

CHAPTER 266.

ATTACHMENT.

| | |
|---|--|
| 266.01 Attachment; municipal corporation. | 266.15 Care of property; collection of debts. |
| 266.02 Writ; form and contents. | 266.16 Bond for release of property; estoppel. |
| 266.03 Basis for attachment. | 266.17 Exception to defendant's sureties; release of property; costs. |
| 266.04 Amendment to affidavit. | 266.18 Vacation or modification of writ. |
| 266.06 Bond; justification. | 266.19 Traverse of attachment, trial. |
| 266.07 Additional security. | 266.20 Trial of traverse. |
| 266.08 Officer's return; action on bond. | 266.21 Damages, defendant when to recover. |
| 266.09 Alias writs. | 266.22 Return of property; damages on dismissal; entry in register's office. |
| 266.10 Directions to sheriff; several writs. | 266.23 Judgment for plaintiff, how satisfied. |
| 266.11 Attachment of real estate. | 266.24 Action by sheriff, who to prosecute. |
| 266.12 What may be attached; how attached. | 266.25 Execution after defendant's death. |
| 266.13 Indemnity to sheriff. | 266.26 Stranger may intervene. |
| 266.14 Sale of perishable property attached or garnished. | |

266.01 Attachment; municipal corporation. Any creditor may attach the property of his debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter. No writ of attachment shall be issued against a municipal corporation, as defined in section 67.01 or to recover the price or value of intoxicating liquors sold at retail. [1935 c. 541 s. 72]

Revisor's Note, 1935: Title XXV (chapters 260 to 274) relate to actions in courts of record. 260.01. The proper county is determined by chapter 261. The addition of "as defined in 67.01" is to cover towns, counties and school districts. That is now the law, we believe. (Bill No. 50 S, s. 72)

While property or money is in custodia legis, the officer holding it is the mere hand of the court and his possession is the possession of the court and it is not subject to levy either in attachment or by way of execution. Guardianship of Kohl, 221 W 385, 266 NW 800.

266.02 Writ; form and contents. The writ of attachment shall be issued in an action on the request of the plaintiff at any time before final judgment. It shall be directed to the sheriff of some county in which the property of the defendant is supposed to be, and shall require him to attach all the property of the defendant within his county or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses. It shall be in the name of the court and be sealed with its seal and signed by its clerk. [1935 c. 541 s. 73]

266.03 Basis for attachment. (1) **ON CONTRACT OR JUDGMENT.** Before any writ of attachment shall be executed the plaintiff or some one in his behalf shall make and annex thereto an affidavit stating that the defendant is indebted to the plaintiff in a sum exceeding fifty dollars specifying the amount above all set-offs, and that the same is due upon contract or upon a judgment and that the affiant knows or has good reason to believe either:

- (a) That the defendant is absent from this state, or is concealed therein so that summons cannot be served on him; or
- (b) That the defendant has disposed of or concealed or is about to dispose of or conceal his property or some part thereof with intent to defraud his creditors; or
- (c) That the defendant has removed or is about to remove property out of this state with intent to defraud his creditors; or
- (d) That the defendant fraudulently incurred the obligation respecting which the action is brought; or
- (e) That the defendant is not a resident of this state; or
- (f) That the defendant is a foreign corporation; or if domestic that no officer or agent thereof on whom to serve the summons exists or resides in this state or can be found; or
- (g) That the action is against a defendant as principal on an official bond to recover money due the state or to some county or other municipality therein, or that the action is against the defendant as principal upon a bond or other instrument given as evidence of debt for or to secure the payment of money embezzled or misappropriated by such defendant as an officer of the state or of a county or municipality therein.

(2) **TORT ACTION.** In tort actions the affidavit shall state that a cause of action in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:

- (a) That the defendant is not a resident of this state; or that his residence is unknown and cannot with due diligence be ascertained; or
- (b) That the defendant is a foreign corporation.

(3) **ON DEMANDS NOT YET DUE.** An action may be maintained and a writ of attachment issued on a demand not yet due in any case mentioned in this section, except the cases mentioned in the paragraphs (e), (f) and (g) and the same proceedings in the action shall be had and the same affidavit shall be required as in actions upon matured demands except that the affidavit shall state that the debt is to become due; but the bond specified in section 266.06 shall be conditioned in three times the amount demanded. In case an attachment be issued before the maturity of the debt and a traverse to such attachment is sustained the court shall render a judgment for damages and costs against the plaintiff. [1935 c. 541 s. 74]

266.04 Amendment to affidavit. The affidavit required by section 266.03 may be amended at any time before the trial by the substitution of a new affidavit containing allegations of facts existing at the time of making the former affidavit. [1935 c. 541 s. 75]

266.05 [Repealed by 1935 c. 541 s. 76]

266.06 Bond; justification. Before the writ of attachment shall be executed a bond on the part of the plaintiff in the sum of at least two hundred and fifty dollars executed by sufficient surety, shall be delivered to the officer, to the effect that if the defendant recover judgment the plaintiff shall pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment. The affidavit of the surety annexed to such bond shall state that he is a resident and householder or freeholder within the state and worth double the sum specified in the bond in property therein above his debts and exclusive of property exempt from execution. No bond is necessary when this state or any county, town or municipality therein is plaintiff. [1935 c. 541 s. 77]

266.07 Additional security. In case the defendant is not satisfied with the amount specified in the bond or with the surety he may, upon five days' notice to the plaintiff, apply to a judge for additional security and such judge may require the plaintiff to give and file another bond, to be approved by him, in such sum as he shall deem proper, not exceeding the appraised value of the property attached. The surety shall justify as provided in section 266.06; but if there be more than one surety they may be accepted if they are jointly responsible for the required sum. [1935 c. 541 s. 78]

266.08 Officer's return; action on bond. The officer executing the writ shall return thereon all his proceedings and within ten days from receipt of the bond shall file the summons, writ, affidavit and bond with the clerk of the court. [1935 c. 541 s. 79]

266.09 Alias writs. Alias writs of attachment may be issued to the sheriffs of different counties at any time before judgment. In such case a copy of the affidavit and bond annexed to the original writ shall be annexed to such alias writ. Such alias writs shall be executed and returned in the same manner as the original. [1935 c. 541 s. 80]

Revisor's Note, 1935: There is no bond given. The amendment requires a copy of with the alias writ and the sheriff has no the bond. (Bill No. 50 S. s. 80) official information that a bond has been

266.10 Directions to sheriff; several writs. (1) The sheriff shall without delay seize so much of the property of the defendant, in his county, as will satisfy the demand of the plaintiff, with costs and expenses, and make an inventory thereof; he shall cause all personal property attached by him to be appraised by two disinterested residents of the county, who shall be first sworn by him to make a true appraisal thereof, which appraisal shall be signed by them, and the appraisal and inventory shall be returned with the writ; he shall serve copies of the writ, affidavit and bond, and inventory, upon the defendant in the same manner as a summons. In case of a nonresident or a foreign corporation the sheriff shall serve such copies on any agent of such defendant in the county, if any be known to him.

(2) If two or more writs against the same defendant shall be executed on the same property an inventory and appraisal shall be made in but one of the actions, and the sheriff shall indorse on the copy served upon the defendant in the other action a notice that the property seized is the property seized in the action in which the inventory and appraisal are made, giving the title of such action; and such officer shall state in his return the fact of such indorsement. [1935 c. 541 s. 81]

Note: Sheriff may compel freeholders to act as appraisers in serving writ of attachment. If freeholder refuses to act, sheriff may arrest him for having committed offense in his presence in refusing to answer summons of sheriff; he may swear out warrant for freeholder's prosecution. 19 Atty. Gen. 207.

266.11 Attachment of real estate. To attach real estate the sheriff shall file in the office of the register of deeds a copy of the writ with his certificate that by virtue of the original writ he has attached all the interest of the named defendant in such real estate, describing the same. [1935 c. 541 s. 82]

266.12 What may be attached; how attached. All the property of the defendant, not exempt from execution, may be attached. Personal property shall be attached as upon

an execution and the provisions respecting the levy of an execution thereon shall be applicable to an attachment. [1935 c. 541 s. 83]

Revisor's Note, 1935: The law as to shares of stock is in chapter 183. They are negotiable, 183.01; and cannot be attached as formerly. (Bill No. 50 S. s. 83)

County warrants or orders although nonnegotiable, given a public improvements contractor, are subject to attachment under chapter 266 as the property of such contractor, not exempt from execution; 272.25, re-

lating to execution and sale thereunder of negotiable instruments, not applying to attachment, and the reference in this section to the chapter relating to executions being not to determine what may be attached, but to prescribe the manner in which property may be attached and applied on the judgment. *Danischefsky v. Klein-Watson Co.* 209 W 210, 244 NW 772.

266.13 Indemnity to sheriff. If there is reasonable doubt as to the ownership of the property or as to its liability to be attached the sheriff may require sufficient security to indemnify him for attaching such property. [1935 c. 541 s. 84]

266.14 Sale of perishable property attached or garnished. When any property taken on a writ of attachment or received by the officer from any garnishee including actions appealed to the court, shall be likely to depreciate in value before the end of the action or the keeping thereof shall be attended with much loss or expense the court or a judge may order it sold in such manner as the best interests of the parties demand, and the money realized shall be held by the officer in lieu of the property sold. [1935 c. 541 s. 85]

266.15 Care of property; collection of debts. The officer shall keep the property seized by him and the proceeds of such as shall have been sold to answer any judgment which may be recovered in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession all the debts, credits and effects of the defendant. The officer may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose and discontinue the same at such times and on such terms as the court or judge may direct.

266.16 Bond for release of property; estoppel. The defendant may, at any time before judgment, deliver to the officer who attached his property a bond executed by two sureties, to the effect that they will, on demand, pay to the plaintiff the amount of the judgment, with all costs, that may be recovered against such defendant in the action, not exceeding the sum specified in the bond with interest. Such a bond shall be at least double the amount alleged by the plaintiff to be due or, at defendant's option, double the value of the property attached, according to the appraisal; or, if real estate, in a sum fixed by the court or a judge, on notice. The sureties shall justify as provided in section 266.06, and may be accepted if they are jointly responsible for the required sum. [1935 c. 541 s. 86]

266.17 Exception to defendant's sureties; release of property; costs. The officer shall forthwith give to the plaintiff a copy of such bond with notice of the time when the same was delivered to him; and the plaintiff shall, within three days thereafter, give notice to the officer that he excepts to the sureties or he waives all objections to them. When plaintiff excepts the sureties shall justify as provided in section 265.08. The officer shall be responsible for the sufficiency of such sureties and may retain possession of the attached property until they shall so justify or objection be so waived. Thereafter the officer shall deliver the property attached to such defendant; if real estate is attached, the sheriff shall file a certificate of the discharge thereof in the office of the register of deeds. If the plaintiff recover, all his costs and disbursements on the attachment shall be included in his judgment. [1935 c. 541 s. 87]

Note: Statutory redelivery bond, not delivered to officer holding attached property, never became effective. Consideration for redelivery bond failed, so as to preclude re-

covery thereon, where attachment plaintiff's attorney prevented return of attached automobile to defendant by sheriff. *Rodenfels v. Fidelity & D. Co.*, 211 W536, 248 NW 442.

266.18 Vacation or modification of writ. The court or the presiding judge thereof may, at any time before the trial of the action or a release of the property under section 266.17, vacate or modify the writ of attachment for irregularity or other sufficient cause, upon five days' notice of motion; and the motion therefor may be combined with a motion to increase the plaintiff's security under section 266.07.

266.19 Traverse of attachment, trial. Within ten days after notice of the issuing of a writ of attachment against his property or within the time in which he may answer the complaint, the defendant may, by special answer, deny the existence, at the time of the making of the attachment affidavit of the material facts stated therein except the alleged liability and the amount thereof. The issue so raised shall be tried by the court, before the trial of the action and the affirmative thereof shall be upon the plaintiff. And if the defendant shall have made an assignment for the benefit of his creditors his assignee may traverse and defend according to section 128.03 [Stats. 1933]. [1935 c. 541 s. 88]

266.20 Trial of traverse. If the court on the trial of such issue, raised by the traverse, finds for the defendant the judge presiding shall tax the defendant's costs of such trial, and an order shall be entered that the property attached be forthwith delivered to the defendant; and the jury or the court shall, on the trial of the action or thereafter assess the damages sustained by the defendant by reason of the taking and detention or sale of the property attached or by reason of any injury thereto; and the same, together with the costs so taxed, shall be a set-off to the plaintiff's demand, and if in excess of it, or the plaintiff fail to recover, the defendant shall have judgment for the amount his due. If the court on the trial of such special issue find for the plaintiff the presiding judge shall tax the plaintiff's costs of such trial, and the amount so taxed shall, if he recover, be taxed by the clerk as disbursement in the action; and if the defendant or his assignee recover judgment in the action said costs and the judgment shall be offset. [1935 c. 541 s. 89]

Revisor's Note, 1935: This section is very plain in R. S. 1858, c. 130, s. 26. 266.21. (Bill No. 50 S. s. 89)

A purchaser for value and without notice of any defect in the title of the debtor's daughter, which purchaser intervened in the attachment proceedings for the purpose of seeking a release of the land from the writ of attachment, was properly allowed damages against the judgment creditor who

had wrongfully attached the land. *Dorington v. Jacobs*, 213 W 521, 252 NW 307.

In the absence of exceptional circumstances, in actions for the tortious taking or conversion of goods, the plaintiff is entitled to recover as damages the value of the chattels at the time and place of the wrongful taking or conversion, with interest to the time of trial. *Topzant v. Koshe*, 242 W 585, 9 NW (2d) 136.

266.21 Damages, defendant when to recover. If the defendant prevails in the action or if the action be discontinued the damages sustained by him by reason of the taking and detention or sale of any property attached by reason of any injury thereto shall be assessed and he shall have judgment therefor. [1935 c. 541 s. 90]

266.22 Return of property; damages on dismissal; entry in register's office. When the defendant recovers judgment all the money or property held by any writ of attachment shall be delivered to him, subject to the plaintiff's rights on appeal, and he may maintain an action on the plaintiff's bond for the assessed damages sustained by reason of the writ of attachment. Upon the entry of final judgment in favor of the defendant or on satisfaction of a plaintiff's judgment, the clerk of court shall, if real estate was attached, certify the fact of such judgment or satisfaction, and on filing such certificate with the register of deeds in any county in which attached lands are situated such register shall enter such certificate upon the records of his office in discharge of such attachments. [1935 c. 541 s. 91]

266.23 Judgment for plaintiff, how satisfied. When the plaintiff shall have recovered judgment in the action the sheriff or officer shall satisfy the same out of the property attached or received from any garnishee or otherwise, if sufficient therefor:

(1) By paying over to such plaintiff all money attached or received upon sales of property, or from any garnishee, or upon any debts or credits, or so much thereof as shall be necessary.

(2) By selling, under such execution as may be issued on such judgment, so much of the attached property, real or personal, as shall be necessary to satisfy the balance unpaid, according to the provisions regulating sales upon execution; except as provided in subsection (4) hereof.

(3) If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money such 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 writ of attachment; and any person who shall wilfully conceal or withhold such property from the sheriff shall be liable to double damages at the suit of the party injured.

(4) Until the judgment against the defendant shall be paid the sheriff may proceed to collect the evidences of debt that may have been seized or attached by virtue of the writ of attachment or that may have been delivered up by any person summoned as garnishee, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment and costs. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the property attached or that may have been received from any garnishee, or the proceeds thereof.

266.24 Action by sheriff, who to prosecute. The actions herein authorized to be brought by the sheriff or officer may be prosecuted by the plaintiff or under his direction, upon the delivery by him to the sheriff or officer of an undertaking, with two sufficient sureties, to the effect that the plaintiff will indemnify him for all damages, costs and expenses thereon not exceeding two hundred and fifty dollars in any one action; such sureties shall, when required by the sheriff or officer, justify by making an affidavit that each is a

householder and worth double the amount of the penalty named in the undertaking over and above all debts and exemptions.

266.25 Execution after defendant's death. If any defendant whose property is attached shall die and the judgment is in favor of the plaintiff, the property attached shall be applied to the payment of the judgment and execution may be issued on such judgment and satisfied out of the property so attached in the same manner as if such defendant were living. [1935 c. 541 s. 92]

266.26 Stranger may intervene. Any person not a party to the action, whose property is attached, may, at any time, either before or after judgment, be made a party upon his application for the purpose of removing or discharging the attachment. The court may grant such summary relief as shall be just, and may in proper cases award an issue for trial by jury.