

## LEGISLATIVE BILL 474

Approved by the Governor May 8, 1973

Introduced by DeCamp, 40

AN ACT to amend sections 25-1093, 25-1096, 25-1097, and 25-10,110, Reissue Revised Statutes of Nebraska, 1943, and section 25-1094, Revised Statutes Supplement, 1972, relating to civil procedure; to provide procedure for replevin of personal property; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 25-1093, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1093. The plaintiff in an action to recover the possession of specific personal property may, at the commencement of the suit, or any time before answer, claim request the immediate delivery of such property as provided by sections ~~25-1094 to 25-10,110~~ 1 to 9 of this act, and sections 25-1095 and 25-1098 to 25-10,109.

Sec. 2. The plaintiff may request the delivery of property as specified in section 25-1093 by filing in the office of the clerk of the court in which the action is filed an affidavit of the plaintiff, his agent or attorney, showing (1) a description of the property claimed, (2) that the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the possession of the same, (3) that the property is wrongfully detained by the defendant, and (4) that it was not taken in execution on any order or judgment against such plaintiff, or for the payment of any fine, tax, or amercement assessed against him or by virtue of an order of delivery issued under Chapter 25, or any other mesne or final process issued against him: Provided, such affidavit may omit the first and last clause of this subdivision and, in lieu thereof, show that the property was taken on execution on a judgment or order other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state; and provided further, the provisions of Chapter 25, article 10, shall extend to and apply as well to proceedings in replevin had before municipal and county courts. Attached to such affidavit shall be a specific request for the delivery of the

property and the issuance of an order by the court to that effect.

Sec. 3. Upon the filing of such affidavit and request for delivery, if the defendant with full knowledge of the allegations and effect of the plaintiff's request agrees that such delivery in replevin be had, he may execute a voluntary, intelligent, and knowing waiver under oath of his rights to notice and hearing, in which event the court shall order that all further proceedings shall be suspended and the property being replevied delivered to the plaintiff forthwith, otherwise upon the filing of such affidavit and request for delivery required by section 2 of this act, the court shall issue a temporary order addressed to the defendant that he shall hold the property described in the affidavit in his possession, unimpaired and unencumbered, and in all respects in the same state and condition as at the time of receipt of the order, until further order of the court. The temporary order shall also notify such defendant that if he fails to comply with the temporary order he shall be subject to the full contempt powers of the court. Attached to such temporary order shall be a notice that a hearing will be had and specifying the date, time, and place of such hearing, at which hearing will be determined plaintiff's right to possession of the goods described in plaintiff's affidavit and request for delivery, pending final determination of the merits. At such hearing the defendant shall be required to show cause why the possession of the goods should not be delivered to the plaintiff. Unless otherwise determined and ordered by the court, the date of such hearing shall be four days after service of the order upon the defendant, but in no event later than seven days after service.

Sec. 4. If filed at the commencement of suit, such affidavit and request for delivery and such temporary order containing the notice of hearing shall be served by the sheriff or other officer with the summons. If filed after the commencement of suit but before answer, they shall be served separately from the summons, but as soon after their filing and issuance as practicable.

Sec. 5. If the court finds at such hearing that the plaintiff is entitled to possession of the property, it shall order the clerk to issue an order for delivery of the property to the plaintiff, and deliver such order for delivery to the sheriff or other officer to be served and returned according to sections 25-1096 and 25-1097. The order of the court required by this section shall conform to the content requirements of section 25-1094.

Sec. 6. That section 25-1094, Revised Statutes Supplement, 1972, be amended to read as follows:

25-1094. An order for the delivery of personal property to the plaintiff shall be made by the clerk of the court in which the action is brought, ~~when there shall be filed only upon the filing in his office of an affidavit of the plaintiff, his agent, or attorney order of the court~~ showing (1) a description of the property claimed; (2) that the plaintiff has raised a bona fide issue as to whether he is the owner of the property, or whether he has a special ownership or interest therein, ~~stating the facts in relation thereto, and that he is entitled to the immediate possession of the same; but that it appears sufficiently probable to the court that the plaintiff will prevail on the merits; and~~ (3) that there is a bona fide issue as to whether the property is wrongfully detained by the defendant and that the plaintiff is entitled to the immediate delivery of the property. ~~;(4) that it was not taken in execution on any order or judgment against said plaintiff; or for the payment of any fine, tax or amercement assessed against him; or by virtue of an order of delivery issued under this chapter or any other mesne or final process issued against him; Provided, such affidavit may omit the first and last clause of this subdivision, and in lieu thereof show that the property was taken on execution on a judgment or order, other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state; and provided, further, the provisions of this article shall extend to and apply as well to proceedings in replevin had in county court;~~

Sec. 7. That section 25-1096, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1096. The return day for the order of delivery, ~~when issued at the commencement of the suit, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it issued.~~

Sec. 8. That section 25-1097, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-1097. The sheriff shall execute the order of delivery by taking the property therein mentioned. He shall also deliver a copy of the order of delivery to the person charged with the unlawful detention of the property, or leave such copy at his usual place of residence.

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Sec. 9. That section 25-10,110, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

25-10,110. Any order for the delivery of property issued under section 25-1094 without the affidavit order of the court required thereby, shall be set aside at the cost of the clerk issuing the same, and such clerk, as well as the plaintiff, shall also be liable in damages to the party injured.

Sec. 10. That original sections 25-1093, 25-1096, 25-1097, and 25-10,110, Reissue Revised Statutes of Nebraska, 1943, and section 25-1094, Revised Statutes Supplement, 1972, are repealed.