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1905

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4598. Service of writ—The writ of habeas corpus may be served by delivering the same to the person to whom it is directed, or, if he cannot be found, by leaving it at the jail or other place in which the prisoner is confined, with any underofficer or other person of proper age having charge for the time of such prisoner. *If the person upon whom the writ ought to be served conceals himself, or refuses admittance to the party attempting to serve the writ, it may be served by affixing the same in some conspicuous place on the outside either of his dwelling house, or of the place where the party is confined.* (6024, 6025)

4599. Return to be made, when—If the writ is returnable on a certain day, return shall be made and the prisoner produced at the time and place specified therein. If it is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made and the prisoner produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles. (6026)

4600. Power of court not restrained—Nothing herein shall prevent any court from issuing a writ of habeas corpus necessary or proper to bring before it any prisoner for trial, or to be examined as a witness in any action or proceeding, civil or criminal, pending in such court. (6027)

4601. Appeal to supreme court—Any party aggrieved by the final order in proceedings upon a writ of habeas corpus may appeal therefrom to the supreme court in the same manner as other appeals are taken from the district court, except that no bond shall be required of the appellant. Upon filing notice of appeal with the clerk of the district court, and payment or tender of his fees therefor, such clerk shall forthwith make, certify, and return to the clerk of the supreme court copies of the petition, writ, return of respondent, answer, if any, of the relator thereto, and the order appealed from. ('95 c. 327 ss. 1, 2)

83-252, 86+89; 84-237, 87+770; 61-539, 63+1113; 65-453, 68+77; 66-291, 68+1089; 69-104, 72+53; 77-483, 502, 80+633, 778; 78-166, 80+877; 84-203, 87+489; 86-310, 90+769; 91-277, 97+972; 93-294, 101+303.

4602. Hearing on appeal—The appeal may be heard before the supreme court whenever it is in session, upon application of either party to said court or a justice thereof. The order fixing the time of hearing, which shall not be less than six nor more than fifteen days from the date of application, shall be served on the adverse party at least five days before the date so fixed. The appeal shall be tried and judgment rendered in the same manner as if the writ had originally issued out of the supreme court, and, if the person in whose behalf the writ is applied for is a child of tender years, the court, as a part of its judgment, shall determine who is entitled to control his education and training. No costs or disbursements shall be allowed any party to such appeal, nor shall any of the papers used on such hearing be required to be printed. ('95 c. 327 s. 3)

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CHAPTER 88

ACTIONS AGAINST BOATS AND VESSELS

4603. For what liable—Every boat or vessel used in navigating the waters of this state shall be liable for the claims or demands hereinafter mentioned, and which shall constitute liens thereon:

1. For all debts contracted by the master, owner, agent, or consignee thereof on account of supplies furnished for its use, or on account of work done or services rendered on board for its benefit, or on account of labor done or materials furnished by mechanics, tradesmen, or others in and for building, repairing, fitting out, furnishing, or equipping the same;

2. For all sums due for wharfage or anchorage of such boat or vessel within the state;

3. For all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or any contract touching the transportation of persons or property entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed; and

4. For all injuries done to persons or property by such boat or vessel.

Provided, that no boat or vessel shall be so liable for any debt contracted on account of work done or services rendered on board of or for the benefit of such boat or vessel until such contract is fully performed. (6085)

Constitutional (43-192, 45+430; 44-510, 47+160). Liability of boat for death by wrongful act (8-97, 72). A common law remedy. Assignee of claim may sue (10-242, 190; 10-250, 195). Jurisdiction when cause arises out of state (2-178, 146; 3-192, 124). Jurisdiction of state court of cause of action for breach of contract of affreightment (12-465, 364). Extent of lien for supplies and service (69-537, 72+809). Jurisdiction of federal court (36 Fed. 197).

4604. Action—Warrant—Procedure—An action against a boat or vessel may be instituted by the filing in the district court of the county where it may be of a complaint against it by name, or if it have no name by description, verified by the plaintiff or some person having knowledge of the facts, and setting forth the demand, and on whose account it accrued. Thereupon the clerk shall issue a warrant, returnable in twenty days, directing the sheriff to seize such boat or vessel and detain it in custody, with its tackle, apparel, and furniture, until discharged by due course of law. Such warrant shall be served and returned as in the case of a writ of attachment. Upon the return of the warrant, proceedings shall be had against the boat or vessel seized in the same manner as if the action had been instituted against the person on whose account the demand accrued. The master, owner, agent, or consignee of the boat or vessel may appear on its behalf and answer the complaint. For sufficient cause shown, he shall be entitled to a continuance, but such continuance shall not operate as a discharge of the boat or vessel from custody, and no continuance shall be granted to the plaintiff. (6086-6090, 6102, 6104, 6105)

4605. Discharge of boat—Bond—If before judgment, the master, owner, agent, or consignee give bond to the plaintiff, to be approved by the court, or by a judge or the clerk thereof in vacation, conditioned to satisfy the amount which shall be adjudged to be due to the plaintiff, with costs, the boat or vessel, with its tackle, apparel, and furniture, shall be discharged from custody. (6091)

44-510, 47+160.

4606. Sale—Execution—If judgment be rendered in favor of the plaintiff against the boat or vessel, the court shall make an order, directing the sheriff to sell it, with its tackle, apparel, and furniture, or such part thereof or interest therein as shall be necessary, to satisfy the judgment and costs, and the order shall be executed and returned in the same manner as an execution. If a bond has been given, as provided in § 4605, and judgment rendered in favor of the plaintiff, execution shall issue for the amount thereof and costs against the principal and sureties on the bond. (6092, 6093, 6103)

44-510, 47+160.

4607. Owner, etc., summoned to show cause—When judgment is rendered in favor of the plaintiff against a boat or vessel, and prior thereto it has been discharged from custody by the giving of bond or otherwise, or when for any reason such judgment or any part thereof remains unpaid for sixty days, the master and owner, or either, may be summoned to show cause why they should not be personally bound by the judgment. Such summons shall be subscribed by the judgment creditor, his agent or attorney, and shall describe the judgment, specify the amount due thereon, and require the party summoned to show cause within twenty days after the service thereof, and may be served in the same manner as a summons in a civil action. It shall be accompanied by an affidavit of the person subscribing it, to the effect that the judgment has not

been paid or satisfied, except as specified in the summons, to his knowledge, information, or belief. (6094-6096)

4608. Pleadings—Trial—Judgment—The party summoned may by answer deny that the judgment was duly rendered, or that he was master, owner, or part owner of the boat or vessel when the cause of action against it arose, and he may set up any defence which has arisen since the rendition of judgment, but no other defence. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The issues shall be tried, and judgment, with costs, shall be rendered and enforced in the same manner as in a civil action. (6097, 6098)

4609. Appeals—In all cases under this chapter, if judgment be rendered in favor of the plaintiff, the master, owner, agent, or consignee of the boat or vessel, and any other person interested, may appeal from the orders or judgment of the court as in other cases. (6106)

12-388, 269.

4610. Limitation of action—All actions under this chapter shall be commenced within one year after the cause of action accrues. (6107)

36 Fed. 197.

CHAPTER 89

ASSIGNMENTS FOR BENEFIT OF CREDITORS

4611. Requisites—Every assignment made by a debtor of the whole or any part of his estate, real or personal, in trust for the benefit of creditors, shall be void unless the assignee be a resident freeholder of the state, and unless the assignment be in writing, subscribed and acknowledged by the assignor, and be filed with the clerk of the district court of the county wherein the assignor, or one of the assignors if there be more than one, resides, or wherein the business in reference to which the same is made has been principally carried on. (4227)

1. Nature of proceeding—Statute a regulation not a grant of power. A mere regulation of common law assignments for the benefit of creditors. Such assignments are the voluntary acts of the debtor. No statutory authority can exact them and when made they partake of the nature of a contract (28-93, 95, 9+585; 77-407, 409, 80+361; 33-412, 414, 23+856; 39-520, 522, 40+827; 93-274, 101+167). The existence of a bankrupt act does not suspend right to make a voluntary assignment for the benefit of creditors (39-520, 522, 40+827). Proceeding is of a judicial nature (32-122, 123, 19+652; 24-232, 241; 26-141, 143, 1+830; 24-295, 297). It is under the general supervision of the court (See § 4620). The assignee is the officer of the court (69-69, 74, 71+921), and the property assigned is in custodia legis (69-69, 74, 71+921). See 32-60, 64, 19+347; 33-412, 415, 23+856). Object of statute to protect creditors of assignors and to regulate the duties of assignees. Its aim is to secure an equal distribution of the debtor's property without preferences and to place the estate and the assignee under the control of the court so as to insure a faithful administration of the trust (41-304, 307, 43+67; 93-274, 277, 101+167. See 32-122, 123, 19+652). The statute is not, like the insolvency law of 1881, a bankrupt act (32-60, 19+347).

2. Compared with insolvency law of 1881—33-412, 414, 23+856; 32-60, 19+347; 77-407, 409, 80+361; 62-501, 505, 65+78, 632.

3. To what applicable—An assignment not good under the insolvency law of 1881 may be held good under this section (41-3, 4, 42+539). If an assignment does not affirmatively appear on its face to be under the insolvency law of 1881 it will be conclusively presumed to be under this section (77-407, 80+361).

4. Assignor must be resident freeholder—60-358, 62+325; 77-407, 80+361; 46-138, 48+687.

5. Formal requisites—A failure to comply with the provisions of this section does not render the assignment void but merely voidable at instance of creditors and subsequent purchasers in good faith. It is good between the parties (93-274, 101+167. See 68-414, 418, 71+679). Statutory requirements not applicable to foreign assignments (31-136, 16+700). Provisions as to execution, etc., mandatory (28-118, 9+636; 68-414, 417, 71+679). Assignment must be the personal act of the assignor. Power of attorney held insufficient (68-414, 71+679). Acknowledgment by corporation held insufficient (66-4, 68+111). Assignment held void for want of notary's seal to acknowl-