

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 Justice Court
 Before, Justice of the Peace

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 justice of the peace in said county, at my office at on the day of, 19.., at o'clock in thenoon, to answer the complaint.

Dated, 19...

...., Justice of the Peace.

[*R. S. 1849 c. 88 s. 140; R. S. 1858 c. 120 s. 134; R. S. 1878 s. 3731; Stats. 1898 s. 3731; Stats. 1925 s. 305.01; 1945 c. 441*]

Comment of Advisory Committee, 1945: The warrant of replevin is made returnable, as to time, the same as an ordinary summons. To require the return on the 3d day seems overly rigid. In circuit court, replevin is begun by summons; ch. 265. (Bill 193-S)

Note: An action to recover the possession of personalty will not lie against one not in the actual possession and control of it and who disclaims title or right of possession upon demand. *McHugh v. Robinson*, 71 W 565, 37 NW 426.

Where there is no uncertainty as to the property to be taken and the right property was taken a variance between the description in the affidavit and that in the writ is immaterial, it seems, and may be cured by amendment. *McCourt v. Bond*, 64 W 596, 25 NW 532.

Upon certiorari the record of the justice as returned imports verity and is conclusive as to the time a writ of replevin was re-

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. [*R. S. 1849 c. 88 s. 137, 138; R. S. 1858 c. 120 s. 133; R. S. 1878 s. 3732; Stats. 1898 s. 3732; Stats. 1925 s. 305.02; 1945 c. 441*]

Note: The right of a town treasurer to hold property seized under a tax warrant does not cease on the return day thereof; but he may thereafter sell the property, and the owner cannot in the meantime maintain replevin for it. *Keystone L. Co. v. Pederson*, 93 W 466, 67 NW 696.

The operation of this statute is confined to cases in which the property seized is that of the person or one in privity with the person against whom the tax was assessed. *C. C. Thompson L. Co. v. Hynes*, 84 W 353, 54 NW 576.

turnable. *Smith v. Baker*, 62 W 244, 22 NW 438.

The action must be considered commenced when the warrant is placed in the hands of a third person with intent to have the same served, whether such person be an officer entitled to serve the same or other person who receives the same with intent to place it in the hands of an officer for service. *Wheeler & W. M. Co. v. Teetzlaff*, 53 W 211, 10 NW 156.

Warrant must contain description of property as given in affidavit but need not state its value. *State v. Welch*, 37 W 196.

Irregularity in service of process may be waived. *Krueger v. Pierce*, 37 W 269. And in time at which it is returnable. *Lowe v. Stringham*, 14 W 222.

Clerical error in description of property may be corrected by amendment and does not render process void. *Nolty v. State*, 17 W 668.

The judgment debtor cannot maintain replevin to recover nonexempt property which has been taken on execution. *Hesse v. Hargraves*, 74 W 643, 43 NW 736.

"Seized" means taken, not necessarily possessed. The purpose of the statute is to prevent property being taken from the custody of the law by replevin. *Power v. Kind-schl*, 58 W 539, 17 NW 689.

Replevin cannot be maintained against an officer for property taken by him by virtue of a tax warrant regular upon its face, notwithstanding he had notice of a defect in the

tax proceedings which rendered them void. But it may be maintained against one who purchases at a sale made under the warrant. *Power v. Kindschi*, 58 W 539, 17 NW 689, distinguishing *Dudley v. Ross*, 27 W 679.

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. Such affidavit may be amended as provided in section 304.02. [*R. S. 1849 c. 88 s. 139*; *R. S. 1858 c. 120 s. 135*; *R. S. 1878 s. 3733*; *Stats. 1898 s. 3733*; *1905 c. 155 s. 1*; *Supl. 1906 s. 3733*; *Stats. 1925 s. 305.03*; *1945 c. 441*]

Note: Replevin affidavit where the plaintiff is mentioned as "Charles Oleson" which is signed "Charley Olson" and who refers to the defendant's first name as "Wimmian" instead of "William" as it appears in the warrant is sufficient. *Olson v. Peabody*, 121 W 675, 99 NW 458.

An affidavit was sworn to before a justice and was present when the warrant issued, but was taken away by the officer serving the warrant, and returned with the warrant two or three days later, and then indorsed by the justice as having been filed on the day it was made. He did not lose jurisdiction. *State ex rel. Kaltenbach v. Shiel*, 114 W 254, 90 NW 112.

Under sec. 3733, *R. S. 1878*, an affidavit which is not made by the plaintiff and which does not show that it was made by some one in his behalf is insufficient to confer jurisdiction. The objection on that account may be first raised in the supreme court notwithstanding trials on the merits in the circuit court and justice's courts. Consent cannot confer jurisdiction over the subject matter. *Detroit S. Co. v. Kelly*, 78 W 134, 47 NW 187.

The affidavit must appear upon the records and be strictly sufficient; if it does not appear there is no jurisdiction. *Wells v. American E. Co.*, 55 W 23, 11 NW 537, 12 NW 441.

Filing affidavit and delivery of warrant for service is commencement of the action. *Wheeler & Wilson M. Co. v. Teetzlaff*, 53 W 211, 10 NW 155.

Defective affidavit is jurisdictional, is not amendable and cannot be waived. *Steen v. Norton*, 45 W 402.

Affidavit need not state nature of plaintiff's interest. *Hass v. Prescott*, 38 W 146. If it fails to state value of property or states it at over \$200 justice has no jurisdiction. If justice determines value to be over that sum he has no jurisdiction except to render statutory judgment of abatement, including costs in defendant's favor and damages for caption and detention of property seized. *Darling v. Conklin*, 42 W 478.

It is not necessary to make allegation of special damages in the complaint. *Zitske v. Goldberg*, 33 W 216.

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. [*R. S. 1849 c. 88 s. 141*; *R. S. 1858 c. 120 s. 136*; *R. S. 1878 s. 3734*; *Stats. 1898 s. 3734*; *Stats. 1925 s. 305.04*; *1945 c. 441*]

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. [*R. S. 1849 c. 66 s. 31*; *R. S. 1849 c. 83 s. 142*; *R. S. 1858 c. 120 s. 137*; *R. S. 1878 s. 3735*; *Stats. 1898 s. 3735*; *Stats. 1925 s. 305.05*; *1945 c. 441*]

Comment of Advisory Committee, 1945: Only verbal changes are made. The last clause is not needed; see 59.24. (Bill 193-S)

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. [*R. S. 1849 c. 88 s. 144, 145*; *R. S. 1898 c. 120 s. 139, 140*; *R. S. 1878 s. 3736*; *Stats. 1898 s. 3736*; *Stats. 1925 s. 305.06*; *1945 c. 441*]

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. [*R. S. 1849 c. 88 s. 160*; *R. S. 1858 c. 120 s. 153*; *R. S. 1878 s. 3737*; *Stats. 1898 s. 3737*; *Stats. 1925 s. 305.07*; *1945 c. 441*]

Note: The undersheriff, being defendant in a replevin suit, appeared and went to trial on the merits, without objecting that process was served upon him by the sheriff instead of by a constable, except to state by what officer service was made. The irregularity was held to be waived and the court had jurisdiction. *Krueger v. Pierce*, 37 W 269.

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. [*R. S. 1849 c. 88 s. 143*; *R. S. 1858 c. 120 s. 138*; *R. S. 1878 s. 3738*; *Stats. 1898 s. 3738*; *Stats. 1925 s. 305.08*; *1945 c. 441*]

Note: If it is shown that the defendant actually took the property either for himself or as agent for another and without any right, the plaintiff may maintain replevin for the recovery of it or its value if the property cannot be found by the officer. *Pranke v. Herman*, 76 W 428, 45 NW 312.

305.09 Pleadings. The affidavit is the complaint in the action. The defendant may answer as in other cases. [*R. S. 1849 c. 88 s. 146*; *R. S. 1858 c. 120 s. 141*; *R. S. 1878 s. 3739*; *Stats. 1898 s. 3739*; *Stats. 1925 s. 305.09*; *1945 c. 441*]

Note: It is error to permit an amendment of the complaint increasing the damages claimed after the defendant has withdrawn his answer. *Geer v. Holcomb*, 92 W 661, 66 NW 793.

The complaint referred to is the affidavit required by 305.03. *Wheeler & Wilson M. Co. v. Teetzlaff*, 53 W 211, 10 NW 155.

The declaration that the affidavit shall be deemed the complaint was made as a matter of convenience. It does not warrant the inference that it was intended to throw upon the plaintiff the burden of proving any negative averment which he is required to make in his affidavit. *Carney v. Doyle*, 14 W 270.

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. [*R. S. 1849 c. 88 s. 147, 148; R. S. 1858 c. 120 s. 142; R. S. 1878 s. 3740; Stats. 1898 s. 3740; Stats. 1925 s. 305.10; 1945 c. 441*]

Comment of Advisory Committee, 1945: "Undertaking" is substituted for "bond". Otherwise the law is not changed. (Bill 193-S)

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.

[*R. S. 1849 c. 88 s. 149; R. S. 1858 c. 120 s. 143; R. S. 1878 s. 3741; Stats. 1898 s. 3741; Stats. 1925 s. 305.11; 1945 c. 441*]

Comment of Advisory Committee, 1945: The undertaking is limited to \$200. (Bill 193-S)

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. [*R. S. 1849 c. 88 s. 150; R. S. 1858 c. 120 s. 144; R. S. 1878 s. 3742; Stats. 1898 s. 3742; Stats. 1925 s. 305.12; 1945 c. 441*]

Comment of Advisory Committee, 1945: (1) No change in the law. (2) "Judgment" is substituted for "order" in 305.12, 305.13, 305.14 and 305.21. All judgments are entered in the docket; 300.07 (10). Executions are covered by ch. 303. (Bill 193-S)

Note: Where the trial is without a jury it is not required that the findings be entered in the docket and a failure to do so is at most an irregularity. *Paulson v. Ingersoll*, 62 W 312, 22 NW 477, distinguishing *Beemis v. Wylie*, 19 W 318.

Subsection (2) must be complied with. It is not satisfied by reading the verdict aloud and entering it in the docket. He must enter judgment. *Smith v. Bahr*, 62 W 244, 22 NW 438.

A general denial by the defendant, followed by special averment of title in him, will not relieve plaintiff from showing that he was entitled to possession and that defendant had possession in fact. *Wheeler & Wilson M. Co. v. Teetzlaff*, 53 W 211, 10 NW 155.

Judgment for property omitted from verdict is erroneous. Judgment must be for all

the articles awarded by verdict. Where verdict does not determine right to all chattels in dispute there must be a new trial. *Young v. Lego*, 38 W 206.

Judgment in following form not void: "Judgment against plaintiff and in favor of defendant for costs, and defendant is entitled to the possession of the property, valued at \$12." *Puncheon v. Hill*, 38 W 156.

The answer denied the alleged ownership and right to the possession and alleged that defendant legally detained the property as poundmaster and had a lien upon it. The verdict was that plaintiff was not entitled to the possession, that defendant did not unlawfully detain, but was entitled to the possession. It was fatally defective in not finding who was the general owner and the value of defendant's special property. *Warner v. Hunt*, 30 W 200.

Verdict must show finding of value of property and of title or right of possession. Verdict of no cause of action will not support judgment. *Ford v. Ford*, 3 W 399.

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. [*R. S. 1849 c. 88 s. 157; R. S. 1858 c. 120 s. 145; R. S. 1878 s. 3743; Stats. 1898 s. 3743; Stats. 1925 s. 305.13; 1945 c. 441*]

Note: On appeal from justice's court by defendant in replevin if a nonsuit is granted an affirmative judgment may be rendered for the redelivery of the property or its value

and damages for detention. *Fugina v. Brownie*, 65 W 628, 27 NW 403.

Pleas to the jurisdiction are not abrogated by this section; they are merely dispensed with. *Darling v. Conklin*, 42 W 478.

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. [*R. S. 1849 c. 88 s. 157; R. S. 1858 c. 120 s. 151; R. S. 1878 s. 3744; Stats. 1898 s. 3744; Stats. 1925 s. 305.14; 1945 c. 441*]

Revisers' Note, 1878: "Section 151, chapter 120, R. S. 1858, rewritten and amended so as to require the jury to find the damages sustained by the respective parties for the unlawful taking or detention of the property not belonging to them respectively; also amending the form of the judgment so as to require the justice to direct the officer to return the property to the respective parties found to be the owners thereof, and taking away the discretion given to the justice to render a judgment in favor of the defendant for the value of the goods found to belong to him. There does not appear to be any good reason for vesting such a discretion in the justice, and it might be exercised to the manifest perversion of justice. The section is also amended as to the form of the judgment as to damages, requiring the damages

to be set off, and judgment rendered in favor of the party recovering the larger amount for the excess only, leaving the question of costs in such case with the court."

Note: The action was for several chattels and the verdict found that plaintiff was entitled to some and defendant to the possession of others, and was silent as to one. Held, error to adjudge a return of the article not included. The statute requires judgment in his favor for such of the articles as were awarded him. *Young v. Lego*, 38 W 206.

If the plaintiff has obtained possession of the property and the defendant has a lien upon it the judgment should be, if a return cannot be had, that defendant recover merely the value of his interest. *Warner v. Hunt*, 30 W 200.

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. [*R. S. 1849 c. 88 s. 158; R. S. 1858 c. 120 s. 152; R. S. 1878 s. 3745; Stats. 1898 s. 3745; Stats. 1925 s. 305.15; 1945 c. 441*]

Revisers' Note, 1878: "Section 152, chapter 120, R. S. 1858, rewritten and amended so as to permit judgment to be rendered in favor of a party having a lien and right of possession for the amount of such lien, only when he shall demand such judgment, and not leaving it to the discretion of the court. It would seem just that a party having the right to hold the possession of chattels for a lien which he may have on the same should not be deprived of his right to such possession without his consent until such lien be paid."

Note: Under sec. 152, ch. 120, R. S. 1858, where plaintiff had obtained possession under the statute and defendant claimed under chattel mortgage, it was held that the verdict and judgment should have determined the value of defendant's special interest in the property. *Burke v. Birchard*, 47 W 35, 1 NW 351.

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 sections 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 section 328.19; and the cause shall be continued to the time and place mentioned in the order. [*R. S. 1849 c. 88 s. 152; R. S. 1858 c. 120 s. 146; R. S. 1878 s. 3746; Stats. 1898 s. 3746; Stats. 1925 s. 305.16; 1945 c. 441*]

Comment of Advisory Committee, 1945: The manner of proving publication is clarified. (Bill 193-S)

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. [*R. S. 1849*

c. 88 s. 153; R. S. 1858 c. 120 s. 147; R. S. 1878 s. 3747; Stats. 1898 s. 3747; Stats. 1925 s. 305.17; 1945 c. 441]

Comment of Advisory Committee, 1945: for a bond in double the value of the property. An undertaking limited to \$400 is substituted. (Bill 193-S)

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. [*R. S. 1849 c. 88 s. 154; R. S. 1858 c. 120 s. 148; R. S. 1878 s. 3743; Stats. 1898 s. 3748; Stats. 1925 s. 305.18; 1945 c. 441]*]

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. [*R. S. 1849 c. 88 s. 155; R. S. 1858 c. 120 s. 149; R. S. 1878 s. 3749; Stats. 1898 s. 3749; Stats. 1925 s. 305.19; 1945 c. 441]*]

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. [*R. S. 1849 c. 88 s. 156; R. S. 1858 c. 120 s. 150; R. S. 1878 s. 3750; Stats. 1898 s. 3750; Stats. 1925 s. 305.20; 1945 c. 441]*]

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. [*1859 c. 112 s. 1; R. S. 1878 s. 3751; Stats. 1898 s. 3751; Stats. 1925 s. 305.21; 1945 c. 441]*]

Note: A justice allowed to an officer for the keep of a replevined horse 50 cents a day in a case where the officer did not keep the horse himself but delivered it to a third person who made no charge for the keep. Held that the allowance was improper but that the error should have been corrected in the replevin action and that an independent action to recover the amount could not be maintained. *Kerwin v. Albrecht*, 155 W 599, 145 NW 205.

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. [*R. S. 1878 s. 3752; Stats. 1898 s. 3752; Stats. 1925 s. 305.22; 1945 s. 441]*]

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 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 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 sheriff shall promptly notify the plaintiff that the defendant has demanded a return of the property. [*1947 c. 142]*]

305.24 Justification of sureties. The plaintiff may within 3 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 305.25. 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. [*1947 c. 142]*]

305.25 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 2 nor more than 6 days' notice. Each surety must swear that he is a resident free-

holder 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. [1947 c. 142]