

Remedies for Possession of Property

CHAPTER 565

CLAIM AND DELIVERY

565.01 POSSESSION OF PERSONAL PROPERTY, HOW CLAIMED.

HISTORY. R.S. 1851 c. 70 s. 122; P.S. 1858 c. 60 s. 130; G.S. 1866 c. 66 s. 112; G.S. 1878 c. 66 s. 132; G.S. 1894 s. 5274; R.L. 1905 s. 4204; G.S. 1913 s. 7834; G.S. 1923 s. 9331; M.S. 1927 s. 9331.

If in an action in replevin the plaintiff waives his right to immediate delivery, the action is not thereby changed to one for conversion merely. *Nelson v McKinnon*, 61 M 219, 63 NW 630; *White v Flamme*, 64 M 5, 65 NW 959.

Where the answer demands a restoration of the property to the defendant, a demand by the plaintiff before suit is not necessary. *Raymond v Kohn*, 124 M 426, 145 NW 164; *Hoiby v Fed. Motor*, 185 M 361, 241 NW 58.

It is not a precedent to the maintenance by the vendor in a conditional sales contract, that he return or offer to return to the buyer partial payments or notes given for unpaid instalments. *Raymond v Kohn*, 124 M 426, 145 NW 164.

Replevin does not lie against a joint owner, or a tenant in common, of an article of personal property. *Wilkes v Holmes*, 128 M 349, 150 NW 1098; *Gerde v Jones*, 129 M 525, 152 NW 1101.

Replevin must be directed against a party in possession, but others interested such as an attaching creditor who directed the attachment, though not in possession, may be joined as defendants. *Northern Timber v Stone-Ordean*, 143 M 200, 173 NW 439.

Property turned over to plaintiff by the officer is no longer in the custody of the law, and the bond in replevin becomes a substitute therefor, and the claimant must look to the bond for protection. *Republic Co. v Brown*, 158 M 396, 197 NW 840.

In replevin for the owner's share of crops raised by defendant under a cropping contract, it is a defense, that before severance plaintiff deeded away the property. *Rue v Kutzbach*, 164 M 366, 205 NW 262.

Where plaintiff in replevin holds a past due chattel mortgage on part of the property, it is error to direct a verdict for defendant. *Swany v Hassara*, 164 M 416, 205 NW 274.

A finding that the horses were the property of the plaintiff; that each horse was of the value stated in the verdict; and the damages for retention were as stated in the verdict, is sustained. *Maslof v Christian*, 166 M 408, 208 NW 135.

While a sheriff cannot take property under a writ of replevin which he is holding under a writ of attachment, on being released from the attachment, it is his duty to execute the writ of replevin. *Farmers Bank v Hammond*, 170 M 313, 212 NW 593.

Where a person makes an agreement as to a fact which involves his property rights, such person is estopped from asserting facts which the agreement denied, when on the faith of the agreement the other party has acted. *Lepak v Hedberg*, 170 M 495, 213 NW 40.

Where the pleadings disclose plaintiff's source of title to property as resting on a note and chattel mortgage, the defense of payment must be pleaded. *Trovatten v Hanson*, 171 M 130, 213 NW 536.

The bringing of a replevin suit was not an election, and on dismissal, the plaintiff may proceed against the debtor to recover the debt. *Thompson Co. v Brown*, 171 M 483, 214 NW 284.

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In this case the furnace did not become a part of the realty, and may be replevined. *Holland v Jefferson*, 173 M 121, 216 NW 795.

In this case the new contract was valid and binding and operates as an accord and satisfaction of the prior contracts it succeeded. *Trovatten v Hanson*, 175 M 357, 221 NW 238.

In replevin of mortgaged chattels, plaintiff has the burden of identifying the goods seized with those mortgaged. *First Nat'l v Halvorsen*, 176 M 406, 223 NW 618.

Where plaintiff declares as owner, defendant under a general denial may prove payment. *First Nat'l v Halvorsen*, 176 M 406, 223 NW 618.

Where plaintiffs in awarding a prize made an error in counting, they may replevin from the party to whom the award was mistakenly given and award the prize to the actual winner. *Amlie v Moose*, 176 M 598, 224 NW 158.

The cardinal question in a replevin action is plaintiff's right to immediate possession of the property at the commencement of the action, and failure of the intervenor to enforce payment of rent is not a waiver of the default for non-payment. *Warren v Driscoll*, 178 M 344, 227 NW 199.

The court, at defendant's request, properly required to elect as between replevin and conversion. She chose to stand on conversion. Defendant cannot successfully assign such election as error. *La Veaux v Holt*, 181 M 355, 232 NW 622.

Where the plaintiff owner of the property delivers it to another to deliver to a customer of plaintiff, on failure to deliver, the plaintiff may replevin. *Boiby v Federal Truck*, 185 M 361, 241 NW 58.

Torginson aided and abetted defendant in fraudulently obtaining possession of plaintiff's certificate of stock. *Blekre* defaulted. Judgment was properly granted as to both defendants. *Hovda v Blekre*, 193 M 218, 258 NW 305.

Conditional vendor has a lien similar to a chattel mortgage and may elect to foreclose by an action of foreclosure in equity and thus secure a deficiency judgment. *Ablers v Jones*, 193 M 544, 259 NW 397.

Plaintiff in replevin of an automobile, where the answer is a general denial, may prove that defendant's sole claim is based on an instrument tainted with usury. *Halos v Nachbar*, 196 M 387, 265 NW 26.

An action of replevin cannot be successfully maintained against a public officer who, in the course of his duty, seized the property, when such property owned by plaintiff, but possessed by plaintiff for an illegal use at the time of the seizure. *Starrett v Pederson*, 198 M 416, 270 NW 131.

The doctrine that where a fact of a continuous nature is shown to exist at a certain time there is a presumption that it continues to exist, does not apply as to the ownership of a diamond ring which is so easily transferred. *Exsted v Otto*, 202 M 644, 279 NW 559.

Replevin, which is the proper means to recover possession of specific personal property is, like an action in ejectment, a possessory action; and the plaintiff, in order to prevail, must show his immediate right of possession to the involved property. *Seebold v Eustermann*, 216 M 577, 13 NW(2d) 739.

Rights of assignee of conditional sales contract against subsequent bona fide purchaser from original vendor. 16 MLR 690.

565.02 AFFIDAVIT.

HISTORY. R.S. 1851 c. 70 s. 123; P.S. 1858 c. 60 s. 131; G.S. 1866 c. 66 s. 113; G.S. 1878 c. 66 s. 133; 1893 c. 86 s. 1; G.S. 1894 s. 5275; R.L. 1905 s. 4205; G.S. 1913 s. 7835; G.S. 1923 s. 9332; M.S. 1927 s. 9332.

The law which provides for issuing distress warrants for collection of personal property taxes without prior notice is constitutional. *Nelson v McKinnon*, 61 M 219, 63 NW 630.

Property in custodia legis, when not exempt, and taken by the officer under a legal writ, cannot be replevined from such officer. *Kelso v Youngren*, 86 M 177, 90 NW 316.

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The burden is on the laborers who cut wood to identify the wood in question as that on which they performed labor. *Lohrenz v Nelson*, 123 M 525, 143 NW 268.

Replevin will lie, though the property sought is not in actual possession of the defendant, if it is so under his control that he may deliver possession of it if he so desires. *Burkee v Gt. Northern*, 133 M 202, 158 NW 41; *Dalton v Bailey*, 137 M 61, 162 NW 1059.

Plaintiff who had delivered the property to defendant with instructions to deliver it to plaintiff's customer, had sufficient title and right of possession on which to base an action in replevin. *Hoiiby v Fed. Motor*, 185 M 361, 241 NW 58.

565.03 BOND AND SURETIES.

HISTORY. R.S. 1851 c. 70 s. 124; P.S. 1858 c. 60 s. 132; G.S. 1866 c. 66 s. 114; 1868 c. 76 s. 1; G.S. 1878 c. 66 s. 134; G.S. 1894 s. 5276; R.L. 1905 s. 4206; G.S. 1913 s. 7836; G.S. 1923 s. 9333; M.S. 1927 s. 9333.

If an action in replevin before a justice is simply dismissed with costs, there being no judgment for a return, the defendant cannot recover the value of the property in an action on the bond. *Clark v Norton*, 6 M 412 (277).

In the absence of a statutory provision, it is not necessary to issue an execution upon a judgment in an action in replevin before commencing suit on the bond. *Robertson v Davidson*, 14 M 554 (422).

Bond void for irregularity. *Hicks v Mendenhall*, 17 M 475 (453).

Where the surety successfully defended on the ground of an erroneous entry of judgment, he cannot contest a motion by defendant for an amendment of the judgment in the replevin suit, or appeal from an order granting the amendment. *Berthold v Fox*, 21 M 51.

The condition of a replevin bond, that plaintiff shall prosecute to effect, is broken if the action be dismissed; and an action will lie for such breach although no judgment was awarded for return of the property as there should have been. *Boom v St. P. Foundry*, 33 M 253, 22 NW 538; *Katz v Amer. Bonding Co.* 86 M 168, 90 NW 376.

A defeated plaintiff in a replevin action, cannot escape liability on his bond by procuring an ex parte order permitting him to deliver the property into court; but when sued on the bond, he may in mitigation of damages, show that the real loss is less than the value of the goods. *Hansen v Thomas*, 171 M 101, 213 NW 378.

An agent bailee may maintain an action on a replevin bond. *Kelly v Kremer*, 177 M 516, 225 NW 425.

The writ of replevin was properly vacated as the bond was for less than the value of the property. *Melin v Dalseide*, 179 M 589, 229 NW 804.

This being an action for damages for breach of the conditions of a replevin bond, the only proper judgment was a money judgment. *Plankerton v Continental Co.* 180 M 168, 230 NW 464.

In a replevin action whether neither party is in possession at time of trial, a verdict in the alternative may be granted in favor of the defendant, and the losing party may be discharged on paying into court of the amount found by the jury to be the value of the property, plus interest and costs. *Breitman v Buffalo*, 196 M 369, 265 NW 36.

565.04 REQUISITION TO SHERIFF; SERVICE AND RETURN.

HISTORY. R.S. 1851 c. 70 ss. 124, 133; P.S. 1858 c. 60 ss. 132, 141; G.S. 1866 c. 66 ss. 114, 127; 1868 c. 76 ss. 1, 2; G.S. 1878 c. 66 ss. 134, 144; G.S. 1894 ss. 5276, 5286; R.L. 1905 s. 4207; G.S. 1913 s. 7837; G.S. 1923 s. 9334; M.S. 1927 s. 9334.

The court officers had a right to peaceably enter plaintiff's abode and take possession of the property described in the replevin papers. *Durgin v Cohen*, 168 M 80, 209 NW 532.

The reason of the rule making conclusive an officer's return on a writ extends only to cases where it is collaterally attacked for the purpose of invalidating the

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officer's proceedings, or defeating the writ or some right thereby acquired. *Grossman v Lockedell*, 184 M 446, 238 NW 893.

565.05 EXCEPTION TO SURETIES; REBONDING.

HISTORY. R.S. 1851 c. 70 ss. 126, 127; P.S. 1858 c. 60 ss. 134, 135; G.S. 1866 c. 66 ss. 118, 119; G.S. 1878 c. 66 ss. 135, 136; G.S. 1894 ss. 5277, 5278; R.L. 1905 s. 4208; G.S. 1913 s. 7838; G.S. 1923 s. 9335; M.S. 1927 s. 9335.

An assignment of a judgment carries the bond and all rights under it. *Schlieman v Bowlin*, 36 M 198, 30 NW 879.

Defendant rebonded and obtained a return of the property. Verdict was for the plaintiff for the value only. As it was not in the alternate, and no showing of impossibility of return had it been so ordered, there is no liability on the bond. *New England v Bryant*, 64 M 256, 66 NW 974.

Defendant who rebonded, and who had judgment in his favor, cannot recover for any depreciation of the property during pendente lite. *Katz v Hlavac*, 88 M 57, 92 NW 506.

In an action for conversion of a team, if plaintiff proves title, the defendant has not made out a defense by showing merely that the team taken under a writ of replevin from plaintiff's husband was afterwards returned to him because rebonded by the husband. *Klein v Frerichs*, 127 M 177, 149 NW 2.

Where the owner of property brings replevin against one claiming a lien thereon, and obtains possession from the officer, the defendant failing to rebond, the plaintiff has full right to sell the property pendente lite. *Republic Co. v Brown*, 158 M 396, 197 NW 840.

Surety on defendant's bond cannot escape liability for damages for the retention of the property because after the bond was given the complaint was amended increasing the amount claimed as damages. *General Pictures v Jensen*, 190 M 236, 251 NW 270.

Whether neither party has possession, a verdict in the alternative is not violative of statutory requirements. *Breitman v Buffalo*, 196 M 370, 265 NW 36.

Priority as against a landlord's lien for rent and a mortgage on the tenant's chattels. 20 MLR 436.

565.06 JUSTIFICATION OF SURETIES.

HISTORY. R.S. 1851 c. 70 s. 128; P.S. 1858 c. 60 s. 136; G.S. 1866 c. 66 s. 120; G.S. 1878 c. 66 s. 137; G.S. 1894 s. 5279; R.L. 1905 s. 4209; G.S. 1913 s. 7839; G.S. 1923 s. 9336; M.S. 1927 s. 9336.

565.07 DELIVERY OF PROPERTY; WAIVER OF JUSTIFICATION.

HISTORY. G.S. 1866 c. 66 s. 121; G.S. 1878 c. 66 s. 138; G.S. 1894 s. 5280; R.L. 1905 s. 4210; G.S. 1913 s. 7840; G.S. 1923 s. 9337; M.S. 1927 s. 9337.

Whether landlord proceeded "in good faith" under OPA rent regulations to receive possession of premises from tenant for use as a personal dwelling was, upon the record in the instant case, a question of fact for the jury, and the court's order directing a verdict for tenant was error. *Sviggum v Phillips*, 217 M 586, 15 NW(2d) 109.

565.08 PROCEEDINGS WHEN PROPERTY IS CONCEALED.

HISTORY. R.S. 1851 c. 70 s. 130; P.S. 1858 c. 60 s. 138; G.S. 1866 c. 66 s. 125; 1877 c. 26 s. 1; G.S. 1878 c. 66 s. 142; G.S. 1894 s. 5284; R.L. 1905 s. 4211; G.S. 1913 s. 7841; G.S. 1923 s. 9338; M.S. 1927 s. 9338.

565.09 PROPERTY, HOW KEPT, AND WHEN DELIVERED BY SHERIFF.

HISTORY. R.S. 1851 c. 70 s. 131; P.S. 1858 c. 60 s. 139; G.S. 1866 c. 66 s. 126; G.S. 1878 c. 66 s. 143; G.S. 1894 s. 5285; R.L. 1905 s. 4212; G.S. 1913 s. 7842; G.S. 1923 s. 9339; M.S. 1927 s. 9339.

565.10 CLAIM OF PROPERTY BY THIRD PERSON.

HISTORY. 1865 c. 24 s. 1; G.S. 1866 c. 66 s. 137; 1877 c. 27 s. 1; G.S. 1878 c. 66 s. 154; G.S. 1894 s. 5296; 1897 c. 171; R.L. 1905 s. 4213; G.S. 1913 s. 7843; G.S. 1923 s. 9340; M.S. 1927 s. 9340.

Applicable only to cases where the property seized is found in the possession of the defendant named in the writ, or his agent, so as to create an appearance or presumption of ownership in the one in possession. *Dodge v Chandler*, 9 M 97 (87); *Barry v McGrade*, 14 M 163 (126); *Livingstone v Brown*, 18 M 308 (278) *Butler v White*, 25 M 432; *Moulton v Thompson*, 26 M 120, 1 NW 836; *Tyler v Hanscom*, 28 M 1, 8 NW 825; *Ohlson v Manderfeld*, 28 M 390, 10 NW 418; *Leshner v Getman*, 30 M 321, 15 NW 309; *Perkins v Zarrocher*, 32 M 71, 19 NW 385; *Johnson v Bray*, 35 M 248, 28 NW 504; *Hazeltine v Swensen*, 38 M 424, 38 NW 110; *Granning v Swenson*, 49 M 381, 52 NW 30; *Wood v Motter*, 88 M 123, 92 NW 523.

Where, upon process against "A", an officer takes "B's" goods, of which he is in possession through "A" as a mere custodian, in his capacity as "B's" clerk, it is not necessary for "B" as a foundation for an action against the officer to make and serve the statutory affidavit. *Jones v Town*, 26 M 173, 2 NW 473; *Lampson v Branden*, 28 M 526, 11 NW 94; *North. R. I. v Hackett*, 165 M 283, 206 NW 446.

The affidavit and notice may be served on the deputy sheriff who made the levy and has the property in his possession. *Williams v McGrade*, 13 M 174 (165).

An attorney of a non-resident has implied authority to execute a bond in the name of his client under this section. *Schoregge v Gordon*, 29 M 367, 13 NW 194.

The statute is designed for the protection of the officer in the discharge of his duties. *Leshner v Getman*, 30 M 321, 15 NW 309; *Heberling v Jaggar*, 47 M 70, 49 NW 396; *Schneider v Anderson*, 77 M 124, 79 NW 603; *Kiewel v Tanner*, 105 M 50, 117 NW 231.

A statement in the affidavit that the claimant is the owner of the property is a sufficient statement of the ground of his title or right to possession, at least where he is the general owner. The affidavit should allege the claimant's ownership as of the time of the levy as well as of the time of the demand. An agent making an affidavit may state the facts as upon information furnished him by his client. *Carpenter v Bodkin*, 36 M 183, 30 NW 453; *Schneider v Anderson*, 77 M 124, 79 NW 603.

Failure to serve the affidavit did not avoid a verdict where the only issue tried related to other matters. *Gilbert v Gohyee*, 103 M 459, 115 NW 640.

The statements in the affidavit were sufficient. *Krall v Moritz*, 112 M 270, 127 NW 1020.

A provision in a farm contract reserving the title to the cropper's share as security for advances should be filed as a chattel mortgage; but if the landowner takes possession of the grain before any other lien attaches, his rights are superior even though his mortgage was not on file. *Nelson v McDonald*, 153 M 475, 191 NW 281.

This section does not apply if the officer takes the property from the possession of the claimant, and not from the execution defendant. *Haubrich v Heaney*, 161 M 93, 200 NW 930.

Failure by a third party to make claim under section 565.10, does not relieve the judgment creditor from liability for conversion in the levy of an execution. *Lundgren v Western Bank*, 189 M 476, 250 NW 1.

The holder of a lien which is superior to a chattel mortgage is not estopped by his mere silence to assert his superior right against a purchaser with notice at the foreclosure sale under the chattel mortgage. *Connor v Caldwell*, 208 M 505, 294 NW 650.

Plaintiff being in unlawful possession of land and of the trees standing thereon, the unlawful severance of the trees by defendant did not deprive plaintiff of possession of logs made therefrom; but when defendant removed them from the land, it took them from plaintiff's possession as regards his right to maintain replevin therefor. *Cloquet v Burns*, 207 F. 40.

The provision of section 565.10 applies to the court officer of the municipal court of the city of Virginia. 1934 OAG 293, May 17, 1933 (59a-41).

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Liability of sheriffs and constables to third parties growing out of wrongful levies. 23 MLR 801.

565.11 PLAINTIFF AND SURETIES FIRST LIABLE IN ACTION FOR TAKING.

HISTORY. 1865 c. 24 s. 2; G.S. 1866 c. 66 s. 138; G.S. 1878 c. 66 s. 155; G.S. 1894 s. 5297; 1897 c. 171; R.L. 1905 s. 4214; G.S. 1913 s. 7844; G.S. 1923 s. 9341; M.S. 1927 s. 9341.

Each writ having been levied upon all the property, and the sheriff having been charged as for a conversion of the whole in a sum exceeding the amount of the penalties in all of the bonds, the obligors in the several bonds should be charged to the extent of the penalties named in their respective bonds. *Leshner v Getman*, 30 M 321, 15 NW 309; *Richardson v McLaughlin*, 55 M 489, 57 NW 210.