

THE SUPREME COURT OF THE STATE OF ALASKA

COURT ORDER NO. 156

Amending Rules of Civil Procedure

IT IS ORDERED that the following Rules of Civil Procedure be amended to read as set out in the attached rules:

Rule 88 Procedure for Claiming Delivery of Personal Property.

Rule 89 Attachment.

These rules shall be effective Friday, December 8, 1972.

DATED at Anchorage, Alaska, this 8th day of December, 1972...

/s/ Jay A. Rabinowitz
CHIEF JUSTICE

/s/ Roger G. Connor
ASSOCIATE JUSTICE

/s/ Robert C. Erwin
ASSOCIATE JUSTICE

/s/ Robert Boochever
ASSOCIATE JUSTICE

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RULE 88. PROCEDURE FOR CLAIMING DELIVERY OF
PERSONAL PROPERTY.

(a) Prejudgment Delivery of Personal Property to Plaintiff; Availability. When the plaintiff has commenced a civil action to recover possession of personal property, and has provided a written undertaking with sufficient sureties as ordered by the court, he may make application to the court to have the property delivered to him. The court may order the prejudgment seizure of the property in accordance with the provisions of this rule.

(b) Motion and Affidavit for Delivery. The plaintiff shall file a motion with the court requesting the delivery of personal property, together with an affidavit showing:

(1) A particular description of the property claimed, and if the property claimed is a portion of divisible property of uniform kind, quality and value, that such is the case, and the amount thereof which the plaintiff claims; and

(2) That the plaintiff is the owner of the property or lawfully entitled to its possession, and the facts and circumstances relating thereto; and

(3) The value of the property claimed; and if more than one article is claimed, the current value of each article; and

(4) That the property is in the possession of the defendant, and the facts and circumstances relating to such possession according to the plaintiff's best knowledge or belief; and

(5) That the prejudgment seizure is not sought and the action is not prosecuted to hinder, delay or defraud any other creditor of the defendant; and

(6) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

The plaintiff or his attorney shall endorse in writing upon the motion attached to the affidavit a request that the property claimed be taken by a peace officer from the defendant and be delivered to the plaintiff.

(c) Notice of Motion; Pre-Seizure Hearing. Except as section (j) provides, the court may order prejudgment delivery of personal property to the plaintiff only after:

(1) The defendant is served with notice of the motion and a copy of the affidavit; and

(2) The defendant is given an opportunity for a judicial hearing to determine the necessity of and justification for the prejudgment seizure of the property. The hearing shall be held not less than three (3), nor more than seven (7) business days (exclusive of Saturdays, Sundays, and legal holidays) after the service of the notice of motion upon the defendant.

(3) The hearing shall be held before the court on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall immediately order the prejudgment seizure of the property. The hearing shall be conducted in conformity with Civil Rule 77, except where the provisions of Rule 77 conflict with the specific requirements of the instant rule, in which case, the requirements of the instant rule shall control.

(d) Hearing; Burden of Proof. At the hearing the court shall require the plaintiff to establish by a preponderance of the evidence the probable validity of his claim to the property and the absence of any reasonable probability that a successful defense can be asserted by the defendant.

(e) Issuance of Order; Service and Seizure. If at the hearing the court finds that the plaintiff has met his burden of proof set forth in section (d) of this rule, the court shall issue an order directing a peace officer to seize and take into custody the property described in the affidavit. The peace officer shall forthwith proceed to seize and take into custody the property described in the affidavit. He shall also without delay, serve on the defendant copies of the plaintiff's affidavit and request for the taking of the property, and a copy of the undertaking. Service shall be made in the manner prescribed by Rule 4(d), or if that cannot be done, then as prescribed by order of the court in accordance with Rule 4(e).

(l) New or Additional Undertaking. The court at any time may require the giving of a new or additional undertaking to protect the interests of the defendant, the peace officer, or any party who intervenes, if good reason is shown that a new or additional bond is necessary.

(g) Sureties on Undertaking. The qualifications of sureties and their justification shall be as prescribed by these rules.

(h) Return by Peace Officer. The peace officer shall file a return with the court promptly and in any event within 20 days after the taking of the property from the defendant. Such return shall contain an inventory of the property taken, a statement of the claims, if any, by persons other than the plaintiff, and the name of the person to whom the property has been delivered. If the property is not taken, the peace officer shall promptly make a return to the court stating the fact and giving his reasons therefor.

(i) Defendant's Security. No order for prejudgment seizure of personal property may issue, or the peace officer shall redeliver to the defendant any property seized pursuant to the hearing, when the defendant provides a written undertaking with sufficient sureties as ordered by the court. The court may take into account a defendant's indigency, and may, in its discretion, permit the defendant to establish security by means other than the posting of bonds or the provision of a written undertaking. Such alternative means may include an installment payment arrangement or any other mechanism which the court deems just.

(j) Ex Parte Prejudgment Delivery of Personal Property. The court may issue a prejudgment order for delivery of personal property in an ex parte proceeding upon the plaintiff's motion, affidavit, and undertaking only in the following extraordinary situations:

(1) Imminence of Defendant Concealing, Destroying or Conveying the Property. The court may issue an ex parte order for delivery if the plaintiff establishes the probable validity of his claim for possession of the property, and if he states in his affidavit specific facts sufficient to support a judicial finding of one of the following circumstances:

- (i) The defendant is concealing, or about to conceal, the property; or
- (ii) The defendant is about to destroy the property; or
- (iii) The defendant is causing, or about to cause, the property to be removed beyond the limits of the state; or
- (iv) The defendant is about to convey or encumber the property; or
- (v) The defendant is otherwise disposing, or about to dispose, of the property in a manner so as to defraud his creditors, including the plaintiff.

(2) Defendant's Waiver of Right to Pre-Seizure Hearing. The court may issue an ex parte order for delivery if the plaintiff establishes the probable validity of his claim for possession of the property, and if he accompanies the affidavit and motion with a document signed by the defendant voluntarily, knowingly and intelligently waiving his constitutional right to a hearing before prejudgment seizure of the property.

(3) The Government as Plaintiff. The court may issue an ex parte order for delivery when the possessory action and claim for delivery is brought by a government agency (state or federal), provided the government-plaintiff demonstrates that an ex parte seizure is necessary to protect an important governmental or general public interest.

(k) Execution, Duration, and Vacation of Ex Parte Orders.

When the peace officer executes an ex parte delivery order, he shall at the same time serve on the defendant copies of the plaintiff's affidavit, motion and undertaking, and the order. No ex parte order shall be valid for more than seven (7) business days (exclusive of Saturdays, Sundays, and legal holidays), unless the defendant waives his right to a pre-seizure hearing in accordance with subsection (j)(2) of this rule, or unless the defendant consents in writing to an additional extension of time for the duration of the ex parte order. The defendant may at any time after service of the order request an emergency hearing at which he may refute the special need for the seizure and the validity of

the plaintiff's claim for possession of the property.

(1) Duration and Vacation of Prejudgment Seizure

Orders Issued Pursuant to Hearing. A prejudgment seizure order issued pursuant to a hearing provided for in section (c) of this rule shall unless sooner released or discharged, cease to be of any force or effect and the property seized shall be released from the operation of the order at the expiration of six (6) months from the date of the issuance of the order, unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the order was issued, in which case the order shall continue in effect until released or vacated after judgment as provided in these rules. However, upon motion of the plaintiff, made not less than ten (10) nor more than sixty (60) days before the expiration of such period of six (6) months, and upon notice of not less than five (5) days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the order for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The order may be extended from time to time in the manner herein prescribed.

RULE 89. ATTACHMENT.

(a) Prejudgment Attachment; Availability. When the plaintiff has commenced a civil action, and has provided a written undertaking with sufficient sureties as ordered by the court, he may make application to the court to have the property of the defendant attached under AS §§ 09.40.010-110 as security for satisfaction of a judgment that may be recovered. The court may issue the writ of attachment in accordance with the provisions of this rule.

(b) Motion and Affidavit for Attachment. The plaintiff shall file a motion with the court requesting the writ of attachment, together with an affidavit showing:

(1) That the action is one upon an express or implied contract for the payment of money, and the facts and circumstances relating thereto; and

(2) That the sum for which the attachment is asked is an existing debt due and owing from the defendant to the plaintiff, over and above all legal setoffs and counter-claims, and the facts and circumstances relating thereto; and

(3) That the payment of such debt has not been secured by any mortgage, lien or pledge upon real or personal property, or if so secured, that the value of the security (specifying its value) is insufficient to satisfy any judgment that may be recovered by the plaintiff in the action; and

(4) That the attachment is not sought nor the action prosecuted to hinder, delay, or defraud any other creditor of the defendant; and

(5) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

(c) Notice of Motion; Pre-Attachment Hearing. Except as section (n) provides, the court may issue the writ of attachment only after:

(1) The defendant is served with notice of the motion and a copy of the affidavit; and

(2) The defendant is given an opportunity for a judicial hearing to determine the necessity of and justification for the prejudgment attachment of the property. The hearing shall be held not less than three (3), nor more than seven (7) business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice of motion upon the defendant.

(3) The hearing shall be held before the court on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall immediately order the prejudgment attachment of the property. The hearing shall be conducted in conformity with Civil Rule 77, except where the provisions of Rule 77 conflict with the specific requirements of the instant rule, in which case, the requirements of the instant rule shall control.

(d) Hearing; Burden of Proof. At the hearing the court shall require the plaintiff to establish by a preponderance of the evidence the probable validity of his claim for relief in his action and the absence of any reasonable probability that a successful defense can be asserted by the defendant.

(e) Issuance of Writ. If at the hearing the court finds that the plaintiff has met his burden of proof set forth in section (d) of this rule, the court shall order that a writ of attachment be issued unless the defendant posts security as provided in section (j). The writ shall be directed to a peace officer and shall require him to attach and safely keep property of the defendant not exempt from execution sufficient to satisfy the plaintiff's demand (the amount of which shall be stated in conformity with the complaint), together with costs and expenses. Several writs may be issued at the same time and delivered to different peace officers, provided the total amount of the several writs does not exceed the plaintiff's claim. Additional writs may be issued where previous writs have been returned unexecuted, or executed in an amount insufficient

to satisfy the full amount of the plaintiff's claim.

(f) Execution of Writ. The peace officer shall execute the writ without delay, as follows:

(1) Real property shall be attached by leaving a certified copy of the writ with the occupant of such property, or if there be no occupant, then in a conspicuous place on such property.

(2) Personal property capable of manual delivery to the peace officer, and not in the possession of a third party, shall be attached by the peace officer by taking it into his custody.

(3) Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of same, or if it be a debt, then with the debtor.

(g) New or Additional Undertaking. The court at any time may require the giving of a new or additional undertaking to protect the interests of the defendant, the peace officer, or any party who intervenes, if good reason is shown that a new or additional bond is necessary.

(h) Sureties on Undertaking. The qualifications of sureties and their justification shall be as prescribed by these rules.

(i) Return by Peace Officer. The peace officer shall note upon the writ of attachment the date of its delivery to him. When the writ has been executed, the peace officer shall promptly return it to the clerk with the officer's proceedings endorsed thereon, including a full inventory of any property attached. If the writ cannot be executed, the peace officer shall promptly return it to the clerk stating thereon the reasons why it could not be executed.

(j) Defendant's Security. No writ of attachment may issue, or the peace officer shall redeliver to the defendant any property seized pursuant to the hearing, when the defendant provides a written undertaking with sufficient sureties as ordered

by the court. The court may take into account a defendant's indigency, and may, in its discretion, permit the defendant to establish security by means other than the posting of bonds or the provision of a written undertaking. Such alternative means may include an installment payment arrangement or any other mechanism which the court deems just.

(k) In Rem Jurisdiction. In an action upon an express or implied contract against a defendant not residing in the state, the court may issue an ex parte writ of attachment only when necessary to establish jurisdiction in the court. To establish necessity, the plaintiff must demonstrate that personal jurisdiction over the defendant is not readily obtainable under AS § 09.05.015.

(l) Wages of Defendant. No part of the defendant's wages shall be attached prior to entry of final judgment, except as permitted under 15 U.S.C. § 1673, AS 09.35.080 and AS 09.40.030.

(m) Garnishee Proceedings.

(1) Order of Appearance - Service. When a person is ordered to appear before the court to be examined as to any property or debt held by him belonging to a defendant, such person shall be known as the garnishee. The order shall state the time and place where the garnishee is to appear, shall be served upon the garnishee and return of service made in the manner provided for service of summons and return thereof in Rule 4.

(2) Failure to Appear - Default. When a garnishee fails to appear in compliance with the order, the court on motion may compel him to do so.

(3) Discovery. After entry of the order mentioned in subsection (1), plaintiff may utilize the rules of discovery under the supervision of the court with respect to all matters relating to property of the defendant believed to be in the possession of the garnishee. The consequences of the garnishee's failure or refusal to make discovery shall be governed by these rules.

(4) Trial of Issues of Fact. Issues of fact arising between the plaintiff and the garnishee shall be resolved and disposed of in accordance with these rules as in the case of issues of fact arising between plaintiff and defendant. Witnesses, including the defendant and garnishee, may be required to appear and testify as upon the trial of an action.

(5) Judgment Against Garnishee. If it shall be found that the garnishee, at the time of service of the writ of attachment and notice, had any property of defendant liable to attachment beyond the amount admitted in his statement, or in any amount if a statement is not furnished, judgment may be entered against the garnishee for the value of such property in money. At any time before judgment, the garnishee may be discharged from liability by delivering, paying or transferring the property to the peace officer.

(6) Order Restraining Garnishee. At the time of the application by plaintiff for the order provided for in subsection (1), and at any time thereafter and prior to the entry of judgment against the garnishee, the court may enter an order restraining the garnishee from paying, transferring, or in any manner disposing of or injuring any of the property of the defendant alleged by the plaintiff to be in the garnishee's possession or control, or owing by the garnishee to the defendant. Disobedience of such order may be punished as a contempt.

(7) Execution. Execution may issue upon a judgment against a garnishee as upon a judgment between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner.

(n) Ex Parte Attachments. The court may issue a writ of attachment in an ex parte proceeding based upon the plaintiff's motion, affidavit, and undertaking only in the following extraordinary situations:

(1) When Defendant Non-Resident. In an action upon an express or implied contract against a defendant not residing in the state, the court may issue an ex parte writ of attachment only when necessary to establish jurisdiction in the court. To establish necessity, the plaintiff must demonstrate that personal jurisdiction over the defendant is not readily obtainable under AS § 09.05.015.

(2) Imminence of Defendant Avoiding Legal Obligations. The court may issue an ex parte writ of attachment if the plaintiff establishes the probable validity of his claim for relief in his main action, and if he states in his affidavit specific facts sufficient to support a judicial finding of one of the following circumstances:

(i) The defendant is fleeing, or about to flee, the jurisdiction of the court; or

- (ii) The defendant is concealing himself; or
- (iii) The defendant is causing, or about to cause, his property to be removed beyond the limits of the state; or
- (iv) The defendant is concealing, or about to conceal, convey or encumber his property in order to escape his legal obligations; or
- (v) The defendant is otherwise disposing, or about to dispose, of the property in a manner so as to defraud his creditors, including the plaintiff.

(3) Defendant's Waiver of Right to Pre-Attachment Hearing. The court may issue an ex parte writ of attachment if the plaintiff establishes the probable validity of his claim for relief in his main action, and if he accompanies the affidavit and motion with a document signed by the defendant voluntarily, knowingly and intelligently waiving his constitutional right to a hearing before prejudgment attachment of the property.

(4) The Government as Plaintiff. The court may issue an ex parte writ of attachment when the motion for such writ is made by a government agency (state or federal), provided the government-plaintiff demonstrates that such ex parte writ is necessary to protect an important governmental or general public interest.

(o) Execution, Duration, and Vacation of Ex Parte Writs of Attachment. When the peace officer executes an ex parte writ of attachment, he shall at the same time serve on the defendant copies of the plaintiff's affidavit, motion and undertaking, and the order. No ex parte attachment shall be valid for more than seven (7) business days (exclusive of Saturdays, Sundays, and legal holidays), unless the defendant waives his right to a pre-attachment hearing in accordance with subsection (n)(3) of this rule, or unless the defendant consents in writing to an additional extension of time for the duration of the ex parte attachment, or the attachment is extended, after hearing, pursuant to section (e) of this rule. The defendant may at any time after service of the writ request an emergency hearing at which he may refuse the special need for the attachment and the validity of the plaintiff's claim for relief in his main action.

(p) Discharge of Attachment Where Perishable Goods Have Been Sold. Whenever the defendant shall have appeared in

the action, he may apply to the court for an order to discharge the attachment on perishable goods which have been sold. If the order be granted, the peace officer shall deliver to the defendant all proceeds of sales of perishable goods, upon the giving by the defendant of the undertaking provided for in section (j).

(q) Duration and Vacation of Writs of Attachment

Issued Pursuant to Hearing. A writ of attachment issued pursuant to a hearing provided for in section (c) of this rule shall unless sooner released or discharged, cease to be of any force or effect and the property attached shall be released from the operation of the writ at the expiration of six (6) months from the date of the issuance of the writ unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the writ was issued, in which case the writ shall continue in effect until released or vacated after judgment as provided in these rules. However, upon motion of the plaintiff, made not less than ten (10) nor more than sixty (60) days before the expiration of such period of six (6) months, and upon notice of not less than five (5) days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the writ for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The order may be extended from time to time in the manner herein prescribed.