judgment appealed from is out of office after the notice of appeal was filed with him but before return is made he shall nevertheless make return, and may be compelled to do so the same as if he were still in office.

306.14 Appeal, how determined without return. If a justice whose judgment is appealed from dies, becomes insane or removes from the state and fails to make a return or makes a defective return on appeal the appellate court may examine witnesses as 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 brings the appeal to trial before the third term after filing the return of the justice, the appellate court shall, unless the action is continued for cause, affirm the judgment with costs.

This section contemplates that an opportunity be afforded to the appellant to show cause, and that either the court or opposing counsel notify affected parties of the time when the court will hear the parties before taking the drastic step of dismissing the action. *Wauwatosa v. Grunewald*, 18 W (2d) 83, 118 NW (2d) 128.

306.17 Trial on appeal. The appeal shall be tried in the appellate court as an action originally brought there.

306.19 Proceedings when appeal is dismissed. (1) In case an appeal from justice court is dismissed, if the execution of the justice court judgment was not stayed on the appeal, the appeal record need not be remitted.

(2) If the justice court judgment was stayed pending the appeal, the clerk of the appellate court shall retain the record 60 days following the entry of the order or judg-

ment of dismissal. During said 60 days the appellant may apply for and the court may grant a stay of the remittitur pending an appeal to the supreme court from the order or judgment of dismissal. Such stay order may be conditioned upon a prompt appeal to the supreme court. At the expiration of said 60 days the clerk shall remit the appeal record to the justice unless a stay thereof has been ordered. If an appeal to the supreme court is taken, the return of the record shall await the outcome thereof. When the appeal record is returned to the justice, proceedings may be had as though no appeal had been attempted.

306.20 Judgment against appellant also against sureties. (1) If the judgment is against an appellant who gave an undertaking to stay execution, such judgment shall be entered against the appellant and his surety jointly; but it shall not be collected of the surety if the officer can find sufficient property of the principal to satisfy the same; and the justice issuing the execution shall indorse a direction thereon to that effect.

(2) Where the appellant has given an undertaking to stay execution, and subsequently, by amendment, supplemental pleading or otherwise, sets forth and proves a discharge in bankruptcy obtained after giving the undertaking, the appellate court shall determine all the issues of the action, and if it finds that judgment would have been rendered against the appellant, except for the defense of a discharge in bankruptcy obtained subsequently to giving the undertaking, the court shall give judgment against the appellant and his surety 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 the costs or fees of the justice and for a return to the writ need not be paid. The justice shall file the writ and his return thereto with the clerk of the court issuing the writ within 10 days after service thereof. If the return is defective the court may order a further or amended return.