

Compensatory and Collection Remedies

CHAPTER 570

ATTACHMENT

570.01 WHEN AND IN WHAT CASES ATTACHMENT ALLOWED.

HISTORY. R.S. 1851 c. 70 ss. 134 to 136; 1852 Amend. p. 10; P.S. 1858 c. 60 ss. 142 to 144; G.S. 1866 c. 66 ss. 128 to 130; 1867 c. 66 s. 1; G.S. 1878 c. 66 ss. 145 to 147; G.S. 1894 ss. 5287 to 5289; R.L. 1905 s. 4215; G.S. 1913 s. 7845; G.S. 1923 s. 9342; M.S. 1927 s. 9342.

1. Nature of proceedings
2. Statute to be followed strictly
3. Matter of right
4. In what actions allowed
5. At what time may issue
6. Jurisdiction, how acquired.
7. Who may allow writ
8. Effect of bankruptcy

1. Nature of proceedings

An attachment may issue in an action for the recovery of money, whether sounding in tort or contract; and an order vacating an attachment is appealable. *Davidson v Owens*, 5 M 69 (50).

The attachment of the separate interest of one partner in a partnership debt is not a defense to an action brought by the remaining partner, in the name of the partnership, against the debtor in whose hands the property is attached, for the recovery of the debt due to the firm. *Day v McQuillan*, 13 M 205 (192).

An attachment is a provisional remedy in the action, and does not confer jurisdiction to enter judgment against the defendant without a service of the summons in the matter prescribed by statute. *Heffner v Gunz*, 29 M 108, 12 NW 342; *Barker v Morris*, 37 M 194, 33 NW 559.

An attaching creditor is "a creditor having a lien" within the meaning of the statute relating to real estate. *Atwater v Manchester Bank*, 45 M 346, 48 NW 187.

For purposes of attachment, a debt has a situs wherever the debtor can be found. It is immaterial that the debt was not made payable in the state where attachment proceedings are instituted. *Harvey v Gt. Northern*, 50 M 405, 52 NW 905.

The pending of a prior action in another state, which binds the debt, may be set up by way of defense to a suit by the defendant in the attachment in this state to recover the same debt. *Harvey v Gt. Northern*, 50 M 405, 52 NW 905.

That land is exempt as a homestead is not in the instant case a ground for dissolution of an attachment; nor is an order dissolving the attachment an adjudication that the homestead was on the land attached. *Rossing v Larson*, 162 M 176, 202 NW 711.

The property attached was held in trust for the husband by the wife and a binding judgment was properly taken against both trustee and cestui que trust. *Capital Trust v Knauff*, 172 M 83, 214 NW 771.

Property was attached by a creditor and this plaintiff sued the sheriff in conversion. If the plaintiff in the attachment suit had a valid attachment, when plaintiff in the instant case started suit, section 511.01 casts the burden on the instant plaintiff to support her mortgage by evidence. *Glasser v O'Brien*, 172 M 355, 215 NW 517.

An attachment against one having only a bare legal title to land without any beneficial interest therein, the attaching creditor having knowledge of the facts, does not create a lien. *Scott v Marquette*, 173 M 225, 217 NW 136.

Assignment of farm lease whereby lessor assigned all his interest thereunder did not in this case constitute a chattel mortgage so as to require filing under the provisions of section 570.01, in order to be valid against creditor attaching lessor's interest subsequent to the date of the assignment. *Federal Bank v Smaagaard*, 192 M 21, 256 NW 102.

Attachment is a provisional remedy, purely statutory, and has for its object the satisfaction of such judgment as plaintiff may recover in his action. It is a purely ancillary remedy. *Reiling v Wood*, 202 M 576, 279 NW 579.

Relation between renter of safe-deposit box and the safe-deposit company. 11 MLR 449.

2. Statute to be followed strictly

Bonds issued by a state are personal property and to constitute a levy on them, they must be actually taken into the custody of the sheriff. *Caldwell v Sibley*, 3 M 406 (300).

An affidavit for an attachment is a jurisdictional prerequisite to the issuance of a valid writ against the property of a non-resident. An affidavit which wholly fails to state the grounds of plaintiff's claim against defendant is fatally defective, and confers no jurisdiction to allow the writ. *Duxbury v Dahle*, 78 M 427, 81 NW 198.

The return of the sheriff that defendant cannot be found must be acted upon within a reasonable time. If not, another return must be obtained and filed. An action must be begun not later than 60 days after the issuance of a writ of attachment. *Haney v Haney*, 163 M 121, 203 NW 614.

Service by publication is in derogation of the common law, and all statutory requirements must be strictly complied with. An affidavit for publication of a summons must be filed and publication commenced within a reasonable time after the sheriff's return of not found is made. *Wiik v Russell*, 173 M 583, 218 NW 110.

3. Matter of right

The "absolute right" of plaintiff to a writ upon condition he "make affidavit" is subject to the existence of the facts stated. Upon a defendant's motion to vacate a writ on account of the alleged untruth of the statement, it is competent for the district court to inquire into the truth or falsity of such statement for the purpose of determining said motion. *Nelson v Gibbs*, 18 M 541 (485); *Callanan v Callanan*, 188 M 611, 248 NW 45.

In replevin by a mortgagee of personal property against a sheriff attaching it as the property of the mortgagor, where the defense is that the mortgage is fraudulent as against the mortgagor's creditors, the sheriff must prove the existence of the debt on which the attachment issued; and by evidence other than the files in the case. *Braley v Byrnes*, 20 M 435 (389).

If a writ be issued on a defection affidavit, and defendant makes no appearance, the proceedings are void, and may be assailed collaterally. *Duxbury v Dahle*, 78 M 427, 81 NW 198.

4. In what actions allowed

A writ may be issued in an action for recovery of money, whether sounding in tort or not. *Davidson v Owens*, 5 M 69 (50); *Morrison v Lovejoy*, 6 M 183 (117).

The affidavit may be made on information and belief. The allowance of the writ is a judicial act, and under the constitution cannot be exercised by the clerk. *Morrison v Lovejoy*, 6 M 183 (117).

A writ of attachment may issue in an action for alienation of affections. *Stockhaus v Lind*, 149 M 423, 183 NW 844.

Where real estate is sold by an executor, the fact that an attachment had been levied upon the interest of one of the heirs to the property, is of no im-

portance in an action to quiet title. The attachment by operation of law is transferred from the interest of the heir in the property to his interest in the proceeds of the sale. *Morrison v Parry*, 161 M 252, 201 NW 422.

The property of a foreign railroad company operating no line of railroad in this state is not immune to attachment of its property used in interstate commerce, where the plaintiff is a resident of this state and the course of action is for damages to goods in transportation, received by said company as the initial carrier. *Rosenblet v Pere Marquette*, 162 M 55, 202 NW 56.

Section 570.01 expressly excepts from its operations actions for libel and slander. It does not except actions for slander of title. *Quevli v Union Svgs. Bank*, 178 M 27, 226 NW 191.

Attachment in an action for slander of title. 14 MLR 78.

5. At what time may issue

The writ of attachment may be obtained at the time of issuing the summons, or at any time thereafter. The affidavit need not state that the action in which the writ is sought has been commenced. *Blake v Sherman*, 12 M 420 (305).

It will be presumed that the summons issued at or before the time at which the attachment issued. *Blackman v Wheaton*, 13 M 326 (299).

Before the filing of a notice of lis pendens can be effectual, the action must be commenced by service of the summons upon the defendant. *Spencer v Koell*, 91 M 226, 97 NW 974; *Clements v Utley*, 91 M 352, 98 NW 188.

Distinction between garnishment and attachment. *Hudson v Patterson*, 123 M 332, 143 NW 792; *Wagner v Farmers Coop.* 147 M 380, 180 NW 231.

To constitute issuance of a summons it must be either served or delivered to the proper officer for service; and under section 570.01 the summons must be issued at or before the time the writ of attachment issues. *Borgen v Corty*, 181 M 349, 232 NW 512.

What constitutes issuance of a summons. 16 MLR 442.

6. Jurisdiction, how acquired

An attachment is a provisional remedy in the action, and does not confer jurisdiction to enter judgment against the defendant without a service of the summons as prescribed by statute. *Heffner v Gunz*, 29 M 108, 12 NW 342.

The action is not commenced by the attachment but by service of summons and failure to make such service, actual or constructive, as authorized by statute, leaves the court without jurisdiction. *Barber v Morris*, 37 M 194, 33 NW 559.

An action against a non-resident, although in form in personam, is in effect in rem, as it is only by attaching property that the court acquires jurisdiction to proceed further, and then only to the extent of the property attached. *Kenney v Goergen*, 36 M 190, 31 NW 210; *Cousins v Alworth*, 44 M 505, 47 NW 169; *Daly v Bradbury*, 46 M 396, 49 NW 190; *Plummer v Hatton*, 51 M 181, 53 NW 460.

Practice in proceedings in attachment under the log lien law. *Breckke v Duluth Log Co.* 101 M 110, 111 NW 919.

Attachment of chamber of commerce membership of a non-resident. *Wagner v Farmers Coop.* 147 M 376, 180 NW 231.

Action under the Carmak Amendment against initial carrier is maintainable only where service can be had in manner permissible in federal courts. *Pratt v Denver & Rio Grande*, 284 F 1009.

A suit brought in a state court by one foreign corporation against another on a foreign cause of action is not an unreasonable burden on interstate commerce; reviewing 189 M 507, 250 NW 186. *International Milling v Columbia Trans.* 292 US 520.

7. Who may allow writ

The allowance of a writ of attachment is a judicial act, and under the constitution cannot be exercised by the clerk. *Morrison v Lovejoy*, 6 M 183 (117);

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Zimmerman v Lamb, 7 M 421 (336); Guerin v Hunt, 8 M 477 (427); Jacoby v Drew, 11 M 408 (301).

Parties procuring a void attachment to be issued are not protected by the fact that it was issued under a statute which was unconstitutional. Meritt v City of St. Paul, 11 M 223 (145).

Court commissioner has the power of a district judge in chambers. Clements v Utley, 91 M 352, 98 NW 188.

8. Effect of bankruptcy

A trustee in bankruptcy, may reclaim property under attachment; or, upon securing an order from the court, he may retain the benefit of the attachment, if such course inure to the benefit of the estate; but the authority to retain the attachment rests upon such order. Watschke v Thompson, 85 M 105, 88 NW 263.

Leins obtained within four months of bankruptcy avoidable only by bankrupt's trustee or those claiming under him. Swaney v Hasara, 164 M 416, 205 NW 274; Martin v Green Lake, 166 M 405, 208 NW 21.

Garnishment and bankruptcy. 27 MLR 49.

570.02 CONTENTS OF AFFIDAVIT.

HISTORY. R.S. 1851 c. 70 s. 136; 1852 Amend. p. 10; P.S. 1858 c. 60 s. 144; G.S. 1866 c. 66 s. 130; 1867 c. 66 s. 1; G.S. 1878 c. 66 s. 147; G.S. 1894 s. 5289; R.L. 1905 s. 4216; G.S. 1913 s. 7846; G.S. 1923 s. 9343; M.S. 1927 s. 9343.

1. Debt fraudulently contracted
2. Non-resident
3. Departed from the state
4. Transfer with intent to defraud
5. Generally

2. Non-resident

Affidavit for attachment against a non-resident need not state that he has property in the state subject to attachment. Kenny v Goergen, 36 M 190, 31 NW 210.

An affidavit upon which to serve the summons by publication in an action against a non-resident must state positively, and not on information and belief, that the defendant has property within the state. Distinguishing other cases. Firkert v Wilson, 38 M 341, 37 NW 585.

3. Departed from the state

A debtor sold all his non-exempt property and started to remove to another state, with the intention of establishing a residence there. While on the way, but as yet in the state, an attachment was levied on his horse. He was still a resident of the state, within the meaning of the exemption laws, and the horse was exempt. Grimstad v Lofgren, 105 M 286, 117 NW 515.

An affidavit stating "that the defendant has or is about to dispose of his property with intent to defraud his creditor, the plaintiff" is bad. Porter v Boehme, 160 M 127, 199 NW 895.

Comparative survey of Minnesota decisions, and restatement of the law, as to conflict of laws relating to domicile. 15 MLR 668, 673.

4. Transfer with intent to defraud

An allegation "that the defendant has assigned, secreted, or disposed of his property with intent to delay or defraud his creditors" is sufficient. Guile v McNanny, 14 M 520 (391); Brown v Mpls. Lbr. 25 M 461.

An allegation "that defendant has disposed of a part of his property with intent thereby to delay and defraud the plaintiff and is about to dispose of the

rest of his property with the same intent" is sufficient. *Nelson v Munch*, 23 M 229; *Auerbach v Hitchcock*, 28 M 73, 9 NW 79; *First Bank v Hultgren*, 187 M 502, 245 NW 829.

A preferential transfer or payment, without actual fraud, does not constitute a disposition of property with intent to delay and defraud creditors, so as to authorize the issuance of a writ of attachment. *Crookston Bank v Lee*, 124 M 112, 144 NW 433.

Under the circumstances of this case a chattel mortgage given to secure a preexisting debt, while a constructive fraud will not alone support an attachment made on the ground that a debtor has assigned, secreted and disposed of his property with intent to defraud his creditors. An actual personal intent to defraud is necessary. *Harris v Spencer*, 130 M 141, 153 NW 125.

Preponderance of weight given by the lower court to the affidavit of the plaintiff, the order of the trial court in denying defendant's motion to discharge the writ is sustained. *Gen'l Woodwork v N. W. Body Co.* 155 M 509, 193 NW 595.

A transfer of property may be preferential without being fraudulent; and in this case the amount transferred to secure payment of a past due debt, being less in value than the amount of the debt, the transaction is not fraudulent. *Van Dane v Baker*, 164 M 130, 204 NW 633.

The findings of the jury, that the creditor proved his attachment valid, and the chattel mortgagee failed to prove she was a good faith mortgagee. *Glasser v O'Brien*, 172 M 355, 215 NW 517.

The proof of expressed intentions to transfer property without any proof of extrinsic fact or circumstances was insufficient in the instant case to justify an attachment. *Stricker v Trullinger*, 172 M 547, 216 NW 231.

Affidavit and proof under clause 4 held sufficient. *Callanan v Callanan*. 188 M 611, 248 NW 45.

An actual personal intent to delay or defraud creditors is necessary to support an attachment. Proof of a preferential transfer without other proof of fraud is not sufficient. *Reiling v Wood*, 202 M 576, 279 NW 579.

Uniform fraudulent conveyance act. How may the creditor proceed. 7 MLR 545.

Chattel mortgages; retention of possession and non-filing. 24 MLR 838.

5. Generally

Allegations of affidavit must be positive and not on information and belief. Except as expressly authorized it is insufficient to allege facts "as deponent verily believes". *Morrison v Lovejoy*, 6 M 183 (117); *Murphy v Purdy*, 13 M 422 (390); *Ely v Titus*, 14 M 125 (93); *Feikert v Wilson*, 38 M 341, 37 NW 585.

Several grounds, if they are not inconsistent may be alleged, but an allegation that defendant is about to dispose of property, and that he has disposed of it, are inconsistent. *Hinds v Fogebank*, 9 M 68 (57); *Guile v McNanny*, 14 M 520 (391).

To the same effect, but distinguishing *Hinds v Fogebank*, 9 M 68 (57). *Nelson v Munch*, 23 M 229.

It is not necessary to allege that summons has been issued or suit commenced. *Blake v Sherman*, 12 M 420 (305).

While several grounds may be alleged if not inconsistent, they must not be alleged disjunctively. *Guile v McNanny*, 14 M 520 (391); *Auerbach v Hitchcock*, 28 M 73, 9 NW 79.

In the absence of a rule of court or statute requiring it, the subscription to an affidavit by affiant is not necessary. *Norton v Hangl*, 47 M 405, 50 NW 368.

An affidavit is not void because entitled in an action not actually commenced when the affidavit was sworn to. *Crombie v Little*, 47 M 581, 50 NW 823.

If an affidavit is made by an agent or attorney, it should state or recite that affiant is such agent or attorney. *State v Madigan*, 57 M 425, 59 NW 490; *West v Berg*, 66 M 287, 68 NW 1077.

An attachment is discharged as to an assignee in a general assignment for the benefit of creditors by an amendment to the complaint and affidavit for at-

tachment, made after the execution of the assignment, substituting an entirely different and distinct cause of action for the one set up in the original complaint and affidavit. *Heidel v Benedict*, 61 M 170, 63 NW 490.

An affidavit is a jurisdictional prerequisite to the issuance of a valid writ, and a judgment based on an insufficient affidavit is void and is subject to collateral attack. If the grounds are not stated, the affidavit is fatally defective. *Duxbury v Dahle*, 78 M 427, 81 NW 198.

As plaintiff was unable to furnish evidence of the truth of his affidavit, the writ was properly discharged. *McCleery v Davidson*, 157 M 283, 195 NW 1015.

The charge in an affidavit for attachment, of one ground for attachment, cannot be sustained by proof that another ground for attachment existed. *First Nat'l v Morrow*, 161 M 358, 201 NW 442.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. *Sheehan v First Nat'l*, 163 M 294, 204 NW 38.

The affidavit on which the attachment of the homestead was based purported to be authorized by Minnesota Constitution, Article 1, Section 12. This was in lieu of the grounds provided in section 570.02. The writ was properly set aside. *Westerman v Raschke*, 167 M 243, 208 NW 960.

A writ may be vacated either because the statute has not been complied with in its allowance and issuance or because the statements in the affidavit are untrue. When the defendant denies the statements in the affidavit, generally the burden is on the plaintiff to prove them. *Reiling v Wood*, 202 M 576, 279 NW 579.

Relation between renter of safe deposit box and the safe deposit company. 11 MLR 449.

570.03 CONDITIONS OF BOND.

HISTORY. R.S. 1851 c. 70 s. 137; P.S. 1858 c. 60 s. 145; G.S. 1866 c. 66 s. 131; G.S. 1878 c. 66 s. 148; 1885 c. 125; G.S. 1894 s. 5290; R.L. 1905 s. 4217; G.S. 1913 s. 7847; G.S. 1923 s. 9344; M.S. 1927 s. 9344.

The obligors upon a statutory attachment bond are liable to the defendant upon the bond for all costs which may be awarded to him in the action, and not merely for such as may result from the attachment. Attorney's fees expended in defending the principal action are not recoverable. *Crandall v Rickley*, 25 M 119; *Frost v Jordan*, 37 M 544, 36 NW 713; *Greaves v Newport*, 41 M 240, 42 NW 1059.

An undertaking may be given in lieu of an attachment bond. In this case the defect in the undertaking is not jurisdictional. *Schweigel v Shakman*, 78 M 142, 80 NW 871, 81 NW 529.

While the statute requires a particular form of affidavit, it does not specify a particular bond. If there is an error in the bond, it may be cured by filing a sufficient bond nunc pro tunc. *Schweigel v Shakman*, 78 M 142, 80 NW 871, 81 NW 529; *Duxbury v Dahle*, 78 M 432, 81 NW 198.

No liability arises under an attachment bond, given pursuant to statute, from a judgment of dismissal, where the record shows that it was entered pursuant to a stipulation. *Downs v Amer. Surety*, 132 M 201, 156 NW 5.

570.04 ISSUANCE, CONTENTS, AND SCOPE OF WRIT.

HISTORY. R.S. 1851 c. 70 ss. 138, 139; P.S. 1858 c. 60 ss. 146, 147; G.S. 1866 c. 66 ss. 132, 133; G.S. 1878 c. 66 ss. 149, 150; G.S. 1894 ss. 5291, 5292; R.L. 1905 s. 4218; G.S. 1913 s. 7848; G.S. 1923 s. 9345; M.S. 1927 s. 9345.

1. Form of writ
2. Held attachable
3. Not attachable

1. Form of writ

A slight variance between the amounts as stated in the summons and in the complaint is immaterial. *Shaubut v Hilton*, 7 M 506 (412).

The writ need not state by what officer it was allowed. *Shaubut v Hilton*, 7 M 506 (412).

The writ must be under seal of court, dated, signed by the clerk, and listed in the name of the presiding judge. *Wheaton v Thompson*, 20 M 196 (175); *O'Farrell v Heard*, 22 M 189. See rules of court.

Court commissioners retain the power to authorize writs of attachment. A writ signed "L. H. Prosser, Clerk, By D. W. Bacon", was properly signed. *Clements v Utley*, 91 M 352, 98 NW 188.

2. Held attachable

Where an officer has an execution against one part owner of a chattel, he must seize the whole chattel, though he can only sell the interest of the defendant, and this whether the ownership be by virtue of a partnership relation or as tenants in common. *Caldwell v Hebert*, 4 M 217 (156); *Allis v Day*, 13 M 199 (189); *Day v McQuillan*, 13 M 205 (192); *Barrett v McKenzie*, 24 M 20; *Wickham v Davis*, 24 M 167; *Hankey v Becht*, 25 M 212; *Moquist v Chappel*, 62 M 258, 64 NW 567.

Property previously fraudulently conveyed may be attached. *Arper v Baze*, 9 M 108 (98).

The interest of a vendor under a contract for the sale of land is attachable. *M. & St. L. v Wilson*, 25 M 382; *Welles v Baldwin*, 28 M 408, 10 NW 427; *Coolbaugh v Roemer*, 30 M 424, 15 NW 869; *Berryhill v Potter*, 42 M 279, 44 NW 251.

The interest of a vendee under a contract of sale is attachable. *Reynolds v Fleming*, 43 M 513, 45 NW 1099.

Equitable, as well as legal, estates in land are subject to attachment or sale on execution. *Atwater v Manchester Bank*, 45 M 345, 48 NW 187.

The trial court did not err in directing judgment to the effect that the plaintiff's judgment was a lien on the reserved interest of the judgment debtor in the land, and that such interest be sold to pay the judgment. *Fryberger v Berven*, 88 M 311, 92 NW 1125.

The lien acquired by a creditor, who causes land of his debtor to be attached, is not affected by bankruptcy proceedings instituted more than four months thereafter, and notwithstanding debtor's subsequent discharge in bankruptcy, the lien may be enforced by execution. *Sheehan v First Nat'l*, 163 M 294, 204 NW 38.

Is the interest of a conditional buyer of personal property attachable. 13 MLR 247.

3. Not attachable

Proceedings by attachment not being of a remedial nature, the statute must be strictly construed, so that money or other personal property of like nature which the debtor refuses to deliver into the custody of the officer, cannot be reached by the writ. *Caldwell v Sibley*, 3 M 406 (300).

There is nothing tangible in prospective profits so that an interest in profits growing out of the use of property is not subject to attachment. *Vose v Stickney*, 8 M 75 (51); *Hankey v Becht*, 25 M 212.

Property in custodia legis is not attachable. *Noyes v Beaupre*, 32 M 496, 21 NW 728; *North Star v Lovejoy*, 33 M 229, 22 NW 388; *Strong v Brown*, 41 M 304, 43 NW 67; *Barnes v Verry*, 154 M 257, 191 NW 589.

The mortgagee has no interest in the land covered by the mortgage subject to levy or to the lien of a judgment, prior to foreclosure. *Butman v James*, 34 M 547, 27 NW 66.

The equitable interest of a residuary legatee in a trust fund is not attachable. *Merriam v Wagener*, 74 M 215, 77 NW 46.

A railroad car of a foreign company sent into this state with freight to be delivered here and there, within a reasonable time necessary for its return, reloaded, and in the customary and usual course of business forwarded to the state from which it came, is not liable to attachment issued in an action in our courts. *Connery v Quincy Railroad*, 92 M 20, 99 NW 365.

570.05 EXECUTION OF WRIT.

HISTORY. R.S. 1851 c. 70 s. 140; 1856 c. 5 s. 11; P.S. 1858 c. 60 s. 148; 1861 c. 17 s. 1; 1861 c. 39 s. 1; G.S. 1866 c. 66 ss. 134, 143; 1868 c. 68 s. 1; G.S.

1878 c. 66 ss. 151, 160; 1881 c. 63 s. 1; 1883 c. 102 s. 1; 1885 c. 110; G.S. 1894 ss. 5293, 5302; R.L. 1905 s. 4219; G.S. 1913 s. 7849; G.S. 1923 s. 9346; M.S. 1927 s. 9346.

1. Levy on realty
2. Levy on personalty
3. Lien on realty

1. Levy on realty

The purpose and necessity of seizure is to hold the property under the jurisdiction and control of the court, so that it shall abide the judgment. In respect to movable property, which may be within reach today, and beyond it tomorrow, this end can be secured only by taking the property into the custody of the court. In respect to immovable property, within the territorial jurisdiction of the court, an actual seizure is not necessary. Constructive seizure is sufficient. The method of seizure must be such as is required by statute. *Chauncey v Wass*, 35 M 24, 25 NW 457, 30 NW 826.

The record in the office of the register of deeds of an attachment of real property, made in conformity with the statute, is admissible in evidence on the trial of an action involving the title to real property. *Cousins v Alworth*, 44 M 505, 47 NW 169; *Carson v Shoemaker*, 55 M 397, 57 NW 134.

A written contract, whereby the equitable owner of timber lands under contract of sale undertook to sell timber, constitutes a sale of the timber, which was not reduced to a mere license or right to cut by a restriction contained in the land contract, against alienation of less than the whole of the contract or the land or without the vendor's approval. The estate and rights of the timber vendee, its contract being of record, were not affected by subsequent attachment and *lis pendens* against the interest of the timber vendor, nor by the latter's subsequent assignment of its land contract and conveyance of the land, such, therefore, not constituting breaches of the timber sale contract. *Gulledge v Wenatchee*, 126 M 176, 148 NW 43.

Within the statutory time after levy plaintiffs presented to the sheriff their selection of a homestead. It was ignored. Defendants cannot contest the selection. *Rossing v Larson*, 162 M 176, 202 NW 711.

2. Levy on personalty

In order to constitute a levy on personalty, the attaching officer must actually take the property into his custody. *Caldwell v Sibley*, 3 M 406 (300).

Book accounts cannot be levied upon by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy, they stand just as debts of which there is no written evidence, and must be levied upon in the same way. *Swart v Thomas*, 26 M 141, 1 NW 830.

Where an officer made a valid levy on cord wood, by marking the piles, leaving a watchman in possession, and filing the required certificate of return in the office of the town clerk, he exercised such dominion over the property to the exclusion of the lawful owner (not being the defendant in the attachment) as being wrongful, constitutes a conversion as respects such owner. *Malm v Barton*, 27 M 530, 8 NW 765.

The assignee under a general assignee for benefit of creditors had in his possession the books of account of the assignor. The assignment being void as to creditors, a creditor sought to garnish the debts by service on the assignee. This was ineffectual. Garnishment can only be made by proper service of the garnishment summons on the debtor owner of such debts. *Ide v Harwood*, 30 M 191, 14 NW 884; *Leshner v Getman*, 30 M 321, 15 NW 309.

Plaintiff (defendant in this action) caused a writ of attachment to issue and put in the hands of the sheriff, who seized property, not in the possession of defendant (in that action) and sold it on execution. Plaintiff (defendant in this action) bid in the property and retained it. This constitutes conversion and a demand for a return of the property is unnecessary. *N. Rock Isl. v Hackett, Gates*, 165 M 282, 206 NW 446.

Shares of stock are personal property in the form of a property interest in a corporation. In Minnesota, shares of stock are the subject of attachment and levy of execution. *Wackerbarth v Weisman*, 207 M 510, 292 NW 214.

Execution sale of stock was properly conducted pursuant to sections 570.05 and 550.14, and physical possession of the certificates by the sheriff at time of sale was not necessary. *Brennan v Friedell*, 215 M 499, 10 NW(2d) 355.

Situs of corporate stocks under the uniform stock transfer act for purposes of attachment. 23 MLR 381.

3. Lien on realty

When the statutory steps were taken, the attaching creditor secured a lien on the real property attached. *Cousins v Alworth*, 44 M 508, 47 NW 169.

Where jurisdiction is obtained, in an action against a non-resident, by attaching his property and publishing the summons, the attachment lien is not waived or lost by entering a general money judgment and issuing a general execution, when the attached property is sold on execution. *Hencke v Twomey*, 58 M 550, 60 NW 667.

Acts of bankruptcy; lien by legal proceedings; preferential transfer. 25 MLR 102.

570.06 INVENTORY, SERVICE AND RETURN.

HISTORY. R.S. 1851 c. 70 ss. 140, 155; 1856 c. 5 s. 11; P.S. 1858 c. 60 ss. 148, 163; 1861 c. 17 s. 1; 1861 c. 39 s. 1; G.S. 1866 c. 66 ss. 134, 142; G.S. 1878 c. 66 ss. 151, 159; 1881 c. 63 s. 1; G.S. 1894 ss. 5293, 5301; R.L. 1905 s. 4220; G.S. 1913 s. 7850; G.S. 1923 s. 9347; M.S. 1927 s. 9347.

A return which states that the sheriff attached "all debts and indebtedness due or owing by AB to CD" does not include the interest of CD in a partnership debt owned by a firm, of which he is a member, not a party to the action. *Allis v Day*, 13 M 199 (189).

An outgoing sheriff made an attachment. His successor, with the consent of the plaintiff, returned it, "no property found". This was an abandonment by the plaintiff in the execution of the lien acquired by the levy of the attachment. *Butler v White*, 25 M 432.

The return of the sheriff is conclusive upon him and his representatives. *State v Penner*, 27 M 269, 6 NW 790.

Upon the dissolution of a writ of attachment, the officer is not bound to retain the property to enable the plaintiff to appeal from the order dissolving it, and give a stay bond. *Ryan Drug v Peacock*, 40 M 470, 42 NW 298.

The original writ, with the certificate of an attachment endorsed thereon, is also admissible in evidence, although not returned and filed with the clerk of the court until long after the entry of judgment. *Cousins v Alworth*, 44 M 505, 47 NW 169.

The failure of the sheriff, in making his return to the writ of attachment, to state whether or not he had served the writ on the defendant, is not a jurisdictional defect. *Schweigel v Shakman*, 78 M 142, 80 NW 871, 81 NW 529.

570.07 PERISHABLE PROPERTY TO BE SOLD; CREDITS COLLECTED.

HISTORY. R.S. 1851 c. 70 s. 143; P.S. 1858 c. 60 s. 151; G.S. 1866 c. 66 s. 136; G.S. 1878 c. 66 s. 153; G.S. 1894 s. 5295; R.L. 1905 s. 4221; G.S. 1913 s. 7851; G.S. 1923 s. 9348; M.S. 1927 s. 9348.

Bonds issued by the state are "personal property capable of manual delivery to the sheriff" and unless actually taken into his custody, the levy cannot hold. *Caldwell v Sibley*, 3 M 406 (300).

If an officer levies upon notes and takes them into his possession, under process valid on its face, he can maintain an action on them under the statute, and a payment to him by the debtor would be valid, and a recovery by him would be a bar to a second recovery by anyone else. *Rohrer v Turrill*, 4 M 407 (309).

As to sale of a stock of merchandise. *Wheaton v Thompson*, 20 M 196.

570.08 JUDGMENT FOR PLAINTIFF, HOW SATISFIED.

HISTORY. R.S. 1851 c. 70 s. 148; P.S. 1858 c. 60 s. 156; G.S. 1866 c. 66 s. 139; G.S. 1878 c. 66 s. 156; G.S. 1894 s. 5298; R.L. 1905 s. 4222; G.S. 1913 s. 7852; G.S. 1923 s. 9349; M.S. 1927 s. 9349.

After judgment is entered the lien of the attachment is merged in the judgment. *McDonald v Clark*, 53 M 230, 54 NW 1118.

When judgment is recovered the practice is to enter a general money judgment and issue a general execution without referring to attachment. *Hencke v Twomey*, 58 M 550, 60 NW 667.

570.09 MOTION TO VACATE.

HISTORY. R.S. 1851 c. 70 s. 154; P.S. 1858 c. 60 s. 162; G.S. 1866 c. 66 s. 141; 1867 c. 66 s. 3; G.S. 1878 c. 66 s. 158; G.S. 1894 s. 5300; R.L. 1905 s. 4223; G.S. 1913 s. 7853; G.S. 1923 s. 9350; M.S. 1927 s. 9350.

1. When may be made
2. Notice
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1. When may be made

A defendant who has answered in the action may move to vacate a writ of attachment so long as the answer stands undisposed of. Such motion may be made before any levy is made under the writ. *First Nat'l v Randall*, 38 M 382, 37 NW 799.

A motion to vacate an attachment cannot be made after final judgment has been entered in the action. *McDonald v Clark*, 53 M 230, 54 NW 1118.

2. Notice

The defendant served on the plaintiff that he would move the district court "at the next special or adjourned term thereof to be held on the 28th day of January, 1867" for an order vacating the attachment. Held a sufficient notice. *Blake v Sherman*, 12 M 420 (305).

3. Who may move

An assignor for the benefit of creditors has such an interest in the assigned estate as to entitle him to defend it when attached for his debts, and to move to vacate the attachment. *Richards v White*, 7 M 345 (271); *First Nat'l v Randall*, 38 M 382, 37 NW 799.

4. Effect of failure to move

Where a void warrant of attachment, issued under an unconstitutional statute, is issued and executed, the parties procuring its issuance are trespassers; and are not protected by the fact that defendant did not move to vacate it. *Merritt v City of St. Paul*, 11 M 223 (145).

5. Practice on hearing

Where the affidavits, offered in opposition to the motion, show that the moving party is entitled to the relief sought, though upon a ground not stated in the

moving papers, he may take advantage of the ground thus shown. *Richards v White*, 7 M 345 (272).

It rests on the court to determine the truth or falsity of allegations of fact in an affidavit on which an attachment is issued. *Nelson v Gibbs*, 18 M 541 (485); *Draught v Collins*, 20 M 374 (325).

Counter affidavits may be admitted. Defendant may use his verified answer as an affidavit. *Nelson v Munch*, 23 M 229; *Carson v Getchell*, 23 M 571.

Whether a continuance may be granted to procure other affidavits, and as to what affidavits may be received, and in what order are matters of judicial discretion. *Carson v Getchell*, 23 M 571.

Where the defendant traverses facts alleged as grounds for attachment the burden is on plaintiff to prove their truth and this he must do by competent evidence. A mere reiteration of the general statement of his original affidavit in the language of the statute, or a statement of mere opinion or belief, is not sufficient. *Jones v Swank*, 51 M 285, 53 NW 634.

Where counter-affidavits clearly and specifically state a badge of fraud they are not overcome or sufficiently contradicted by the general statements in the moving affidavits denying fraud. *Rosenberg v Burnstein*, 60 M 18, 61 NW 684.

The conclusion of the trial court is within the rule in *Hicks v Stone*, 13 M 398 (434). The presumption in favor of such a conclusion has been specifically applied to attachment cases. Where the affidavit for the attachment and the affidavits in opposition are "such as might reasonably lead different minds to opposite conclusions as to the fact in question," and there being no clear preponderance of proof opposed to the decision of the court below, it should not be reversed. *First Nat'l v Randall*, 38 M 382, 37 NW 799; *Schoeneman v Sowle*, 102 M 469, 113 NW 1061; *Phillips Petroleum v Jacobson*, 182 M 237, 234 NW 11.

The burden of proof is on the plaintiff to sustain the allegations of the original affidavit. *Tereau v Madison*, 135 M 469, 160 NW 1024; *Callanan v Callanan*, 188 M 609, 248 NW 45.

The truth of an affidavit for attachment should be challenged by motion to vacate the writ. *Sheehan v First Nat'l*, 163 M 294, 204 NW 38.

A writ may be vacated because the statute has not been complied with in its issuance, or because the allegations in the affidavit are untrue. *Reiling v Wood*, 202 M 576, 279 NW 579.

6. Grounds for vacating

On a motion to vacate, the court cannot try the question whether plaintiff has or has not a cause of action or defendant a valid defense. *Davidson v Owens*, 5 M 69 (50); *Richards v White*, 7 M 345 (271); *Rosenberg v Burnstein*, 60 M 18, 61 NW 684.

It is not a ground for vacating a writ that the officer has levied upon property not subject to levy. The question on a motion to vacate is the validity of the writ and it cannot be vitiated by any irregularity in the officer executing it. *Davidson v Owens*, 5 M 69 (50).

A writ may be vacated either because the statute has not been complied with in its allowance and issuance or because the statements in the affidavit for its allowance are untrue. *Nelson v Gibbs*, 18 M 541 (485).

Alleged falsehood, in a supporting affidavit to dissolve an attachment, does not justify an order setting aside an order dissolving the attachment when the burden cast upon the plaintiff by the absolute denial in defendant's affidavit has not been met. *Van Dam v Baker*, 164 M 130, 204 NW 633.

A denial of the allegations of the affidavit puts the burden on the attaching party. Upon conflicting affidavit the court found the burden was not sustained, vacated the writ, and dissolved the levy. *Burkhard v Barnes*, 167 M 23, 208 NW 192; *Larson v Sollar*, 167 M 181, 208 NW 759.

7. Motion by non-resident

Rights and liabilities of non-residents. *Whitney v Sherin*, 74 M 4, 76 NW 787.

8. Appeal from order refusing to dissolve

An appeal from an order refusing to dissolve an attachment cannot be prosecuted after the attachment has been released by executing and filing the statutory bond for that purpose. *Thomas v Craig*, 60 M 501, 62 NW 1133.

9. Appeal from order dissolving

An appeal from an order vacating a writ revives and continues the writ in force until such appeal is disposed of. *McNeal v Rider*, 79 M 156, 81 NW 830.

10. Question on appeal

In the conflict of affidavits and there being no clear preponderance of the evidence in favor of the appellant, the order of the trial court will be affirmed. *Blandy v Roguet*, 14 M 243 (179); *Rand v Getchell*, 24 M 319; *Brown v Mpls. Lbr.* 25 M 461; *Cohen v Kroell*, 26 M 308, 3 NW 978; *First Nat'l v Randall*, 38 M 382, 37 NW 799; *Finance Co. v Hursey*, 60 M 17, 61 NW 672; *First Nat'l v Buchan*, 76 M 54, 78 NW 878; *Schoeneman v Sowle*, 102 M 466, 113 NW 1061.

When the defendant traverses the facts in plaintiff's affidavit, the burden is upon the plaintiff to prove their truth by competent evidence. A mere reiteration of the allegations in the original affidavit is insufficient. *Jones v Swank*, 51 M 285, 53 NW 634.

Where the counter-affidavits clearly and specifically state a sufficient badge of fraud, those allegations are not overcome by the general statements in the moving affidavits denying fraud. *Rosenberg v Burnstein*, 60 M 18, 61 NW 684.

On appeal to the supreme court, the determination of the trial court will not be reversed unless it is manifestly contrary to the evidence. *Reiling v Wood*, 202 M 576, 279 NW 579.

11. Possession of property pending appeal

Upon the dissolution of a writ of attachment, the officer is not bound to retain the property to enable the plaintiff to appeal from the order dissolving it, and give a stay bond. *Ryan Drug v Peacock*, 40 M 470, 42 NW 298; *McNeal v Rider*, 79 M 153, 81 NW 830.

570.10 ATTACHED PROPERTY RETAKEN, WHEN; DAMAGES.

HISTORY. R.S. 1851 c. 70 s. 148; P.S. 1858 c. 60 s. 156; G.S. 1866 c. 66 s. 139; G.S. 1878 c. 66 s. 156; G.S. 1894 s. 5298; R.L. 1905 s. 4224; G.S. 1913 s. 7854; G.S. 1923 s. 9351; M.S. 1927 s. 9351.

570.11 SATISFACTION, DISCHARGE; REAL ESTATE.

HISTORY. 1861 c. 17 ss. 1, 2; G.S. 1866 c. 66 ss. 143, 144; G.S. 1878 c. 66 ss. 160, 161; 1881 c. 63 s. 1; 1883 c. 102 s. 1; 1885 c. 110; G.S. 1894 ss. 5302, 5303; R.L. 1905 s. 4225; G.S. 1913 s. 7855; G.S. 1923 s. 9352; M.S. 1927 s. 9352.

570.12 SATISFACTION AND DISCHARGE; PERSONAL PROPERTY.

HISTORY. 1861 c. 17 s. 3; G.S. 1866 c. 66 s. 145; G.S. 1878 c. 66 s. 163; G.S. 1894 s. 5305; R.L. 1905 s. 4226; G.S. 1913 s. 7856; G.S. 1923 s. 9353; M.S. 1927 s. 9353.

570.13 WHEN ACTION IS ABANDONED.

HISTORY. 1861 c. 17 s. 1; G.S. 1866 c. 66 s. 143; G.S. 1878 c. 66 s. 160; 1881 c. 63 s. 1; 1883 c. 102 s. 1; 1885 c. 110; G.S. 1894 s. 5302; R.L. 1905 s. 4227; G.S. 1913 s. 7857; G.S. 1923 s. 9354; M.S. 1927 s. 9354; 1945 c. 272 s. 1.

A motion to vacate an attachment cannot be made after final judgment has been entered in the action. This is true even when the motion is based on the claim that the attachment is dormant. *McDonald v Clark*, 53 M 230, 54 NW 1118.

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ATTACHMENT 570.14

Neither the attachment nor the action was, as a matter of law, abandoned by the delay in the service of the summons. *Wagner v Farmers Coop.* 147 M 376, 180 NW 231.

570.14 ATTACHMENTS AND RELEASES; RECORD AND INDEX.

HISTORY. 1861 c. 17 ss. 1, 3; G.S. 1866 c. 66 ss. 143, 145; G.S. 1878 c. 66 ss. 160, 162; 1881 c. 63 s. 1; 1883 c. 102 s. 1; 1885 c. 110; G.S. 1894 ss. 5302, 5304; R.L. 1905 s. 4228; G.S. 1913 s. 7858; G.S. 1923 s. 9355; M.S. 1927 s. 9355.