

THE *J. Rogers*
GENERAL STATUTES

OF THE

STATE OF MINNESOTA:

REVISED BY COMMISSIONERS APPOINTED UNDER AN ACT APPROVED FEBRUARY 17, 1868, AND
ACTS SUBSEQUENT THERETO, AMENDED BY THE LEGISLATURE,
AND PASSED AT THE SESSION OF 1866.

TO WHICH

THE CONSTITUTION OF THE UNITED STATES, THE ORGANIC ACT, THE
ACT AUTHORIZING A STATE GOVERNMENT, AND THE
CONSTITUTION OF THE STATE OF MINNESOTA,

ARE PREFIXED;

AND A LIST OF ACTS PREVIOUSLY REPEALED,

A GLOSSARY, AND INDEX, ARE ADDED.

Edited and Published under the authority of Chapters 15 and 16 of
the Laws of 1866.

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1872.

trial,) committed at the time and place aforesaid, of which offense the said justice has not final jurisdiction; and whereas, after examination had in due form of law, touching the said charge and offense last aforesaid, the said justice did adjudge that the said offense had been committed, and that there was probable cause to believe the said to be guilty thereof; and whereas, the said has not offered sufficient bail for his appearance to answer for said offense, you are therefore commanded, forthwith to take the said and him convey to the common jail of said county, the keeper whereof is hereby required to detain him in custody, in said jail, until he shall be thence discharged according to law.

Given under my hand this day of , A. D. 18
J. P., justice of the peace.

CHAPTER LXVI.

CIVIL ACTIONS.

SECTION

1. Distinction between actions and forms in law and equity abolished.
2. Parties known as plaintiff and defendant.
- TIME OF COMMENCING ACTIONS.
3. Actions commenced only as prescribed herein.
4. Actions for the recovery of real property within twenty years.
5. Within ten years, upon decrees of court.
6. Within six years, upon contract, liabilities, trespass, criminal conversation, or relief on ground of fraud.
7. Within three years, actions against sheriff, constable, or coroner, upon statute for penalty or forfeiture.
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14. Attempt to commence action dates from delivery of summons for service.
15. Rule when party is out of the state.
16. Actions arising out of the state.
17. Period of disability not to be taken as part of time limited for the commencement of action.
18. Limitation of time for trying actions in case of decease of party.
19. Certain periods not to be considered.
20. When the party is an alien.
21. Action stayed by injunction.

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22. Disability no excuse unless at the time a right of action had accrued.
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30. Infant shall appear by guardian.
31. Guardian, how appointed.
32. Who may prosecute for seduction.
33. Father, mother or guardian may prosecute for injury to child or ward.
34. Wife may prosecute in the absence of the husband.
35. Persons severally liable upon the same instrument may all or any of them be included in the same action.
36. Actions do not abate by death, marriage, or other disability of the party, if the cause of action survives.
37. When two or more persons are associated together in business, they can be sued jointly or separately, and judgment binds both.
- PLACE OF TRIAL OF CIVIL ACTIONS.
38. Actions to be tried in the county where the subject or cause of action arises.
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81. Defendant's defences and counter claims must be stated separately.
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88. Not necessary to set forth items of account in pleading.
89. Pleadings to be liberally construed.
90. Irrelevant or redundant matter may be stricken out.
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92. In pleading performance of conditions precedent, not necessary to state facts.
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101. When not material, court may order fact to be proved according to the evidence.
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- 155. What shall be deemed "effects."
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TITLE I

OF THE FORM OF CIVIL ACTIONS.

SECTION 1. The distinction between actions at law, and suits in equity and the forms of all such actions and suits, are abolished; and there shall be in this state, but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs; which shall be called a civil action.

SEC. 2. The party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Forms of actions abolished—one form adopted called a civil action. 6 Min. 420

Parties, how styled.

TITLE II.

THE TIME OF COMMENCING ACTIONS.

SEC. 3. Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute.

SEC. 4. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that

Limitations of actions. 9 Min. 64.

Actions to recover real property, within twenty years.

the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action. The periods prescribed in the preceding section for the commencement of actions, are as follows:

Sec. 5. Within ten years:

First. An action upon a judgment or decree of a court of the United States, or of any state or territory of the United States.

Sec. 6. Within six years:

First. An action upon a contract or other obligation, express or implied, excepting those mentioned in the preceding section;

Second. An action upon a liability created by statute, other than those upon a penalty or forfeiture;

Third. An action for trespass upon real property;

Fourth. An action for taking, detaining, and injuring personal property, including actions for the specific recovery thereof;

Fifth. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on obligation, and not herein-after enumerated;

Sixth. An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud.

Sec. 7. Within three years:

First. An action against a sheriff, coroner, or constable, upon a liability by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution;

Second. An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved or to such party and the state of Minnesota.

Sec. 8. Within two years:

First. An action for libel, slander, assault, battery, or false imprisonment;

Second. An action upon a statute for a forfeiture or penalty to the state.

Sec. 9. In an action brought to recover a balance due upon a mutual, open, and current account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 10. Every action upon a statute for a penalty given in whole or in part, to the person who prosecutes for the same, shall be commenced by said party within one year after the commission of the offense; and if the action is not commenced within one year by a private party, it may be commenced within two years thereafter on behalf of the state, by the attorney general, or the county attorney of the county where the offense was committed.

Sec. 11. Every action to foreclose a mortgage upon real estate, shall be commenced within twenty years after the cause of action accrues.

Sec. 12. The limitations prescribed in this chapter for the commencement of actions, shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens.

Sec. 13. An action is commenced as to each defendant, when the summons is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him, and is deemed to be pending from the time of its commencement, until its final determination upon appeal, or until the time for an appeal has passed, and the judgment has been satisfied.

Actions upon judgment or decree, within ten years.
2 Min. 241.

Actions upon contract, &c., within six years.
9 Min. 13.
9 Min. 64.

Actions against certain officers, or upon statute for a penalty, within three years.

Action for libel, &c., within two years.

Cause of action upon mutual and current account, accrues when.

Action for penalty given to prosecutor, within one year.

Action to foreclose mortgage, within twenty years.

Limitations to apply to actions brought in name of state or officer.

Action deemed commenced from service of summons, and pending till determined on appeal or judgment is satisfied.
3 Min. 106.

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Attempt to commence action, when equivalent to commencement.

SEC. 14. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this chapter, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation is a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business; but such an attempt shall be followed by the first publication of the summons, or the service thereof, within sixty days.

Absence from the state—effect of.

SEC. 15. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action.

Cause of action accruing out of the state, when action maintainable here. 9 Min. 64.

SEC. 16. When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof, an action thereon cannot there be maintained by reason of the lapse of time, an action thereon cannot be maintained in this state, except in favor of a citizen thereof, who has had the cause of action from the time it accrued.

Period of disability excluded in certain cases.

SEC. 17. If a person, entitled to bring an action mentioned in this chapter, except for a penalty, or forfeiture, is, at the time the cause of action accrued, either

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First. Within the age of twenty-one years; or,

Second. Insane; or,

Third. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life; or,

Fourth. A married woman.

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy, nor can it be so extended in any case, longer than one year after the disability ceases.

Death of party entitled to bring action, effect of.

SEC. 18. If a person entitled to bring an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Period between death of party and granting of letters, &c., not included.

SEC. 19. The time which elapses between the death of a person, and the granting of letters testamentary, and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators.

Period of war not included in certain cases.

SEC. 20. When a person is an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

Period covered by injunction, &c., not included.

SEC. 21. When the commencement of an action is stayed by injunction, or statutory prohibition, the time of the continuance of the injunction or prohibition, is not part of the time limited for the commencement of the action.

Disability available—when

SEC. 22. No person can avail himself of a disability, unless it existed at the time his right of action accrued.

SEC. 23. When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are all removed. Limitation does not attach until all disabilities are removed.

SEC. 24. No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged (thereby; but this section shall not alter the effect of any payment of principal or interest. Evidence of new contract must be in writing. 9 Min. 13.

SEC. 25. If any action is commenced within the time prescribed therefor, and judgment given therein for the plaintiff, and the same is arrested or reversed on error or appeal, the plaintiff may commence a new action within one year after such reversal or arrest. New action may be commenced—when.

TITLE III.

1870. P. 108

THE PARTIES TO CIVIL ACTIONS.

SEC. 26. Every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided; but this section does not authorize the assignment of a thing in action not arising out of contract. Actions in whose name prosecuted. 1 Min. 105-162. 2 Min. 44-107. 4 Min. 407.

SEC. 27. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defence existing at the time of, or before notice of the assignment; but this section does not apply to a negotiable promissory note, or bill of exchange, transferred in good faith and upon good consideration, before due. Action by assignee subject to set-off—exception.

SEC. 28. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. Executor, et als may sue alone. 1 Min. 246. 4 Min. 313.

1869. P. 7

SEC. 29. When a married woman is a party her husband shall be joined with her, except that, Husband and wife to join in actions—when. 3 Min. 202.

First. When the action concerns her separate property she may sue alone;

Second. When the action is between herself and her husband she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend.

SEC. 30. When an infant is a party, he shall appear by his guardian, who shall be appointed by the court in which the action is prosecuted, or by a judge thereof. Infant shall appear by guardian.

SEC. 31. The guardian shall be appointed as follows: Guardian—how appointed.

First. When the infant is plaintiff, upon the application of the infant, if he is of the age of fourteen; or if under that age, upon the application of a relation or friend of the infant; if made by a relative or friend of the infant, notice thereof shall first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides;

Second. When the infant is defendant, upon an application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons, if he is under the age of fourteen, or neglects so to apply, then, upon the application of any other party to the action, or of a relation or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this state; if he has none then to the infant him-

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self, if over fourteen years of age and within the state, or if under that age and within the state, to the person with whom such infant resides.

Who may prosecute for seduction.

SEC. 32. A father, or in case of his death, or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with, or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service.

Injuries to infants, who may sue for.

SEC. 33. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury of the child, and the guardian for the injury of the ward.

Wife may prosecute or defend in name of husband—when.

SEC. 34. When a husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had.

Who may be joined in same action.
5 Min. 333.

SEC. 35. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same instrument, may all or any of them, be included in the same action at the option of the plaintiff.

Abatement of actions.
1 Min. 246.
7 Min. 29.
9 Min. 235.
10 Min. 153.

SEC. 36. An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest, if the cause of action survives or continues. In case of the death, marriage, or other disability of a party, the court on motion at any time within one year thereafter or afterward on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be added or substituted in the action.

How brought against persons doing business under a common name.
7 Min. 217.

SEC. 37. When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name; the process in such case being served on one or more of the associates, the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants.

TITLE IV.

THE PLACE OF TRIAL OF CIVIL ACTIONS.

Actions, where triable.
1 Min. 287.
5 Min. 148.

SEC. 38. Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial as hereinafter provided:

First. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property;

Second. For the partition of real property;

Third. For the foreclosure of a mortgage of real property;

Fourth. For the recovery of personal property distrained for any cause.

Certain actions to be tried in county where cause of action arose.
5 Min. 148.

SEC. 39. Actions for the following causes shall be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial as provided by law:

First. For the recovery of a penalty or forfeiture imposed by statute, except that where it is imposed for an offense committed on a lake, river,

or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream ;

Second. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command or in his aid does anything touching the duties of such officer.

SEC. 40. In all other cases the action shall be tried in the county in which the parties, or one of them, reside at the commencement of the action, or if none of the parties reside in this state, the same may be tried in any county which the plaintiff may designate in his complaint, subject however to the power of the court to change the place of trial as provided by law.

Other actions to be tried in county where one of parties resides.
1 Min. 287.
5 Min. 148.

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SEC. 41. If the defendant is a non-resident of this state and the plaintiff proceeds against him, by attaching his property, such action may be brought in any county where the defendant has property liable to attachment.

Actions, where brought in case of non-residence of defendant.

SEC. 42. If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county, and the place of trial is thereupon changed by consent of parties or by order of court as is provided in this section. The court may change the place of trial in the following cases :

Court may change place of trial, in what cases.

First. When the county designated for that purpose in the complaint is not the proper county ;

Second. When there is reason to believe that an impartial trial cannot be had therein ;

Third. When the convenience of witnesses, and the ends of justice would be promoted by the change ;

Fourth. A change of venue may, in all civil cases, be made, upon the consent in writing of the parties or their attorneys. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed unless otherwise provided by the consent of the parties in writing duly filed, or order of the court, and the papers shall be filed or transferred accordingly.

TITLE V.

SERVICE OF SUMMONS, PLEADINGS, NOTICES, AND APPEARANCE OF PARTIES.

SEC. 43. Civil actions in the several district courts of this state shall be commenced by the service of a summons, as hereinafter provided.

Civil actions commenced by summons.

SEC. 44. The summons shall be subscribed by the plaintiff or his attorney and directed to the defendant, requiring him to answer the complaint, and file his answer in the office of the clerk of the court in which the action is brought within thirty days after the service of the summons, exclusive of the day of service, and shall notify the defendant of the filing of the complaint.

Summons, how subscribed and what to contain.
9 Min. 221.

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SEC. 45. The summons shall also contain a notice in substance as follows :—

Shall also contain notice.

First. In an action arising on contract for the payment of money only, that he will take judgment for a sum specified therein, if the defendant fails to answer the complaint ;

Second. In other actions for the recovery of money only, that he will, upon such failure, have the amount he is entitled to recover, ascertained by the court, or under its direction, and take judgment for the amount so ascertained.

Third. In other actions, that, if the defendant fails to answer the complaint, the plaintiff will apply to the court for the relief demanded therein.

Complaint, when and where filed.

SEC. 46. The complaint shall be filed in the office of the clerk of the court in which the action is brought, prior to the service of the summons in such action.

SEC. 47. The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action; and the service shall be made and the summons returned and filed in the clerk's office with all reasonable diligence.

Summons, by whom served.

SEC. 48. * The summons shall be served by delivering a copy thereof, as follows:—

First. If the action is against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein;

Second. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there is none within this state, then to any person having the care or control of such minor, or with whom he resides, or by whom he is employed;

Third. If against a person for whom a guardian has been appointed for any cause, to such guardian, and to the defendant personally;

Fourth. In all other cases to the defendant personally, or by leaving a copy of the summons at the house of his usual abode, with some person of suitable age and discretion then resident therein.

How served.
10 Min. 386.

Service by publication.

5 Min. 367
9 Min. 239
10 Min. 366
10 Min. 38

SEC. 49. When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is prima facie evidence, and upon the presentation of an affidavit of the plaintiff, his agent or attorney, to the court or judge stating that he believes that the defendant is not a resident of the state, and cannot be found therein, if the complaint in the opinion of the judge states a good cause of action against the defendant, or shows that he is a proper party to an action relating to real property in this state, such court, or judge, may grant an order that the service be made by the publication of a summons in either of the following cases:—

First. When the defendant is a foreign corporation, and has property within this state;

Second. When the defendant being a resident of this state has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent;

Third. When the defendant is not a resident of the state, but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action.

Fourth. When the action is for divorce in the cases prescribed by law;

Fifth. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

* See an Act entitled "A Bill for an act to provide for the service of mesne process upon foreign corporations," published at the end of this chapter.

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Service on unknown heirs

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SEC. 50. The publication shall be made in a newspaper printed and published in the county where the action is brought, and if there is no such newspaper in the county, then in a newspaper printed and published at the capital of the state, once in each week for six consecutive weeks, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid.

Publication, how made and for what length of time.

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SEC. 51. If the summons is not personally served on the defendant, in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and except in an action for divorce, the defendant or his representatives may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

When defendant may appear and defend.
6 Min. 458.

Court may compel restitution.

SEC. 52. When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:—

Proceedings in case of service on less than whole number of defendants.
3 Min 106.

First. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served;

Second. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants;

Third. Though all the defendants have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone.

SEC. 53. Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, shall be as follows:—

Proof of service of summons, how made.

First. If served by the sheriff or other officer, his certificate thereof; or, if by another person, his affidavit; or,

4 Min 168
4 Min 473.

Second. In case of publication, the affidavit of the printer or his foreman, showing the same, and an affidavit of the deposit of a copy of the summons in the post-office, if the same has been deposited; or,

Third. The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit, or admission, shall state the time, place, and manner of service.

SEC. 54. From the time of the service of the summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him.

From what time court deemed to have acquired jurisdiction
10 Min. 175

SEC. 55. No natural person is subject to the jurisdiction of a court of this state, unless he appears in the court, or is found within the state, or is served with process therein, or is a resident thereof, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and then only to the extent of such property, except in cases where it is otherwise expressly provided by statute.

Natural person subject to jurisdiction of court, when.

SEC. 56. No corporation is subject to the jurisdiction of a court of this state, unless it appears in the court, or has been created by or under the laws of this state, or has an agency established therein for the transaction of some portion of its business, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and in the last

Corporation subject to jurisdiction of court, when.

9 Min. 239.
10 Min 178.

case, only to the extent of such property at the time the jurisdiction attached.

Defendant appears in an action, when.
10 Min. 178.

SEC. 57. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance; after appearance, a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notices or papers in the ordinary proceedings in an action, need not be made upon him.

Notice—on whom served.

SEC. 58. Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections, where not otherwise provided by statute.

Service, how made.
2 Min. 319.

SEC. 59. The service may be personal or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:—

First. If upon an attorney, it may be made during his absence from his office, by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion;

Second. If upon a party, it may be made by leaving the papers at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Service by mail allowed, when.

SEC. 60. Service by mail may be made, when the person making the service, and the person on whom it is to be made reside in different places between which there is a regular communication by mail.

Manner of service by mail.

SEC. 61. In case of service by mail, the paper shall be deposited in the post office, addressed to the person on whom it is served at his place of residence, and the postage paid; and in such case the time of service shall be double that required in case of personal service.

Service out of the state.

SEC. 62. Where a plaintiff or defendant who has appeared, resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence is known; if not known, on the clerk for him. But where a party has an attorney in the action, the service of papers shall be upon the attorney instead of the party.

Limitation of four preceding sections.

SEC. 63. The provisions of the four preceding sections do not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Notice valid, when.

SEC. 64. A notice or other paper is valid and effectual, though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceeding; and in furtherance of justice, upon proper terms, any other defect or error in any notice or other paper or proceeding, may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time for good cause shown within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served, or may on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party be permitted to bring such writ of error or appeal after the time therefor has expired.

Pleadings, bonds, affidavits, &c., to be filed, when.

SEC. 65. The pleadings and various bonds required to be given by statute, and the affidavits and other written proceedings in an action, shall be filed or entered in court, or with the clerk thereof, unless the court expressly provide for a different disposition thereof, except that the bonds provided for by this chapter, on the claim and delivery of personal prop-

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erty, shall after the justification of the sureties be delivered by the sheriff to the parties respectively for whose benefit they are taken.

SEC. 66. No copies of any pleadings need be served on the adverse party, but the clerk shall furnish the party with copies thereof on application to him and payment of his fees.

Clerk to furnish copies of pleadings.

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SEC. 67. A defendant who has appeared, may, without answering, demand in writing an assessment of damages, or of the amount which the plaintiff is entitled to recover, and thereupon such assessment shall be had, or any such amount ascertained, in such manner as the court on application may direct, and judgment entered by the clerk for the amount so assessed or ascertained.

Defendant may demand assessment of damages, without answering.

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SEC. 68. The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday, it shall be excluded.

Time, how computed.

SEC. 69. The publication of legal notices required by law, or by an order of a judge or court, to be published in a newspaper once in each week for a specified number of weeks, shall be made on the day of each week in which such newspaper is published.

Publication of legal notices, made how. 6 Min. 192.

TITLE VI.

PLEADINGS IN CIVIL ACTIONS.

SEC. 70. The forms of proceedings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be regulated by statute.

Pleadings regulated by statute.

SEC. 71. The only pleadings on the part of the plaintiff are:

What pleadings allowed.

First. The complaint;

Second. The demurrer or reply.

And on the part of the defendant:

First. Demurrer;

Second. The answer.

THE COMPLAINT.

SEC. 72. The first pleading on the part of the plaintiff, is the complaint.

Complaint, the first pleading.

SEC. 73. The complaint shall contain:

First. The title of the cause, specifying the court in which the action is brought, the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant;

What complaint shall contain. 2 Min. 210. 3 Min. 67. 4 Min. 197. 4 Min. 229.

Second. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition;

Third. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated.

THE DEMURRER.

SEC. 74. The defendant may demur to the complaint within thirty days after notice of the filing thereof, when it appears upon the face thereof, either:

Defendant may demur to complaint, when. 1 Min. 106. 1 Min. 175. 2 Min. 213. 3 Min. 151. 4 Min. 153. 5 Min. 304.

First. That the court has no jurisdiction of the person of the defendant or the subject of the action;

Second. That the plaintiff has not legal capacity to sue;

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7 Min. 234.
8 Min. 254.
9 Min. 178.
9 Min. 246.
10 Min. 133.
10 Min. 439.

Demurrer shall specify grounds of objection.

Defendant shall answer, when—on default plaintiff may have judgment.

Objection taken by answer, when.

Objections waived, when
7 Min. 502.
10 Min. 137.
10 Min. 456.

Answer shall contain, what.
1 Min. 169.
1 Min. 241.
1 Min. 311.
1 Min. 408.
2 Min. 241.
4 Min. 192.
4 Min. 270.
5 Min. 155.
5 Min. 178.
5 Min. 397.
6 Min. 95.
6 Min. 319.
6 Min. 495.
7 Min. 184.
7 Min. 217.
10 Min. 168.

Counter-claim must be an existing one.
3 Min. 182.
5 Min. 155.
6 Min. 319.
6 Min. 420.
6 Min. 550.
8 Min. 243.
10 Min. 13.

Defences and counter-claims, how stated.
3 Min. 182.

Sham answers and frivolous demurrers may be stricken out.
2 Min. 219.
2 Min. 319.

Third. That there is another action pending between the same parties for the same cause;

Fourth. That there is a defect of parties, plaintiff or defendant;

Fifth. That several causes of action are improperly united;

Sixth. That the complaint does not state facts sufficient to constitute a cause of action.

SEC. 75. The demurrer shall distinctly specify the grounds of objection to the complaint; unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein.

SEC. 76. If the complaint is amended, it shall be filed in the proper office and notice thereof served upon the defendant, who shall answer it within thirty days after service of said notice, or the plaintiff, upon filing with the clerk proof of the service of said notice, and of the defendant's omission, may proceed to obtain judgment, as in other cases of failure to answer.

SEC. 77. When any of the matters enumerated in section seventy-four do not appear upon the face of the complaint, the objection may be taken by answer.

SEC. 78. If no such objection is taken, either by demurrer or answer, the defendant is deemed to have waived the same, excepting only the objection to the jurisdiction of the court; and the objection that the complaint does not state facts sufficient to constitute a cause of action.

THE ANSWER.

SEC. 79. The answer of the defendant shall contain:

First. A denial of each allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

Second. A statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition.

Third. All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action. And if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment, or otherwise.

SEC. 80. The counter claim, mentioned in the last section, must be an existing one in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

First. A cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

Second. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

SEC. 81. The defendant may set forth by answer as many defences and counter claims as he has; they shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished; the defendant may also demur to one or more of several causes of action in the complaint, and answer the residue.

SEC. 82. Sham and irrelevant answers or defences and frivolous demurrers may be stricken out, or judgment rendered notwithstanding the same, on motion, as for want of an answer.

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THE REPLY.

SEC. 83. When the answer contains new matter constituting a counter claim, the plaintiff may, within thirty days, reply to such new matter, denying each allegation controverted by him or any knowledge or information thereof sufficient to form a belief, and he may allege in ordinary and concise language without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to an answer containing new matter, when upon its face it does not constitute a counter claim or defence; and the plaintiff may demur to one or more of such defences or counter claims, and reply to the residue of the counter claims.

Plaintiff may reply, when. 1 Min. 408.

SEC. 84. If the answer contains a statement of new matter constituting a counter claim, and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move on notice for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment, order a reference, or assessment of damages by a jury, as the case may require.

Plaintiff failing to reply, defendant may have judgment, when.

SEC. 85. If a reply to any counter claim is insufficient, the defendant may demur thereto, stating the grounds thereof.

Reply demurable, when.

GENERAL RULES OF PLEADING.

SEC. 86. Every pleading in a court of record shall be subscribed by the attorney of the party, and when any pleading in a case is verified, all subsequent pleadings, except demurrers, shall be verified also.

Pleadings how subscribed and when verified. 2 Min., 319.

SEC. 87. The verification shall be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on his information and belief, and as to those matters that he believes it to be true, and shall be made by the party, or, if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party is within the county where the attorney resides, and capable of making the affidavit. The verification may also be made by the agent or attorney, if the party making such pleading is absent from the county where the attorney resides, or for some cause is unable to verify it; and shall be to the effect that the same is true to the best of his knowledge, information and belief. When a corporation is a party, the verification may be made by any officer thereof; and when the state or any officer thereof in its behalf is a party, the verification may be made by the attorney general. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony.

Verification how made and by whom.

SEC. 88. It is not necessary for a party to set forth in a pleading, the items of an account therein alleged, but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further or more particular bill.

Account, how pleaded.

SEC. 89. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

Pleadings, how construed.

SEC. 90. If irrelevant or redundant matter is inserted in a pleading it may be stricken out on motion, and when a pleading is double, or does not conform to the statute, or when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defence is

Irrelevant or redundant matter in a pleading may be stricken out—whole pleading stricken out, when.

1 Min., 195.
 8 Min., 126.
 8 Min., 66.
 10 Min., 133.
 Pleading judgment, how regulated.
 2 Min., 313.
 2 Min., 319.

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What is necessary in pleading performance of conditions precedent.

Private statute, how pleaded.

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In actions by or against corporations it is sufficient to refer to act of incorporation.

What is sufficient in action for libel or slander.
 1 Min., 156.
 4 Min., 233.
 9 Min., 133

Defendant may answer, how.

In action to recover possession of personal property, answer sufficient, when.

What causes of action may be united in same complaint.
 5 Min., 304.
 7 Min., 357.
 8 Min., 254.
 10 Min., 193.

not apparent, the court may strike it out on motion, or require it to be amended.

SEC. 91. In pleading a judgment, or other determination of a court, or officer, of special or general jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated, to have been duly given or made. If such allegation is controverted, the party pleading is bound to establish on the trial, the facts conferring jurisdiction.

SEC. 92. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated, generally, that the party duly performed all the conditions on his part, and if such allegation is controverted, the party pleading is bound to establish, on the trial, the facts showing such performance.

SEC. 93. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title, and the day of its approval, and the court shall thereupon take judicial notice thereof.

SEC. 94. In actions by or against corporations, created by or under the laws of this state, it is sufficient to refer in the complaint or answer to the act of incorporation, or the proceedings by which such corporation was created.

SEC. 95. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial, that it was so published or spoken.

SEC. 96. In the action mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

SEC. 97. In an action to recover the possession of property distrained doing damage, an answer that the defendant or person, by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was, at the time, doing damage thereon, shall be good without setting forth the title to such real property.

SEC. 98. The plaintiff may unite several causes of action in the same complaint, whether legal or equitable, when they are included in either of the following classes:

First. The same transaction or transactions connected with the same subject of action;

Second. Contracts express or implied;

Third. Injuries with or without force to person and property, or either:

Fourth. Injuries to character; or,

Fifth. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or,

Sixth. Claims to recover personal property, with or without damages for the withholding thereof; or,

Seventh. Claims against a trustee by virtue of a contract, or by operation of law. But the causes of action so united, shall belong to one only of these classes, and affect all the parties to the action, and not require different places of trial, and shall be separately stated.

SEC. 99. Every material allegation of the complaint not specifically controverted by the answer as prescribed, and every material allegation of new matter in the answer constituting a counter claim not controverted by the reply as prescribed, shall for the purposes of the action, be taken as true; but the allegation of new matter in the answer not relating to a counter claim or of new matter in a reply is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

Allegations not controverted taken as true, when.
2 Min., 248.
10 Min., 138.

MISTAKES IN PLEADINGS, AND AMENDMENTS.

SEC. 100. No variance between the allegation in a pleading and the proof, is material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and it shall be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just.

Variance between allegation and proof material, when.
1 Min., 175.
4 Min., 119.

SEC. 101. When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Court may direct fact to be found or amendment made, when.

SEC. 102. When, however, the allegation of the cause of action, or defence to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Failure of proof.
10 Min., 192.

SEC. 103. Any pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or if it does not delay the trial, it may be so amended at any time within thirty days after filing of the answer, demurrer or reply to such pleading; in such case the amended pleading shall be filed in the proper office and notice thereof served on the adverse party, who shall have thirty days to answer the same. After the decision of the demurrer, the court may, in its discretion, if it appears that the demurrer was interposed in good faith, allow the party demurring, to withdraw the same, and plead over, or if the demurrer is sustained, may allow the pleading demurred to, to be amended, on such terms as may be just.

Amendment by parties without costs.

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SEC. 104. The court may, before or after judgment in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the fact proved.

Demurrer withdrawn, when.

Amendment by the court.
8 Min., 286

SEC. 105. The court may likewise, in its discretion, allow an answer or reply to be made or other act to be done after the time limited by this chapter, or by an order enlarge such time; and may also in its discretion, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him, through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding. And whenever any proceeding taken by a party, fails to conform in any respect to the provisions of the statute, the court may permit an amendment of such proceeding, so as to make it conformable thereto; but this section does not apply to a final judgment in an action for a divorce.

Relief after default or judgment.
2 Min., 259.
3 Min., 190.
5 Min., 23.
5 Min., 65.
6 Min., 290.
7 Min., 325.
7 Min., 493.
9 Min., 181.

Amendment in certain cases.

SEC. 106. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any process, pleading or proceeding

Defendant designated by any name, when.

by any name, and when his true name is discovered, the process, pleading or proceeding may be amended accordingly.

Court shall disregard errors not affecting substantial rights.
10 Min. 423.

SEC. 107. The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect.

Supplemental pleadings allowed.

SEC. 108. The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply.

TITLE VII.

CONSOLIDATION AND INTERPLEADING.

Two or more actions consolidated—when.

SEC. 109. Whenever two or more actions are pending at any time between the same parties, and in the same court, upon causes of action which might have joined, the court may order the actions to be consolidated

Surety may bring action—when.
5 Min. 311.
8 Min. 126.

SEC. 110. An action may be brought against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as surety.

Defendant may cause another party to be substituted in his place—when.
4 Min. 407.

SEC. 111. A defendant against whom an action is pending upon contract or for money, or specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action and without collusion with him, makes a demand against him for the same money, debt, or property, upon due notice to such person, and the adverse party, apply to the court for an order to substitute such person in his place, and discharge the defendant from liability to either party, on his depositing in court the amount of the debt or money, or delivering the property or its value, to such person as the court may direct; and the court may thereupon make the order, and thereafter the action shall proceed between the plaintiff and person so substituted; and the court may compel them to interplead.

TITLE VIII.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Possession of personal property claimed—when.

SEC. 112. 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, in the manner following:

1 Min. 175.
4 Min. 148.
7 Min. 104.
7 Min. 331.
8 Min. 467.
10 Min. 423.

SEC. 113. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

Affidavit shall show what.

First. 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;

Second. That the property is wrongfully detained by the defendant;

Third. That the same 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

Fourth. The actual value of the property.

SEC. 114. The plaintiff by an indorsement upon the affidavit may require the issuance of a writ, as provided in the next section, and shall thereupon file the affidavit with the clerk of the court where the action is brought.

Shall be indorsed and filed.

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SEC. 115. Upon the filing of the affidavit so indorsed, the clerk shall issue a writ, directed to the sheriff, commanding him to take the property therein described, and the same safely keep until disposed of according to law.

Clerk shall issue writ.

SEC. 116. Before such writ is served, a bond shall be executed to the defendant in an amount double the value of the property, as stated in the affidavit, conditioned that the action shall be prosecuted with effect for a return of the property to the defendant, if a return is adjudged, and for the payment to him of such sum as for any cause may be recovered against the plaintiff; such bond shall be executed by the plaintiff, or by some one in his behalf, with two or more sureties to be approved by the sheriff.

Bond shall be executed. 9 Min. 314.

SEC. 117. On receiving the writ and bond, the sheriff shall forthwith take the property described in the writ, if it is in the possession of the defendant or his agent, and retain it in his custody until delivered as hereinafter provided; he shall also without delay serve on the defendant a copy of the writ and bond, by delivering the same 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.

Sheriff shall take property and notify defendant.

SEC. 118. The defendant may within three days after the service of a copy of the writ and bond, 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; if the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section.

Defendant may except to sufficiency of sureties.

SEC. 119. Within three days after service of the writ and bond as aforesaid, the defendant may, if he does not except to the sureties of the plaintiff, require a return of the property, upon executing to the plaintiff a bond in the same amount as the bond of the plaintiff, conditioned that the property shall be delivered to the plaintiff, if delivery is adjudged, and for the payment to him of such sum as for any cause may be recovered against the defendant. Such bond shall be executed by the defendant or by some one in his behalf, with two or more sufficient sureties. If a return of the property is not required, or the sureties of the plaintiff excepted to, within three days after the taking and service of the writ and bond upon the defendant, then the property shall be delivered to the plaintiff, except as provided in section one hundred and twenty-one.

Defendant may give bond and retain property. 4 Min. 242.

SEC. 120. Notice shall be given of the justification of sureties of not less than two nor more than six days, which notice shall be served within two days after exception taken to the plaintiff's sureties or after the execution of the bond by the defendant, as the case may be. If any surety fails to justify at the time appointed, another may be offered and substituted within such time, not exceeding three days, as the judge or officer shall appoint, but there shall be only one adjournment for such purpose, and in case of substitution a new bond shall be executed by all the parties to be bound.

Notice and justification of sureties.

SEC. 121. Upon due justification of the plaintiff's sureties, the sheriff shall deliver the property to the plaintiff, except as prescribed in section one hundred and thirty-eight, and upon like justification of the defendant's sureties the property shall be delivered to the defendant. When sureties fail to justify as aforesaid, or when justification is waived as here-

Sheriff shall deliver property—when.

in provided, the sheriff shall forthwith deliver the property to the party entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties until such justification or waiver is made or there is a failure to justify. Either party may in writing waive the justification of sureties as well after as before notice.

Justification of sureties may be waived

Qualification of sureties.

SEC. 122. The qualification of sureties is as follows:

First. Each shall be a resident and freeholder of the state

Second. Each shall be worth the amount specified in the bond above his debts and liabilities and exclusive of his property exempt from execution, but the judge or officer taking the justification may allow more than the number of sureties required, to justify severally in amounts less than the penalty of the bond, if the aggregate amount is equivalent thereto.

Sureties shall justify—how,

SEC. 123. For the purpose of justification, each surety shall attend before a judge, court commissioner, or a justice of the peace, at the time and place specified, and may be examined on oath, touching his sufficiency in such manner as the judge or officer may think proper; the examination shall be reduced to writing, and filed in the cause.

Approval of sureties to be indorsed on bond—sheriff exonerated.

SEC. 124. If the judge or officer deems the sureties sufficient he shall indorse his approval upon the bond which shall be delivered to the party entitled thereto, and the sheriff shall thereupon be exonerated from liability.

Power and duty of sheriff in case property is concealed.

SEC. 125. If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it is not delivered, he shall cause the building or inclosure 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.

Sheriff to keep property securely and deliver it to party entitled.

SEC. 126. When the sheriff has taken property, as herein 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 same.

Shall file writ and return, when.

SEC. 127. He shall file the writ with his return thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

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TITLE IX.

ATTACHMENT.

Attachment of property allowed. 5 Min. 69. 7 Min. 421.

SEC. 128. In an action for the recovery of money, the plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover.

Who may allow writ.

6 Min. 183.

7 Min. 510.

8 Min. 477.

Writ allowed, when—affidavit to show, what.

1 Min. 82.

3 Min. 29.

SEC. 129. A writ of attachment shall be obtained from a judge of the court in which the action is brought, or a court commissioner of the county.

SEC. 130. The writ may be allowed whenever it appears by affidavit that a cause of action exists against such defendant, specifying the amount of the claim, and the ground thereof; and that the defendant is either a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent, or that he has assigned, secreted, or disposed, or is about to assign, secrete or

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dispose of his property with intent to delay or defraud his creditors, or that the plaintiff's debt was fraudulently contracted.

SEC. 131. Before issuing the writ the judge or court commissioner shall require a bond on the part of the plaintiff, with sufficient sureties, conditioned that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars.

Bond shall be given.

SEC. 132. The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, and not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, with costs and expenses, the amount of which demand shall be stated in conformity with the complaint. Several writs may be issued at the same time to the sheriffs of different counties.

Form of writ.

SEC. 133. All goods and chattels, real and personal, all property, real, personal and mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book accounts, debts, credits and all other evidences of indebtedness belonging to the defendant are subject to attachment.

What property is subject to attachment.

SEC. 134. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

Writ, how executed.

First. Real estate shall be attached by the officer leaving a certified copy of the writ, and of his return of such attachment thereon, at the office of the register of deeds of the county in which such real estate is situated, or if there is no register of deeds, with the clerk of the district court of the county, and serving a copy of the same upon the defendant in the action if he can be found in his county without any other act or ceremony;

1 Min. 427.
2 Min. 264.
5 Min. 333.

Second. Personal property capable of manual delivery to the sheriff, shall be attached by taking it into his custody;

Third. When an attachment is made of articles of personal estate which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the writ and of the return of the attachment may at any time within three days thereafter be deposited in the office of the town clerk of the town or city in which the attachment is made, and such attachment shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer;

Fourth. The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof, in the order in which they are received, in books kept for noting mortgages of personal property; which entry shall contain the names of the parties to the action, and the date of the entry. The clerk's fee for this service shall be twenty-five cents, to be paid by the officer and included in his charge for the service of the writ;

Fifth. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with a person holding the same, or if a debt with the debtor, or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof;

3 Min. 277.
3 Min. 496.
5 Min. 337.

Sixth. The sheriff shall serve a copy of the writ of attachment, and inventory served by him, upon the defendant, if he can be found within the county; and if he is a resident thereof, but cannot be found therein, the said sheriff shall leave such copy at the last usual place of abode of the said defendant;

Seventh. He shall make a full inventory of the property attached and return the same with the writ of attachment.

Certificate to be furnished sheriff in certain cases.

SEC. 135. Whenever the sheriff, with a writ of attachment or an execution against the defendant, applies to any person mentioned in the fifth subdivision of section one hundred and thirty-four for the purpose of attaching or levying, upon the property mentioned therein, such person shall furnish him with a certificate designating the number of rights or shares of the defendant, in the stock of the corporation, with any dividend or incumbrance thereon on the amount and description of the property, held by such corporation or person for the defendant, or the debt owing to the defendant; if such person refuses to do so, he may be required by the court or judge, to attend before him and be examined on oath concerning the same, and disobedience to the order may be punished as a contempt.

Sheriff shall sell perishable property, collect debts, &c. 4 Min. 407.

SEC. 136. If any of the property attached is perishable, the sheriff shall sell the same in the manner in which property is sold on execution. He may also take such legal proceedings either in his own name, or in the name of the defendant, as are necessary to collect all debts, credits and effects of said defendant, and discontinue the same at such times, or on such terms as the court or judge may direct.

May demand indemnity, when.

SEC. 137. If any property levied upon or taken by a sheriff by virtue of a writ of execution, attachment, or other process, is claimed by any other person than the defendant or his agent, and such person makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof, and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff on demand, indemnify the sheriff against such claim, by a bond executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff unless so made; and notwithstanding such claim, when so made, he may retain such property under levy, a reasonable time to demand such indemnity.

Plaintiff to be impleaded with sheriff in action against him, when.

SEC. 138. If in such case, the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaintiff in such execution, attachment or other process, shall, on motion of such sheriff, be impleaded with him in such action. When in such case a judgment is rendered against the sheriff and his co-defendants, an execution shall be immediately issued thereon, and the property of such co-defendants shall be first exhausted before that of the sheriff is sold to satisfy such execution.

Judgment against defendant to be satisfied out of property attached—mode of proceeding.

SEC. 139. If judgment is recovered by the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose:

First. By paying to the plaintiff the proceeds of all sales of perishable property, sold by him, or of all debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

6 Min. 277.
10 Min. 323.

Second. If any balance remains due, and an execution has been issued on the judgment, he shall sell under the execution, so much of the attached property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands; and in case of the sale of any rights or shares in the stock of a corporation, the sheriff shall execute to the purchaser a certificate of the sale, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by the defendant;

Third. If any of the attached property belonging to the defendant has passed out of the hands of the sheriff, without having been sold or converted into money, the sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

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SEC. 140. The defendant may at any time before the time for answering expires, or at any time thereafter when he has answered and before trial, apply to the court on notice to vacate the writ of attachment.

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Defendant may move to vacate attachment.
5 Min. 69.
7 Min. 345.

SEC. 141. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those on which the writ of attachment was allowed.

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Motion made on affidavits may be opposed by affidavits.

SEC. 142. When the writ of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

Writ of attachment fully executed shall be returned.

SEC. 143. Whenever any real estate has been attached by virtue of any writ of attachment, such real estate may be discharged and released of record from such attachment in the following manner, to wit:—

Attachment of real estate how released.

First. By filing in the office of the register of deeds of the county wherein such real estate is situated, a certified copy of the order discharging or vacating said attachment;

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Second. By filing with such register of deeds, satisfaction of judgment rendered in such action;

Third. By judgment being rendered in the action in favor of the defendant against whom the attachment is issued, upon filing in the office of said register of deeds a transcript of such judgment;

Fourth. By filing in the office of such register of deeds a satisfaction and discharge of such attachment executed by the plaintiff in said action in the same manner as is required by law for the execution of conveyances of real estate.

SEC. 144. The plaintiff in such action may at any time before the final discharge of such attachment, release and discharge from such attachment any part or portion of such real estate incumbered by said attachment, by executing in the same manner as conveyances of real estate are required by law to be executed, a release and discharge of such parts or portions of said real estate so designated to be discharged and released, and particularly describing the same, and filing such release in the office of the register of deeds of the county wherein the lands are situated; and such release or discharge shall in nowise affect the lien and incumbrance of said writ of attachment upon the remainder of the real estate or property covered by said attachment and not included in such release.

Plaintiff may release attachment how.

SEC. 145. The register of deeds shall enter such discharge, release or satisfaction in the same manner and in the same book provided for the filing and entry of writs of attachments, except that the names of the plaintiffs shall be alphabetically arranged in said index, and he shall receive the same fees as are allowed him for the filing and entry of attachments in his office.

Release or satisfaction of attachment to be recorded.

SEC. 146. Any attachment of personal property, under sub-division three of section one hundred and thirty-four, may be discharged or released of record by filing in the proper office an order, release, transcript, or satisfaction piece, as provided in section one hundred and forty-three aforesaid.

Attachment of personal property, how released.

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wages

1871-126 TITLE X.

GARNISHMENT.

Garnishment allowed when.
3 Min. 360.
5 Min. 347.
9 Min. 55.

SEC. 147. In any action in a court of record or justice's court ^{In the recovery of money} founded upon contract express or implied if the plaintiff, his agent or attorney, at the time of filing the complaint, or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files with the clerk of the court, or if the action is in a justice's court, with the justice, an affidavit stating that he believes that any person (naming him) has property, money or effects in his hands or under his control belonging to the defendant in such action, or that such person is indebted to the defendant, and that the value of such property or effects or the amount of such money or indebtedness, if the action is in a district court, exceeds the sum of twenty-five dollars, or if the action is in a justice's court, ten dollars, a summons may be issued against such person, as hereinafter provided; in which summons and all subsequent proceedings the plaintiff in the action shall be known and designated as plaintiff, the defendant as defendant, and the person against whom the summons is issued, as garnishee.

Proceedings in justice's court.

SEC. 148. If the action is in a justice's court, the summons shall be issued by the justice, and shall require the garnishee to appear before him at a time and place mentioned in such summons, not less than six nor more than twelve days from the date thereof, and answer under oath such questions as may be put to him touching his indebtedness to the defendant, and any property, money or effects of the defendant in his possession or under his control; which summons shall be served and returned in the same manner as a summons issued against a defendant in other causes in such court, except that no other than personal service shall be sufficient. A copy of such summons together with a notice to the defendant stating the time, place and manner of service upon the garnishee and signed by the justice of the peace or officer who served the same, and requiring such defendant to appear and take part in the examination, shall be served upon the defendant at least three days before the time specified in the summons for the appearance of the garnishee.

Notice to defendant.

Proceedings in district court.

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SEC. 149. In actions in a district court such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant in other cases in said court, except that the service shall in all cases be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge thereof, or the court commissioner of the county in which the action is pending, at a time and place mentioned therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property, money or effects of the defendant in his possession or under his control. A copy of the summons together with a notice to the defendant stating the time, place and manner of service thereof upon the garnishee, and signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee and requiring such defendant to appear and take part in the examination, shall be served upon the defendant at least ten days before the time specified in the same for the appearance of the garnishee. The garnishee shall be entitled in all cases, whether the action is in a district court or before a justice of the peace, to the same fees as if he was subpoenaed as a witness in such action, and may be compelled to testify and disclose respecting any matters contained in the

Notice to defendant.

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Fees of garnishee.

affidavit in the same manner as if he was a witness duly subpoenaed for that purpose.

SEC. 150. The service of the summons upon the garnishee shall attach and bind all the property, money or effects in his hands, or under his control belonging to the defendant, and any and all indebtedness owing by him to the defendant at the date of such service, to respond to final judgment in the action.

Effect of service of summons.
2 Min. 310.

SEC. 151. Any debt or legacy due from an executor or administrator, and any other property, money or effects in the hands of an executor or administrator may be attached by this process.

Legacies, &c., subject to garnishment.

SEC. 152. Corporations may be summoned as garnishees and may appear by their cashier, treasurer, secretary or such officer as they may appoint, and the disclosure of such person or officer shall be considered the disclosure of the corporation: *provided*, that if it appears to the court that some other member or officer of the corporation is better acquainted with the subject matter than the one making disclosure, the court may cite in such person to make answer in the premises; and in case such person neglects or refuses to attend, judgment may be entered as hereinafter provided upon default; and service of the summons upon the agent of any corporation not located in this state, but doing business therein through such agent, shall be a valid service upon said corporation.

Corporations may be garnished—by whom may appear—court may cite in person best acquainted with facts.
4 Min. 184.

SEC. 153. No person or corporation shall be adjudged a garnishee in either of the following cases, viz. :—

In what cases garnishment not allowed.

First. By reason of any money, or any other thing due to the defendant, unless at the time of the service of the summons, the same is due absolutely and without depending on any contingency;

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Second. By reason of any debt due from said garnishee on a judgment so long as he is liable to an execution thereon;

Third. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange or promissory note.

SEC. 154. Any money or other thing due or belonging to the defendant may be attached by this process, before it has become payable, provided it is due or owing absolutely and without depending on any contingency as aforesaid; but the garnishee shall not be compelled to pay or deliver the same before the time appointed therefor by the contract.

Money, &c., may be attached before due, when.
1 Min. 54.

SEC. 155. Bills of exchange and promissory notes, whether under or over due, drafts, bonds, certificates of deposit, bank notes, money, contracts for the payment of money, and other written evidence of indebtedness, in the hands of the garnishee at the time of the service of the summons, shall be deemed "effects" under the provisions of this section.

What shall be deemed "effects."²

SEC. 156. After the appearance of the garnishee before the court or officer named in the summons on the day specified therein, or on the day to which an adjournment may be had, the said garnishee shall be examined on oath, touching the matters alleged in the affidavit, and the examining officer shall take full minutes of such examination, and file the same with the other papers in the cause: *provided*, that unless the defendant in the action appears at the time and place specified in the summons, for the appearance of the garnishee, such court or officer shall not proceed to the examination of such garnishee, or to the taking of any evidence whatever therein until the plaintiff produces and files an affidavit, or return of an officer, showing the service of the summons and notice upon the defendant, as prescribed in sections one hundred and forty-nine and one hundred and fifty [one hundred and forty-eight and one hundred and forty-nine] aforesaid, but in case the plaintiff is unable so to notify such defendant, the said court or officer may postpone the examination for such reasonable time as may be necessary to enable the plaintiff to notify such

Examination of garnishee—defendant to be notified, when.
3 Min. 389.
4 Min. 381.
5 Min. 468.
9 Min. 240.

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defendant, and he then may be notified of the day to which such postponement is had, in the manner provided by law for the service of a summons in ordinary cases, except that it shall be a notice of ten days in a district court, and of four days in a justice's court; and shall be personally served if the defendant is within the state: *provided*, that when the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and the plaintiff or his agent files an affidavit, stating that the defendant is not a resident of this state, and is not within the same as the affiant verily believes, it shall not be necessary to serve upon the defendant a copy of such garnishee summons, or any notice to the defendant in such action in any court; and the examination shall proceed in like manner as if the defendant had been duly served with such copy and notice, or had appeared at the time and place specified in the summons for the appearance of the garnishee.

Notice to defendant dispensed with, when.

Claimant may appear and be joined as party in the action.
4 Min. 116.

SEC. 157. If it appears from the evidence taken or otherwise, that any person not a party to the action, is interested or claims any interest in any of the property or effects in the hands of the garnishee by virtue of any agreement or matter which existed prior to the service of the summons, the examining officer, upon application, may permit such person to appear in the action and maintain his right, and if he does not voluntarily appear, notice may be given him to appear or be barred of his claims, which notice may be served as such officer shall direct. In case such person voluntarily appears, or notice is given as aforesaid, he shall be joined as a party to the action and judgment therein shall bind him in the same manner as if he had been an original party.

When garnishee denies indebtedness, or there is dispute as to title of property held by him, plaintiff shall proceed, how.
1 Min. 270.
5 Min. 347.
10 Min. 396.

SEC. 158. If any person has in his possession any property or effects of the defendant, which he holds by a conveyance or title that is void as to creditors of said defendant, he may be charged therefor, although the defendant could not have maintained an action against him for the same; but in such cases, and in all cases where the garnishee upon full disclosure denies any indebtedness to, or the possession or control of any property, money or effects of the defendant, there shall be no further proceeding, except in the manner following: if the plaintiff in such case believes that such garnishee does not answer truly in response to the questions put to him upon such examination, or that the conveyance under which he claims title to property, is void as against the creditors of the defendant, he may, on notice to such garnishee and to the defendant at any time before the garnishee has been discharged by the court or officer, of not less than six days, apply to the court in which the action is pending or a judge thereof, for permission to file a supplemental complaint in the action making the garnishee a party thereto, and setting forth the facts upon which he claims to charge such garnishee, and if probable cause is shown by the plaintiff, permission shall be granted, and such supplemental complaint shall be filed and served upon both the defendant and garnishee, either or both of whom may answer the same, and the plaintiff may reply if necessary, and the issues thus made up, shall then be brought to trial, and tried in the same manner in all respects as civil actions. The provisions of this section shall not apply to proceedings in justices' courts.

Garnishee not appearing, may be defaulted—court may remove default.
10 Min. 162.

SEC. 159. When any person duly summoned as a garnishee neglects to appear at the time specified in the summons, or within two hours thereafter, he shall be defaulted, and judgment shall be rendered against him for the amount of the damages and costs recovered by the plaintiff in the action against the defendant, payable in money, and execution may issue directly against the goods and chattels and estate of said garnishee therefor: *provided*, the court may upon good cause shown, remove such de-

fault and permit the garnishee to appear and answer on such terms as may be just.

SEC. 160. No judgment shall be rendered against any garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after examination and disclosure, if it appears that he ought not to be held; whenever a garnishee is not discharged as aforesaid, the cause shall be continued to abide the result of the original action.

Judgment against garnishee, when to be rendered. 3 Min. 413.

SEC. 161. No judgment shall be rendered upon the disclosure of a garnishee except by order of the judge of the court in which the action is pending, or, in case of his absence or inability to act, by order of a judge of another district.

Judgment not to be rendered except by order of district judge.

SEC. 162. Court commissioners or any referee appointed by the court for that purpose, are hereby authorized and required to take the disclosure of any garnishee in writing, together with any other testimony offered by the parties to the action, and report the same to the court; all testimony offered by the parties to be taken subject to any objection seasonably interposed thereto.

Who shall take disclosure of garnishee.

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SEC. 163. Any court commissioner or referee shall receive from the plaintiff ten cents per folio for all evidence taken and reduced to writing, and the fees so paid by the plaintiff may be taxed in the judgment against the garnishee.

Fees of officer taking disclosure.

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SEC. 164. When any person is charged as garnishee by reason of any property or effects, other than an indebtedness payable in money, which he holds, or is bound to deliver to the defendant, such garnishee shall deliver the same or so much thereof as may be necessary, to the officer holding the execution, and the said property shall be sold by the officer and the proceeds accounted for in the same manner as if it had been taken on execution against the defendant; provided, the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant.

Garnishee adjudged chargeable for "effects," to deliver same to officer.

SEC. 165. Upon application and notice to the parties, the court may determine the value of any property or effects so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery and sale of the same, that is necessary to protect the rights of those interested, and may make any order touching the property attached, that is necessary for the protection of all parties interested, upon the application of any party in interest, and may require, at any time after the service of such garnishee summons, the property, money or effects so attached to be brought into court, or delivered to a receiver appointed by the court.

Court may determine value of property, make orders, &c.

SEC. 166. Whenever it appears that any property or effects in the hands of the garnishee belonging to the defendant, are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed under a special order of court, to pay or tender the amount due, and the garnishee shall thereupon deliver the property or effects, as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects with legal interest thereon, and apply the balance upon the execution.

Proceedings when garnishee holds property of defendant that is mortgaged.

SEC. 167. If any garnishee refuses or neglects to deliver any property or effects as provided in the preceding section, he may be punished for contempt of court, and shall in addition be liable to the plaintiff for the value of such property or effects, less the amount of the lien, if any, to be recovered by action.

Garnishee liable for contempt, when.

Garnishee may sell property mortgaged.

SEC. 168. Nothing herein shall prevent the garnishee from selling such property or effects so in his hands for the payment of the demand for which they are mortgaged, pledged, or otherwise liable, at any time before payment or tender of the amount due to him: *provided*, such sale is authorized by the terms of the contract between said garnishee and the defendant.

Garnishee not liable for destruction of property, when

SEC. 169. If any such property or effects are destroyed without any negligence or default of the garnishee after judgment and before demand by the officer holding the execution, such garnishee shall be discharged from all liability to the plaintiff, for the non-delivery of such property or effects.

Judgment, for what amount rendered.

SEC. 170. Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against said defendant with costs taxed and allowed in the proceeding against the garnishee.

Garnishee may make disclosure before return day, by consent of plaintiff.

SEC. 171. Whenever any person is summoned as a garnishee in the district court, he may at any time before the return day of the summons, appear before the officer named therein, or any justice of the peace competent to try causes between the parties, and with the consent of the plaintiff, to be certified by said officer or justice, make his disclosure upon oath with the like effect as if made on the day named in the summons; in case such disclosure is taken by a justice, he shall receive the same fees as are allowed by section one hundred and sixty-three aforesaid.

Plaintiff not consenting, garnishee may proceed, how.

SEC. 172. If the plaintiff will not consent to such examination and disclosure, the garnishee, in case he is compelled to be absent from the county until after the return day of the summons, may make affidavit to that effect, which with a notice of time, place, and the officer or justice, he shall serve upon the plaintiff or his attorney, at least twenty-four hours previous to the time specified in it for the disclosure, and upon due proof of such service, his disclosure shall be taken as provided in the preceding section and with like effect.

Fees and expenses of garnishees.

SEC. 173. If any person summoned as a garnishee appears and submits himself to an examination upon oath as herein provided, he shall be allowed his costs for travel and attendance, and in special and extraordinary cases, such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses.

When garnishee is held chargeable, costs and expenses to be deducted out of sum due.

SEC. 174. If any such person is adjudged chargeable as garnishee, his said costs and allowance shall be deducted and retained out of the property, money or effects in his hands and he shall be accountable only for the balance to be paid on the execution.

In case of specific articles, costs, &c., to be paid before delivery.

SEC. 175. If such person is charged on account of any specific articles or personal property, he shall not be obliged to deliver the same to the officer serving the execution until his costs allowed and taxed are fully paid or tendered; and if he is discharged for any cause he shall recover judgment against the plaintiff for his costs and have execution therefor.

Costs of plaintiff, how limited.

SEC. 176. The plaintiff under the provisions of this section shall in no cases, except in cases provided for in section one hundred and fifty-nine aforesaid, recover a greater sum for costs, including the costs allowed to the garnishee, than the amount of damages recovered.

Amount of judgment in justice's court and in district court.

SEC. 177. No judgment shall be rendered against a garnishee in a justice's court where the judgment against the defendant is less than ten dollars exclusive of costs, nor where the indebtedness of the garnishee to the defendant or the value of the property, money or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than ten dollars. If the action is in a district court no judgment shall be rendered against the garnishee, where the indebtedness proved

against him, or the value of the money, property or effects of the defendant in his hands or under his control shall be less than twenty-five dollars; but in all such cases the garnishee shall be discharged and shall recover his costs and have execution therefor against the plaintiff.

SEC. 178. The judgment against a garnishee shall acquit and discharge him from all claims of all parties to the process, in and to the property, money or effects paid, delivered or accounted for by such garnishee by force of such judgment.

Effect of judgment against garnishee.

SEC. 179. If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand.

Judgment of dismissal no bar, when.

SEC. 180. Any party to a proceeding under this title deeming himself aggrieved by any order or final judgment therein, may remove the same from a justice's court to the district court, or from a district court to the supreme court, by appeal, in the same cases, in like manner, and with like effect as in a civil action.

Party aggrieved may appeal.

TITLE XI

INJUNCTIONS.

SEC. 181. Writs of injunction, attested and sealed as other process of the court, may issue upon the order of the court, or a judge thereof, as hereinafter provided.

3 Min. 217, 222.
4 Min. 294.
7 Min. 49.
8 Min. 113.
9 Min. 103.
10 Min. 23, 82.

SEC. 182. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation, would produce injury to the plaintiff, or when, during the litigation it appears that the defendant is about to do or is doing, or threatening, or procuring, or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

Temporary injunction granted, when.

SEC. 183. The injunction may be granted at the time of commencing the action, or at any time afterward before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Affidavit to be made and filed—copy served.

SEC. 184. An injunction shall not be allowed after answer unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Injunction after answer—defendant restrained, how.

SEC. 185. When no special provision is made by law as to security upon injunction, the court or judge allowing the writ, shall require a bond on behalf of the party applying for such writ, in a sum not less than two hundred and fifty dollars, executed by him or some person for him, as principal, together with one or more sufficient sureties to be approved by said court or judge to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled

Bond to be given.

Damages, how ascertained.

thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.

Injunction only allowed on notice, when
9 Min. 103.

SEC. 186. In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party, either by motion or order to show cause. The application shall be made immediately on receiving notice of the publication of the notice of sale; and no injunction in such cases shall be allowed ex parte, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory excuse is furnished, showing why the application was not made in time to allow the same to be heard and determined, upon notice before the day of sale. In all other cases, if the court or judge deems it proper that the defendant or any of several defendants shall be heard before granting the injunction, an order may be made, requiring cause to be shown at a specified time and place why the injunction should not be granted.

Motion to vacate or modify injunction.

SEC. 187. If the injunction is granted without notice, the defendant at any time before trial, may apply upon notice, to the judge of the court in which the action is brought to vacate or modify the same. The application may be made upon the complaint, and the affidavits on which the injunction was granted, or upon the answer, or affidavits on the part of the defendant, with or without the answer.

Motion made on affidavits, how opposed.

SEC. 188. If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted.

TITLE XII.

RECEIVERS.

Receiver may be appointed, when.

SEC. 189. A receiver may be appointed:

First. Before judgment on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court;

Second. After judgment, to carry the judgment into effect;

Third. After judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment;

Fourth. In the cases provided by law, when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this state of foreign corporations;

Fifth. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided herein.

Court may order deposit of money, when.

SEC. 190. When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which being the subject of the litigation is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court.

SEC. 191. Whenever in the exercise of its authority, a court orders the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff or other proper officer to take the money or property and deposit, deliver or convey it in conformity with the direction of the court.

Disobedience of such order, a contempt—court may direct officer to enforce delivery.

TITLE XIII.

JUDGMENT UPON FAILURE TO ANSWER.

SEC. 192. Judgment may be had if the defendant fails to answer the complaint, as follows:

Judgment on default, how obtained.

First. When in an action arising on contract for the payment of money only, the summons has been personally served and duly returned to the clerk, and no answer has been filed within the time allowed by law, the clerk upon the application of the plaintiff shall enter judgment for the amount mentioned in the summons against the defendant, or against one or more of several defendants, in the cases provided for in this chapter. In other actions for the recovery of money only, on filing the like proof, the plaintiff may apply to the court for a reference to have his damages assessed, or the amount he is entitled to recover, ascertained in any other manner and for judgment;

10 Min. 178.

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Second. In other actions, the plaintiff may upon like service, return, and default, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may in its discretion order a reference for that purpose;

Third. In actions where the summons is served by publication, or by leaving a copy at the house of the usual abode of the defendant, the plaintiff may upon like return and default, apply for judgment, and the court shall thereupon require proof to be made of the demand set forth in the complaint, and if the defendant is not a resident of this state, shall require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before judgment the plaintiff shall file, or cause to be filed, satisfactory security to abide the order of the court touching the restitution of any property or money collected or received under or by virtue of the judgment, in case the defendant or his representatives shall thereafter apply and be admitted to defend the action and shall succeed in the defence.

7 Min. 506.

TITLE XIV.

ISSUES.

SEC. 193. Issues arise upon the pleadings, when a fact or conclusion of law is maintained by one party and controverted by the other; they are of two kinds:

Issues arise, when.

- First.* Of law; and,
- Second.* Of fact.

Issue of law. SEC. 194. An issue of law arises upon a demurrer to the complaint, answer or reply.

Issue of fact. SEC. 195. An issue of fact arises :
First. Upon a material allegation in the complaint, controverted by the answer ; or,

Second. Upon new matter in the answer controverted by the reply ; or,

Third. Upon new matter in the reply, except when an issue of law is joined thereon ; issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action.

Trial is a judicial examination of issues.

SEC. 196. A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

Issue of law, how tried.

SEC. 197. An issue of law shall be tried by the court, unless it is referred as provided by the statute relating to referees.

Issue of fact shall be tried by jury, unless jury trial is waived.

SEC. 198. An issue of fact in an action for the recovery of money only, or of specific, real or personal property, or for a divorce from the marriage contract on the ground of adultery, shall be tried by a jury, unless a jury trial is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.

7 Min. 414.

Other issues of fact by the court.
 6 Min. 182.

SEC. 199. Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred.

Notice of trial—note of issue—calendar.
 10 Min. 316.

SEC. 200. At any time after issue, and at least eight days before the term, either party may give notice of trial ; the party giving the notice shall furnish the clerk, at least four days before the term, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served ; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue. The cause once placed upon the calendar of a term, if not tried at the term for which the notice was given, need not be noticed for a subsequent term, but shall remain upon the calendar from term to term, until finally disposed of.

Issues on calendar, disposed of in what order.

SEC. 201. The issues on the calendar shall be disposed of in the following order, unless for the convenience of parties, or the dispatch of business, the court otherwise directs.

First. Issues of fact, to be tried by a jury ;

Second. Issues of fact, to be tried by the court ;

Third. Issues of law.

Either party may bring issues to trial.
 6 Min. 574.

SEC. 202. Either party, after the notice of trial, whether given by himself or by the adverse party, may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case and take a dismissal of the action, or a verdict, or judgment, as the case may require.

Separate trial in case of several defendants, allowed when.

SEC. 203. A separate trial between the plaintiff and any of several defendants, may be allowed by the court whenever in its opinion, justice will be thereby promoted.

Continuance, how applied for.

SEC. 204. A motion to postpone a trial for the absence of evidence, can only be made upon affidavit, stating the evidence expected to be obtained, and showing its materiality, and that due diligence has been used to procure it.

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TITLE XV.

TRIAL BY JURY.

SEC. 205. When the action is called for trial by jury, the clerk shall draw from the jury box the ballots containing the names of jurors, until the jury is completed or the ballots are exhausted; if the ballots become exhausted before the jury is completed, the sheriff, under the direction of the court, shall summon from the bystanders or the body of the county, so many qualified persons as are necessary to complete the jury.

Jury, how impaneled.

SEC. 206. Before the jury is sworn the plaintiff shall pay to the clerk three dollars as a jury fee, which shall be immediately paid by the clerk to the treasurer of the county.

Plaintiff to pay jury fee. 7 Min. 466.

SEC. 207. When the jury is completed and sworn, the ballots containing the names of the jurors sworn, shall be laid aside till the jury so sworn is discharged, and then they shall be returned to the box; and every ballot drawn, containing the name of a juror not so sworn, shall be returned to the box, as soon as the jury is completed.

Ballots, how kept.

SEC. 208. Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made; the challenges are to the panel and to individual jurors, as in criminal actions, except that there can be but two peremptory challenges on each side.

Challenge of jurors. 6 Min. 319.

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SEC. 209. When the jury is completed and sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise directs:

Order of the trial.

First. The plaintiff, after stating the issue, shall open the case, and produce the evidence on his part;

Second. The defendant may then open his defence, and offer his evidence in support thereof;

Third. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

Fourth. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides without argument, the defendant shall commence and the plaintiff conclude the argument to the jury.

Fifth. If several defendants, having separate defences, appear by different counsel, the court shall determine their relative order in the evidence and argument;

Sixth. The court may then charge the jury.

SEC. 210. Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose; while the jury are thus absent, no person other than the judge or person so appointed, shall speak to them on any subject connected with the trial.

Court may order view, when.

SEC. 211. If, after the impanneling of the jury, and before a verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged; in that case, a new juror may be sworn and the trial begin anew, or the juror may be discharged and a new jury then or afterward impaneled.

Juror falling sick, how to proceed.

SEC. 212. If while the jury are kept together either during the progress of the trial or after their retirement for deliberation, the court orders

Sheriff to provide food for jury, when.

them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff at the expense of the county.

What papers
jury may take.

SEC. 213. Upon retiring for deliberation, the jury may take with them all papers, (except depositions,) which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Court always
open to receive
verdict.

SEC. 214. While the jury are absent, the court may adjourn from time to time, in respect to other business; but it is, nevertheless, to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury.

When verdict is
rendered jury
may be polled.
4 Min. 433.
6 Min. 82.

SEC. 215. When a verdict is rendered, and before it is recorded, the jury may be polled on the request of either party, for which purpose each juror must be asked whether it is his verdict; if any one answers in the negative, the jury shall be sent out for further deliberation. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

Verdict to be re-
recorded and
read to jury—
proceedings when
any juror disa-
grees.

SEC. 216. When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes, and read it to the jury and inquire of them whether it is their verdict; if any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case.

TITLE XVI.

THE VERDICT.

Verdict, general
and special, de-
fined.
4 Min. 515.
7 Min. 267.

SEC. 217. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court; it shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented, as that nothing remains to the court, but to draw from them conclusions of law.

What verdict
jury may render
—direction of
court as to ver-
dict.

SEC. 218. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict; in all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

Special verdict
controls general
verdict, when.

SEC. 219. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court shall give judgment accordingly.

Jury to assess
amount of recov-
ery in certain
cases.

SEC. 220. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counter claim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery.

SEC. 221. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff and the jury find that he is entitled to a recovery thereof, or if the property is not in the possession of the defendant and by his answer he claims a return thereof and the verdict is in his favor, the jury shall assess the value of the property and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. Whenever the verdict is in favor of the party having possession of the property the value thereof shall not be found.

Judgment in action to recover specific personal property.

SEC. 222. Upon receiving a verdict, an entry shall be made in the minutes of the court, specifying the time and place of trial, the names of the jurors, and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration; or the judge trying the cause, may in his discretion and upon such terms as shall be just, stay the entry of judgment and further proceedings until the hearing and final decision of a motion for a new trial, or in arrest of judgment, or for judgment notwithstanding the verdict, or to set aside the verdict, or dismiss the action.

Entries to be made on receiving verdict.
1 Min. 156.
2 Min. 277.

TITLE XVII.

TRIAL BY THE COURT.

SEC. 223. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, and with the assent of the court in other actions, in the manner following:

Trial by jury, how waived.

First. By failing to appear at the trial;

Second. By written consent, in person or by attorney, filed with the clerk;

Third. By oral consent in open court, entered in the minutes.

SEC. 224. Upon the trial of a question of fact by the court, its decision shall be given in writing and filed with the clerk within twenty days after the term at which the trial took place; in giving the decision, the facts found and the conclusions of law shall be separately stated; judgment upon the decision shall be entered accordingly.

Decision of court, when and how given.
3 Min. 67.
3 Min. 83.
5 Min. 275.
5 Min. 409.

SEC. 225. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the statute, upon the failure of the defendant to answer where the summons was personally served. If judgment is for the defendant, upon an issue of law, and the taking of an account, or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered as by statute provided.

Judgment on issue of law.
10 Min. 178.

SEC. 226. In addition to the general terms the district court is always open for the transaction of all ex parte business, for the entry of judgments, of orders of course, and all such other orders as have been granted by the court, and for the hearing and determination of any matter brought before the court by an order to show cause. The judges of the several district courts shall by order appoint such special terms in the counties of their respective districts as may be necessary for the convenient transaction of the law business therein. And the said courts at any such special term in any county, may try any issue of law and hear and determine any application, motion, matter and question, except the trial of issues of fact, which may be pending in such court or arise in any action or proceeding

Court always open, for what business.

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Decision, how and when made.

in any of the several counties of the same judicial district in which the county is situated. When any matter is heard by the court, the decision may be made out of term; and such decision may be an order or a direction that an order or judgment be entered; and upon filing in the office of the clerk in the county where the action or proceeding is pending, the decision in writing signed by the judge, an order or judgment as the case may require, if any, shall be entered by such clerk, in conformity with such decision.

Order to show cause may be granted.
5 Min. 27.

SEC. 227. In all cases where the rights of parties demand immediate action, the several district judges, may, by an order to show cause, appoint a time and place within their respective districts for the hearing of any matter embraced in the preceding section, and at the time and place appointed may hear the same, and make and file the decision in like manner as in other cases.

Repealed
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TITLE XVIII.

TRIAL BY REFEREES.

Reference may be ordered by consent, when.
5 Min. 78.
5 Min. 201.

SEC. 228. Upon the agreement of the parties to a civil action, or a proceeding of a civil nature, filed with the clerk or entered upon the minutes, a reference may be ordered:

First. To try any or all the issues in such action or proceeding, whether of fact or law, (except an action for divorce,) and to report a judgment thereon;

Second. To ascertain and report any fact in such action, or special proceeding or to take and report the evidence therein.

By the court, when.

SEC. 229. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

First. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear, and decide the whole issue, or to report upon any specific question of fact involved therein;

Second. When the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect;

Third. When a question of fact other than upon the pleadings arises, upon motion or otherwise, in any stage of the action; or,

Fourth. When it is necessary for the information of the court in a special proceeding of a civil nature.

Number and qualification of referees.

SEC. 230. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties, or if the parties do not agree, the court or judge shall appoint one or more persons, not exceeding three, residents of any county in this state, and having the qualification of electors.

Conduct of trial—powers of referees.

2 Min. 134.
3 Min. 45.
3 Min. 311.
7 Min. 442.
8 Min. 467.

SEC. 231. The trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings, as the court upon such trial, upon the same terms and with like effect. They shall have the same power to administer oaths and enforce the attendance of witnesses as is possessed by the court. They shall state the facts found and the conclusions of law separately, and their decision shall be given and may be excepted to and reviewed in like manner, but not otherwise, and they may in like manner settle a case or exceptions.

The report of referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

SEC. 232. When there are three referees, all shall meet, but two of them may do any act which might be done by all; and whenever any authority is conferred on three or more persons, it may be exercised by a majority upon the meeting of all, unless expressly otherwise provided by statute.

Referees shall all meet, but any two may act—general rule.

TITLE XIX.

EXCEPTIONS.

SEC. 233. An exception is an objection taken at the trial to a decision upon a matter of law. The point of the exception shall be particularly stated, and either delivered in writing to the judge, or entered in his minutes, and immediately corrected or added to until made conformable to the truth, or it may afterward be settled in a statement of the case.

Exception, how stated and settled.
1 Min. 246.
7 Min. 267.
8 Min. 26.
8 Min. 154
8 Min. 226

SEC. 234. No particular form of exception is required; the objection shall be stated, with so much of the evidence as is necessary to explain it, but no more, and the whole as briefly as possible.

Form of exception.

TITLE XX.

NEW TRIALS.

SEC. 235. A verdict, report or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

For what causes, new trial may be granted.
1 Min. 156.
2 Min. 37.
3 Min. 134.
4 Min. 433.
5 Min. 171.
7 Min. 225.
7 Min. 325.
8 Min. 30.
9 Min. 313.
10 Min. 312.

First. Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court, or referee, or abuse of discretion, by which the moving party was prevented from having a fair trial;

Second. Misconduct of the jury or prevailing party;

Third. Accident or surprise, which ordinary prudence could not have guarded against;

Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

Fifth. That the verdict, report or decision is not justified by the evidence, or is contrary to law;

Sixth. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

Seventh. Error in law, occurring at the trial and excepted to by the party making the application.

SEC. 236. When the application is made for a cause mentioned in the fourth, fifth and seventh sub-divisions of the last section, it is made either upon a bill of exceptions, or a statement of the case prepared as prescribed in the next section; for any other cause it is made upon affidavit.

Application for new trial, how made.
4 Min. 422.
6 Min. 561.
8 Min. 30.

SEC. 237. The party preparing a bill of exceptions or case shall, within five days after the trial, serve it upon the adverse party, who may, within five days after such service, propose amendments thereto; and within fifteen days after service of such bill or case, the same with all

Bill of exceptions, or case, how served and settled.
4 Min. 379.

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amendments proposed thereto, shall be presented to the judge or referee who tried the cause, for allowance or settlement and signature, upon a notice of five days; if not presented within the time aforesaid, the same shall be deemed abandoned. The case or bill, being examined and found conformable to the truth, shall be allowed and signed by the judge or referee.

TITLE XXI.

GENERAL PROVISIONS.

Rate of damages recoverable.

SEC. 238. Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

Court may require conclusions of fact and of law to be submitted.

SEC. 239. Any party may, and if required by the court, shall, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both; they may be written and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes; but in either case they shall be entered, with any exceptions that may be taken, if either party requires it.

Application of certain provisions.

SEC. 240. The provisions of this chapter respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court or referees.

Offer of judgment.

SEC. 241. The defendant may at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof, within ten days, he may file the offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly; if the notice of acceptance is not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay costs to the defendant.

Costs.

SEC. 242. The action may be dismissed without a final determination of its merits, in the following cases:

Dismissal of action.
1 Min. 179.
2 Min. 50.
6 Min. 555.
6 Min. 574.

First. By the plaintiff himself at any time before trial, if a provisional remedy has not been allowed, or counter claim made;

Second. By either party with the written consent of the other; or by the court upon the application of either party, after notice to the other, and sufficient cause shown at any time before the trial;

Third. By the court, where, upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover;

Fourth. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

Fifth. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence. All other modes of dismissing an action, by nonsuit or otherwise, are abolished. The dismissal mentioned in the first two sub-divisions, is made by an entry in the clerk's register, and a notice served on the adverse party; judgment may thereupon be entered accordingly.

Judgment on the merits.

SEC. 243. In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

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SEC. 244. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. Judgment when there are several parties, plaintiff and defendant.

SEC. 245. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. Judgment against one or more of several defendants. 1 Min. 102.

SEC. 246. The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint, but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue. Plaintiff may be granted, what relief. 9 Min. 106.

SEC. 247. When a trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict, unless the court orders the case to be reserved for argument, or further consideration, or grants a stay of proceedings. Clerk to enter judgment in conformity to verdict, when. 2 Min. 277.

SEC. 248. If a counter claim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly. Judgment in case of counter claim.

SEC. 249. In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant in the same action, or for either of them. Judgment for either party, if the property has not been delivered to him and a return is claimed in the complaint or answer, may be for the possession, or the value thereof in case possession cannot be obtained, and damages for the detention or taking and withholding the same. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff and the action is dismissed before answer, or if the answer so claims, the defendant shall have judgment for a return of the property and damages, if any, for the detention, or taking and withholding such property, but such judgment shall not be a bar to another action for the same property or any part thereof. Judgment in action to recover possession of personal property. 4 Min. 270.

SEC. 250. The judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action. Judgment shall specify what. 10 Min. 303.

SEC. 251. If a party dies after verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon; such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate. Judgment, after decease of party, not a lien on real estate.

SEC. 252. Immediately after entering the judgment, the clerk shall attach together and file the following papers, which constitute the judgment roll: Judgment roll, what constitutes.

First. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report, if any, and a copy of the judgment;

Second. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, decision or report, the offer of the defendant, exceptions, and all orders in any way involving the merits and necessarily affecting the judgment. If a statement of the case is made, the same may be attached to the judgment roll on the request of either party.

SEC. 253. If an original pleading or paper is lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original. Copies may be filed—when.

SEC. 254. On filing a judgment roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the Judgment for payment of money to be

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docketed—lien on real estate of debtor—judgment in action on a judgment, not a lien.
 1 Min. 274.
 3 Min. 318.
 5 Min. 333.
 5 Min. 409.
 7 Min. 513.
 10 Min. 303.

Satisfaction of judgment.

 L...
 to clerk
 ...

court, in which it was rendered, and in any other county upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment from the time of docketing the same becomes a lien on all the real property of the debtor in the county owned by him at the time of the docketing of the judgment or afterward acquired said judgment shall survive and the lien thereof continue for the period of ten years, and no longer ~~provided~~, that in any action upon such judgment the judgment therein shall not be a lien upon the real property of the original judgment debtor.

SEC. 255. Satisfaction of a judgment shall be entered in the judgment book and noted upon the docket, upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within two years after the judgment, by the attorney, unless a revocation of his authority is previously entered upon the register. And whenever a judgment is satisfied in fact, as to any one of several defendants, an entry to that effect may be made in the judgment book and docket. Whenever a judgment is satisfied in fact, otherwise than upon an execution, it is the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. Satisfaction of a judgment docketed upon transcript shall be noted on such docket, upon filing in the office of the clerk of the district court of the county where such transcript is filed, a certified copy of the instrument of satisfaction on file in the office of the clerk of the district court of the county where the judgment was recovered. Whenever a judgment is satisfied, it is the duty of the clerk of the district court to give certified copies of instruments of satisfaction.

TITLE XXII.

PROCEEDINGS SUPPLEMENTARY TO THE JUDGMENT.

Parties not originally summoned, may be summoned after judgment—when.

SEC. 256. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided by statute, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

Heirs, devisees, et als., may be summoned, when—proceedings in such case.

SEC. 257. In case of the death of a judgment debtor, after judgment, the heirs, devisees, legatees, or personal representatives of the judgment debtor, or the tenants of real property owned by him, and affected by the judgment, may be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor, in their hands respectively. The proceedings thereon are subject to the provisions of the chapter upon actions by or against executors, administrators, legatees, heirs and devisees.

Summons, what to contain.

SEC. 258. Said summons shall be subscribed by the attorney of the judgment creditor, describe the judgment, and require the person summoned, to show cause within thirty days after service of the summons, and shall be served in the same manner as an ordinary summons.

Affidavit to accompany summons.

SEC. 259. The summons shall be accompanied by an affidavit of the judgment creditor or his attorney, that the judgment has not been satis-

fied, to his knowledge or information and belief, and shall specify the amount due thereon.

SEC. 260. Upon such summons, the party summoned may answer, within the time specified therein, denying the judgment, or setting up any defence which has arisen subsequent to the rendition thereof; if he is proceeded against according to section two hundred and fifty-six, he may make the same defence which might have been made originally to the action, except the statute of limitations; if he is proceeded against according to section two hundred and fifty-seven he may make the same defence which he might have made to an action upon the judgment.

Party summoned may answer—how.

SEC. 261. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply, and the issue may be tried and judgment and costs may be given, in the same manner as in an action, and enforced by execution, or the application of property charged with the payment of the judgment, may, if necessary, be compelled by attachment.

Demurer allowed to answer or reply—issue, judgment and costs, how regulated.

TITLE XXIII.

THE EXECUTION.

SEC. 262. The party in whose favor judgment is given, may, at any time within ten years after the entry thereof, proceed to enforce the same, as prescribed by statute.

Judgment creditor may have execution.

SEC. 263. There are two kinds of writs of execution; one against the property of the judgment debtor, and the other for the delivery of the possession of real or personal property, or such delivery with damages for the detention or taking and withholding the same.

Kinds of execution.

SEC. 264. The writ of execution shall be under the seal of the court, subscribed by the clerk, tested in the name of the district judge, indorsed by the attorney of the party applying therefor, and directed to the sheriff, or coroner when the sheriff is a party or interested; it shall intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Form and contents.

First. If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter not exceeding ten years;

Second. If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the officer to satisfy the judgment, with interest, out of such property;

Third. If it is against defendants jointly indebted upon a contract, a part of whom only have been summoned in the action, it shall issue in form against all the defendants, but the attorney of the party causing it to be issued shall indorse thereon the names of those defendants who were not summoned, and such execution shall not be levied upon the sole property of any such defendant, but it may be collected out of the personal property of any such defendant owned by him as a partner with the other defendants summoned, or any of them;

Fourth. If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, charges, damages, rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it shall be deemed an execution against property.

When returnable.

SEC. 265. The execution shall be made returnable within sixty days after its receipt by the officer, to the clerk with whom the judgment roll is filed.

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How enforced.

SEC. 266. Where a judgment requires the payment of money, or the delivery of real or personal property, the same is enforced in these respects, by execution, as provided in the last three sections. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuses he may be punished by the court as for contempt.

May issue after death of party.

SEC. 267. Notwithstanding the death of a party after judgment, execution thereon against his property may be issued and executed in the same manner and with the same effect as if he was still living; except that such execution cannot be issued within a year after his death.

To what officer issued—may issue to different counties.

SEC. 268. When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

May be levied on what property

SEC. 269. All goods, chattels real or personal, and all property, real, personal or mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book accounts, debts, credits and other evidences of indebtedness belonging to the defendant, may be levied upon and sold on execution. Until a levy, property, not subject to the lien of the judgment, is not affected by the execution.

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Levy on property subject to lien of judgment.

SEC. 270. Upon property subject to the lien of the judgment, a minute by the officer on the execution of the time when said execution was delivered to him, stating that at such time he levied upon such property (describing it) shall be deemed a sufficient levy.

Personal property, how levied on.
5 Min. 397.
Bulky articles, how levied on.

SEC. 271. Personal property capable of manual delivery shall be levied upon by the officer taking it into his custody.

SEC. 272. When an execution is levied upon articles of personal estate, which by reason of their bulk or other cause cannot be immediately removed, a certified copy of the execution and return may within three days thereafter be deposited in the office of the clerk of the city or town in which said articles are, and such levy shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer.

Duty of clerk—fees

SEC. 273. The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof in the order in which they are received in the books kept for making entries of mortgages of personal property; which entry shall contain the names of parties to the suit and the date of the entry.

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The clerks fee for this service shall be twenty-five cents to be paid by the officer and included in his charge for the service of the execution.

SEC. 274. Other personal property shall be levied on by leaving a certified copy of the execution and a notice specifying the property levied on, with a person holding the same, or if a debt, with the debtor, or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof.

Levy on debts, stock, &c. 5 Min. 337.

SEC. 275. The officer shall serve a copy of the execution and inventory certified by him upon the defendant, if he can be found within the county; if he is a resident thereof, but cannot be found therein, the said officer shall leave such copy at the usual place of abode of the said defendant.

Copy of execution and inventory to be served on defendant.

SEC. 276. The officer shall make a full inventory of the property levied on, and return the same with the execution.

Officer shall return full inventory. 5 Min. 333.

SEC. 277. Whenever any gold, silver or copper coin, or any bills or other evidence of debt issued by any moneyed corporation or by the government of the United States and circulated as money is seized upon execution, the officer shall pay and return the same as so much money collected; but if the same does not, at the time and place of such seizure circulate at par, the officer shall make sale thereof as in other cases.

Levy on gold, silver, &c.

SEC. 278. When goods or chattels are pledged for the payment of money or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

Levy on goods or chattels under pledge.

SEC. 279. No property hereinafter mentioned or represented shall be liable to attachment or sale on any final process issued from any court in this state.

Property exempt from execution. 2 Min. 89. 3 Min. 419. 7 Min. 184. 8 Min. 210.

First. The family bible;

Second. Family pictures, school books or library, and musical instruments for use of family;

Third. A seat or pew in any house or place of public worship;

Fourth. A lot in any burial ground;

Fifth. All wearing apparel of the debtor and his family, all beds, bedsteads and bedding, kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils, and all other household furniture not herein enumerated, not exceeding five hundred dollars in value;

Sixth. Three cows, ten swine, one yoke of oxen and a horse; or in lieu of one yoke of oxen and a horse, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also, one wagon, cart or dray, one sleigh, two plows, one drag, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value;

Seventh. The provisions for the debtor and his family necessary for one year's support, either provided, or growing, or both, and fuel necessary for one year;

Eighth. The tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade, and in addition thereto, stock in trade not exceeding four hundred dollars in value; the library and implements of any professional man; all of which articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be.

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one sewing machine

1869-126 Earnings of minor child
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No exemption from attachment or execution—when.

SEC. 280. The property hereinbefore mentioned is not exempt from any attachment issued in an action for the purchase money of the same property, or from an execution issued upon any judgment rendered therein.

Damages recovered for levy on exempt property are exempt. 3 Min. 419.

SEC. 281. Whenever any personal property exempt as aforesaid, is levied upon, seized or sold by virtue of any execution, the damages sustained by the owner thereof by reason of such levy, seizure or sale, and any judgment recovered therefor shall be exempt from attachment, execution or other proceeding whereby any creditor of said owner seeks to apply the same to the payment of his debt.

Excess of exempt property may be levied on.

SEC. 282. When the officer holding an execution against any person, is of the opinion that such person has more property of the classes specified in section two hundred and seventy-nine than is by law exempt, he may levy on the whole of any one class, and forthwith make an inventory thereof, and cause the same to be appraised at its cash value by two disinterested freeholders of the precinct where such property may be, on oath to be administered by him to such appraisers. If such appraisal exceeds the amount by law exempt of that class, the debtor may thereupon forthwith select of such property an amount not exceeding in value, as so appraised, the amount exempt, and the balance shall be held and applied by said officer as in other cases. If neither the debtor nor his agent appears and makes such selection, the officer shall make the same. If one or more indivisible articles of any such class is of greater value than the whole amount exempt of that class, the officer shall sell the same, and after paying to the debtor the amount exempt of that class, shall apply the residue in discharge of his said process.

Levy on grain, grass or other unharvested crops.

SEC. 283. A levy may be made upon grain or grass while growing, and upon any other unharvested crops; but no sale thereof shall be made under such levy, until the same is ripe or fit to be harvested; and any levy thereon by virtue of an execution, issued by a justice of the peace, shall be continued beyond the return day thereof, if necessary, and remain in life, and the execution thereof may be completed at any time within thirty days after such grain, grass, or other unharvested crop is ripe, or fit to be harvested.

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Duty of sheriff holding execution. 10 Min. 323.

SEC. 284. The sheriff shall execute the writ against the property of the judgment debtor, by levying on the property, collecting the things in action, or selling the same, if the court so orders, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

Notice of sale of personal property on execution—how given.

SEC. 285. Before the sale of personal property on execution, notice thereof shall be given as follows:

First. By posting written or printed notice of the time and place of sale, in three public places of the county where the sale is to take place, ten days successively.

Second. When real property is sold upon judgment, decree or execution, a similar notice, describing the property with sufficient certainty to enable a person of common understanding to identify it, shall be posted for six weeks successively, in three public places of the county where the property or some part thereof is situated, and a copy thereof shall be published once a week, for the same period, in a newspaper of the county, if there is one, or if there is none, then in a paper at the capital of the state.

1867-113

Officer selling without notice—penalty. 3 Min. 222.

SEC. 286. An officer selling without the notice prescribed by the last section, shall forfeit one hundred dollars to the aggrieved party, in addition to his actual damages; and a person taking down or defacing the notice posted, if done before the sale, or the satisfaction of the execution, and

without the consent of the parties, shall forfeit fifty dollars; but the validity of the sale is not affected by either act, either as to third persons, or parties to the action.

SEC. 287. A sale shall be made by auction between nine o'clock in the morning and sunset, in the county where the premises or some part thereof is situate; after sufficient property has been sold to satisfy the execution, no more shall be sold; neither the officer holding the execution nor his deputy can purchase; when the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known tracts or parcels, they shall be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold.

Sale, when and how made

SEC. 288. Upon the sale of real property where the estate sold is less than a leasehold of two years unexpired term, the sale is absolute; in all other cases the property sold is subject to redemption as provided by law.

Sale absolute—when.

SEC. 289. Whenever any sale of real property is made upon any execution, or pursuant to any judgment, decree or order of a court, (except where otherwise specified in such judgment, decree or order,) the officer shall make and deliver to the purchaser a certificate under his hand and seal containing—

Officer selling real estate to make and deliver certificate—what certificate shall contain.
1 Min. 427.
7 Min. 82.

First. A description of the execution, judgment, decree, or order, under which such sale is made;

Second. A description of the real property sold;

Third. The price paid for each parcel sold separately;

Fourth. The date of the sale and name of the purchaser;

Fifth. When subject to redemption it shall be so stated.

Said certificate shall be executed, proved or acknowledged, and recorded as required by law for the conveyance of real estate, within twenty days after such sale.

SEC. 290. Such certificate, so proved or acknowledged and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance to the purchaser or his assigns, of all the right, title and interest of the person whose property is sold, in and to the same, at the date of the lien upon which the same was sold, without any other conveyance whatever.

Certificate to operate as a conveyance, when.
5 Min. 499.

SEC. 291. Real estate sold upon execution, judgment or decree, may be redeemed—

Redemptions.
7 Min. 432.

First. By the judgment debtor, his heirs or assigns;

Second. By a creditor having a lien, legal or equitable, on the real estate or some part thereof, subsequent to that on which the same was sold. Creditors shall redeem in the order of their respective liens.

SEC. 292. The judgment debtor, his heirs and assigns, may redeem within one year after the day of sale, by paying to the purchaser the amount of his bid with interest thereon at the rate of seven per cent. per annum, and if the purchaser is a creditor having a prior lien, the amount thereof with interest. If no such redemption is made, the senior creditor may redeem within five days after the expiration of said year, and each subsequent creditor within five days after the time allowed all prior lien holders as aforesaid, by paying the amount aforesaid and all liens prior to his own held by the party from whom such redemption is made: *provided*, that no creditor can redeem unless within the year aforesaid he files notice of his intention to redeem in the office of the clerk of the court where the judgment is entered.

Parties to redeem in what order.

Redemption, how made.
7 Min. 432.

SEC. 293. The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff, or clerk of the district court of the county in which such real property is situated, the amount required by law for such redemption, and shall produce to such person or officer:

First. A certified copy of the docket of the judgment or deed of conveyance or mortgage, or of the record or files evidencing any other lien under which he claims the right to redeem, certified by the officer in whose custody such docket, record, file or files shall be;

Second. Any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto, or of some person acquainted with the signature of the assignor;

Third. An affidavit of himself or his agent, showing the amount then actually due on his lien.

Party redeeming entitled to certificate—what certificate shall contain.

SEC. 294. The person or officer from whom such redemption is made, shall make and deliver to the person redeeming a certificate under his hand and seal, containing:

First. The name of the person redeeming, and the amount paid by him on such redemption;

Second. A description of the sale from which such redemption is made, and of the property redeemed;

Third. Stating upon what claim such redemption is made, and if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificate shall be executed and proved or acknowledged and recorded, as provided by law for conveyance of real estate, and if not so recorded within ten days after such redemption, such redemption and certificate is void, as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, or his heirs or assigns, such redemption annuls such sale; if by a creditor holding a lien on the property, or some part thereof, said certificate, so executed and proved or acknowledged and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem, as is, or may be provided by law.

Interest of purchaser subject to attachment or judgment.

SEC. 295. The interest acquired upon any sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in case of real property; and may be attached or sold upon execution, in the same manner.

Waste may be restrained—waste defined.

SEC. 296. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on application of the purchaser or judgment creditor; but it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family, while he occupies the property.

Rights of purchaser—eviction.

SEC. 297. If the purchaser of real property sold on execution, or his successor in interest, is evicted therefrom, in consequence of irregularity in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor; such judgment creditor, if the recovery was in consequence of the irregularity, shall thereupon be entitled to a new execution on the judgment, for the price paid on the sale, with interest; and for

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that purpose the judgment shall be deemed valid against the judgment debtor, his personal representatives, heirs or devisees; but not against a purchaser in good faith, or an incumbrancer, whose title or incumbrance has accrued before a levy on such new execution.

SEC. 298. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property, or before sale, he may compel repayment from the principal. In such cases, the person so paying or contributing, is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days after his payment he files with the clerk of the court where the judgment was rendered, notice of his payment, and claim to contribution or repayment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket.

Joint debtor or surety may compel contribution.

Surety entitled to benefit of judgment paid by him, when.

TITLE XXIV.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

1867-104

SEC. 299. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment roll, or transcript of a justice's judgment is filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from a judge of the district court from which the execution was issued, requiring such judgment debtor, or if a corporation, any officer thereof, to appear and answer concerning his or its property, before such judge, or a referee appointed by him at a time and place specified in the order.

Judgment debtor may be ordered to appear and answer concerning his property. 9 Min. 270.

SEC. 300. Instead of the order requiring the attendance of the judgment debtor, as provided in the last section, the judge may upon proof, by affidavit that there is danger that the debtor will leave the state, or conceal himself, issue a warrant requiring the sheriff of any county where such debtor is, to arrest him and bring him before such judge; upon being brought before the judge he may be examined on oath, and ordered to give bond with sureties, that he will attend from time to time, before the judge or referee, as he shall direct, during the pendency of the proceeding, and until the final determination thereof, and will not in the mean time dispose of any portion of his property, not exempt from execution; in default of giving such bond he may be committed to jail by warrant of the judge, as for a contempt.

Warrant may be issued—proceedings on arrest of defendant.

SEC. 301. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debts, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt is a sufficient discharge for the amount so paid.

Execution may be paid by person indebted to judgment debtor.

SEC. 302. Witnesses may be required to appear and testify upon any proceedings under this chapter, in the same manner as upon the trial of an issue.

Witnesses may be required to appear, when.

SEC. 303. If the examination is before a referee the testimony and proceedings shall be certified by him to the judge; all examinations and

Examination before referee—duty of referee—

answers to be on oath.

answers before a judge or referee under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Judge may grant order concerning property of judgment debtor.

SEC. 304. The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, can not be so applied, when it appears by the debtor's affidavit, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

May appoint receiver.

SEC. 305. The judge may also by order appoint a receiver of the property of the judgment debtor not exempt from execution, or forbid a transfer or other disposition thereof, or any interference therewith.

Proceedings in case of adverse claimants of property.

SEC. 306. If it appears that a person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation, by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity is given to the receiver to commence the action, and prosecute the same to judgment and execution; such order may be modified or vacated by the judge granting the same, at any time, on such security as he may direct.

Disobedience of order of judge a contempt.

SEC. 307. If any person, party or witness disobeys an order of the judge or referee, duly served, such person, party or witness may be punished by the judge, as for a contempt; the proceedings therefor are prescribed in chapter eighty-seven of these statutes, respecting the punishment of contempt.

Witness compelled to answer, but answer not evidence in criminal proceeding against him.

SEC. 308. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

A BILL for an act to provide for the service of mesne process upon foreign corporations.

Be it enacted by the Legislature of the State of Minnesota:

Summons in action against foreign corporation, how served.

SECTION 1. That the summons in any civil action or proceeding wherein a foreign corporation is defendant, may be served by delivering a copy thereof to the president, secretary, or any managing or general agent of said foreign corporation, and such service shall be of the same force, effect and validity as like service upon domestic corporations.

Act to supersede other inconsistent provisions.

SEC. 2. This act shall have full force and effect notwithstanding any provisions of the general statutes, or other law of the state inconsistent herewith, and shall be published with and as a part of the general statutes.

To take effect when.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved February 28, 1866.