CHAPTER 302.

TRIALS AND JUDGMENTS.

[*302.01 repealed by 1945 c. 441*]

[*302.02 repealed by Supreme Court Order, effective Jan. 1, 1937*]

302.03 Minutes of evidence; attendance of constable. The justice shall take full minutes of all evidence given on the trial and file them in the action, unless the taking of such minutes is waived by the parties. He may command any constable to attend the trial and shall make an entry thereof in his docket. [*R. S. 1849 c. 88 s. 79; R. S. 1849 c. 131 s. 25; R. S. 1858 c. 120 s. 77; R. S. 1858 c. 133 s. 30; R. S. 1878 s. 3638; Stats. 1898 s. 3638; Stats. 1925 s. 302.03; 1945 c. 441*]

Comment of Advisory Committee, 1945: It seems that full minutes may be waived by parties. Elderkin v. Fellows, 60 W 339. (Bill 193-S)

Note: The requirement that full minutes shall be taken may be waived by the parties. Elderkin v. Fellows, 60 W 339, 19 NW 101.

The evidence need not be entered in the docket. Martin v. Beckwith, 4 W 219.

302.04 Demand for jury; waiver. After issue joined and before the commencement of the trial, either party, on paying to the justice $12 to apply on jury fees may demand a jury trial; and a neglect to make such demand is a waiver of the right to trial by jury. The money so advanced shall be paid to the jurors after they have rendered their verdict. [*R. S. 1849 c. 88 s. 80, 81; R. S. 1858 c. 120 s. 78, 79; R. S. 1878 s. 3639; Stats. 1898 s. 3639; Stats. 1925 s. 302.04; 1945 c. 441*]

Cross Reference: For fees of jurors see 307.02.

Comment of Advisory Committee, 1945: Under 307.02 the "jury fees * * * for one day's attendance" are $12. Formerly the fees were $3. This advance in the cost of obtaining a jury trial may raise a constitutional question. "Every person * * * ought to obtain justice freely, and without being obliged to purchase it." Const., Art. I. sec. 9 and sec. 5; La Bowe v. Balthazor, 180 W 419. (Bill 193-S)

Revisers' Note, 1878: "Sections 78 and 79, chapter 120, R. S. 1858, combined and changed so as to compel the party demanding a jury to pay one day's attendance instead of half a day's as heretofore required. It is the experience of those who practice in justices' courts that jurors, when called, are generally required to attend at least one day, and it would seem reasonable that the party demanding their services should be compelled to pay their fees in advance, instead of leaving the payment to the chance of collecting the same from the defeated party, which, when done, rarely helps the jury."

Note: Where defendant in action for violation of county traffic ordinance demands jury trial in justice court, he must pay fees therefor as in other civil actions. 28 Atty. Gen. 636.

302.05 Officer to write names. Upon demand for a jury the justice shall direct the sheriff or any constable of the county present to write the names of 18 persons of the county, eligible as jurors in courts of record and not of kin to any party or interested in the action. [*R. S. 1849 c. 88 s. 82; R. S. 1858 c. 120 s. 80; R. S. 1878 s. 3640; Stats. 1898 s. 3640; Stats. 1925 s. 302.05; 1945 c. 441*]

302.06 Who to write if officer absent. If no officer be present the justice may appoint a suitable person to write down the names of such persons, to whom he shall administer an oath or affirmation, which shall be as follows:

You do solemnly swear (or affirm) that you will perform the duties required of you according to the best of your abilities, without partiality to either party. [*R. S. 1849 c. 88 s. 83; R. S. 1858 c. 120 s. 81; R. S. 1878 s. 3641; Stats. 1898 s. 3641; Stats. 1925 s. 302.06; 1945 c. 441*]

302.07 Jurors, how chosen. From the names listed each party, commencing with the party demanding a jury, may strike alternately 6 names; and in case of the failure of either party to strike, the justice shall strike out 6 names. [*R. S. 1849 c. 88 s. 84; R. S. 1858 c. 120 s. 82; R. S. 1878 s. 3642; Stats. 1898 s. 3642; Stats. 1925 s. 302.07; 1945 c. 441*]

302.08 Venire to issue. The justice shall issue a venire requiring the officer to summon the 6 persons whose names remain upon the list to appear at a time and place mentioned therein to make a jury for the trial of the action. [*R. S. 1849 c. 88 s. 85; R. S. 1858 c. 120 s. 83; R. S. 1878 s. 3643; Stats. 1898 s. 3643; Stats. 1925 s. 302.08; 1945 c. 441*]

302.09 Agreed jury. The parties may agree upon 6 or any less number of jurors to try the action, and in such case the justice shall direct, in the venire, the summoning of the persons agreed upon, who shall compose the jury. [*R. S. 1849 c. 88 s. 86; R. S. 1858 c. 120 s. 84; R. S. 1878 s. 3644; Stats. 1898 s. 3644; Stats. 1925 s. 302.09; 1945 c. 441*]

Comment of Advisory Committee, 1945: The venire gives the names; and the venire is filed. That should suffice. The last clause is moved to 300.07. (Bill 193-S)

302.10 Talesmen. If any juror fails to attend at the time he is summoned to appear or if legal objections are raised to any who appear the justice shall order the officer to summon talesmen to supply the deficiency. [*R. S. 1849 c. 88 s. 87; R. S. 1858 c. 120 s. 85; R. S. 1878 s. 3645; Stats. 1898 s. 3645; Stats. 1925 s. 302.10; 1945 c. 441*]

302.11 Form or venire. Substantially the following form of a venire may be used:

State of Wisconsin, } In Justice Court
.... County. } Before ...., Justice of the Peace

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

You are hereby commanded to summon .... [here insert names of jurors] to appear before the undersigned, justice of the peace, on the .... day of ...., at .... o'clock in the ....noon, at my office at ...., to make a jury for the trial of an action between ...., plaintiff, and ...., defendant.

Dated ...., 19..

...., Justice of the Peace.

[*R. S. 1849 c. 88 s. 88; R. S. 1858 c. 120 s. 86; R. S. 1878 s. 3646; Stats. 1898 s. 3646; Stats. 1925 s. 302.11; 1945 c. 441*]

Comment of Advisory Committee, 1945: "And have you then and there this writ" is not needed. The officer must make a "return." "Substantially" is inserted in the introduction. (Bill 193-S)

302.12 Jurors, how summoned. The officer shall summon the jurors personally by reading the venire to them and shall certify and return his doings thereon to the justice. [*R. S. 1849 c. 88 s. 89; R. S. 1858 c. 120 s. 87; R. S. 1878 s. 3647; Stats. 1898 s. 3647; Stats. 1925 s. 302.12; 1945 c. 441*]

302.13 Failure to appear contempt; penalty; proceedings. Every person duly summoned as a juror who fails to appear or who refuses to serve is guilty of contempt; and the justice shall fine him not less than $5 nor more than $10 and commit him to the county jail until the fine is paid; and if any person so duly summoned refuses to appear, the justice shall issue an attachment, directed to the sheriff or any constable of his county, requiring the officer to arrest the person so summoned and to bring him before the justice to serve as a juror. The fees for issuing and executing the attachment shall be the same as for a civil warrant and they shall be paid by the person attached. If any person summoned as a juror appears and shows good cause therefor the justice may excuse him from serving. [*R. S. 1849 c. 88 s. 90; R. S. 1858 c. 120 s. 88; 1866 c. 24; R. S. 1878 s. 3648; Stats. 1898 s. 3648; Stats. 1925 s. 302.13; 1945 c. 441*]

302.14 Challenges for cause. Either party may challenge any juror for cause and may have him sworn to answer concerning the challenge and may prove the cause by other evidence. The justice shall decide the challenge. [*R. S. 1849 c. 88 s. 91; R. S. 1858 c. 120 s. 89; R. S. 1878 s. 3649; Stats. 1898 s. 3649; Stats. 1925 s. 302.14; 1945 c. 441*]

302.15 Oath to jurors. The jurors selected shall be sworn by the justice as provided in section 331.39. [*R. S. 1849 c. 88 s. 92; R. S. 1858 c. 120 s. 90; R. S. 1878 s. 3650; Stats. 1898 s. 3650; Stats. 1925 s. 302.15; 1945 c. 441*]

302.16 Jury to hear the parties in public. The jurors shall sit together and hear the proofs and allegations of the parties. The trial shall be public. [*R. S. 1849 c. 88 s. 93; R. S. 1858 c. 120 s. 91; R. S. 1878 s. 3651; Stats. 1898 s. 3651; Stats. 1925 s. 302.16; 1945 c. 441*]

[*302.17 repealed by Supreme Court Order, effective Jan. 1, 1937*]

302.18 Return of verdict; judgment accordingly. When the jurors have agreed upon their verdict they shall deliver it to the justice publicly and he shall enter it in his docket and enter judgment according to the verdict. A verdict is valid if agreed to by

5 jurors. [*R. S. 1849 c. 88 s. 95; R. S. 1858 c. 120 s. 93; R. S. 1878 s. 3653; Stats. 1898 s. 3653; 1923 c. 46; Stats. 1925 s. 302.18; 1945 c. 441*]

302.19 Jury unable to agree, discharge of jury; new trial. When a justice is satisfied that a jury, after having been out a reasonable time, cannot agree on their verdict, he may discharge them and issue a new venire, unless the parties consent that the justice render judgment on the evidence before him or that a new trial be had before him. [*R. S. 1849 c. 88 s. 96; R. S. 1858 c. 120 s. 94; R. S. 1878 s. 3654; Stats. 1898 s. 3654; Stats. 1925 s. 302.19; 1945 c. 441*]

302.20 Trial without jury. When an action has been submitted to a justice for his decision he shall not receive or consider further evidence or any communication about it, except on due notice to the parties, until he has rendered judgment. [*R. S. 1849 c. 88 s. 97, 174, 175; R. S. 1858 c. 120 s. 95; R. S. 1878 s. 3655; Stats. 1898 s. 3655; Stats. 1925 s. 302.20; 1945 c. 441*]

Note: Where judgment is altered after entry, at request of party against whom it was rendered, he is estopped from objecting to the alteration even if it was unauthorized. Steckmesser v. Graham, 10 W 37.

302.21 Rules in courts of record to apply. The rules of evidence shall be the same in actions before justices as in courts of record. [*R. S. 1849 c. 88 s. 99; R. S. 1858 c. 120 s. 97; R. S. 1878 s. 3656; Stats. 1898 s. 3656; Stats. 1925 s. 302.21; 1945 c. 441*]

[*302.22 repealed by 1945 c. 441*]

302.23 Default judgment. If the defendant fails to appear at the time specified for the return of process duly served or at the hour of adjournment the justice shall proceed to hear the proofs of the plaintiff and render judgment thereon. [*R. S. 1849 c. 88 s. 167; R. S. 1858 c. 120 s. 154; R. S. 1878 s. 3658; Stats. 1898 s. 3658; Stats. 1925 s. 302.23; 1945 c. 441*]

Comment of Advisory Committee, 1945: The waiting hour is eliminated. When the bell rings "school is called." (Bill 193-S)

Note: A justice's judgment is not open to collateral attack by showing that the person who rendered it was not a justice de jure. McCormick v. Cleveland, 98 W 522, 74 NW 339.

On suit in trespass for damage to wheat judgment for damage to grass cannot be upheld. Hassa v. Junger, 15 W 598.

Where defendant does not appear proof must be required of plaintiff's cause of action. Judgment cannot be rendered upon mere default. Roberts v. Warren, 3 W 736.

302.24 Nonsuit. (1) Judgment of nonsuit shall be rendered against the plaintiff if he discontinues his action before the argument to the jury has been concluded or waived; or if he fails to appear at the return hour; or at the hour of adjournment.

(2) A compulsory nonsuit shall not be ordered after evidence has been submitted to the jury. [*R. S. 1849 c. 88 s. 169; R. S. 1858 c. 120 s. 157; R. S. 1878 s. 3659; Stats. 1898 s. 3659; 1903 c. 118 s. 1; Supl. 1906 c. 3659; Stats. 1925 s. 302.24; 1945 c. 441*]

Comment of Advisory Committee, 1945: The first part of old (4) seems meaningless. There are other grounds for nonsuit; failure to plead a cause of action; suing on a cause beyond justice's jurisdiction. The waiting hour is eliminated. (Bill 193-S)

302.245 Contents of judgments. Each judgment for money damages shall specify clearly the relief granted and the place of abode, and occupation, trade or profession of each party as accurately as can be ascertained. [*Supreme Court Order, effective Jan. 1, 1935; 1945 c. 441*]

302.25 Judgments generally. (1) Judgment shall be for the plaintiff for the amount of damages found by the jury or the justice, less any offset established by the defendant.

(2) Judgment shall be for the defendant if the justice or jury finds that the plaintiff has no cause of action or that the defendant's counterclaim exceeds the plaintiff's damages. [*R. S. 1849 c. 88 s. 170; R. S. 1858 c. 120 s. 158; R. S. 1878 s. 3660; Stats. 1898 s. 3660; Stats. 1925 s. 302.25; 1945 c. 441*]

Comment of Advisory Committee, 1945: Old 302.25 says judgment may be rendered for the defendant when it is found that the plaintiff has no cause of action. Nothing is said about other grounds for judgment for defendant nor about judgment for plaintiff. New 302.25 provides for judgment for plaintiff, less any offset established by defendant, and for judgment for defendant where plaintiff has no cause of action, or where defendant's counterclaim exceeds plaintiff's damages. This makes it possible to repeal 302.30, judgment on indivisible set-off.

Under 301.35 (4), as amended by this bill, a "counterclaim must be a claim which is within the jurisdiction of a justice court." The note to Section 62, amending 301.35, says on this point: "The addition to (4) is now the law. Counterclaim in excess of jurisdiction was properly struck out. Martin v. Eastman, 109 W 286. The provision for counterclaim should be complete in itself. Hence the reference to 263.14 is struck out and the rule fully stated here." See Bryant's Wisconsin Justice, secs. 70 and 191, citing the Martin case and Bacher v. Gray, 112 W 487. (Bill 193-S)

Note: A justice of the peace has jurisdiction to render judgment dismissing the counterclaim for want of any evidence in support thereof even though a jury had been impaneled. Fuller v. Tubbs, 115 W 212, 91 NW 660.

Jurisdiction over defendants served or who appeared is not lost by rendering a default judgment against one who was not served and who did not appear. French v. Ferguson, 77 W 121, 45 NW 817.

If justice has no jurisdiction he cannot render judgment. Elderkin v. Spurbeck, 2 Pin. 129.

302.26 Costs. Unless herein otherwise provided, judgment shall be with costs of the action. [*R. S. 1849 c. 88 s. 171; R. S. 1858 c. 120 s. 159; R. S. 1878 s. 3661; Stats. 1898 s. 3661; Stats. 1925 s. 302.26; 1945 c. 441*]

Comment of Advisory Committee, 1945: "Herein" in old 302.26 probably means Title XXVIII. When is it "otherwise provided?" (Bill 193-S)

Note: A verdict in replevin for chattels found that plaintiff was entitled to some of them, that defendant was entitled to others but as to one chattel there was no finding. The judgment awarded plaintiff the article as to which there was no finding. This was error; defendant was entitled to costs. Young v. Lego, 38 W 206.

302.27 Judgment, when rendered. If the plaintiff is nonsuited or a verdict is rendered or the defendant is in custody, the justice shall forthwith render judgment; otherwise he may adjourn the action not more than 72 hours and at the adjourned hour shall enter judgment. [*R. S. 1849 c. 88 s. 98, 172; R. S. 1858 c. 120 s. 98, 160; R. S. 1878 s. 3662; Stats. 1898 s. 3662; Stats. 1925 s. 302.27; 1945 c. 441*]

Comment of Advisory Committee, 1945: The reference to confession of judgment is eliminated, the section on that subject being repealed by this bill. The reference to withdrawal of actions seems needless and is omitted. 300.07 (11) requires entry of the judgment in the docket and that provision need not be repeated here. (Bill 193-S)

Note: See note to 253.03, citing State ex rel. Leverance v. Prey, 231 W 661, 286 NW 705.

This statute is not satisfied by the acts of the justice in reading the verdict aloud to those present and entering it in his docket, although the verdict was returned upon a legal holiday. Smith v. Bahr, 62 W 244, 22 NW 438.

Forthwith means instanter. Hull v. Mallory, 56 W 355, 14 NW 374.

Rendering judgment at time verdict is received will satisfy statute and it may be entered subsequently. Hull v. Mallory, 56 W 355, 14 NW 374.

Where verdict was received at 11 o'clock P. M., and court adjourned to 9 A. M., and then rendered and entered judgment, his action was void. Wearne v. Smith, 32 W 412; Hull v. Mallory, 56 W 355, 14 NW 374.

Seventy-two hours. The hours of an intervening Sunday are not to be computed. Meng v. Winkleman, 43 W 41.

Judgment must be perfected and costs taxed within a reasonable time or jurisdiction will be lost. Thirteen days not a reasonable time. Kleinsteuber v. Schumacher, 35 W 609.

Justice may continue cause not exceeding 72 hours. May do it by successive continuances without consent of parties. Wheeler v. Hall, 42 W 573.

Judgment on verdict must be rendered forthwith or justice loses jurisdiction. McNamara v. Spees, 25 W 539.

Failure to enter on docket place at which judgment would be rendered not error. Wheeler v. Smith, 18 W 651.

The justice announced his decision at the close of the trial and made a memorandum of the judgment he had determined upon and gave it to a third party to enter in form on his docket. It was not entered there and the memorandum was lost. Held, that no valid judgment had been given. Benaway v. Bond, 2 Pin. 449.

302.27 does not apply to criminal trials in justice courts. Justice ought to pronounce judgment immediately after cause is submitted, under 360.10 and 360.21, but may, for cause shown and in the exercise of a reasonable discretion, postpone sentence to a fixed future time, not unreasonably distant. 35 Atty Gen. 430.

[*302.28 repealed by 1945 c. 441*]

302.29 Release of sum in excess of jurisdiction. If any sum found in favor of a party exceeds the sum for which a justice is authorized to give judgment such party may remit or release the excess and take judgment for the residue. [*R. S. 1849 c. 88 s. 173; R. S. 1858 c. 120 s. 161; R. S. 1878 s. 3664; Stats. 1898 s. 3664; Stats. 1925 s. 302.29; 1945 c. 441*]

[*302.30 repealed by 1945 c. 441*]

302.31 New trial. A new trial may be granted a defendant at any time within one year from the rendition of judgment upon a publication of notice where no service has been had and the defendant did not appear. But if notice of entry of judgment is personally served on such defendant his time to move for a new trial is limited to 20 days. [*R. S. 1849 c. 88 s. 176; R. S. 1858 c. 120 s. 164; R. S. 1878 s. 3666; Stats. 1898 s. 3666; Stats. 1925 s. 302.31; 1945 c. 441*]

Comment of Advisory Committee, 1945: One who has been personally served with notice of entry of judgment should not be allowed a year in which to move for new trial. The amendment gives him 20 days to so move—the time allowed under 306.02 for appeal. (Bill 193-S)

302.32 Application for new trial; procedure. Such new trial shall be granted upon a petition, subscribed and sworn to by the defendant or his attorney, addressed to the justice who rendered the judgment, or the justice to whom or the court into which the action has been removed, and setting forth a valid defense, in whole or in part, to the complaint; and if the court is satisfied that the petition sets forth a valid defense, in whole or in part, it shall make an order setting the time and place and the court before which a new trial will take place. A copy of the petition and order shall be served on the plaintiff at least 10 days previous to the time fixed for the new trial. The petition shall stand as the answer to the complaint; and thereafter the same proceedings shall be had as in other trials. [*R. S. 1849 c. 88 s. 177-179; R. S. 1858 c. 120 s. 165-167; R. S. 1878 s. 3667; Stats. 1898 s. 3667; Stats. 1925 s. 302.32; 1945 c. 441*]

302.33 Action on judgment, limitation. No action on a judgment rendered by a justice shall be brought in the same county within 5 years after its rendition, except in case of his incapacity to act, or in case the process was not personally served on some

defendant, or in case of the death of some party, or in case the docket or record of such judgment has been lost or destroyed. [*R. S. 1858 c. 122 s. 19; 1863 c. 286 s. 2; R. S. 1878 s. 3668; Stats. 1898 s. 3668; Stats. 1925 s. 302.33; 1945 c. 441*]

Revisers' Note, 1878: "Part of section 10, chapter 122, R. S. 1858, being as much as relates to judgments in justice's courts, extending the prohibition to five years instead of two, to correspond with the change made by section 2, chapter 286, Laws 1863, extending the time within which an execution can issue upon a justice's judgment from two years to five years."

302.34 Transcript of judgment. (1) Every justice, on demand of any person in whose favor a judgment has been rendered, either by him or his predecessor in office whose dockets are in his custody, shall give to such person a certified transcript of the judgment. The transcript may be in substantially the following form:

A. B. }
v. } In Justice Court
C. D. } Before ...., Justice of the Peace

.... County.

Date of judgment ...., 19...
Judgment for the plaintiff for the sum of $...., damages.
Costs $.... Total $....
Costs of copy 25 cents.
Name of attorney for judgment creditor, if any ....
Name, abode and vocation of judgment debtor ....
I certify the above to be a true copy of a judgment rendered before me (or before ...., justice of the peace), in the above entitled action, as appears from my (or his) docket now in my custody.
Dated ...., 19...

...., Justice of the Peace.

(2) When the execution upon any judgment has been stayed the justice shall state in the transcript that execution was stayed and give the name of the person who entered into the undertaking for that purpose. [*1858 c. 141 s. 1; R. S. 1858 c. 120 s. 170, 172; R. S. 1878 s. 3669; 1887 c. 31; Ann. Stats. 1889 s. 3669; Stats. 1898 s. 3669; Stats. 1925 s. 302.34; Supreme Court Order, effective July 1, 1939; 1945 c. 441*]

Comment of Advisory Committee, 1945: The $10 provision is struck, so that a transcript may be obtained of any judgment, even though it is for less than $10. "Substantially" is inserted in the introduction. (Bill 193-S)

Note: The date of the judgment is a material part of the transcript, and its absence avoids the filing. Duecker v. Goeres, 104 W 29, 80 NW 91.

302.35 Index to judgments. Every justice shall keep an alphabetical index under the names of the judgment debtors of all judgments entered in his docket by him. The index shall give the names of the parties and the page of his docket where each judgment is entered. [*R.S. 1849 c. 88 s. 71; R. S. 1858 c. 120 s. 241; R. S. 1787 s. 3670; Stats. 1898 s. 3670; Stats. 1925 s. 302.35; 1945 c. 441*]

Comment of Advisory Committee, 1945: The index should be by names of judgment debtors. (Bill 193-S)

302.36 Set-off of judgments. If there be mutual justice's judgments equitably belonging to the same parties, upon which the time of appealing has elapsed on which there is no existing execution, one judgment, on the application of either party and reasonable notice given to the adverse party, may be set off against the other by the justice before whom the judgment against which the set-off is proposed may be. [*R. S. 1849 c. 88 s. 58; R. S. 1858 c. 120 s. 57; R. S. 1878 s. 3671; Stats. 1898 s. 3671; Stats. 1925 s. 302.36; 1945 c. 441*]

Note: Justice is not liable in damages for refusing to set off one judgment against another rendered before him and for issuing execution on one of them. Keeler v. Woodward, 3 Pin. 306.

302.37 When judgments before different justices. If the judgment proposed as a set-off was rendered before another justice the party proposing such set-off must produce before the justice a transcript of such judgment, upon which there is a certificate of the justice rendering the judgment that it is unsatisfied in whole or in part and that there is no appeal or existing execution thereon, and that such transcript was obtained for the purpose of being set off against the judgment to which it is offered as a set-off. The justice granting such transcript shall make an entry thereof in his docket and all further proceedings on such judgment shall be stayed unless such transcript shall be returned with the proper justice's certificate that it has not been allowed in set-off. [*R. S. 1849 c. 88 s. 59; R. S. 1858 c. 120 s. 58; R. S. 1878 s. 3672; Stats. 1898 s. 3672; Stats. 1925 s. 302.37; 1945 c. 441*]

302.38 Setting off judgments. In setting off judgments the justice shall make an entry thereof in his docket. If a justice allows a judgment rendered by another justice to be set off he shall file the transcript among the papers relating to the judgment in which it is allowed in set off. If he refuses the set off he shall so certify on the transcript and return it to the party who offered it. [*R. S. 1849 c. 88 s. 60: R. S. 1858 c. 120 s. 59; R. S. 1878 s. 3673; Stats. 1898 s. 3673; Stats. 1925 s. 302.38; 1945 c. 441*]

Comment of Advisory Committee, 1945: Execution issues for the amount then due on the judgment. No provision on that point is needed here. * * * (Bill 193-S)