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CHAPTER 69.

RECOVERY OF PERSONAL PROPERTY

**SECTION 15‑69‑10.** Time when immediate delivery may be claimed.

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

**SECTION 15‑69‑20.** Any one of several joint owners may sue for possession.

Any one or more of several joint owners of personal property who can establish such partial ownership in such property shall have the right to institute an action in claim and delivery to recover possession of the property from any wrongful holder thereof. In such an action the co‑owners of the property who do not join the plaintiff in bringing the suit may be made parties defendant.

**SECTION 15‑69‑30.** Affidavit and requisites thereof.

When a delivery is claimed an affidavit must be made by the plaintiff or by someone on his behalf showing:

(1) That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the defendant;

(3) The alleged cause of the detention thereof, according to the affiant’s best knowledge, information and belief;

(4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff or, if so seized, that it is by statute exempt from such seizure; and

(5) The actual value of the property.

**SECTION 15‑69‑40.** Notice of right to preseizure hearing.

The plaintiff shall attach to the affidavit a notice of a right to a preseizure hearing which shall notify the defendant that within five days from service thereof, he may demand such hearing by notifying the clerk of court in writing and present such evidence touching upon the probable validity of the plaintiff’s claim for immediate possession, and defendant’s right to continue in possession.

**SECTION 15‑69‑50.** Sheriff shall serve affidavit and notice; required security; sheriff shall be directed to take property.

Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if the return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, including damages suffered on account of depreciation in value of the property pending the determination of the action, the sheriff shall forthwith serve the same upon defendant. If the defendant (1) fails to demand a preseizure hearing within five days of service, or (2) after such hearing the judge shall find that plaintiff’s claim for immediate possession should be allowed, or (3) the clerk of court or judge finds that a preseizure hearing has been previously waived in writing as provided in this chapter, or (4) the clerk of court or judge finds, as provided in this chapter, that there is a probability that the subject property is in immediate danger of being destroyed or concealed by the possessor of such property, then the clerk of court or judge shall endorse upon the affidavit for possession a direction to the sheriff requiring him to take the property described therein from the defendant and keep it, to be disposed of according to law.

In case the plaintiff does not execute the required undertaking, the party having possession of the property shall retain it until the determination of the suit, and no endorsement allowing immediate possession shall be made on the affidavit until the appropriate undertaking is executed.

**SECTION 15‑69‑60.** Manner of effecting service; when sheriff shall take and retain property.

The sheriff shall without delay serve on the defendant a copy of the affidavit, notice and undertaking, by delivering it to him personally, if he can be found, or to his agent, from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. Upon delivery of the affidavit with the endorsement of the clerk of court or judge allowing immediate possession, the sheriff shall take the property described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody.

**SECTION 15‑69‑70.** Purpose of preseizure hearing; allowing claim for immediate possession.

The purpose of the preseizure hearing is to protect the defendant’s use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property. If the judge shall, after conducting the hearing, find that the plaintiff’s claim for immediate possession is probably valid and the defendant has no overriding right to continue in possession of the property, then the judge may allow the claim for immediate possession and endorse the affidavit accordingly.

**SECTION 15‑69‑80.** Notice and opportunity for preseizure hearing is required; waiver.

No property shall be seized under the provisions of this chapter unless five days’ notice and an opportunity to be heard have been afforded the party in possession as herein provided; provided, however, any person in possession of the personal property may waive the right to a preseizure hearing, if the waiver is conspicuously displayed in the contract and includes the wording “waiver of hearing prior to immediate possession.” In order for the contractual waiver or any other waiver to be effective, the plaintiff by affidavit must show that the defendant has in writing by contract or separate written instrument voluntarily, intelligently and knowingly waived his right to a hearing prior to the repossession of such personal property. The judge or clerk of court may order immediate delivery of the property to the plaintiff upon receipt of such affidavit.

**SECTION 15‑69‑90.** Order restraining defendant from damaging, concealing or removing property.

The judge may issue an order which shall be concurrently served on the defendant that restrains the defendant from damaging, concealing or removing the subject property, when immediate possession of such property is not being taken. Upon proper showing that such order has been violated, the defendant shall be subject to a fine not to exceed one thousand dollars or imprisonment for not more than six months, or both.

**SECTION 15‑69‑100.** Determination upon affidavit showing danger of destruction or concealment.

Upon a showing unto the judge or clerk of court supported by an affidavit containing facts sufficient to show that it is probable to believe that the property at issue is in immediate danger of being destroyed or concealed by the possessor of such property and particularly describing such property and its location, the judge or clerk of court shall make a determination as to whether or not the property may be immediately seized. Provided, that the holding of a preseizure hearing by the judge shall not be a condition precedent to such determination.

**SECTION 15‑69‑110.** Service of affidavit of waiver or probability of destruction or concealment.

If either an affidavit showing that the defendant has waived his right to a preseizure hearing or an affidavit of probability of damage or concealment is filed under the provisions of this chapter, a copy thereof shall be served on the defendant in lieu of serving him with notice of right to preseizure hearing.

**SECTION 15‑69‑120.** Filing of notice and affidavit.

The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein.

**SECTION 15‑69‑130.** Exception to sureties.

The defendant may within three days after the service of a copy of the affidavit and undertaking give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them. When the defendant excepts the sureties shall justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they shall justify or new sureties shall be substituted and justify. But before delivery of such property to the plaintiff the defendant shall have three days after (a) such justification, (b) new sureties have been substituted by the plaintiff or (c) a holding by the sheriff that plaintiff’s sureties are sufficient, within which to replevy as provided in Section 15‑69‑140.

**SECTION 15‑69‑140.** When defendant shall be entitled to redelivery; undertaking.

At any time before the delivery of the property to the plaintiff the defendant may require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, including damages suffered on account of depreciation in value of the property pending the determination of the action, be recovered against the defendant. If a return of the property be not required by the defendant as herein and under the circumstances in Section 15‑69‑130 provided and within the time therein provided, it shall be delivered to the plaintiff, except as provided in Section 15‑69‑200.

**SECTION 15‑69‑150.** Amount of bond required of defendant when claim is for debt.

In all actions in claim and delivery when the purpose is to collect a debt the undertaking required of the defendant shall in no case be in excess of double the amount of the debt claimed by the plaintiff to be due. But if there is an appeal the court from which the appeal is taken may increase the bond.

**SECTION 15‑69‑160.** Justification of defendant’s sureties.

The defendant’s sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge, clerk of court or magistrate in the same manner as upon bail on arrest. Upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant’s sureties until they justify or until justification is completed or expressly waived and may retain the property until that time. But if they, or others in their place, fail to justify at the time and place appointed he shall deliver the property to the plaintiff.

**SECTION 15‑69‑170.** Manner of qualification and justification of sureties.

The qualifications of sureties and their justification shall be as are prescribed by Sections 15‑17‑230 and 15‑17‑270 in respect to bail upon an order of arrest.

**SECTION 15‑69‑180.** Taking of property concealed in building or enclosure.

If the property or any part thereof be concealed in a building or enclosure the sheriff shall publicly demand its delivery. If it be not delivered he shall cause the building or enclosure to be broken open and take the property into his possession and, if necessary, he may call to his aid the power of his county.

**SECTION 15‑69‑190.** Keeping of property; sheriff’s fees and expenses.

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the property.

**SECTION 15‑69‑200.** Claim of property by third person.

If the property taken be claimed by any other person than the defendant or his agent and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the affidavit upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking executed by two sufficient sureties accompanied by their affidavit that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and are freeholders and householders within this State. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid, and, notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

**SECTION 15‑69‑210.** Judgment.

In an action to recover the possession of personal property judgment for the plaintiff may be for the possession, for the recovery of possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention. If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages, both actual and punitive, for taking and withholding the property.

But when either party gives bond for the property, as provided by law, no punitive damages shall be allowed for anything occurring after the giving of the bond.