CHAPTER 306.

APPEALS.

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. [*R. S. 1849 c. 88 s. 226; R. S. 1858 c. 120 s. 204; R. S. 1878 s. 3753; Stats. 1898 s. 3753; Stats. 1925 s. 306.01; 1945 c. 441*]

Note: Where bail money was forfeited by the defendant for failure to appear in the county court of Eau Claire county on a charge of violating a county traffic ordinance, but no order or judgment, as to a forfeiture of bail money or otherwise, was entered in such court there was nothing from which the defendant could appeal, and hence his appeal to the circuit court should have been dismissed on the district attorney's motion. Eau Claire County v. Bandoli, 247 W 524, 19 NW (2d) 892.

Certiorari can only be brought by a party to the proceeding, or one directly affected by it, so that it is directed against him, or his property. A widow of a judgment debtor cannot bring the writ, without showing that her husband left any property, or that she was interested in any property affected by the judgment. State ex rel. Sullivan v. Drake, 130 W 152, 109 NW 982.

It is proper for circuit court to permit an appellant from a judgment rendered in justice court to dismiss his appeal against objection by the opposite party. Hart v. Minneapolis, St. P. & S. S. M. R. Co., 122 W 308, 99 NW 1019.

The principal defendant in garnishment cannot appeal after the garnishee defendant has sued out and served a common-law writ of certiorari in the same action. McCormick Harvesting M. Co. v. Reed, 85 W 201, 55 NW 147.

A judgment of a justice dismissing an action, either with or without costs, because of the plaintiff's refusal to comply with an order requiring him to give security for costs, is a final judgment. Steinam v. Schulte, 83 W 567, 53 NW 844.

An order made under 304.34, requiring a garnishee to pay money into court, is not appealable. Williams v. Brechler, 75 W 309, 43 NW 952.

Judgment of dismissal for want of prosecution is a final judgment. Hewett v. Currier, 63 W 386, 23 NW 884.

An appeal should not be dismissed because the appellant, a minor, had no guardian when it was taken, where a guardian ad litem was appointed before appeal heard. Hepp v. Huefner, 61 W 148, 20 NW 923.

An appeal to the supreme court from a void judgment will not be dismissed, but the judgment will be reversed. Kidder v. Fay, 60 W 218, 18 NW 839.

Where the justice has jurisdiction, but by rendering a void judgment loses it, the appeal gives jurisdiction. State v. Haas, 52 W 407, 9 NW 9. See State v. Haas, 56 W 577, 14 NW 596; State v. Boucher, 59 W 477, 18 NW 335.

On certiorari to a justice's court the only question for the circuit court or for the supreme court on appeal is that of the justice's jurisdiction. Alford v. Jacobson, 46 W 574, 1 NW 233.

No appeal lies under this section from judgment rendered against complaining witness for costs of criminal prosecution. State v. Rusch, 44 W 582.

This section makes no distinction between appeals from judgments in abatement and on the merits. Hence an appeal lies from the judgment of a justice in replevin dismissing the action because the value of the property in dispute exceeds $200. Darling v. Conklin, 42 W 478.

Appeal or certiorari is the only remedy. Equity will not interfere with judgment where justice of it is not attacked. Crandall v. Bacon, 20 W 639; Stokes v. Knarr, 11 W 389.

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 $1.50 for his return and $1 for state tax and $2 for 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. [*R. S. 1858 c. 120 s. 205, 206; R. S. 1878 s. 3754; 1887 c. 166 s. 3; Ann. Stats. 1889 s. 3754; Stats. 1898 s. 3754; Stats. 1925 s. 306.02; 1941 c. 309; 1943 c. 554; 1945 c. 441*]

Comment of Advisory Committee, 1945: Instead of the requirement that when a party has appeared by attorney service must be upon the attorney, the option of serving personally on either the party or his attorney is given. "By registered mail" should be sufficient without the details. This section has too many details and is not satisfactory. See 274.04 for notice of entry of an order in circuit court. "At the time of presenting such notice and affidavit to the justice" is struck out because that requirement is not jurisdictional (Palin v. Probert, 137 W 40) and its retention is misleading. The possibility of keeping the right to appeal alive for 2 years is objectionable. A stretch of 90 days may be over-long. The fees of a justice of the peace for "appeal, approving undertaking, making return" are $1.50. See 307.01. To harmonize therewith the payment of fees on appeal under 306.02 (1) is changed to $1.50. (Bill 193-S)

Revisers' Note, 1878: "Section 205, chapter 120, R. S. 1858, amended to allow notice of appeal to be given to a successor or other justice in custody of the docket; and omitting the last clause as unnecessary; and adding the first part of section 206, chapter 120, R. S. 1858, changing it so as to require the notice of judgment to be in writing."

Note: It is doubtful whether the strict rule regarding the form of notice of appeal laid down in Widner v. Wood, 19 W 199, would be followed at the present time. Cowles v. Neillsville, 137 W 384, 119 NW 91.

The payment of the fees required by this section is not jurisdictional and an appeal may be affected without them. Palin v. Probert, 137 W 40, 118 NW 173.

Affidavit of good faith which is not entitled but which is on the same sheet with a notice of appeal, which gives the title of the case, is sufficient as it shows it was made in the same action. Wattawa v. Jahnke, 116 W 491, 93 NW 547.

Where plaintiff appealed and filed an affidavit of good faith in which he stated that he was the defendant, such statement was mere surplusage and did not render ineffective an otherwise complete and sufficient affidavit. Ladd v. Witte, 116 W 35, 92 NW 365.

Mistakes in a notice of appeal will not render it ineffective if it contains enough to identify with reasonable certainty the judgment, parties and court, and to show that it was made by the party appealing personally or some person or persons duly authorized in his behalf. A notice of appeal signed by three persons as supervisors held sufficient. Patrick v. Baldwin, 109 W 342, 85 NW 274.

Where notice of appeal fails to state the day on which the judgment was rendered or its amount it is insufficient. June v. Wright, 96 W 630, 71 NW 1041.

If an affidavit purports to be made by the attorney of the appellant the presumption is, nothing appearing to the contrary, that such attorney was authorized to make it. Smith v. Ormsby, 61 W 13, 20 NW 656.

Notice of appeal must be in writing, properly designate the party by whom, the cause in which, and the judgment from which, the appeal is taken, and be properly signed or presented to the justice by the appellant or his agent. If notice is materially defective appellate court has no jurisdiction even to allow amendment. Morris v. Brewster, 60 W 229, 19 NW 50.

If the jurat is unsigned the presumption is that the paper was not sworn to and parol evidence to prove that it was is inadmissible. If the oath was taken before an officer who is dead there is no remedy. Kidder v. Fay, 60 W 218, 18 NW 839.

The circuit court may require a justice to amend his return so as to show who presented to him the notice of appeal. Evangelical L. St. P.'s Gemeinde v. Koehler, 59 W 650, 18 NW 476.

Either the notice of appeal must be signed by the appellant or some person authorized by him, or, not being so signed, the record must show that the notice was presented to the justice by the appellant or such agent. It is required that it shall be made, as well as presented to the justice, by the appellant or his agent, and when the notice is unsigned it does not appear that it was made by the proper person unless it appears that such person actually so presented it. The docket and the return of the justice ought to show who presented to him the notice of appeal. Evangelical L. St. P.'s Gemeinde v. Koehler, 59 W 650, 18 NW 476.

Affidavit must be signed by affiant at foot thereof though affiant writes his own name in the body of the affidavit. Schuster v. Haight, 53 W 290, 10 NW 511.

Provisions regulating appeals are remedial, and will be liberally construed. A notice in replevin was not ineffectual because it did not mention the value of the property or that it was ordered to be delivered to plaintiff. Hender v. Ring, 90 W 358, 63 NW 282.

If the jurat is not signed there is no affidavit. Knappe v. Seyler, 87 W 165, 58 NW 248; Royston's Appeal, 53 W 612, 11 NW 36.

The notice is good when it identifies the party appealing and the cause in which and the judgment from which the appeal is taken. Noall v. Halonen, 84 W 402, 54 NW 729.

It is not necessary that the notice be served on the opposite party. Friemark v. Rosenkrans, 81 W 359, 51 NW 557.

The name of a garnishee appended to the title of the cause in the papers on an appeal taken by the principal defendant is surplusage and may be disregarded. Notice of appeal from a judgment rendered against a firm in its name might be signed by the partners in their individual names. Schweppe v. Wellauer, 76 W 19, 45 NW 17.

If the notice is unsigned and the justice's return does not show who presented the same to him the appeal is ineffectual. Kelly v. Owen, 63 W 351, 23 NW 583.

Omission of the word "made" is immaterial. Filer & Stowell Co. v. Sohns, 63 W 118, 23 NW 135.

If there is no valid notice or affidavit there is no jurisdiction in the appellate court. Wright v. Fallon, 47 W 488, 2 NW 1120; Palmer v. Peterson, 46 W 401, 1 NW 73.

The notice and affidavit were signed by X. in his own name, with words added which described him as defendant's attorney. On the return day of the summons X. made an affidavit in the case stating that he appeared voluntarily for the defendant to ask an adjournment. The defendant subsequently stated in an affidavit that he never appeared in the case personally or by an authorized attorney. Held, that the presumption that X. was authorized to make the notice and affidavit of appeal was rebutted. Palmer v. Peterson, 46 W 401, 1 NW 73.

If affidavit purports to be executed for appellant by his agent or attorney proof of authority need not appear on face of papers. Benjamin v. Houston, 24 W 309.

Unless requirements of statute are fully complied with, appeal will be dismissed. Chinnock v. Stevens, 23 W 396.

Justice may make return without requiring payment of his fees or of state tax. Golling v. Harder, 14 W 86.

When the last day falls on Sunday it is to be excluded in computation and appeal may be taken on the following Monday. Buckstaff v. Hanville, 14 W 77.

If notice is sufficiently descriptive of judgment to designate it with certainty inaccuracy will not defeat the appeal. Hills v. Miles, 13 W 625.

It is not necessary that affidavit should be entitled of the cause and court. If it substantially conform to statute and describe the parties it is good by relation to the other papers. Bremer v. Koenig, 5 W 156; Kearney v. Andrews, 5 W 23.

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. [*R. S. 1858 c. 120 s. 206, 211; R. S. 1878 s. 3755; Stats. 1898 s. 3755; Stats. 1925 s. 306.03; 1945 c. 441*]

Revisers' Note, 1878: "Combines the last part of section 206 with section 211, chapter 120, R. S. 1858, and omits the provision that the time may be extended for perfecting the appeal as provided in section 206. It does not seem advisable to have two methods of proceeding in the case of the absence of the justice for the perfection of the appeal, and as it is necessary to retain the provisions of section 211 in cases when the justice is dead or permanently absent, it is deemed best to make the provisions of that section apply to the case of a temporary absence."

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. [*1856 c. 120 s. 258, 259; R. S. 1858 c. 120 s. 207, 208; R. S. 1878 s. 3756; 1881 c. 66 s. 1; Ann. Stats. 1889 s. 3756; Stats. 1898 s. 3756; Stats. 1925 s. 306.04; 1945 c. 441*]

Revisers' Note, 1878: "Sections 207 and 208, chapter 120, R. S. 1858, combined, changing the condition of the undertaking so as to conform to the provisions of law as to the direction to the officer upon an execution issued upon a judgment rendered against the principal and sureties in the appellate court."

Note: A surety is not released by an amendment to the complaint in circuit court increasing the damages claimed to a sum beyond jurisdiction of justice. Hare v. Marsh, 61 W 435, 21 NW 267.

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. [*Stats. 1898 s. 3756a; Stats. 1925 s. 306.05; 1945 c. 441*]

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. [*1856 c. 120 s. 260; R. S. 1858 c. 120 s. 209; R. S. 1878 s. 3757; Stats. 1898 s. 3757; Stats. 1925 s. 306.06; 1945 c. 441*]

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. [*1856 c. 120 s. 261; R. S. 1858 c. 120 s. 210; R. S. 1878 s. 3758; Stats. 1898 s. 3758; Stats. 1925 s. 306.07; 1945 c. 441*]

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. [*1859 c. 112 s. 2; R. S. 1878 s. 3759; Stats. 1898 s. 3759; Stats. 1925 s. 306.08; 1945 c. 441*]

Revisers' Note, 1878: "In place of section 2, chapter 112, Laws 1859, substituting an undertaking instead of recognizance, as being more in conformity to the present form of security required to be given in legal proceedings, and adding thereto a declaration that, upon giving the undertaking required, the property shall be delivered to the successful party, notwithstanding an appeal may have been taken by the opposite party."

Note: Property in the possession of an officer by virtue of an attachment was replevied by the owner. The officer executed an undertaking under this section, the replevin suit was dismissed, but the property was never actually returned to his possession and he afterwards disclaimed such possession and refused to accept the delivery of the property. Held, that a second action of replevin could not be maintained against him by the owner. McHugh v. Robinson, 71 W 565, 37 NW 426.

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. [*1873 c. 120 s. 2; Stats. 1878 s. 3760; 1881 c. 66 s. 2; Ann. Stats. 1889 s. 3760; Stats. 1898 s. 3760; Stats. 1925 s. 306.09; 1945 c. 441*]

Comment of Advisory Committee, 1945: * * * The time for appellant to file an undertaking is changed to run from the time the appeal is perfected, rather than from the expiration of the time for appeal. At present, if he appeals immediately he has 25 days to file the undertaking. (Bill 193-S)

Revisers' Note, 1878: "In place of section 2, chapter 120, Laws 1873, making the condition of the undertaking conform to the one required to be given by the successful party, and amending the last clause of the section so as to make it definite in what particular cases upon an appeal the property shall remain in the custody of the officer, subject to the order of the appellate court. This and the preceding section take the place of sections 2, 3 and 4, chapter 112, Laws 1859, and part of sections 1 and 2, chapter 120, Laws 1873."

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. [*1859 c. 112 s. 5; 1873 c. 120 s. 2; R. S. 1878 s. 3761; 1881 c. 66 s. 3; Ann. Stats. 1889 s. 3761; Stats. 1898 s. 3761; Stats. 1925 s. 306.10; 1945 c. 441*]

Comment of Advisory Committee, 1945: The time for appellant to give the undertaking is changed to 5 days after appeal rather than 5 days after expiration of time for appeal. (Bill 193-S)

Revisers' Note, 1878: "That part of section 217, chapter 120, R. S. 1858, not included in the preceding section, as the same has been amended by chapter 21, Laws 1862, chapter 302, Laws 1863, chapter 262, Laws 1864, and section 7, chapter 112, Laws 1859, combined and rewritten, but not changed, except by allowing defendant the same privilege of a new trial as the plaintiff, when more than fifteen dollars is involved, and by omitting the clause respecting the return being admitted in evidence with the written consent of the parties. It does not seem necessary to retain this provision, as the parties always have the power to stipulate as to what shall be admitted as evidence."

[*306.11 repealed by 1945 c. 441*]

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 $2 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. [*1856 c. 120 s. 265; R. S. 1858 c. 120 s. 212, 214; R. S. 1878 s. 3763; 1887 c. 166 s. 4; Ann. Stats. 1889 s. 3763; Stats. 1898 s. 3763; Stats. 1925 s. 306.12; Court Rule XXIX s. 4; Supreme Court Order, effective Jan. 1, 1934; 1945 c. 441*]

Note: The provision that the return on appeal shall be made after 10 days and within 30 days, is directory only. Such return may be made after the expiration of the 30 days. Richter v. Lukaszewicz, 169 W 61, 171 NW 671.

The payment of the justice fees and amount required by 306.02 is not jurisdictional to the appeal. Palin v. Probert, 137 W 40, 118 NW 173.

Where neither the notice nor the affidavit on appeal gave the name of the justice, but the return of the justice stated that notice, affidavit and undertaking had been presented to him, it was sufficient compliance with the statute. Wattawa v. Jahnke, 116 W 491, 93 NW 547.

Return of justice of the peace on appeal may be amended by a supplemental return pursuant to the order of the appellate court or by the justice's voluntary act, if such court sees fit to receive and consider it. Its reception rests in the sound discretion of the court. Crate v. Pettepher, 112 W 252, 87 NW 1104.

If there is a question as to the sufficiency of the amount tendered as fees the party alleging the affirmative has the burden of proof. Allard v. Smith, 97 W 534, 73 NW 50.

A return will not be compelled before the expiration of the time allowed by law for making it. Allard v. Smith, 97 W 534, 73 NW 50.

The recitals of the return cannot be contradicted. Hewett v. Currier, 63 W 386, 23 NW 884.

The circuit court may require the return to be amended so as to show who presented the notice of appeal. Evangelical L. St. P.'s Gemeinde v. Koehler, 59 W 650, 18 NW 476.

It is not necessary that justice should certify that evidence returned is all the evidence in the case; in absence of motion for further return it will be so presumed. Bruins v. Downey, 51 W 120, 8 NW 110.

Until return is made the only proceedings which can be had in appellate court are to dismiss appeal or grant an order compelling a return. Bruins v. Downey, 45 W 496.

Appeal should not be dismissed because return is defective. Further return should be directed. Nor because return was made within ten days after appeal taken. Demming v. Weston, 15 W 236; Norden v. Jones, 33 W 600.

Return must be full and complete. Cecil v. Barber, 3 W 297. And include minutes of evidence taken. Martin v. Beckwith, 4 W 219.

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. [*1856 c. 120 s. 264, 265; R. S. 1858 c. 120 s. 213, 215; R. S. 1878 s. 3764; Stats. 1898 s. 3764; Stats. 1925 s. 306.13; 1945 c. 441*]

Comment of Advisory Committee, 1945: 300.22 is amended to require dockets to go to the town clerk when the dockets change hands. (Bill 193-S)

Note: A copy of the docket of the justice filed by his successor constitutes no return to the circuit court. Allard v. Smith, 120 W 22, 97 NW 510.

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. [*1856 c. 120 s. 266; R. S. 1858 c. 120 s. 215; R. S. 1878 s. 3765; Stats. 1898 s. 3765; Stats. 1925 s. 306.14; 1945 c. 441*]

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. [*R. S. 1858 c. 120 s. 216; R. S. 1878 s. 3766; Stats. 1898 s. 3766; 1907 s. 160; Stats. 1925 s. 306.15; 1945 c. 441*]

Note: There is no abuse of discretion in the trial court refusing to dismiss an appeal from justice court at the third term after the appeal was perfected, where cause for such delay was shown by appellant and costs imposed upon him. Brickner v. Kipmeier, 133 W 582, 113 NW 414.

The appellant may have his appeal dismissed against the objection of the opposite party. Hart v. Minneapolis, St. P. & S. S. M. R. Co., 122 W 308, 99 NW 1019.

The appellate court has no authority to vacate and set aside a judgment of the justice upon a motion. Where case has been appealed from justice court and no proper return has been made the appellate court has power to cause the return to be made within a reasonable time, and in case of failure so to do to dismiss the appeal. Deuster v. Zillmer, 119 W 402, 97 NW 31.

The cause may be continued in the discretion of the court after the end of the second term. Whitham v. Mappes, 89 W 668, 62 NW 430.

Where an appeal was not brought to trial at the second term because the appellant's attorney understood that it was agreed between him and the attorney for the other side that the appeal should await the result of another action then pending, an order reinstating the case was properly granted. Stone v. Halpin, 83 W 483, 53 NW 691.

The respondent's admission of service of a notice of trial for the third term was not a waiver of his right to move for a dismissal. Fred Miller B. Co. v. Quirk, 82 W 197, 52 NW 93.

If the appellant misleads his attorney by inducing him to believe that the case would be settled and thereby induces him not to notice the cause for trial at the second term, a continuance may be refused. Fred Miller B. Co. v. Quirk, 82 W 197, 52 NW 93.

If the appellant does all that he can do to bring the appeal to a hearing the fact that after the evidence has been received the cause is continued for the purpose of securing an amended return which, when obtained, shows that the appeal was taken in time, the appeal is brought to a hearing within the meaning of this section. Newman v. Board, 74 W 303, 41 NW 961.

This section cannot be applied to a case when there is no term of court at which the appeal could have been brought to a hearing. Cook v. McDonnell, 70 W 329, 35 NW 556.

The continuance of a cause by special order for cause shown at the first term after filing the return will not save the appeal from dismissal unless it is brought to a hearing before the end of the second term, or is at such term again continued by special order for cause. Bates v. Steele, 65 W 355, 27 NW 42.

The fact that the respondent in the appeal expressed an anxiety to settle the cause and talked to the appellant about such settlement was no excuse for the latter's failure to notice the cause for trial. Comdohr v. Coleman, 64 W 413, 25 NW 422.

If at the second term after the return the case is continued for cause the appeal is saved; and thereafter, as regards the laches of the appellant, it is on the same basis as a case originally brought in the appellate court. Platto v. Western U. T. Co., 64 W 341, 25 NW 421.

Noticing a cause for trial is not bringing it to hearing. Respondent does not waive his right to have the appeal dismissed by noticing the cause for trial. Holt v. Coleman, 61 W 422, 21 NW 297.

Obtaining an order for changing the place of trial, unless the order is made effective by a transmission of the papers does not prevent the operation of this statute. Holt v. Coleman, 61 W 422, 21 NW 297.

The provision concerning good cause should be liberally construed in order to accomplish the purpose of its enactment. Holt v. Coleman, 61 W 422, 21 NW 297.

Court may continue appeal not noticed for trial at first or second term after taken and may allow answer to be filed where judgment was by default. Wilcox v. Holmes, 20 W 307.

[*306.16 repealed by 1945 c. 441*]

306.17 Trial on appeal. The appeal shall be tried in the appellate court as an action originally brought there. [*1856 c. 120 s. 268; R. S. 1858 c. 120 s. 217; 1859 c. 112 s. 7; 1862 c. 21; 1863 c. 302; 1864 c. 262; R. S. 1878 s. 3768; Stats. 1898 s. 3768; Stats. 1925 s. 306.17; 1945 c. 441*]

Comment of Advisory Committee, 1945: The repeal of 306.16 makes possible the streamlining of 306.17. "Terms" (subsection (3)) no longer determine when actions may be noticed for trial. The notice may be served any time after issue is joined. Filing a return on appeal is the date of issue. (Bill 193-S)

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

The rules governing reversal of judgments for defendant in cases where plaintiff was entitled to nominal damages are as follows: 1. Where the recovery of such nominal damages would not carry costs, but would subject plaintiff to costs, the judgment will be affirmed. 2. It will also be affirmed in penal actions, and in "hard actions" including slander and libel. 3. Subject to such ex-

ception, the judgment will be reversed when plaintiff would be entitled to recover costs, as, where the case was tried de novo, and plaintiff recovers less on appeal than below. Cronemillar v. Duluth-Superior M. Co., 134 W 248, 114 NW 432.

Where a trial de novo is had a proper counterclaim may be interposed in the circuit court. Monroe W. W. Co. v. Monroe, 110 W 11, 85 NW 685.

Where a trial de novo is had in the circuit court, it may be consolidated with a case originally brought in that court. Lauterbach v. Netzo, 111 W 322, 87 NW 230.

When the court is without jurisdiction of an appeal it can only order a dismissal and impose costs; but if the decision be in form of a judgment the irregularity is not prejudicial. Finlay v. Prescott, 104 W 614, 80 NW 930.

The minutes of a justice are not admissible to show what the party testified to before him but the justice may so testify and refresh his recollection from the minutes. McGeoch v. Carlson, 96 W 138, 71 NW 116.

A plaintiff who appeals from a judgment dismissing his action because of noncompliance with an order requiring him to give security for costs and makes the affidavit required by (2) is entitled to a trial in the appellate court in the manner provided in this section. Steinan v. Schulte, 83 W 567, 53 NW 844.

If respondent goes to trial on the merits without objecting to absence of affidavit he waives the objection. Hagan v. Casey, 30 W 553.

When verdict does not find value of property affidavit must govern. Bradley v. Morse, 21 W 680.

[*306.18 repealed by 1945 c. 441*]

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 judgment 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. [*1873 c. 20; R. S. 1878 s. 3770; Stats. 1898 s. 3770; Stats. 1925 s. 306.19; 1945 c. 441*]

Comment of Advisory Committee, 1945: If the enforcement of the justice court judgment was not stayed on the appeal therefrom and the appeal is dismissed, there is no reason for returning the appeal record to the justice. It may as well remain in the appellate court. But when the execution of the justice court judgment is stayed, it is based on an undertaking and that undertaking is part of the appeal record. It must be returned to lift the stay and to render it, i.e., the bond, available to the appellee in enforcing his judgment. See Form of Justice's Return on Appeal, Bryant's Wis. Justice (9th Ed.) p. 661. (Bill 193-S)

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. [*1856 c. 120 s. 327; R. S. 1858 c. 140 s. 50; R. S. 1878 s. 3771; Stats. 1898 s. 3771; 1911 c. 372; Stats. 1925 s. 306.20; 1945 c. 441*]

Comment of Advisory Committee, 1945: Each undertaking is executed by one surety, under this bill. (Bill 193-S)

Note: The judgment against an appellant and his surety authorized by this section is not in effect a general judgment and cannot be made the foundation of a general judgment against the surety. Kellan v. Toms, 38 W 592.

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. [*1856 c. 120 s. 271; R. S. 1858 c. 133 s. 53; R. S. 1878 s. 3772; Stats. 1898 s. 3772; Stats. 1925 s. 306.21; 1945 c. 441*]

Revisers' Note, 1878: "Same as section 53, chapter 133, R. S. 1858, amended to make it an ordinary motion, adding a provision that the order for restoration may be enforced as a judgment."

Note: The procuring of an order that money collected upon a judgment subsequently reversed be restored, is not such an election of remedies as will bar an action against the attorney making the collection who, after notice not to pay it over and after reversal, has paid a part of it to the judgment plaintiff. Blizzard v. Brown, 152 W 160, 139 NW 737.

On reversal it is proper to order the amount paid by the garnishee to be restored, with interest; but a judgment in favor of the defendant for that amount of damages, with

interest and costs, was erroneous. Eastlund v. Armstrong, 117 W 394, 94 NW 301.

This language does not make the order a judgment. Where a judgment against a garnishee has been reversed a motion for an order requiring the plaintiff to restore the money collected thereon is properly made by the defendant. Where two judgments were rendered against a garnishee, but one of which was appealed from and reversed, an order for the restoration of the sum of both judgments was erroneous; it should have been limited to the amount paid on the reversed judgment. Lewis v. Chicago & N. W. R. Co., 97 W 368, 72 NW 976.

This statute authorizes a special proceeding and, being in derogation of the common law, should be strictly construed. An order of a justice requiring a garnishee to pay into court for plaintiff's benefit the amount of a judgment against the principal defendant, or in default thereof that judgment be rendered against him, is not a judgment, and upon its reversal on appeal the amount collected on the judgment subsequently rendered cannot be ordered to be repaid under this section. Eilers v. Wood, 64 W 422, 25 NW 440.

This section has no application where the amount recovered is merely reduced on appeal. Sutton v. Chapman, 64 W 312, 25 NW 207.

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. [*1875 c. 125; 1878 c. 268; R. S. 1878 s. 3773; Stats. 1898 s. 3773; Stats. 1925 s. 306.22; 1945 c. 441*]