

CHAPTER 304.

ATTACHMENT AND GARNISHMENT.

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304.01 Attachment; liquor debts. An action by warrant of attachment may be commenced against the property of a debtor as provided by this chapter. No such warrant shall issue to recover for malt or intoxicating liquors sold at retail. [*R. S. 1849 c. 88 s. 100; R. S. 1858 c. 120 s. 98; R. S. 1878 s. 3701; Stats. 1898 s. 3701; 1909 c. 276; Stats. 1925 s. 304.01; 1945 c. 441*]

Revisers' Note, 1878: "Section 98, chapter 120, R. S. 1858, amended by a declaration that an action may be commenced by attachment. It seems that this ought to be declared as one of the methods of commencing actions in a justice's court, as actions are not so commenced in courts of record."

304.02 Affidavit for attachment; amendment; traverse. (1) Before a warrant of attachment issues the plaintiff or some person in his behalf shall file with the justice an affidavit stating that the defendant is indebted to the plaintiff in a specified sum exceeding \$5 above all legal set-offs; and that the same is due upon contract or upon a judgment; and that the deponent knows or has good reason to believe either that the defendant:

(a) Is a foreign corporation or, if domestic, that all its officers on whom to serve a summons do not exist, are nonresidents of the state or cannot be found; or

(b) Is not a resident of this state; or

(c) Has absconded or is about to abscond from this state; or

(d) Has removed or is about to remove property out of this state with intent to defraud his creditors; or

(e) Resides more than 100 miles from the residence of the justice; or

(f) Contracted the debt under fraudulent representations; or

(g) So conceals himself that summons cannot be served upon him; or

(h) Has fraudulently conveyed or disposed of or is about fraudulently to convey or dispose of property so as to hinder or delay his creditors; or

(i) Is the principal defendant in an action upon his official bond to recover money due to the state or some county or other municipality therein.

(2) A warrant may issue on a like affidavit showing that a cause of action sounding in tort exists in favor of the plaintiff against the defendant; that the damages sustained and claimed are a specified sum exceeding \$5; and that the defendant is not a resident of this state or that his residence is unknown and cannot, with due diligence, be ascertained or is a foreign corporation.

(3) The affidavit may be amended at any time before trial by the substitution therefor of a new affidavit containing allegations of facts existing at the time of making the former affidavit and if the new affidavit is traversed or denied trial shall be had thereon as in other cases. [*R. S. 1849 c. 88 s. 101; R. S. 1858 c. 120 s. 99; R. S. 1878 s. 3702; 1883 c. 249 s. 4; 1887 c. 191; Ann. Stats. 1889 s. 3702; 1893 c. 134; Stats. 1898 s. 3702; Stats. 1925 s. 304.02; 1945 c. 441*]

Revisers' Note, 1878: "Section 99, chapter 120, R. S. 1858, amended so as to conform to proceedings upon attachment in the circuit court so far as grounds of attachment are concerned."

Note: Where there is defective affidavit in attachment and the defendant appears generally, such appearance gives the justice jurisdiction not only to enter personal judgment against the defendant but also to allow an amendment to the affidavit and to entertain the attachment proceedings. *Givans v. Searle*, 136 W 608, 118 NW 202.

The proceeding by attachment, with all its safeguards, is a violent remedy and the statute will not receive a more liberal construction than a fair interpretation of its letter demands. *Maguire v. Bolen*, 94 W 48, 68 NW 408.

A recital in an affidavit that the affiant "for and on behalf of the firm of" A. & B., "hereinafter mentioned, being duly sworn,

on oath doth say," etc., is not good. *Maguire v. Bolen*, 94 W 48, 68 NW 408.

Amending a void affidavit by increasing the amount claimed after the levy does not affect the rights of another creditor whose attachment intervened. *Maguire v. Bolen*, 94 W 48, 68 NW 408.

An affidavit is good which states that indebtedness is for work, labor and services done and performed for defendant at its special instance and request. *Ruthe v. Green Bay & M. R. Co.*, 37 W 344.

Misnomer of plaintiff in signature to affidavit may be corrected by amendment at any time. *Ruthe v. Green Bay & M. R. Co.*, 37 W 344.

If the affidavit follows the words of the statute the justice may issue the writ. But whenever it appears, either from the complaint or evidence, that the true cause of action is not an indebtedness due upon contract it is his duty to dismiss the case. *Elcott v. Jackson*, 3 W 649.

304.03 When returnable. The warrant of attachment shall be returnable as an ordinary summons. [*R. S. 1849 c. 88 s. 102; R. S. 1858 c. 120 s. 100; R. S. 1878 s. 3703; Stats. 1898 s. 3703; Stats. 1925 s. 304.03; 1945 c. 441*]

Comment of Advisory Committee, 1945: reason for speed under (f), (g) or (h) as under the other situations. (Bill 193-S)

304.04 Form of warrant. The warrant of attachment may be in substantially the following form:

State of Wisconsin, } In Justice Court
 County. } Before Justice of the Peace

The State of Wisconsin, to the sheriff or any constable of said county:

You are commanded to attach the personal property of, or so much thereof as is sufficient to satisfy the sum of \$...., in whosoever hands or possession the same is found in your county, and so provide that the property so attached may be subject to further proceedings thereon as the law requires; and also to summon said, if found, to appear before me at my office at, on the day of, 19 .., at o'clock in the noon, to answer to, to his damage \$200 or under.

Dated, 19 ...

.... Justice of the Peace.

[*R. S. 1849 c. 88 s. 103; R. S. 1858 c. 120 s. 101; R. S. 1878 s. 3704; Stats. 1898 s. 3704; Stats. 1925 s. 304.04; 1945 c. 441*]

304.05 Warrant, how executed. The officer shall execute a warrant by serving it upon the defendant in the manner that a summons returnable within like time is required to be served and by attaching personal property of the defendant, not exempt by law, and make due return of his doings thereon. [*R. S. 1849 c. 88 s. 104; R. S. 1858 c. 120 s. 102; R. S. 1878 s. 3705; Stats. 1898 s. 3705; Stats. 1925 s. 304.05; 1945 c. 441*]

Revisers' Note, 1878: "Section 102, chapter 120, R. S. 1858; rewritten and amended so as to obviate the effect of the decision in *Champion v. Argall*, 25 Wis. 521, and leave it to be served as a long or short summons is according to whether it is a three days' attachment or longer."

Note: A return which states, that "after diligent search and inquiry within my coun-

ty, am unable to find the defendant, H. P. A., therein; therefore am unable to serve the defendant personally or by leaving a copy at his usual place of abode," does not show that the defendant had no place of abode in the county where the process could have been served, so as to authorize service by publication under 304.12. *Shearer v. Davis & Starr L. Co.*, 78 W 278, 47 NW 360.

304.06 Pleadings and proceedings. Like pleadings and like proceedings shall be had in actions commenced by warrant as in actions commenced by summons. [*R. S. 1849 c. 88 s. 113; R. S. 1858 c. 120 s. 110; R. S. 1878 s. 3706; Stats. 1898 s. 3706; Stats. 1925 s. 304.06; 1945 c. 441*]

304.07 Release of attached property. When property of the defendant is attached, he or any person for him or the person in whose possession it is found may obtain possession by giving an undertaking executed on his part by a surety approved by the officer executing the warrant, conditioned that the property shall be forthcoming when and where the justice directs and shall abide the judgment of the justice. [*R. S. 1849 c. 88 s. 105, 119; R. S. 1858 c. 120 s. 103, 117; R. S. 1878 s. 3707; Stats. 1898 s. 3707; Stats. 1925 s. 304.07; 1945 c. 441*]

Comment of Advisory Committee, 1945: attachment defendant is entitled to the possession of the property attached; the officer who holds it has no discretion in the matter. See comment of advisory committee under 304.08. (Bill 193-S)

Note: If the statute is complied with the

Wheeler v. McDill, 51 W 356, 8 NW 193.

304.08 Dissolution of attachment; undertaking. The attachment may be dissolved on motion of the defendant at any time before final judgment if he appears and pleads to the action and gives an undertaking to the plaintiff executed by a surety, approved by the justice, conditioned that if judgment is rendered against the defendant in such action

he will pay the judgment, but not exceeding \$400. [R. S. 1858 c. 120 s. 111; R. S. 1878 s. 3708; Stats. 1898 s. 3708; Stats. 1925 s. 304.08; 1945 c. 441]

Comment of Advisory Committee, 1945: property. That will enable a defendant to An undertaking with a \$400 limit is substituted for a bond in double the value of the get a surety company. (Bill 193-S)

304.09 Effect of dissolution. When any attachment shall be dissolved the property and effects attached shall be released and the garnishees shall be discharged and the action proceed as if it had been commenced by a summons only. [R. S. 1849 c. 88 s. 114; R. S. 1858 c. 120 s. 112; R. S. 1878 s. 3709; Stats. 1898 s. 3709; Stats. 1925 s. 304.09; 1945 c. 441]

304.10 Sale of perishable property. When attached property is likely to perish or depreciate in value before the end of the action or the keeping of such property would be attended with much loss or expense, the justice may order it sold by the officer in the same manner and upon the same notice as goods are sold on execution; and if it appears to the justice that the property is likely to perish before the expiration of the time for notice of such sale he may order sale made upon giving not less than 24 hours' notice. The proceeds of sale shall remain in the hands of the officer, to be disposed of as if the property were money. [R. S. 1849 c. 88 s. 106; R. S. 1858 c. 120 s. 104; R. S. 1878 s. 3710; 1897 c. 117; Stats. 1898 s. 3710; Stats. 1925 s. 304.10; 1945 c. 441]

Comment of Advisory Committee, 1945: An order of sale made upon affidavits will It should be "24 hours' notice" rather than not be set aside because of their falsity upon "one day's notice." (Bill 193-S) a motion made long after defendant knew of the order and after proceedings under it were practically concluded. L. A. Shakman & Co. v. Koch, 93 W 595, 67 NW 925. Sterling v. Ripley, 3 Pin. 155; Maguire v. Bolen, 94 W 48, 68 NW 408.

304.11 Officer's compensation. The justice shall allow the officer his necessary, just and reasonable expenses in attaching and preserving property. [R. S. 1849 c. 88 s. 107; R. S. 1858 c. 120 s. 105; R. S. 1878 s. 3711; Stats. 1898 s. 3711; Stats. 1925 s. 304.11; 1945 c. 441]

Comment of Advisory Committee, 1945: The revised 304.11 is in substance the same as 59.28 (25). (Bill 193-S)

304.12 Publication after attachment. When the defendant cannot be served and his property is attached and he does not appear in the action at the return of the warrant, the justice shall enter an order on his docket requiring the plaintiff to publish once in a newspaper, if there is one printed in the county, and if there is none, to post up in 3 public places therein a notice to the defendant in the form prescribed by section 304.13; and the justice shall continue the action to the time and place mentioned in said order, which time shall be not less than 20 nor more than 30 days from the date of the order. [R. S. 1849 c. 88 s. 108; R. S. 1858 c. 120 s. 106; R. S. 1878 s. 3712; Stats. 1898 s. 3712; Stats. 1925 s. 304.12; 1945 c. 441]

Comment of Advisory Committee, 1945: What reason is there for 90 days' time? 30 days are enough. Is there any county which has no newspaper? In that event the notice could go to the paper of an adjoining county. * * * For time allowed to give notice, see 304.14. (Bill 193-S)
Revisers' Note, 1878: "Section 106, chapter 120, R. S. 1858, so changed as to compel the notice to be published in a newspaper, if there be one printed in the county. This is the course now pursued, but the section would perhaps admit of the construction that it was in the discretion of the justice to order it published or posted as he might deem best."
Note: Service by publication is good only when it affirmatively appears that it cannot be made by reading the summons to the defendant and delivering a copy to him when demanded, if he can be found, and if he cannot be found, by leaving a copy thereof at his usual place of abode, etc., as prescribed by section 301.08. Shearer v. Davis & Starr L. Co., 78 W 278, 47 NW 360.

304.13 Form of notice of attachment. The notice may be in substantially the following form:

State of Wisconsin, } In Justice Court
.... County. } Before, Justice of the Peace
A. B., Plaintiff,
v.
C. D., Defendant.

To C. D.:
You are hereby notified that a warrant of attachment has been issued against you and your property attached to satisfy the demand of A. B., amounting to \$. . . ; now unless you appear before, a justice of the peace in said county, at his office at, on the day of, 19 .., at o'clock in the noon, judgment will be rendered against you and your property sold to pay the debt.

Dated, 19 ...
....., Plaintiff,
P. O. Address
[R. S. 1849 c. 88 s. 109; R. S. 1858 c. 120 s. 107; R. S. 1878 s. 3713; Stats. 1898 s. 3713; Stats. 1925 s. 304.13; 1945 c. 441]

304.14 Notice, posting, publication. Such notice shall be posted or published at least 15 days before the time at which the party is required to appear. Posting may be proved either by the return of the officer, upon a copy of the notice, or by the affidavit of the person who posted it. Publication may be proved by an affidavit as provided by section 328.19. [*R. S. 1849 c. 88 s. 110; R. S. 1858 c. 120 s. 103; R. S. 1878 s. 3714; Stats. 1898 s. 3714; Stats. 1925 s. 304.14; 1945 c. 441*]

Comment of Advisory Committee, 1945: prove the posting. A provision as to proof of publication is inserted. (Bill 193-S)

304.15 Proceedings after publication. When the defendant is so notified and does not appear that fact shall be entered in the docket and the plaintiff may proceed to judgment as in actions commenced by summons; but no execution shall issue on the judgment, either against the defendant or the garnishee, or money be paid to the justice thereon until the plaintiff gives to the defendant an undertaking executed in his behalf by a surety, limited to \$400, approved by the justice, conditioned that if the defendant, within one year from the rendition of the judgment, appears and disproves the damages adjudged against him or any part thereof the plaintiff will refund the whole or such part thereof as may be found not justly due on a review of the action. [*R. S. 1849 c. 88 s. 111; R. S. 1858 c. 120 s. 109; R. S. 1878 s. 3715; Stats. 1898 s. 3715; Stats. 1925 s. 304.15; 1945 c. 441*]

Comment of Advisory Committee, 1945: for a bond in double the amount of the judgment. An undertaking limited to \$400 is substituted. (Bill 193-S)

304.16 Traverse of attachment. In an attachment action the defendant may, whether he answers the complaint or not, by special verified answer, filed with the justice at or before the time the warrant is returnable, deny the existence at the time of making the attachment affidavit of any material fact stated therein, except the alleged liability and the amount thereof. The issue so raised shall be tried by the justice and the affirmative shall be upon the plaintiff. In determining the issue the justice shall follow the rules of courts of record. If an issue is made as to the defendant's liability, the trial upon the traverse shall be had with the trial of the action, but the justice shall make and file his finding upon the traverse separately from the verdict or finding in the action. [*1885 c. 424 s. 1; Ann. Stats. 1889 s. 3706a; Stats. 1898 s. 3715a; Stats. 1925 s. 304.16; 1945 c. 441*]

Note: See note to 266.19, 1930 Annotations.

304.17 Proceedings and costs on trial of traverse. (1) If the justice finds for the defendant on the traverse he shall tax his costs on the trial thereof and assess his damages caused by the taking and detention of the property and any injury thereto, and shall order the property returned to the defendant. If the defendant succeeds in the action, judgment shall be rendered for him for such damages and the costs of the traverse and of the action.

(2) If the plaintiff recovers in the action and the defendant on the traverse, the costs and damages taxed and assessed in favor of the defendant shall be offset against the plaintiff's recovery and the plaintiff shall get no costs on account of the attachment. If the defendant's costs and damages exceed the plaintiff's recovery and taxable costs, judgment shall be for the defendant for the excess.

(3) If on the trial of such traverse the justice finds for the plaintiff he shall tax his costs on such trial, and the amount so taxed shall, if he recovers in the action, be added to his other costs; but if the defendant recovers judgment the amount so taxed shall be applied toward payment thereof. [*1885 c. 424 s. 2; Ann. Stats. 1889 s. 3706b; Stats. 1898 s. 3715b; Stats. 1925 s. 304.17; 1945 c. 441*]

304.18 Appeal from finding on traverse. The aggrieved party may appeal from the finding upon the traverse the same as from the judgment, but the appeal must be separate from an appeal from the judgment. The issue raised by the traverse shall be tried the same as though the action had been commenced in the appellate court. [*1885 c. 424 s. 3, 4; Ann. Stats. 1889 s. 3706c, 3706d; Stats. 1898 s. 3715c; Stats. 1925 s. 304.18; 1945 c. 441*]

304.19 Undertaking to stay proceedings. No appeal from the finding on the traverse shall stay the sale of the attached property or the delivery thereof to the defendant unless the appellant files with the justice, at the time of taking the appeal, a written undertaking executed in his behalf by a surety approved by the appellate court or the judge thereof or by the justice (if the defendant is appellant) that, if the finding appealed from is affirmed or judgment is rendered upon the appeal against the appellant, he will pay the judgment, with interest and costs, or, at the option of the appellant, that he will pay the plaintiff the value of the property returned to him, as determined by the court, with interest thereon, the costs of the action and of the traverse; and (if the plaintiff is appellant) that if the finding is affirmed or judgment is rendered against him he will pay the defendant

the value of the property attached, as determined by the court, with interest thereon and all damages assessed and costs taxed against him by reason of the attachment. [1885 c. 424 s. 5; Ann. Stats. 1889 s. 3706e; Stats. 1898 s. 3715d; Stats. 1925 s. 304.19; 1945 c. 441]

Comment of Advisory Committee, 1945: One surety is sufficient. The present undertaking is unlimited. (Bill 193-S)

304.20 Garnishment affidavit. If the plaintiff or some one in his behalf makes and delivers to the officer having the summons or warrant of attachment an affidavit stating that the affiant has good reason to believe that some person (naming him) is indebted to the defendant or has personal property in his possession or under his control belonging to the defendant or, when there is more than one defendant, to any of them, not by law exempt from execution, and demands that he summon such person as garnishee, the officer shall summon him to appear before the justice, on the return day of the summons or warrant, to answer as garnishee. The affidavit may be amended as provided in section 304.02. Any number of garnishees may be embraced in the same affidavit and garnishee summons but if a joint liability is claimed it shall be stated in the affidavit and the garnishees named as jointly liable shall be deemed jointly proceeded against, otherwise the garnishees shall be deemed severally proceeded against. [R. S. 1849 c. 88 s. 115; R. S. 1858 c. 58 s. 1; R. S. 1858 c. 120 s. 113; 1871 c. 161; R. S. 1878 s. 3716; 1883 c. 249; Ann. Stats. 1889 s. 3716; 1893 c. 134; Stats. 1898 s. 3716; 1905 c. 72 s. 1; Supl. 1906 s. 3716; Stats. 1925 s. 304.20; 1945 c. 441]

Revisers' Note, 1878: "In accordance with plan adopted for garnishment in circuit courts, we have made the garnishee proceeding in justices' courts alike, whether commenced in an action commenced by summons or warrant of attachment, and this section is written to conform the law to that plan, and is in place of section 1, chapter 58, Laws 1858 (as amended by chapter 161, Laws 1871), and section 113, chapter 120, R. S. 1858."

Note: Where service was not made upon the principal defendant and the garnishee appeared and denied any indebtedness before service by publication was had, a determination by the justice upon the issue raised by the denial of the indebtedness by the garnishee was without jurisdiction and void. State ex rel. Chicago & N. W. R. Co. v. Pauli, 126 W 65, 104 NW 1007.

The treasurer of a corporation may be garnished by its creditors to reach money in his hands belonging to the corporation. Mayo v. Hanson, 94 W 610, 69 NW 344.

The amendments made to sections 2753 and 2763, R. S. 1878, did not, by implication, amend this section so as to require that the affidavit shall state the amount of plaintiff's claim over and above all offsets. Jones v. St. Onge, 67 W 520, 30 NW 927.

The proceeding in garnishment is special,

[304.21 repealed by 1945 c. 543]

304.21 Garnishment of public employes. (1) A judgment creditor may garnish the wages or salary of any public officer or employe as provided in this chapter, subject to the limitations of this section.

(2) The garnishee summons may be served upon the secretary of state or upon the clerk or corresponding officer of the political subdivision from which such compensation is due.

(3) The officer so served shall, within 20 days after service, certify to the court the amount which was owing to the judgment debtor at the date of service, and such certification shall, for the purposes of the garnishee action, be conclusive.

(4) A certified copy of the judgment in the garnishee action, and an affidavit that no appeal from the judgment is pending, filed with the secretary of state or such clerk or corresponding officer, entitle the judgment creditor (if the garnishee judgment is in his favor) to a warrant on the proper treasury for payment of the amount so certified as owing to the debtor (less personal exemptions) for salary or wages or so much thereof as will satisfy the judgment; and the payment shall be conclusive upon him, and a discharge to that extent of the public liability.

(5) This section does not apply or extend to money due to an officer or employe to reimburse him for expenditures made by him in the discharge of his duties.

(6) The repeal of section 304.21 of the statutes of 1943 shall not affect the rights or remedy of a judgment creditor who had theretofore commenced a quasi garnishment proceeding under said section by filing a transcript of judgment. His rights and remedy shall continue in force under such repealed section the same as though it had not been repealed, but the effect of such filing shall expire 5 years after he filed his transcript. He may also proceed by garnishment the same as other judgment creditors. [1945 c. 543]

in derogation of the common law, and the statute must be strictly pursued in order to confer jurisdiction. Edler v. Hasche, 67 W 653, 653, 31 NW 57; McDonald v. Vinette, 58 W 619, 17 NW 319.

A garnishee is not justified in delivering property contrary to the instructions of the owner by an order made without jurisdiction. Edler v. Hasche, 67 W 653, 31 NW 57.

The affidavit, being the prerequisite of jurisdiction, must not only appear upon the record but be strictly sufficient; and, not appearing, no jurisdiction is shown in the justice. Wells v. American E. Co., 55 W 23, 11 NW 537, 12 NW 441.

An affidavit is not defective because in the disjunctive, as "is indebted to or has property;" nor because it does not contain the word "personal" before property; nor because it states that affiant verily believes. Russell v. Ralph, 53 W 328, 10 NW 518.

It is a fatal defect if affidavit omits to state that money, etc., of principal debtor in garnishee's possession is not exempt. Rasmussen v. McCabe, 46 W 600, 1 NW 196.

One is only liable as garnishee when he has in his possession at time of garnishment property, money or effects belonging to defendant or is indebted to him. Smith v. Davis, 1 W 447.

Revisor's Note, 1945: Ch. 543, laws of 1945 (Bill No. 403-S, sponsored by the Advisory Committee on Rules of Pleading, Practice and Procedure) repealed 304.21 and created 267.22, 289.535 and a new 304.21 to take its place. New 304.21 is almost entirely unlike the old one. For cases construing 304.21 of the 1943 and earlier statutes, see 1930 Wisconsin Annotations and the annotations under 304.21 in the 1943 Statutes.

304.22 Garnishment; liquor debts. No garnishee action shall be commenced to recover for malt or intoxicating liquors sold at retail. [1909 c. 276; 1911 c. 663 s. 443; Stats. 1923 s. 3716m; Stats. 1925 s. 304.22; 1945 c. 441]

304.23 Form of garnishee summons. The garnishee summons may be substantially in the following form:

State of Wisconsin, } In Justice Court
 County. } Before, Justice of the Peace
 The State of Wisconsin to, garnishee:

Whereas, a summons (or warrant of attachment) has been issued by (or a summons has been signed and issued by, an attorney at law of, returnable before) a justice of the peace of said county, returnable on the day of, 19 .., in favor of, plaintiff, and against, defendant; and whereas the plaintiff (or in his behalf) has made oath that you have property in your possession or under your control belonging to the defendant (or are indebted to him):

You are hereby summoned to appear before said justice at his office at, on the return day of said summons (or warrant of attachment) at o'clock in the noon of said day, then and there to answer under oath touching your liability as garnishee.

Dated, 19 ...

...., Constable or Sheriff.

[R. S. 1849 c. 88 s. 116; R. S. 1858 c. 120 s. 114; R. S. 1878 s. 3717; Stats. 1898 s. 3717; Stats. 1925 s. 304.23; 1935 c. 273; 1945 c. 441]

304.231 Property in safe deposit box. Property in a safe deposit box in any bank or safe deposit company is not property in the possession or control of such bank or safe deposit company within the meaning of this chapter. [1945 c. 544]

304.24 Garnishee summons, how served; notice to defendant. The officer shall serve the garnishee summons on the garnishee personally, and return it, with the affidavit, stating the date of service, to the justice when he makes return of the summons or warrant. A copy of the garnishee summons shall be served on the defendant in the same manner prescribed for service of summons in the original action. If the defendant cannot be so served or is not a resident of the state, service of notice may be made as provided in sections 304.12 and 304.14. The notice to the defendant may be substantially in the following form:

State of Wisconsin, } In Justice Court
 County. } Before, Justice of the Peace
 To, defendant:

You are hereby notified that a summons and garnishee has been issued against you and your property garnished to satisfy the demand of, amounting to \$; now unless you appear before, a justice of the peace in said county, at his office at on the day of, 19 .., at o'clock in the noon, judgment will be rendered against you and your property sold to pay the debt.

Dated, 19...

...., Plaintiff.

[R. S. 1849 c. 88 s. 117; 1858 c. 58 s. 2; R. S. 1858 c. 120 s. 115; R. S. 1878 s. 3718; 1880 c. 253; 1887 c. 405; Ann. Stats. 1889 s. 3718, 3718a; Stats. 1898 s. 3718; 1913 c. 413; Stats. 1925 s. 304.24; 1945 c. 441]

Comment of Advisory Committee, 1945: The notice to the defendant by publication or posting is substantially as in 304.13. The provision for service on an agent or attorney is anomalous, mystifying and impractical. Its constitutionality is doubtful. Hence it is omitted. The manner of service is made more specific. (Bill 193-S)

Revisers' Note, 1878: "Section 115, chapter 120, R. S. 1858, and section 2, chapter 58, Laws 1858, making a further requirement that he shall return the garnishee summons and affidavits at the time of the return of the original process."

Note: Where the officer's return on the summons was that the defendant "not being found and having no residence or no known agent or attorney within the said county, I

am unable to serve upon the within named defendant," and the garnishee answered admitting an indebtedness to the defendant, it was proper to serve the garnishee summons by publication. The member of defendant's family on whom the service may be made must reside with the defendant within the jurisdiction of the justice. *De Laval S. Co. v. Hofberger*, 161 W 344, 154 NW 387.

Service by publication, see *Shearer v. Davis & Starr L. Co.*, 78 W 278, 47 NW 360.

A garnishee has no right to appear under void process and thus substitute his creditor's creditor for his own because that goes to the jurisdiction of the subject, not to jurisdiction of his person. *Steen v. Norton*, 45 W 412, 417.

304.25 Liability of garnishee. (1) The garnishee, from the time of service of the garnishee summons upon him, shall stand liable to the plaintiff to the amount of the personal property; money in his hands belonging to the defendant and the amount of his debt to the defendant, and not by law exempt from execution.

(2) Section 267.18, exempting specified property from garnishment, is applicable to garnishment in justice court. [*R. S. 1849 c. 88 s. 118*; *R. S. 1858 c. 120 s. 116*; *R. S. 1878 s. 3719*; *Stats. 1898 s. 3719*; *Stats. 1925 s. 304.25*; *1945 c. 441*]

Comment of Advisory Committee, 1945: (2) is from 304.36 and is based on practice in courts of record. (Bill 193-S)

Revisers' Note, 1878: "Section 116, chapter 120, R. S. 1858, rewritten so as to conform to the garnishment in circuit courts, and inserting the word 'personal' before property, in the second line. The word property, alone, means as well real as personal property, and, as a justice's court has no jurisdiction in actions concerning the title to real estate, it is thought best to indicate with certainty that the garnishees are only to be held liable for personal property in garnishment."

Note: Property delivered to a carrier and in transit when a garnishee summons was served on the consignee is not "in the hands" of the consignee within the meaning of this section. Actual manual possession is required. *Kuehn v. Nero*, 145 W 256, 130 NW 56.

304.26 Effect of service. (1) The service of the garnishee summons commences an action against the garnishee; and upon the return of the officer that such summons has been duly served the justice shall enter an action in his docket in which the plaintiff in the original action is plaintiff and the garnishee is defendant.

(2) At any time after service of the garnishee summons upon the garnishee defendant, the defendant in the principal action may file with the justice a request in writing for an immediate trial of the garnishee action. Thereupon the justice shall issue an order at once, requiring the plaintiff and garnishee defendant to appear before him at a stated time, not to exceed 3 days from date of the order, for trial of the garnishee action. Said order shall be served upon the parties as a garnishee summons is served, at least 48 hours before such trial. Upon return of said process showing that the order has been duly served, the justice may proceed to try the action with the same effect as though it were the return day of the principal action, but may, where justice requires it, continue the matter to such time as may be necessary but not beyond the time of return in the principal action. Any further adjournment shall be only for cause or by agreement of the parties. [*R. S. 1849 c. 88 s. 120, 123*; *R. S. 1858 c. 120 s. 118*; *R. S. 1878 s. 3720*; *Stats. 1898 s. 3720*; *1913 c. 290*; *Stats. 1925 s. 304.26*; *1945 c. 441*]

Revisers' Note, 1878: "Same as section 118, chapter 120, R. S. 1858, striking out the words 'in attachment' and inserting in their place the words 'in the original action' so as to make the section apply to all garnishment."

Note: Proceeding by garnishee process is commencement of separate suit and should be entered, conducted and judgment rendered therein as in separate suit. *Gariand v. McKittrick*, 52 W 261, 9 NW 160.

304.27 Garnishee to be examined. The garnishment affidavit shall be the complaint in the action; and the garnishee may answer the matters alleged in the affidavit either orally or by verified written answer, and if the answer is oral it shall be reduced to writing by the justice and filed. The action may be adjourned by the garnishee as in case of a second adjournment. [*R. S. 1849 c. 88 s. 124*; *R. S. 1858 c. 120 s. 121, 122*; *R. S. 1878 s. 3721*; *1881 c. 313 s. 1*; *Ann. Stats. 1889 s. 3721*; *1893 c. 73 s. 1*; *Stats. 1898 s. 3721*; *Stats. 1925 s. 304.27*; *1945 c. 441*]

Note: When, to the knowledge of the garnishee, an assignment or transfer of the property in his hands is made after he has answered and he is apprised of it in time to apply for leave to amend, he must do so or he will be precluded from giving evidence of the transfer. *John R. Davis L. Co. v. First Nat. Bank*, 84 W 1, 54 NW 108.

The defense of prior garnishment cannot be proven unless it is pleaded. *Schuerman v. Foster*, 82 W 319, 52 NW 311.

The garnishee shall set forth in his answer any claim which third persons, to his knowledge, may have upon the property in his hands. *Luck v. Galloway*, 52 W 164, 8 NW 608.

304.28 Undertaking to discharge garnishee. The defendant in the main action may obtain a discharge of the garnishee and a dismissal of the garnishee action by filing in the main action an undertaking executed in his behalf by a surety approved by the justice, conditioned that any final judgment which may be obtained by the plaintiff in the main action shall be entered against the defendant and the surety jointly (including costs in the garnishee action). If the judgment is for the plaintiff it shall be entered against the defendant and his surety jointly, but it shall not be collected from the surety if the officer can find property of the defendant to satisfy the same, and the execution shall so direct. In no event shall the surety be liable for more than \$400. [*1905 c. 173 s. 1*; *Supl. 1906 s. 3721a*; *1907 c. 348*; *Stats. 1925 s. 304.28*; *1945 c. 441*]

Comment of Advisory Committee, 1945: The wording of old 304.28 is very confusing and obscure. The revise is intended to state the meaning more clearly. The liability of the surety is limited to \$400. (Bill 193-S)

304.29 Trial if garnishee answer unsatisfactory; appeal. If the plaintiff is not satisfied with the garnishee's answer or if either party desires a trial the justice shall enter that fact on his docket and proceed forthwith to try the action upon the issue formed by the affidavit and answer, and if upon the trial nonexempt property is found in the hands of the garnishee or he is found indebted to the defendant and that such indebtedness is not exempt, the justice or jury shall assess the value thereof and the garnishee shall hold the same subject to the further order of the justice; but if, upon such trial, it is found that the property in the hands of the garnishee or his indebtedness to the defendant is exempt, the justice shall forthwith enter judgment discharging the garnishee; and if it is found that part of such property or such indebtedness is exempt he shall enter judgment discharging the garnishee as to the exempt property or indebtedness. Either party may appeal from such judgment. [*R. S. 1849 c. 88 s. 124, 127; R. S. 1858 c. 120 s. 123; R. S. 1878 s. 3722; 1881 c. 313 s. 2; Ann. Stats. 1889 s. 3722; 1895 c. 378; Stats. 1898 s. 3722; Stats. 1925 s. 304.29; 1945 c. 441*]

304.30 Defendant's defense; garnishee may plead exemption. The defendant may defend in the garnishee action upon the ground that the indebtedness of the garnishee or any property held by him is exempt from execution against such defendant or is not liable to garnishment, or upon any ground upon which a garnishee might defend, and may participate in the trial of any issue between the plaintiff and the garnishee for the protection of his interests. The garnishee may defend the principal action for the defendant, if the latter does not appear; but the defense by a garnishee shall not preclude the defendant from a new trial under sections 302.31 and 302.32. The garnishee, if he has property under his control belonging to the defendant, may, but he is not obliged to, answer that said property is exempt from execution. [*R. S. 1849 c. 88 s. 126; R. S. 1858 c. 120 s. 124; R. S. 1878 s. 3723; 1887 c. 190; Ann. Stats. 1889 s. 3723; Stats. 1898 s. 3723; Stats. 1925 s. 304.30; 1945 c. 441*]

Note: Where the garnishee denied the indebtedness before the service by publication on the principal defendant, the justice had no jurisdiction to try an issue on the garnishee's answer and charge him thereon before completing service on the principal defendant who never appeared nor answered. State ex rel. Chicago & N. W. R. Co. v. Pauli, 126 W 65, 104 NW 1007.

304.31 Stay if other action pending against garnishee. If the answer of the garnishee discloses that he has property in his possession or under his control belonging to the defendant or is indebted to him but that said property or indebtedness is held subject to a garnishee proceeding or attachment issued by a state or federal court, and requests a stay of proceedings for a definite period, not exceeding one year, until such proceedings are disposed of, the justice shall enter a stay order and shall adjourn the garnishee action until the day to which such proceedings are stayed. The plaintiff may, on not less than 6 days' written notice to the garnishee, apply to the justice to have the stay vacated, and on making satisfactory proof to the justice that the proceedings on account of which the stay was granted have been disposed of, the justice may vacate the stay and proceed as in other cases. [*1887 c. 228 s. 1; Ann. Stats. 1889 s. 3723a; Stats. 1898 s. 3723a; Stats. 1925 s. 304.31; 1945 c. 441*]

304.32 Payment into court or deposit of property; adjournment; costs; notice; undertaking. (1) If the answer of the garnishee discloses that he is indebted to or has property belonging to the defendant not exempt from execution and the same is claimed by some named person not a party to the action, giving his post-office address, if possible, and that he is in doubt as to whom said property should be delivered or such debt paid, the justice may order him to pay the money or debt into court or deliver the property to the court or some designated officer, and give the garnishee a receipt therefor which shall discharge the garnishee and bind the plaintiff and the claimant. The justice shall thereupon cause a notice setting forth the facts stated in the answer to be served upon the person mentioned therein as claiming said debt or property which notice shall be served upon him as a garnishee summons is served, and which shall direct said person to appear before the justice and defend his rights thereto. The justice shall adjourn the action to such time, not exceeding 90 days in all, as seems to him fit, and shall make the notice returnable at the time and place to which he has adjourned. If the person so summoned appears and claims the property but fails to establish his right thereto, costs shall be awarded against him.

(2) If the claimant cannot be found or is a nonresident of the state, the justice shall enter an order on his docket requiring the plaintiff to publish such notice for 2 successive weeks in a newspaper printed in the county, if there be one, and if not, to post up the notice in 3 public places in the town, city or village at least 4 weeks before rendering judgment. The notice may be substantially in the following form:

State of Wisconsin, } In Justice Court
 County. } Before , Justice of the Peace
 To :

You are hereby notified that in an action of garnishment in said court, between, plaintiff, and, garnishee, the garnishee answers that you claim from him certain property in question in said action, and that he is in doubt as to whom the same belongs. Unless you appear in said court at on the day of, 19. . ., at . . . o'clock in the noon and prove your claim, the court will proceed to judgment in the action.

., Plaintiff.

(3) The publication may be proved by the affidavit of the publisher or foreman of the newspaper and the posting proved by the affidavit of any person who posted the notice. If the claimant does not appear, the debt or property shall not be paid or delivered to the plaintiff, unless an undertaking is entered upon the docket, signed by a surety approved by the justice, substantially in the following form:

State of Wisconsin, } In Justice Court
 County. } Before, Justice of the Peace

In an action of garnishment of, plaintiff, against, garnishee, the garnishee having answered that claims the property in question, and said claimant having been notified thereof, and not having appeared and the court having decided that said property belongs to the defendant, and should be paid to the plaintiff;

Now I undertake that the plaintiff will pay all damages which the said claimant may sustain by reason of said judgment, but not exceeding \$200.

Dated, 19 . . .

., Surety.

(4) The claimant may bring an action on the undertaking; and if he establishes his title to the property he shall recover thereon; provided such action is brought within one year from the date of the judgment. [1887 c. 228 s. 2; Ann. Stats. 1889 s. 3723b; Stats. 1898 s. 3723b; 1901 c. 280 s. 1; Supl. 1906 s. 3723b; Stats. 1925 s. 304.32; 1945 c. 441]

Comment of Advisory Committee, 1945: Of course the discharge under (1) applies only to the debt or property in question. For uniformity, \$200 is substituted for \$300 as the limit of the undertaking. The posting under 304.14 is 15 days and only 1 publication is required. (Bill 193-S)

Note: Where a note was claimed by a third party and the garnishee defendant failed to bring such party in under this section, payment under a garnishee judgment was no defense to an action by such third party. *Holman v. Lueck*, 137 W 375, 119 NW 124.

304.33 Costs to garnishee. In the garnishee action if the plaintiff is nonsuited or if upon the trial of the issue between the plaintiff and garnishee no property is found in his hands or nothing is found due from him to the defendant, or if the plaintiff is nonsuited or nothing is found due from the defendant to the plaintiff, then the garnishee shall recover costs against the plaintiff. [R. S. 1849 c. 88 s. 128; R. S. 1858 c. 120 s. 125; R. S. 1878 s. 3724; Stats. 1898 s. 3724; Stats. 1925 s. 304.33; 1945 c. 441]

304.34 Proceedings when garnishee liable; his costs. (1) If the plaintiff recovers in the original action and the garnishee at the time of the service of the summons had property in his possession belonging to the defendant or was indebted to him, the justice shall enter an order in his docket requiring the garnishee, within 10 days, to deliver to the justice the property or the amount of the indebtedness, or so much thereof as is necessary to satisfy the judgment, and the costs of the garnishee proceedings; or if it appears that the garnishee is to pay or deliver to the defendant any money or property in any other manner or at any other time than immediately and at the time of the service of the summons (the same belonging to the defendant) then the order of the justice shall be that payment or delivery be made accordingly to the justice for the benefit of the plaintiff.

(2) If the garnishee pays the indebtedness and delivers the property as directed by the order, the costs of the garnishee shall be paid out of the money or property received by the justice, unless the garnishee upon an issue joined with him by the plaintiff has been held liable in a greater amount of property or indebtedness than was disclosed in his answer, in which case he shall be liable for costs; and all property, except money, delivered to the justice shall be by him ordered to be sold on the execution against the defendant. [R. S. 1849 c. 88 s. 129, 130; R. S. 1858 c. 120 s. 126, 127; R. S. 1878 s. 3725; 1880 c. 207; Ann. Stats. 1889 s. 3725; Stats. 1898 s. 3725; Stats. 1925 s. 304.34; 1945 c. 441]

Comment of Advisory Committee, 1945: The garnishee should pay costs if he contests and loses. (Bill 193-S)

Revisers' Note, 1878: "In place of sections 126 and 127, chapter 120, R. S. 1858, rewritten so as to make it the duty of the justice in all cases to enter an order requiring the garnishee to pay or deliver the property in his hands and omitting portions of section 127, as unnecessary and tending to render the meaning of the section obscure."

Note: Notes and mortgages in the hands of an attorney for collection and upon which he has a lien for services rendered cannot be garnished. *Grimsrud v. Linley*, 109 W 632, 85 NW 410.

An order directing a garnishee to pay money into court can only be enforced by an entry of judgment as prescribed in 304.35. It is not a judgment from which an appeal can be taken. *Williams v. Brechler*, 75 W 309, 43 NW 952.

Where garnishee holds property of principal defendant, subject to be delivered to him in future, judgment should direct delivery thereof to the court and upon garnishee's failure judgment should go against him. *Rasmussen v. McCabe*, 43 W 471.

304.35 Judgment if garnishee fails to deliver property; stay of proceedings; appeal. (1) If the garnishee does not deliver the property or pay the money due or found in his possession and belonging to defendant judgment shall be given against him for the value of such property, as found by the justice or jury, but in no case for a sum greater than the judgment against the principal defendant.

(2) The plaintiff, instead of taking judgment against the garnishee, may enforce the delivery of the property by proceedings as for a contempt in case of the garnishee's refusal to deliver the property pursuant to the order of the justice. An appeal may be taken from the order directing the delivery of the property in the garnishee's possession. Proceedings under said order may be stayed during the pendency of the appeal by the defendant executing an undertaking, with a surety approved by the justice, that if the order appealed from is affirmed or the appeal dismissed, the appellant will pay to the plaintiff the value of the property, with interest, and the costs of the plaintiff on the appeal or that, in either such event, he will deliver such property to the plaintiff and pay interest on the value thereof and on such cost.

(3) When an appeal is taken by the defendant from a judgment against him in the principal action, and execution on such judgment is stayed, all proceedings in the garnishee action are thereby stayed until the final determination of the principal action. Further proceedings in the garnishee action may be had upon filing a certified copy of the judgment in the original action with the justice and 3 days' notice to the opposite party. [*R. S. 1849 c. 88 s. 131; R. S. 1858 c. 120 s. 128; R. S. 1878 s. 3726; 1883 c. 24; Ann. Stats. 1889 s. 3726; Stats. 1898 s. 3726; 1901 c. 267 s. 1; 1903 c. 263 s. 1; Supl. 1906 s. 3726; Stats. 1925 s. 304.35; 1945 c. 441*]

Note: The object of the amendment by chapter 24, laws of 1883, was, first, to direct for what sum judgment should be rendered against the garnishee in case he had been ordered to deliver property and had failed to do so. Another object was to confer upon the plaintiff in the garnishee action the right to take a judgment, not for the value of the property in the hands of the garnishee, but

for the delivery of the property itself. The appeal given is from the latter order, and not from an order directing him to pay into court the amount of any indebtedness from the garnishee to the defendant in the principal action. Such an order is not appealable. *Williams v. Brechler*, 75 W 309, 43 NW 952.

304.36 Judgment against garnishee, exception. No final judgment shall be rendered against the garnishee until final judgment is rendered against the defendant in the original action. [*R. S. 1849 c. 88 s. 125; R. S. 1858 c. 120 s. 129; R. S. 1878 s. 3727; Stats. 1898 s. 3727; Stats. 1925 s. 304.36; 1945 c. 441*]

Comment of Advisory Committee, 1945: The second part of old 304.36 seems to be misplaced. Logically it goes with the provision which declares who and what may be garnished, i.e. 304.25, and it is moved to that section. (Bill 193-S)

Revisers' Note, 1878: "Section 129, chapter 120, R. S. 1853, amended so as to make it applicable to all cases of garnishment, and adding the provisions prohibiting a judgment against a garnishee in the same cases, as prohibited in the circuit court."

Note: Order requiring garnishee to pay into court amount of conditional indebted-

ness which was subject to claims for mechanic's liens is improper. Such an order is, however, within the jurisdiction of the justice and cannot be reviewed upon certiorari. *Krueger v. Cone*, 106 W 522, 81 NW 934.

After the entry of a judgment against the garnishee a justice cannot, of his own motion, reopen the case and adjourn the action to a future date. *McCormick H. M. Co. v. James*, 84 W 600, 54 NW 1088.

The judgment is no protection to the defendant against a suit by his creditor for the same claim if the proceedings are void. *Edler v. Hasche*, 67 W 653, 31 NW 57.

304.37 Money paid into court by garnishee. Where a judgment is rendered against the garnishee in any court, the garnishee may pay into that court the amount of the judgment, and take a receipt from the clerk, if a court of record, or from the judge or justice, if a court not of record, which shall be a full discharge and satisfaction of the liability of the garnishee on the judgment; and on such payment the liability of the garnishee shall cease, except as to such greater sum as may be found due the plaintiff upon an appeal or a retrial of the action. [*1903 c. 80 s. 1; Supl. 1906 s. 3727a; 1917 c. 566 s. 47; Stats. 1925 s. 304.37; 1945 c. 441*]

304.38 Proceedings on default of garnishee. When a garnishee fails to appear or, appearing, fails to make full answer touching his liability, the justice shall enter that fact in his docket and shall adjudge the garnishee indebted to the defendant; and if judgment is rendered in favor of the plaintiff the judgment shall be entered against the garnishee and shall include all costs in the garnishee proceedings, and no such costs shall be paid by the defendant; or, on demand of the plaintiff, a warrant for the arrest of the garnishee may issue and be served as are warrants issued by justices in civil actions founded on tort, and the garnishee shall be held thereon until he makes full and direct answers touching his liability; and the justice may continue the cause, if necessary, for further proceedings. [*R. S. 1849 c. 88 s. 121, 132; R. S. 1858 c. 120 s. 119, 130; R. S. 1878 s. 3728; 1893 c. 73 s. 2; Stats. 1898 s. 3728; Stats. 1925 s. 304.38; 1945 c. 441*]

Note: A justice has no power to enter a personal judgment against a garnishee for default unless he has before him proof that all the conditions precedent to enforce attendance have been complied with. *Townsend v. Seelig*, 113 W 31, 88 NW 908.

Where garnishee fails to appear his attendance may be compelled; or, after judgment against principal debtor, judgment may be rendered against him. *Bushnell v. Allen*, 48 W 460, 4 NW 599.

304.39 Appearance before judgment. If the garnishee fails to appear at the proper time he may afterward appear and answer at any time before final judgment against him if he first pays all costs in the garnishee action which have accrued up to that time; and when he so appears the justice shall cause the plaintiff to be notified thereof, so that he may be present at the making of such answer. [*R. S. 1849 c. 88 s. 122; R. S. 1858 c. 120 s. 120; R. S. 1878 s. 3729; 1893 c. 73 s. 3; Stats. 1898 s. 3729; Stats. 1925 s. 304.39; 1945 c. 441*]

Revisers' Note, 1878: "Section 120, chapter 120, R. S. 1858, adding a provision that if the garnishee shall appear, after the re- turn day, notice shall be given to the plaintiff so that he may be present at the examination."

304.40 Judgment a bar. The order or judgment in the garnishee action shall be conclusive between the parties and those claiming under them. [*R. S. 1849 c. 88 s. 133; R. S. 1858 c. 120 s. 131; R. S. 1878 s. 3730; 1897 c. 42; Stats. 1898 s. 3730; 1919 c. 679 s. 99; Stats. 1925 s. 304.40; 1945 c. 441*]

304.41 Garnishment based on judgment. When an execution on a justice court judgment has issued or is issuable, the judgment creditor may commence a garnishee action against the debtor before the justice who has legal custody of the judgment docket, by filing with the justice an affidavit made by him or in his behalf, stating that he has good reason to believe that a named person is indebted to the judgment debtor or has unexempt property of such debtor in his possession; and demanding that the named person be summoned as garnishee. Thereupon a garnishee summons shall be issued by the justice; and the subsequent proceedings shall be as in other garnishee actions. [*1945 c. 441*]

Comment of Advisory Committee, 1945: See Note to Section 135. New 304.41 expressly provides who shall issue the garnishee summons. (Bill 193-S)
304.41 is new. It takes the place of old 303.27 (as amended by Supreme Court Order) which is repealed by Section 135 of this bill.