

CHAPTER XLII.

OF SPECIAL REMEDIES BY ATTACHMENT, REPLEVIN,
AND GARNISHMENT.

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TITLE I.
OF ATTACHMENT.

(*This Title is Title IX. of Chapter LXVI. of the Statutes of 1866.*)

SECTION 1 (128). *Attachment of property allowed.*—In an action for the recovery of money, the plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover.

Remedy by attachment may be had in all actions for the recovery of money sounding in tort or contract, *Davidson v. Owens et al.*, 5 Minn. 69. Writ of attachment allowed at the time of issuing the summons, *Blake v. Sherman*, 12 Minn. 420; *Blackman v. Wheaton*, 13 Minn. 327; *vide also Stein et al. v. Dow et al.*, *ib.* 412.

SEC. 2 (129). *Who may allow writ.*—A writ of attachment shall be obtained from a judge of the court in which the action is brought, or a court commissioner of the county.

Allowance of warrant of attachment is a judicial act, and statute does not allow clerks of district court to issue it, *Morrison et al. v. Lovejoy*, 6 Minn. 183; *Zimmerman v. Lamb*, 7 Minn. 421; *Cuvier v. Green*, 8 Minn. 477; *Merritt v. City of St Paul*, 11 Minn. 223. Warrant need not show what officer allowed it to issue, *Shaubhut v. Hilton et al.*, 7 Minn. 507.

SEC. 3 (130, AS AMENDED BY ACT OF MARCH 7, 1867). *Writ allowed, when—affidavit to show, what.*—The writ of attachment shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof, and that the plaintiff's debt was fraudulently contracted, or that the defendant is either a foreign corporation or not a resident of this state, or has departed therefrom as defendant verily believes with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent, or has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of his property with intent to delay or defraud his creditors: *provided*, that the writ of attachment shall not be allowed in actions for libel, slander, seduction, breach of promise of marriage, false imprisonment, or assault and battery.

S. L. 1867, 110.

Legal proof required, *Pierce v. Smith*, 1 Minn. 83; *Curtis v. Moore*, 3 Minn. 29. Must show defendant's solvency at date of the alleged fraudulent transfer, *Hinds v. Fagebank*, 9 Minn. 68. Fraudulent representations, *Lewis et al. v. Pratt*, 11 Minn. 57. Existence of an action, *Blake v. Sherman*, 12 Minn. 420. Averment as to fraudulent transfer must be positive, *Murphy v. Purdy*, 13 Minn. 422; *Ely v. Titus*, 14 Minn. 125. When necessary to state fraud or fraudulent intent, *Keigher et al. v. McCormick*, 11 Minn. 545. Two grounds in the alternative affidavit had, *Guile v. McManey*, 14 Minn. 520. What state of facts will afford no just ground for inferring that defendant intends to delay, etc., *Eaton v. Wells et al.*, 18 Minn. 410.

SEC. 4 (131). *Bond shall be given.*—Before issuing the writ the judge or court commissioner shall require a bond on the part of the plaintiff, with sufficient sureties, conditioned that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars.

Vide cases cited under secs. 1, 2, and 3, supra; also *Jacoby v. Drew*, 11 Minn. 408, invalid undertaking will not support an action.

SEC. 5 (132). *Form of writ.*—The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, and not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, with cost and expenses, the amount of which demand shall be stated in conformity with the complaint. Several writs may be issued at the same time to the sheriffs of different counties.

SEC. 6 (133). *What property is subject to attachment.*—All goods and chattels, real and personal, all property, real, personal, and mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book accounts, debts, credits, and all other evidences of indebtedness, belonging to the defendant are subject to attachment.

Of goods seized under virtue of a chattel mortgage, *vide* Edson v. Newell, 14 Minn. 228.

SEC. 7 (134). *Writ, how executed.*—The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows :

First. Real estate shall be attached by the officer leaving a certified copy of the writ, and of his return of such attachment thereon, at the office of the register of deeds of the county in which such real estate is situated, or if there is no register of deeds, with the clerk of the district court of the county, and serving a copy of the same upon the defendant in the action if he can be found in his county without any other act or ceremony.

Second. Personal property capable of manual delivery to the sheriff shall be attached by taking it into his custody.

Third. When an attachment is made of articles of personal estate which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the writ and of the return of the attachment may at any time within three days thereafter be deposited in the office of the town clerk of the town or city in which the attachment is made, and such attachment shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer.

Fourth. The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof, in the order in which they are received, in books kept for noting mortgages of personal property ; which entry shall contain the names of the parties to the action, and the date of the entry. The clerk's fee for this service shall be twenty-five cents, to be paid by the officer and included in his charge for the service of the writ.

Fifth. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with a person holding the same, or if a debt with the debtor, or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof.

Sixth. The sheriff shall serve a copy of the writ of attachment, and inventory served by him, upon the defendant, if he can be found within the county ; and if he is a resident thereof, but cannot be found therein, the said sheriff shall leave such copy at the last usual place of abode of the said defendant.

Seventh. He shall make a full inventory of the property attached, and return the same with the writ of attachment.

Where sheriff did not leave copy on premises held no levy, *Castner et al. v. Symonds*, 1 Minn.

407. Minnesota state railroad bonds are personal property, capable of manual delivery,

Caldwell v. Sibley, 3 Minn. 406. So also promissory notes, Mower v. Stickney, 5 Minn. 397. Sheriff's return, what a sufficient one, Tullis v. Brawley, 3 Minn. 277; Rohrer v. Turrill, 4 Minn. 407; Folsom v. Carli, 5 Minn. 333. Sheriff's return shows that a specific debt belonging to a certain partnership was attached, how construed, Allis v. Day, 13 Minn. 199.

SEC. 8 (135). *Certificate to be furnished sheriff in certain cases.*—Whenever the sheriff, with a writ of attachment or an execution against the defendant, applies to any person mentioned in the fifth subdivision of section four (one hundred and thirty-four) for the purpose of attaching or levying, upon the property mentioned therein, such person shall furnish him with a certificate designating the number of rights or shares of the defendant, in the stock of the corporation, with any dividend or incumbrance thereon on the amount and description of the property, held by such corporation or person for the defendant, or the debt owing to the defendant; if such person refuses to do so, he may be required by the court or judge to attend before him and be examined on oath concerning the same, and disobedience to the order may be punished as a contempt.

SEC. 9 (136). *Sheriff shall sell perishable property, collect debts, etc.*—If any of the property attached is perishable, the sheriff shall sell the same in the manner in which property is sold on execution. He may also take such legal proceedings, either in his own name or in the name of the defendant, as are necessary to collect all debts, credits, and effects of said defendant, and discontinue the same at such times, or on such terms as the court or judge may direct.

Sheriff can maintain action on notes levied upon, for the purpose of collection, Rohrer v. Turrill, 4 Minn. 407.

SEC. 10 (137). *May demand indemnity, when.*—If any property levied upon or taken by a sheriff by virtue of a writ of execution, attachment, or other process, is claimed by any other person than the defendant or his agent, and such person makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff on demand indemnify the sheriff against such claim, by a bond executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff unless so made; and notwithstanding such claim, when so made, he may retain such property under levy, a reasonable time to demand such indemnity.

SEC. 11 (138). *Plaintiff to be impleaded with sheriff in action against him, when.*—If in such case the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaintiff in such execution, attachment, or other process, shall, on motion of such sheriff, be impleaded with him in such action. When in such case a judgment is rendered against the sheriff and his co-defendants, an execution shall be immediately issued thereon, and the property of such co-defendants shall be first exhausted before that of the sheriff is sold to satisfy such execution.

SEC. 12 (139). *Judgment against defendant to be satisfied out of property attached—mode of proceeding.*—If judgment is recovered by the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose:

First. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of all debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

Second. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution so much of the attached property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands; and in case of the sale of any rights or shares in the stock of a corporation, the sheriff shall execute to the purchaser a certificate of the sale, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by the defendant.

Third. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff, without having been sold or converted into money, the sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

Sheriff sells under an erroneous description, and it afterwards appears that judgment debtor had no title to property, court of equity will relieve from the mistake, *Lay et al. v. Shaubhut*, 6 Minn. 277. Sheriff's right to sue in aid of process depends on statute, *Robertson v. Sibley*, 10 Minn. 323.

SEC. 13 (140, AS AMENDED BY ACT OF MARCH 6, 1868). *Defendant may give bonds, in what sum.*—A defendant whose property has been attached may, at any time before trial, execute to the plaintiff a bond in double the amount claimed in the complaint, or if the value of the property attached be less than the amount claimed, then in double the value of the property, with two or more sureties, to be approved by the officer, allowing the writ of attachment, or by the court commissioner of the county in which the defendant resides; conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereof equal to the value of the property attached; and the officer approving such bond shall make an order discharging such attachment.

S. L. 1868, 109, amending S. L. 1867, 110.

The taking of property not subject to attachment affords no ground for vacating the writ, *Davidson v. Owens et al.*, 5 Minn. 69. An attachment of property in hands of assignee will be dissolved, when, *Richards et al. v. White*, 7 Minn. 345; following *Lemay v. Bideau*, 2 Minn. 291. What notice is sufficient in application for an order vacating attachment, *Blake v. Shorman*, 12 Minn. 420.

SEC. 14 (141, AMENDED BY ACT OF MARCH 7, 1867). *Defendant may move to vacate attachment—motion made on affidavit may be opposed by affidavits.*—The defendant may at any time before the time for answering expires, or at any time thereafter when he has answered and before trial, apply to the court on notice to vacate the writ of attachment. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those on which the writ of attachment was allowed.

S. L. 1867, 110.

District court may inquire into truth or falsity of statement contained in affidavit, *Nelson v. Gibbs et al.*, 18 Minn. 541.

SEC. 15 (142). *Writ of attachment fully executed shall be returned.*—When the writ of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

Allis v. Day, 13 Minn. 205, and cases cited under sec. 9, *supra*.

SEC. 16 (143, AS AMENDED BY ACT OF MARCH 6, 1868). *Liens, how released.*—Whenever any real estate has been attached by virtue of any writ of attachment, such real estate shall be bound and the attachment shall be a lien thereon from the time that a certified copy of the attachment, with a description of the real estate, has been delivered for record in the office of the register of deeds in the county where the same is situated, and not otherwise. Every register of deeds shall note the day, hour, and minute when he receives such certified copy, and shall record and index the same in the books kept for the recording and indexing of mortgages. Such real estate may be discharged and released of record from such attachment in the following manner, to wit :

First. By filing for record in the office of the register of deeds of the county wherein such real estate is situated, a certified copy of the order discharging or vacating said attachment.

Second. By filing for record with such register of deeds, satisfaction of judgment rendered in such action.

Third. By judgment being rendered in the action in favor of the defendant against whom the attachment is issued, upon filing for record in the office of said register of deeds a transcript of such judgment.

Fourth. By filing for record in the office of such register of deeds a satisfaction and discharge of such attachment executed by the plaintiff in said action in the same manner as is required by law for the execution of conveyances of real estate.

S. L. 1868, 107.

SEC. 17 (144). *Plaintiff may release attachment, how.*—The plaintiff in such action may at any time before the final discharge of such attachment, release and discharge from such attachment any part or portion of such real estate incumbered by said attachment, by executing in the same manner as conveyances of real estate are required by law to be executed, a release and discharge of such parts or portions of said real estate so designated to be discharged and released, and particularly describing the same, and filing such release in the office of the register of deeds of the county wherein the lands are situated ; and such release or discharge shall in nowise affect the lien and incumbrance of said writ of attachment upon the remainder of the real estate or property covered by said attachment and not included in such release.

SEC. 18 (145). *Release or satisfaction of attachment to be recorded.*—The register of deeds shall enter such discharge, release, or satisfaction in the same manner and in the same book provided for the filing and entry of writs of attachments, except that the names of the plaintiffs shall be alphabetically arranged in said index, and he shall receive the same fees as are allowed him for the filing and entry of attachments in his office.

SEC. 19 (146). *Attachment of personal property, how released.*—Any attachment of personal property, under subdivision three of section seven (one hundred and thirty-four), may be discharged or released of record by filing in the proper office an order, release, transcript, or satisfaction piece, as provided in section sixteen (one hundred and forty-three) aforesaid.

TITLE II.

OF GARNISHMENT.

(This Title is Title X. of Chapter LXVI. of the Statutes of 1866.)

SEC. 20 (147, AS AMENDED BY ACT OF MARCH 6, 1867). *Garnishment allowed, when.*—In any action in a court of record or justice's court for the recovery of money, if the plaintiff, his agent or attorney, at the time of filing the complaint, or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files with the clerk of the court, or if the action is in a justice's court, with the justice, an affidavit stating that he believes that any person (naming him) has property, money, or effects in his hands or under his control belonging to the defendant in such action, or that such person is indebted to the defendant, and that the value of such property or effects or the amount of such money or indebtedness, if the action is in a district court, exceeds the sum of twenty-five dollars, or if the action is in a justice's court, ten dollars, a summons may be issued against such person, as hereinafter provided; in which summons and all subsequent proceedings the plaintiff in the action shall be known and designated as plaintiff, the defendant as defendant, and the person against whom the summons is issued as garnishee.

S. L. 1867, 108.

Under the R. S. 1851, chapter 91, certain requisites necessary, and unless they exist no summons can issue, *Black v. Brisbin et al.*, 3 Minn. 361. Affidavit must comply with statute, *Prince v. Hendy*, 5 Minn. 347; Emmett, C. J., dissents. Garnishee summons may be issued upon filing the affidavit required by statute, *Hinkley et al. v. St Anthony Falls Power Co. et al.*, 9 Minn. 55.

SEC. 21 (148). *Proceedings in justice's court.*—If the action is in a justice's court, the summons shall be issued by the justice, and shall require the garnishee to appear before him at a time and place mentioned in such summons, not less than six nor more than twelve days from the date thereof, and answer under oath such questions as may be put to him touching his indebtedness to the defendant, and any property, money, or effects of the defendant in his possession or under his control; which summons shall be served and returned in the same manner as a summons issued against a defendant in other causes in such court, except that no other than personal service shall be sufficient. A copy of such summons, together with a notice to the defendant stating time, place, and manner of service upon the garnishee, and signed by the justice of the peace or officer who served the same, and requiring such defendant to appear and take part in the examination, shall be served upon the defendant at least three days before the time specified in the summons for the appearance of the garnishee.

SEC. 22 (149, AS AMENDED BY ACTS OF FEBRUARY 29, 1868, AND MARCH 6, 1871). *Proceedings in district court—fees of the garnishee.*—In actions in a district court such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant in other cases in said court, except that the service shall in all cases be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or the clerk thereof, or the court commissioner of the county in which the action is pending, at a time and place mentioned

therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property, money, or effects of the defendant in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place, and manner of service thereof, upon the garnishee, and signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring such defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the same for the appearance of the garnishee. Such notice and copy of the summons may be served in the manner provided by law for the service of a summons in ordinary cases. The garnishee shall be entitled in all cases, whether the action is in a district court or before a justice of the peace, to the same fees as if he were subpoenaed as a witness in such action, and may be compelled to testify and disclose respecting any matters contained in the affidavit in the same manner as if he were a witness duly subpoenaed for that purpose. But no person shall be obliged to appear as garnishee unless his fees for one day's attendance and mileage, according to law, is paid or tendered in advance.

S. L. 1868, 121; S. L. 1871, 123.

SEC. 23 (150). *Effect of service of summons.*—The service of the summons upon the garnishee shall attach and bind all the property, money, or effects in his hands, or under his control, belonging to the defendant, and any and all indebtedness owing by him to the defendant at the date of such service, to respond to final judgment in the action.

Property must be in hands of garnishee at service of summons, *Hubbard v. Williams*, 1 Minn. 54; *Nash v. Gale*, 2 Minn. 311.

SEC. 24 (151). *Legacies, etc., subject to garnishment.*—Any debt or legacy due from an executor or administrator, and any other property, money, or effects in the hands of an executor or administrator may be attached by this process.

SEC. 25 (152). *Corporations may be garnisheed—by whom may appear—court may cite in person best acquainted with facts.*—Corporations may be summoned as garnishees and may appear by their cashier, treasurer, secretary, or such officer as they may appoint, and the disclosure of such person or officer shall be considered the disclosure of the corporation; *provided*, that if it appears to the court that some other member or officer of the corporation is better acquainted with the subject-matter than the one making disclosure, the court may cite in such person to make answer in the premises; and in case such person neglects or refuses to attend, judgment may be entered as hereinafter provided upon default; and service of the summons upon the agent of any corporation not located in this state, but doing business therein through such agent, shall be a valid service upon said corporation.

Section only applies to private corporations, etc., *McDougal v. Board of Supervision of Hennepin Co.*, 4 Minn. 184.

SEC. 26 (153). *In what cases garnishment not allowed.*—No person or corporation shall be adjudged a garnishee in either of the following cases, viz.:

First. By reason of any money, or any other thing due to the defendant, unless at the time of the service of the summons, the same is due absolutely and without depending on any contingency.

Second. By reason of any debt due from said garnishee on a judgment so long as he is liable to an execution thereon.

Third. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange, or promissory note.

Amount of insurance policy, conditions precedent to liability of company, etc., *Geis et al. v. Koltman*, 12 Minn. 279.

SEC. 27 (154). *Money, etc., may be attached before due, when.*—Any money or other thing due or belonging to the defendant may be attached by this process, before it has become payable, provided it is due or owing absolutely and without depending on any contingency as aforesaid; but the garnishee shall not be compelled to pay or deliver the same before the time appointed therefor by the contract.

Negotiable paper not such property, money, or effects as statute contemplates, *Hubbard v. Williams*, 1 Minn. 54.

SEC. 28 (155). *What shall be deemed "effects."*—Bills of exchange and promissory notes, whether under or overdue, drafts, bonds, certificates of deposit, bank notes, money, contracts for the payment of money, and other written evidence of indebtedness, in the hands of the garnishee at the time of the service of the summons, shall be deemed "effects" under the provisions of this section.

Railroad bonds issued by state are within the statute, *Banning v. Sibley*, 3 Minn. 389.

SEC. 29 (156, AS AMENDED BY ACT OF MARCH 6, 1871). *Examination of garnishee—defendant to be notified, when.*—After the appearance of the garnishee before the court or officer named in the summons, on the day specified therein, or on the day to which an adjournment may be had, the said garnishee shall be examined on oath touching the matters alleged in the affidavit, and the examining officer shall take full minutes of such examination, and file the same with the other papers in the cause: *provided*, that unless the defendant in the action appears at the time and place specified in the summons for the appearance of the garnishee, such officer or court shall not proceed to the examination of such garnishee, or to the taking of any evidence whatever therein, until the plaintiff produces and files an affidavit or return of an officer, showing the service of the summons and notice upon the defendant, as prescribed in sections one hundred and forty-eight and one hundred and forty-nine aforesaid; but in case the plaintiff is unable so to notify such defendant, the said court or officer may postpone the examination for such reasonable time as may be necessary to enable the plaintiff to notify such defendant, and he may then be notified of the day to which such postponement is had in the manner provided by law for the service of a summons in ordinary cases, except that it shall be a notice of ten days in a district court, and of four days in a justice court: *provided*, that when the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and the plaintiff or his agent or attorney files an affidavit stating that the defendant is not a resident of this state, and is not within the same, as the affiant verily believes, it shall not be necessary to serve upon the defendant a copy of such garnishee summons, or any notice to the defendant in such action in any court, and the examination shall proceed in the same manner as if the defendant had been duly served with such copy and notice, or had appeared at the time and place specified in the summons for the appearance of the garnishee.

S. L. 1871, 123.

Same rules apply to examination of garnishee as to other witnesses, *Banning v. Sibley*, 3 Minn. 389. Party calling garnishee must take his answers at his own risk, *Chaso*.

v. North, 4 Minn. 381. To recover against a garnishee he must admit an indebtedness to the principal debtor, *Cole v. Slater*, 5 Minn. 468. Under the garnishee Act of 1860, where defendant cannot be found within the state, notice to him may be published, *Brooms et al. v. The G. D. D. & M. Packet Co.*, 9 Minn. 239. Garnishee cannot be forced into court as plaintiff in error against his consent by a stranger to the record, *Hollingshead v. Banning et al.*, 4 Minn. 116.

SEC. 30 (157). *Claimant may appear and be joined as party in the action.*—If it appears from the evidence taken or otherwise, that any person not a party to the action, is interested or claims any interest in any of the property or effects in the hands of the garnishee by virtue of any agreement or matter which existed prior to the service of the summons, the examining officer, upon application, may permit such person to appear in the action and maintain his right, and if he does not voluntarily appear, notice may be given him to appear or be barred of his claims, which notice may be served as such officer shall direct. In case such person voluntarily appears, or notice is given as aforesaid, he shall be joined as a party to the action and judgment therein shall bind him in the same manner as if he had been an original party.

Vide Hollingshead v. Banning et al., 4 Minn. 116, *supra*.

SEC. 31 (158). *When garnishee denies indebtedness, or there is dispute as to title or property held by him, plaintiff shall proceed, how.*—If any person has in his possession any property or effects of the defendant, which he holds by a conveyance or title that is void as to creditors of said defendant, he may be charged therefor, although the defendant could not have maintained an action against him for the same; but in such cases, and in all cases where the garnishee upon full disclosure denies any indebtedness to, or the possession or control of any property, money or effects of the defendant, there shall be no further proceeding, except in the manner following: if the plaintiff in such case believes that such garnishee does not answer truly in response to the questions put to him upon such examination, or that the conveyance under which he claims title to property, is void as against the creditors of the defendant, he may, on notice to such garnishee and to the defendant at any time before the garnishee has been discharged by the court or officer, of not less than six days, apply to the court in which the action is pending or a judge thereof, for permission to file a supplemental complaint in the action making the garnishee a party thereto, and setting forth the facts upon which he claims to charge such garnishee, and if probable cause is shown by the plaintiff, permission shall be granted, and such supplemental complaint shall be filed and served upon both the defendant and garnishee, either or both of whom may answer the same, and the plaintiff may reply if necessary, and the issues thus made up, shall then be brought to trial, and tried in the same manner in all respects as civil actions. The provisions of this section shall not apply to proceedings in justices' courts.

Debtor when protected as garnishee, *Dodd v. Brott*, 1 Minn. 270. Garnishee having denied indebtedness, or etc., plaintiff can only proceed further by filing a supplemental complaint, etc., *Ingersoll et al. v. First Nat. Bank*, 10 Minn. 396; *vide also Prince v. Hendy*, 5 Minn. 347, *supra*.

SEC. 32 (159). *Garnishee not appearing may be defaulted—court may remove default.*—When any person duly summoned as a garnishee neglects to appear at the time specified in the summons, or within two hours thereafter, he shall be defaulted, and judgment shall be rendered against him for the amount of the damages and costs recovered by the plaintiff in the action against the defendant,

payable in money, and execution may issue directly against the goods and chattels and estate of said garnishee therefor: *provided*, the court may upon good cause shown, remove such default, and permit the garnishee to appear and answer on such terms as may be just.

In removing default of a garnishee, and permitting him to disclose, it is necessary to fix the time and place for his disclosure, *Goodrich et al. v. Hopkins et al.*, 10 Minn. 162.

SEC. 33 (160). *Judgment against garnishee, when to be rendered.*—No judgment shall be rendered against any garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after examination and disclosure, if it appears that he ought not to be held; whenever a garnishee is not discharged as aforesaid, the cause shall be continued to abide the result of the original action.

In case of doubt, garnishee should be discharged, *Pioneer Printing Co. v. Sanborn et al.*, 3 Minn. 413.

SEC. 34 (161). *Judgment not to be rendered except by order of district judge.*—No judgment shall be rendered upon the disclosure of a garnishee, except by order of the judge of the court in which the action is pending, or in case of his absence or inability to act, by order of a judge of another district.

SEC. 35 (162, AS AMENDED BY ACT OF MARCH 6, 1871). *Who shall take disclosure of garnishee.*—Court commissioners, clerks of the district court, or any referee appointed by the court for that purpose, are hereby authorized and required to take the disclosure of any garnishee in writing, together with any other testimony offered by the parties to the action, and report the same to the court; all testimony offered by the parties to be taken subject to any objection reasonably interposed thereto.

S. L. 1871, 123.

SEC. 36 (163, AS AMENDED BY ACT OF MARCH 6, 1871). *Fees of officer taking disclosure.*—Any court commissioner, clerk, or referee, shall receive from the plaintiff ten cents per folio for all evidence taken and reduced to writing, and the fees so paid by the plaintiff may be taxed in the judgment against the garnishee.

S. L. 1871, 123.

SEC. 37 (164). *Garnishee adjudged chargeable for "effects," to deliver same to officer.*—When any person is charged as garnishee by reason of any property or effects, other than an indebtedness payable in money, which he holds, or is bound to deliver to the defendant, such garnishee shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution, and the said property shall be sold by the officer, and the proceeds accounted for in the same manner as if it had been taken on execution against the defendant: *provided*, the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant.

SEC. 38 (165). *Court may determine value of property, make orders, etc.*—Upon application and notice to the parties, the court may determine the value of any property or effects so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery, and sale of the same, that is necessary to protect the rights of those interested, and may make any order touching the property attached, that is necessary for the protection of all parties interested, upon the application of any party in interest, and may require, at any time after the service of such garnishee summons, the property, money, or effects so attached to be brought into court, or delivered to a receiver appointed by the court.

SEC. 39 (166). *Proceedings when garnishee holds property of defendant that is mortgaged.*—Whenever it appears that any property or effects in the hands of the garnishee belonging to the defendant are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed under a special order of court to pay or tender the amount due, and the garnishee shall thereupon deliver the property or effects, as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects with legal interest thereon, and apply the balance upon the execution.

SEC. 40 (167). *Garnishee liable for contempt, when.*—If any garnishee refuses or neglects to deliver any property or effects as provided in the preceding section, he may be punished for contempt of court, and shall in addition be liable to the plaintiff for the value of such property or effects, less the amount of the lien, if any, to be recovered by action.

SEC. 41 (168). *Garnishee may sell property mortgaged.*—Nothing herein shall prevent the garnishee from selling such property or effects so in his hands for the payment of the demand for which they are mortgaged, pledged, or otherwise liable, at any time before payment or tender of the amount due to him: *provided*, such sale is authorized by the terms of the contract between said garnishee and the defendant.

SEC. 42 (169). *Garnishee not liable for destruction of property, when.*—If any such property or effects are destroyed without any negligence or default of the garnishee after judgment and before demand by the officer holding the execution; such garnishee shall be discharged from all liability to the plaintiff for the non-delivery of such property or effects.

SEC. 43 (170). *Judgment, for what amount rendered.*—Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against said defendant, with costs taxed and allowed in the proceeding against the garnishee.

SEC. 44 (171). *Garnishee may make disclosure before return day, by consent of plaintiff.*—Whenever any person is summoned as a garnishee in the district court, he may at any time before the return day of the summons, appear before the officer named therein, or any justice of the peace competent to try causes between the parties, and with the consent of the plaintiff, to be certified by said officer or justice, make his disclosure upon oath with the like effect as if made on the day named in the summons; in case such disclosure is taken by a justice, he shall receive the same fees as are allowed by section thirty-six (one hundred and sixty-three) aforesaid.

SEC. 45 (172). *Plaintiff not consenting, garnishee may proceed, how.*—If the plaintiff will not consent to such examination and disclosure, the garnishee, in case he is compelled to be absent from the county until after the return day of the summons, may make affidavit to that effect, which, with a notice of time, place, and the officer or justice, he shall serve upon the plaintiff or his attorney at least twenty-four hours previous to the time specified in it for the disclosure, and upon due proof of such service, his disclosure shall be taken as provided in the preceding section and with like effect.

SEC. 46 (173). *Fees and expenses of garnishees.*—If any person summoned as a garnishee appears and submits himself to an examination upon oath as herein

provided, he shall be allowed his costs for travel and attendance, and in special and extraordinary cases such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses.

SEC. 47 (174). *When garnishee is held chargeable, costs and expenses to be deducted out of sum due.*—If any such person is adjudged chargeable as garnishee, his said costs and allowance shall be deducted and retained out of the property, money, or effects in his hands, and he shall be accountable only for the balance to be paid on the execution.

SEC. 48 (175). *In case of specific articles, costs, etc, to be paid before delivery.*—If such person is charged on account of any specific articles or personal property, he shall not be obliged to deliver the same to the officer serving the execution until his costs allowed and taxed are fully paid or tendered; and if he is discharged for any cause he shall recover judgment against the plaintiff for his costs, and have execution therefor.

SEC. 49 (176). *Costs of plaintiff, how limited.*—The plaintiff, under the provisions of this section, shall in no cases, except in cases provided for in section one hundred and fifty-nine aforesaid, recover a greater sum for costs, including the costs allowed to the garnishee, than the amount of damages recovered.

SEC. 50 (177). *Amount of judgment in justice's court and in district court.*—No judgment shall be rendered against a garnishee in a justice's court where the judgment against the defendant is less than ten dollars exclusive of costs, nor where the indebtedness of the garnishee to the defendant or the value of the property, money, or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than ten dollars. If the action is in a district court no judgment shall be rendered against the garnishee, where the indebtedness proved against him, or the value of the money, property, or effects of the defendant in his hands or under his control shall be less than twenty-five dollars; but in all such cases the garnishee shall be discharged and shall recover his costs and have execution therefor against the plaintiff.

Troyer v. Schweizer et al., 15 Minn. 241, *supra*.

SEC. 51 (178). *Effect of judgment against garnishee.*—The judgment against a garnishee shall acquit and discharge him from all claims of all parties to the process, in and to the property, money, or effects paid, delivered, or accounted for by such garnishee by force of such judgment.

SEC. 52 (179). *Judgment of dismissal no bar, when.*—If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand.

SEC. 53 (180). *Party aggrieved may appeal.*—Any party to a proceeding under this title deeming himself aggrieved by any order or final judgment therein, may remove the same from a justice's court to the district court, or from a district court to the supreme court, by appeal, in the same cases, in like manner, and with like effect as in a civil action.

SEC. 54 (ADDED BY ACT OF MARCH 6, 1871). *Defendant to execute bond, for what purpose.*—A defendant, when property, money, or effects has been garnisheed, may, at any time before the trial of the action in which he is defendant, execute to the plaintiff a bond in double the amount claimed in the complaint, with two or more sureties, who shall justify and be approved by the judge of the district or court commissioner of the county in which the garnishee proceedings [were]

instituted, conditioned that if the plaintiff recover judgment in the action he will pay such judgment or an amount thereon equal to the value of the money, property, or effects so garnished. And the officer approving such bond shall make an order discharging such garnishment, and releasing such money, property, or effects therefrom, upon filing such bond with the court in which the garnishee proceedings were entitled, and serving upon the garnishee a copy of the order discharging such proceedings. The defendant shall have the same power to receive or collect the money, property, and effects so garnished in the same manner as if such garnishee proceedings had never been instituted.

TITLE III.

OF REPLEVIN (CLAIM AND DELIVERY OF PERSONAL PROPERTY).

(This Title is Title VIII. of Chapter LXVI. of the Statutes of 1866.)

SEC. 55 (112). *Possession of personal property claimed, when.*—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, in the manner following :

Plaintiff must allege that he is the owner or entitled to the possession, *Loomis v. Youle*, 1 Minn. 175. Will lie against defendant who has control, though not the actual custody of property, *Bradley v. Gamelle et al.*, 7 Minn. 331. Plaintiff cannot succeed unless he can identify the specific property, *Ames v. Mississippi Boom Co.*, 8 Minn. 467. Complaint averring generally that defendant wrongfully detains, the want of allegation of demand and refusal is cured by verdict, *Hurd v. Simonton*, 10 Minn. 423. Plaintiff must recover on his own right to possession, *Howland v. Fuller*, 8 Minn. 50. The right of immediate possession is a *sine qua non*, *Berthold v. Holman et al.*, 12 Minn. 235. Mortgagee having neither the possession nor right of possession of mortgage premises cannot maintain action for recovery of timber, etc., *Berthold v. Fox et al.*, 13 Minn. 501. *Defenses.*—Not permitted to defendants to show property belongs to stranger, under what circumstances, *McClung v. Berfeld*, 4 Minn. 148. Where defendant acted as U. S. Marshal, and seized property by virtue of attachment issued by U. S. District Court, *Lewis v. Buck*, 7 Minn. 104.

SEC. 56 (113). *Affidavit shall show what.*—When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing :

First. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.

Second. That the property is wrongfully detained by the defendant.

Third. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution, or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure ; and

Fourth. The actual value of the property.

The question of value becomes immaterial except with regard to the question of damages, *Foster v. Borkey et al.*, 8 Minn. 351.

SEC. 57 (114, AS AMENDED BY ACT OF MARCH 6, 1868). *Duty of sheriff on receipt of affidavit.*—The plaintiff or his attorney may thereupon by indorsement in writing upon the affidavit, require the sheriff of the county where the property

claimed may be to take the same from the defendant and deliver it to the plaintiff: and upon the receipt of the affidavit, with the indorsement thereon, together with a bond executed to the defendant by the plaintiff, or some one in his behalf, with one or more sureties, to be approved by the sheriff, in an amount double the value of the property; conditioned that the property shall be returned to the defendant, if a return shall be adjudged, and for the payment to him of such sum as for any cause may be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant, or his agent, and retain it in his custody until delivered, as hereinafter provided. He must also serve on the defendant without delay a copy of the affidavit, indorsement, and bond, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion.

S. L. 1868, 115.

Sec. 115 repealed by Act of March 6, 1868 (S. L. 1868, 116); sec. 116 repealed by Act of March 6, 1868 (S. L. 1868, 116); sec. 117 repealed by Act of March 6, 1868 (S. L. 1868, 116).

SEC. 58 (118). *Defendant may except to sufficiency of sureties.*—The defendant may, within three days after the service of a copy of the writ and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fails to do so, he shall be deemed to have waived all objections to them; if the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section.

SEC. 59 (119). *Defendant may give bond and retain property.*—Within three days after service of the writ and bond as aforesaid, the defendant may, if he does not except to the sureties of the plaintiff, require a return of the property, upon executing to the plaintiff a bond in the same amount as the bond of the plaintiff, conditioned that the property shall be delivered to the plaintiff, if delivery is adjudged, and for the payment to him of such sum as for any cause may be recovered against the defendant. Such bond shall be executed by the defendant, or by some one in his behalf, with two or more sufficient sureties. If a return of the property is not required, or the sureties of the plaintiff excepted to, within three days after the taking and service of the writ and bond upon the defendant, then the property shall be delivered to the plaintiff, except as provided in section one hundred and twenty-one.

The officer taking property in replevin should hold in his possession three days, etc., *Vanderburg v. Bassett*, 4 Minn. 242.

SEC. 60. (120). *Notice and justification of sureties.*—Notice shall be given of the justification of sureties of not less than two nor more than six days, which notice shall be served within two days after exception taken to the plaintiff's sureties, or after the execution of the bond by the defendant, as the case may be. If any surety fails to justify at the time appointed, another may be offered and substituted within such time, not exceeding three days, as the judge or officer shall appoint, but there shall be only one adjournment for such purpose, and in case of substitution a new bond shall be executed by all the parties to be bound.

Proceedings irregular under secs. 115, 116, and 117 repealed, bond given under sec. 120 on substitution for that provided for in sec. 116 of no validity, *Hicks v. Mendenhall et al.*, 17 Minn. 475.

SEC. 61 (121). *Sheriff shall deliver property, when.*—Upon due justification of the plaintiff's sureties, the sheriff shall deliver the property to the plaintiff,

except as prescribed in section eleven (one hundred and thirty-eight), and upon like justification of the defendant's sureties the property shall be delivered to the defendant. When sureties fail to justify as aforesaid, or when justification is waived as herein provided, the sheriff shall forthwith deliver the property to the party entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties until such justification or waiver is made, or there is a failure to justify. Either party may in writing waive the justification of sureties as well after as before notice.

SEC. 62 (122). *Qualification of sureties.*—The qualification of sureties is as follows:

First. Each shall be a resident and freeholder of the state.

Second. Each shall be worth the amount specified in the bond above his debts and liabilities, and exclusive of his property exempt from execution, but the judge or officer taking the justification may allow more than the number of sureties required, to justify severally in amounts less than the penalty of the bond, if the aggregate amount is equivalent thereto.

SEC. 63 (123). *Sureties shall justify, how.*—For the purpose of justification, each surety shall attend before a judge, court commissioner, or a justice of the peace, at the time and place specified, and may be examined on oath, touching his sufficiency in such manner as the judge or officer may think proper; the examination shall be reduced to writing, and filed in the cause.

SEC. 64 (124). *Approval of sureties to be indorsed on bond—sheriff exonerated.*—If the judge or officer deems the sureties sufficient he shall indorse his approval upon the bond, which shall be delivered to the party entitled thereto, and the sheriff shall thereupon be exonerated from liability.

SEC. 65 (125). *Power and duty of sheriff in case property is concealed.*—If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it is not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and if necessary he may call to his aid the power of his county.

SEC. 66 (126). *Sheriff to keep property securely and deliver it to party entitled.*—When the sheriff has taken property, as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

SEC. 67 (127, AS AMENDED BY ACT OF MARCH 6, 1868). *Sheriff shall file affidavit, etc., with clerk of court.*—He shall file the affidavit and indorsement with his return thereon with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.