CHAPTER XLI.

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TITLE I.

OF THE FORM OF CIVIL ACTIONS.

(*This Title is Title I. of Chapter LXVI. of the Statutes of* 1866.)

SECTION 1. *Forms of actions abolished—one form adopted called a civil action.*—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. *Parties, how styled.*—The party complaining shall be known as the plaintiff, and the adverse party as the defendant.

TITLE II.

LIMITATION OF ACTIONS.

(*This Title is Title II. of Chapter LXVI.*)

SEC. 3. *Limitations of actions.*—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.

Limitation statutes may operate retrospectively, Holcombe *v.* Tracey, 2 Minn. 246. Limitation governed by the *lex fori*, Fletcher *v.* Spaulding, 9 Minn. 64. Law in force at time of bringing action governs, Cook *v.* Kendall, 13 Minn. 324. Statute may run against one joint debtor only, Town *v.* Washburn, 14 Minn. 268. Limitation when action depends on contingency, Johnson *v.* Gilfillan, 8 Minn. 395.

SEC. 4. *Actions to recover real property within twenty years.*—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that 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. *Actions upon judgment or decree, within ten years.*—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.

Foreign judgment, Holcombe *v.* Tracey, 2 Minn. 241; Stine v. Bennet, 13 Minn. 153.

SEC. 6. *Actions upon contracts, etc., within six years.*—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 hereinafter 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.

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SEC. 7. *Actions against certain officers, or upon statute for a penalty, within three years.*—Within three years:

First. An act 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. *Action for libel, etc., within two years.*—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. *Cause of action upon mutual and current account, accrues when.*—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. *Action for penalty given to prosecutor, within one year.*—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 (AS AMENDED BY ACT OF MARCH 8, 1870). *Action to foreclose mortgage, within ten years.*—Every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues.

S. L. 1870, 121. Action to foreclose mortgage not an action upon contract, etc., Ozmun *v.* Reynolds, 11 Minn. 459; Berry, J., dissents. Action to recover surplus money by junior incumbrancer, Ayer *v.* Stewart, 14 Minn. 97; McMillan, J., dissents. Deed absolute on the face, action to foreclose as a mortgage, Holton *v.* Meighen, 15 Minn. 69.

SEC. 12. *Limitations to apply to actions brought in name of state or officer.*—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. *Action deemed commenced from service of summons, and pending till determined on appeal or judgment is satisfied.*—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.

Hooper *v.* Farwell, 3 Minn. 106.

SEC. 14. *Attempt to commence action, when equivalent to commencement.*—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 application of the summons, or the service thereof, within sixty days.

SEC. 15. *Absence from the state, effect of.*—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.

Absence from the state, action not barred, Duke *v.* Balme, 16 Minn. 306.

SEC. 16. *Cause of action accruing out of the state when action maintainable here.*—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.

Action accruing in another state, Fletcher *v.* Spaulding, 9 Minn. 64. Where party is non-resident, Hoyt *v.* McNeil, 13 Minn. 390.

SEC. 17 (AS AMENDED BY ACT OF MARCH 5, 1869). *Period of disability excluded in certain cases.*—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

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.

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.

S. L. 1869, 74. Amd. removed the disabilities of married women, and took effect June 1st, 1869. Actions against married women, Burke *v.* Burridge, 15 Minn. 205.

SEC. 18. *Death of party entitled to bring action, effect of.*—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.

SEC. 19. *Period between death of party and granting of letters, etc., not included.*—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.

SEC. 20. *Period of war not included in certain cases.*—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.

SEC. 21. *Period covered by injunction, etc., not included.*—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.

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

SEC. 23. *Limitation does not attach until all disabilities are removed.*—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.

SEC. 24. *Evidence of new contract must be in writing.*—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.

Where payments are made when statutes commence to run, Whitacre *v.* Rice, 9 Minn. 13; Brisbin *v.* Farmer, 16 Minn. 215. What will take a cause of action out of the statute, Whitney *v.* Reese, 11 Minn. 138; McNab *et al.* Exrs. *v.* Stewart, 12 Minn. 407. The statute of limitation only denies a remedy after the prescribed time without extinguishing the debt, etc., Smith *v.* Moulton, 12 Minn. 352. What is a sufficient acknowledgment to bind a school district, Sanborn *v.* School Dist. No. 10, 12 Minn. 17. New promise cannot be rescinded, *ib.* What is an insufficient acknowledgment, Whitney *v.* Reese, 11 Minn. 138. Part payment inference of promise to pay balance, Brisbin *v.* Farmer, 16 Minn. 215. Part payment no evidence of promise to pay balance, *ib.*

SEC. 25. *New action may be commenced, when.*—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.

TITLE III.

OF PARTIES TO CIVIL ACTIONS.

(This Title is Title III. of Chapter LXVI. of the Statutes of 1866.)

SEC. 26. *Actions in whose name prosecuted.*—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.

When assignee may sue in his own name, Russell *v.* Minnesota Outfit, 1 Minn. 162; St Anthony Mills Co. *v.* Vandall, *ib.* 251; Castner *v.* Summer, 2 Minn. 44; Rogers *v.* Stevenson, 16 Minn. 68; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123. When assignee cannot sue, Spencer *v.* Woodbury, 1 Minn. 105. Creditor's action to be brought by whom, Goncolier *v.* Foret, 4 Minn. 13. One who holds for the joint use and benefit of another, Hawks *v.* Banning, 3 Minn. 67. Indorsee of non-negotiable note must sue in his own name, etc., Holfer *v.* Alden, 3 Minn. 332. Action only sustained by real party in interest, Rohrer *v.* Burrill, 4 Minn. 407. Assignee of guaranty, Johnson *v.* Gilfillan, 8 Minn. 395. Where principal shipped goods by an agent, which defendant lost, Ames *v.* The First Div. St Paul & P. R. R. Co. 12 Minn. 412. The state of Minnesota has legal capacity to sue, State *v.* Grant, 10 Minn. 39. Action on appeal bond, assignee of prevailing party should sue, Bennett *v.* McGrade, 15 Minn. 132. Action by master of boat for freight, Houghton *v.* Lynch, 13 Minn. 83.

SEC. 27. *Action by assignee subject to set-off—exception.*—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 defense 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.

SEC. 28. *Executor, et al., may sue alone.*—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.

Vide note to sec. 26. St Anthony Mills Co. *v.* Vandall, 1 Minn. 251. When executor to sue, Landis *v.* Olds, 9 Minn. 90. When *cestuis qui trust* need not be joined in action by creditor to reach property in hands of trustees, Winslow *v.* Minnesota & Pacific R. R. Co., 4 Minn. 313.

SEC. 29 (AS AMENDED BY ACT OF MARCH 5, 1869). *Married women may sue without joining with husbands.*—A married woman may sue or be sued as if unmarried, and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation.

S. L. 1869, 72; took effect June 1, 1869. Wife to appear by next friend or guardian, when, Wolfe *v.* Banning, 3 Minn. 202.

SEC. 30 (AS AMENDED BY ACT OF MARCH 6, 1871). *Infant may appear by guardian when plaintiff—remedy for incompetency.*—When an infant is a plaintiff he shall appear by his guardian, who shall be appointed by the court in which the action is prosecuted, or by a judge thereof, and shall be a competent and responsible person, resident of this state, and shall file his written consent to such appointment in the office of the clerk of the district court or court of common pleas before the issuing of the summons in such action. Whenever it shall appear to the court or judge that such guardian is not competent or responsible, he may be removed and another substituted, without prejudice to the progress of the action; and before such guardian shall receive any money or property of such infant, he shall be required by an order of such court or judge to give a bond with sufficient sureties, to be approved by such court or judge, to secure such money or property and account therefor to such infant.

S. L. 1871, 115. When guardian *ad litem* may bring action without joining general guardian, Price *v.* Phœnix Mut. Life Ins. Co., 17 Minn. 497.

SEC. 31 (AS AMENDED BY ACT OF MARCH 6, 1871). *May appear by guardian when defendant—by whom appointed.*—Whenever an infant is a defendant he shall appear by guardian, to be appointed by the court in which the action is pending, or the judge thereof, or the proper court commissioner; and such court or judge may make such orders as may be necessary for the protection of the rights of such infant defendant. Such guardian must be a resident of this state and consent in writing to such appointment, which must be filed in the office of the clerk of such court at the time of said appointment.

S. L. 1871, 115.

SEC. 32. *Who may prosecute for seduction.*—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.

SEC. 33. *Injuries to infants, who may sue for.*—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.

SEC. 34. *Wife may prosecute or defend in name of husband, when.*—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.

SEC. 35. *Who may be joined in same action.*—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.

Folson et al. v. Carli, 5 Minn. 333. All parties having subsisting interests should be joined, Fish *v.* Berkey, 16 Minn. 199.

SEC. 36. *Abatement of actions.*—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.

Substitution of parties *pendente lite*, St Anthony Mills Co. *v.* Vandall, 1 Minn. 246; Keough *v.* McNitt, 7 Minn. 29; Capehart *v.* Van Campen, 10 Minn. 158. Assignment by plaintiff *pendente lite* does not affect the action, Whitacre *v.* Culver, 9 Minn. 295. Considered in and distinguished from, Chisholm *v.* Clitherall, 12 Minn. 380. Persons upon whom by operation of law title has been cast *pendente lite* must be made parties, Steele *v.* Taylor, 1 Minn. 279.

SEC. 37. *How brought against persons doing business under a common name.*—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.

Action must be brought against all partners, Fetz *v.* Clark, 7 Minn. 217.

SEC. 38 (ACT OF FEBRUARY 27, 1868). *When judge can order party to appear.*—Whenever the plaintiff, his agent or attorney, in any action now or hereafter pending in any of the district courts of this state, shall discover that any party ought, in order to a full and just determination of such action, to have been made defendant therein, and shall make an affidavit stating the pendency of such action, and the reasons why such party ought to have been made defendant therein, and present the same to said court, or to a judge thereof, the said court or judge shall, if such reasons are deemed sufficient, grant an order reciting the summons by which the action was commenced, and requiring the said party to appear and answer the complaint in said summons named within twenty days after the service of such order upon him, exclusive of the day of such service, and in default thereof, the judgment or relief demanded in said complaint will be rendered against him in all respects as though he had been made a party to such action in the first instance.

S. L. 1868, 118.

SEC. 39 (2). *How order to be served.*—The order shall be served upon the party in the manner now provided by law for the service of a summons in said court in civil actions.

S. L. 1868, 118.

SEC. 40 (3). *Judge may order proceedings to be stayed—for what purpose.*—The said court or judge may upon application of the plaintiff at the time of applying for the order in the first (thirty-eighth) section named, or at any time thereafter, make an order staying all further proceedings in said action for such time as may be necessary to enable the plaintiff to have the said party in said action named brought into court to defend in said action.

S. L. 1868, 118.

SEC. 41 (4). *Party in court, action to proceed.*—After a party has been brought into court under the provisions of this act, the action shall proceed against all the parties thereto in the same manner as though they had all been originally made defendants therein.

S. L. 1868, 119.

TITLE IV.

PLACE OF TRIAL.

(*This Title is Title IV. of Chapter LXVI. of the Statutes of* 1866.

SEC. 42 (38). *Actions, where triable.*—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.

Action on note may be brought anywhere, but on application will be changed to proper county, Merrill *et al. v.* Shaw *et al.*, 5 Minn. 148.

SEC. 43 (39). *Certain actions to be tried in county where cause of action arose.*—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.

Merrill *et al. v.* Shaw, 5 Minn. 148, *supra.*

SEC. 44 (40, AS AMENDED BY ACT OF MARCH 7, 1867). *Other actions to be tried in county where one of parties resides.*—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: *provided, however,*

that if an action is brought in the district court for the recovery of any sum not exceeding fifty dollars it must be commenced and tried in the county where the defendant resides, if a resident of this state, subject, however, to the power of the court to change the place of trial as provided by law.

S. L. 1867, 103. *Vide* cases cited in preceding sections.

SEC. 45 (41). *Actions, where brought in case of non-residence of defendant.*—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.

SEC. 46 (42). *Court may change place of trial, in what cases.*—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:

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.

OF PROCEEDINGS IN ACTIONS.

ARTICLE I.

OF THE SERVICE OF PROCESS, PLEADINGS, NOTICES, ETC.

(*This Article is Title V. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 47 (43). *Civil actions, how commenced.*—Civil actions in the several district courts of this state shall be commenced by the service of a summons, as hereinafter provided.

SEC. 48 (44, AS AMENDED BY ACT OF MARCH 9, 1867). *Summons, how signed and what to contain.*—The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant, requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a post office,

within twenty days after the service of the summons, exclusive of the day of service.

S. L. 1867, 114. Subscription of summons not complied with by printing the name of attorney, Ames *v.* Schurmier, 9 Minn. 221. Written signature signed by plaintiff's agent valid, when, Hotchkiss *v.* Cutting, 14 Minn. 537.

SEC. 49 (45). *Shall also contain notice.*—The summons shall also contain a notice in substance as follows:

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.

To whom notice will apply on default for judgment, Hotchkiss *v.* Cutting, 14 Minn. 537.

SEC. 50 (46, AS AMENDED BY ACT OF MARCH 9, 1867). *Copy may be filed with clerk, how to proceed in which case.*—A copy of the complaint must be served upon the defendant with the summons, unless the complaint itself be filed in the office of the clerk of the district court of the county in which the action is commenced, in which case the service of the copy may be omitted, but the summons in such case must notify the defendant that the complaint has been filed with the clerk of the said court; and if the defendant appear within ten days after the service of the summons the plaintiff must serve a copy of the complaint on the defendant or his attorney within five days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case until the expiration of the time.

S. L. 1867, 105. Fact that the complaint is not filed with clerk, etc., does not affect validity of judgment, Young *v.* Young, 18 Minn. 90.

SEC. 51 (47). *Summons, by whom served.*—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.

SEC. 52 (48). *How served.*—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.

Service, where made, Sullivan *v.* La Crosse and Minnesota Packet Co., 10 Minn. 386.

SEC. 53 (ACT OF FEBRUARY 28, 1866).* *Summons in action against foreign corporation, how served.*—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.

Personal service of summons within this state, on a general agent of a foreign insurance company, temporarily within this state, will give jurisdiction over company, Guernsey *v.* Amer Insurance Company, 13 Minn. 278; Wilson, C. J., dissents.

SEC. 54 (ACT OF MARCH 6, 1871). *In actions against railroad companies on whom papers to be served.*—The service of all process and papers in any civil action or proceeding before any justice of the peace, or in the district court against any railroad company within this state, may be made upon any acting ticket or freight agent of such company, within the county in which the action or proceeding shall be commenced, and shall be taken and held in all cases to be a legal service: *provided,* that whenever any railroad company has appeared in an action by an attorney, thereafter such service shall be made upon the attorney of record.

S. L. 1871, 121, amending S. L. 1870, 25.

SEC. 55 (49, AS AMENDED BY ACT OF FEBRUARY 8, 1869). *In what cases summons to be published.*—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 filing of an affidavit of the plaintiff, his agent, or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons in the post office directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney 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

* This section found on page 494, G. S. 1866. Section 2 of said act provided that it should have full force and effect notwithstanding any provisions of the general statutes or other law of the state inconsistent herewith, and should be published with and as a part of the general statutes.

the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

The affidavit must state facts showing that the defendant, after due diligence, cannot be found within the state, McKubin *et al. v.* Smith, 5 Minn. 367; following Curtis *v.* Moore, 3 Minn. 29. What constitutes such showing, Broome *et al. v.* The G. D. D. & M. Packet Co., 9 Minn. 239. Service on foreign corporation can only be by publication, Sullivan *v.* La Crosse & Minn. Steam Packet Co., 10 Minn. 386. What is insufficient affidavit, Harrington *v.* Loomis, 10 Minn. 366.

SEC. 56 (50, AS AMENDED BY ACT OF MARCH 1, 1867). *Publication, how made, and for what length of time.*—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 in an adjoining county, and if there is no such newspaper in an adjoining 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.

S. L. 1867, 113. Time of publication, Cleland *v.* Tavernier, 11 Minn. 194.

SEC. 57 (51). *When defendant may appear and defend.*—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.

Opening decree in the case of divorce, True *v.* True, 6 Minn. 458.

SEC. 58 (52). *Proceedings in case of service on less than whole number of defendants.*—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:

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.

Judgment against one co-partner does not dismiss action against other, where process was served upon both, Hooper *v.* Farwell, 3 Minn. 106.

SEC. 59 (53). *Proof of service of summons, how made.*—Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, shall be as follows:

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

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.

What requisite proof of service of summons on entry by default, Masterson *v.* Le Claire, 4 Minn. 163. Proof of service by admission, when sufficient, Kipp *v.* Fullerton, 4 Minn. 173. Ætna Ins. Co. *v.* Swift, 12 Minn. 437. Service by private person, affidavit need not state that he knew defendant, Young *v.* Young, 18 Minn. 90.

SEC. 60 (54). *From what time court deemed to have acquired jurisdiction.*—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.

Demurrer to complaint by foreign corporation is appearance, Reynolds *v.* La Crosse & Minnesota Packet Co., 10 Minn. 178.

SEC. 61 (55). *Natural person subject to jurisdiction of court, when.*—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.

SEC. 62 (56). *Corporation subject to jurisdiction of court, when.*—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 case, only to the extent of such property at the time the jurisdiction attached.

Foreign corporation subject to jurisdiction of court, when, Broome *v.* The G. D. D. & M. Packet Co., 9 Minn. 239; Reynolds *v.* La Crosse & Minn. Packet Co., 10 Minn. 178.

SEC. 63 (57). *Defendant appears in an action, when.*—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.

Vide cases cited under preceding section, also—An application for an extension of time to answer, pending decision of motion to set aside the summons, is recognition of jurisdiction of court over person, Yale *v.* Edgerton, 11 Minn. 271. Written admission of service indorsed on back of summons not appearance, First Nat. Bank of Hastings *v.* Rogers, imp. 12 Minn. 529.

SEC. 64 (58). *Notice—on whom served.*—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.

SEC. 65 (59). *Service, how made.*—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.

Papers served after time for service has expired must be returned within reasonable time, Smith *v.* Milikin, 2 Minn. 319.

SEC. 66 (60). *Service by mail allowed, when.*—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.

SEC. 67 (61). *Manner of service by mail.*—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.

SEC. 68 (62, AS AMENDED BY ACT OF FEBRUARY 14, 1872). *Service out of state made by mail.*—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, whether resident or non-resident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally, either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made on the clerk for the attorney.

S. L. 1872, 138.

SEC. 69 (63). *Limitation of four preceding sections.*—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.

SEC. 70 (64). *Notice valid, when.*—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.

SEC. 71 (65, AS AMENDED BY ACT OF MARCH 9, 1867). *Pleadings, bonds, affidavits, etc., to be filed, when.*—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 property, shall after the justification of the sureties be delivered by the sheriff to the parties respectively for whose benefit they are taken. Each party shall, on or before the second day of the term for which any cause is noticed, file his pleadings in the office of the court.

S. L. 1867, 106.
Sec. 66, G. S., repealed by Act of March 9, 1867 (S. L. 1867, 106).

SEC. 72 (ACT OF FEBRUARY 28, 1866). *Death, etc., of attorney—service of notice to appoint another, etc.*—Whenever, by reason of death or otherwise, the attorney for a party to an action ceases to act as such, and said party is absent from and has no known place of residence within the state, service of notice requiring said party to appoint another attorney, or to appear in person in such action, may be made upon said party by filing the same in such action with the clerk of the court in which the action is pending, and in case such party shall neither appoint an attorney nor appear in person therein within thirty days, he shall not be entitled to notice of any subsequent proceedings in such action.

S. L. 1866, 83.

SEC. 73 (67). *Defendant may demand assessment of damages without answering.*—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.

SEC. 74 (68). *Time, how computed.*—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.

SEC. 75 (69). *Publication of legal notices, made how.*—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.

What a sufficient publication under statute, Worley *v.* Naylor, 6 Minn. 192.

ARTICLE II.

OF PLEADINGS.

(*This Article is Title VI. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 76 (70). *Pleadings regulated by statute.*—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.

SEC. 77 (71). *What pleadings allowed.*—The only pleadings on the part of the plaintiff are:

First. The complaint.
Second. The demurrer or reply.
And on the part of the defendant.
First. Demurrer.
Second. The answer.

THE COMPLAINT.

SEC. 78 (72). *Complaint, the first pleading.*—The first pleading on the part of the plaintiff is the complaint.

SEC. 79 (73). *What complaint shall contain.*—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.

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.

Facts only should be pleaded, Steamboat War Eagle *v.* Nutting, 1 Minn. 259; Wilcox *v.* Davis, 4 Minn. 197; Caldwell *v.* Auger *et al.*, 4 Minn. 237. How facts should be pleaded, Moulton *v.* Doran *et al.*, 10 Minn. 67; Taylor *v.* Blake, 11 Minn. 255. Designation of the court, Choteau *v.* Rice, 1 Minn. 192. Full name of parties should be stated, Knox *et al. v.* Stark *et al.*, 4 Minn. 28. Partnership must be pleaded, Forester *v.* Kirkpatrick, 2 Minn. 210; Irvine *et al. v.* Myers, 4 Minn. 229; Fetz *v.* Clark, 7 Minn. 217. When immaterial, Jaeger *et al. v.* Hartman, 13 Minn. 55; Hayward *et al. v.* Grant, *ib.* 165. Complaint may set up a contract as modified by subsequent agreement, Estes *v.* Farnham, 11 Minn. 423. Consideration must be pleaded to an executory agreement, Becker *v.* Sweetzer, 15 Minn. 427. Special damages must be alleged, Brackett *v.* Edgerton, 14 Minn. 174. Damages by way of interest not facts, Talcott *v.* Marston, 3 Minn. 339. Joint contract must be pleaded and proved, Fetz *v.* Clark, 7 Minn. 217. In actions for goods sold, etc., what complaint must state, Forester *v.* Kirkpatrick, 2 Minn. 210; Holgate *v.* Brown, 8 Minn. 243. Actions for work and labor, what must be alleged, Nash *et al. v.* Murnan *et al.*, 6 Minn. 577. Actions on negotiable instruments, what necessary to allege, Gebhart *v.* Eastman *et al.*, 7 Minn. 56; Goodnow *v.* Coms. of Ramsey Co., 11 Minn. 31; Kennedy *v.* Williams, 11 Minn. 314; Jaeger *et al. v.* Hartman, 13 Minn. 55; Wiley *v.* Board of Education of Town of Minneapolis, 11 Minn. 371. Actions on non-negotiable instruments, Clark *v.* Norton, 6 Minn. 413; State *v.* Grant, 10 Minn. 39; Hall *v.* Williams *et al.*, 13 Minn. 260. In actions for unliquidated damages for breach of contract, Rose *v.* Roberts, 9 Minn. 119; Rhone *v.* Gale, 12 Minn. 54. In actions for injuries to person, Andrews *v.* Stone, 10 Minn. 72; Shartle *v.* Minneapolis, 17 Minn. 308. In actions for injuries to personal property, Buck *v.* Colbath, 7 Minn. 210; Adams *v.* Corriston, *ib.* 456; Tozier *v.* Merriam, 12 Minn. 87; Clague *v.* Hodgson, 16 Minn. 329; Jones *v.* Rahilly, *ib.* 320. In actions for injuries to real property, Gould *v.* Eagle School Dist., 7 Minn. 203; Daley *v.* City of St Paul, *ib.* 390; Gray *v.* St Paul & Pacific R. R. Co., 13 Minn. 315; Molitor *v.* Same, *ib.* 285; Pott *v.* Penington, 16 Minn. 509. In actions to recover the possession of real property, McLane *v.* White, 5 Minn. 178; Armstrong *v.* Hinds, 8 Minn. 254; Pinney *v.* Fridley, 9 Minn. 34; Wells *et al. v.* Masterson, 9 Minn. 566; Holmes *v.* Williams *et al.*, 16 Minn. 164. In actions for equitable relief, Irvine *v.* Irvine, 5 Minn. 61; Cathcart *v.* Peck *et al.*, 11 Minn. 45; Carver *v.* Slingerland, 11 Minn. 447; Holton *v.* Meighen, 15 Minn. 69, over-ruling Belote *v.* Morrison, 8 Minn. 945. In actions given by statute, McComb *v.* Bell, 2 Minn. 295; Mason *et al. v.* Heyward, 5 Minn. 74; St Peter's Church *v.* The Board of County Coms. of Scott Co., 12 Minn. 395; Webb *v.* Bidwell, 15 Minn. 479. In complaint in divorce it is not necessary to show in what county plaintiff resided, nor, etc., Young *v.* Young, 18 Minn. 90.

THE DEMURRER.

SEC. 80 (74, AS AMENDED BY ACT OF MARCH 9, 1867). *Defendant may demur to complaint, when.*—The defendant may demur to the complaint within twenty days after the service thereof, when it appears upon the face thereof, either:

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.

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.

S. L. 1867, 106.

When it will lie.—For defect of parties, Castner *v.* Sumner, 2 Minn. 46; Lowry *v.* Harris, 12 Minn. 255. When it clearly appears that the statute of limitations has barred the action. Kennedy *v.* Williams, 11 Minn. 314; Eastman *v.* The St Anthony Falls Water Power Co., 12 Minn. 137; McArdle *v.* McArdle, 12 Minn. 98. For failure to allege title in action to recover possession of real property, Armstrong *v.* Hinds, 8 Minn. 254.

When it will not lie.—When defense of statute of limitations does not clearly appear, McArdle *v.* McArdle, 12 Minn. 98. To the form and manner of bill in equity, Chouteau *et al. v.* Rice *et al.*, 1 Minn. 106. For misjoinder of defendants, Lewis & Pickering *v.* Williams & Sons, 3 Minn. 151; Goncolier *v.* Foret *et al.*, 4 Minn. 13; Nichols Adm. *v.* Randall, 5 Minn. 304. For redundancy or immateriality, Loomis *v.* Youle, 1 Minn, 175. For indefiniteness, Dewey *v.* Leonard, 14 Minn. 153. For misjoinder of actions, Smith *v.* Jordan *et al.*, 13 Minn. 264. To less than a distinct cause of action or defense, Daniels *v.* Bradley, 4 Minn. 158; Emmet, C. J., dissents. To prayer for improper relief, Conner *v.* Board of Education of St Anthony, 10 Minn. 439; Metzner *et al. v.* Baldwin *et al.*, 11 Minn. 158. Where the complaint did not show affirmatively that premises in dispute were within jurisdiction of court. Powers *v.* Ames *et al.*, 9 Minn. 178. Where action was commenced in wrong county, Mininger *v.* Coms. of Carver Co., 10 Minn. 133. When part of relief should be granted, Armstrong *v.* Hinds, 9 Minn. 356; Lockwood *v.* Bigelow, 11 Minn. 113.

For failure to allege *in hac verba* a promissory note to be properly stamped, Cabbot *v.* Radford, 17 Minn. 320. Objection on ground of want of proper parties must be taken by demurrer or answer, McRoberts *v.* So. Minn. R. Co., 18 Minn. 110.

SEC. 81 (75). *Demurrer shall specify grounds of objection.*—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, G. S., repealed by Act of March 9, 1867 (S. L. 1867, 106).

SEC. 82 (77). *Objection taken by answer, when.*—When any of the matters enumerated in section seventy-four (eighty) do not appear upon the face of the complaint, the objection may be taken by answer.

SEC. 82A (78). *Objections waived, when.*—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.

Where complaint does not state facts sufficient to constitute a cause of action, not waived, Stratton *v.* Allen, 7 Minn. 502; Lee *v.* Emery *et al.*, 10 Minn. 187; Lockwood *v.* Bigelow, 11 Minn. 113. Objection to the legal capacity of plaintiff to sue not taken by answer or demurrer waived, Tapley *v.* Tapley, 10 Minn. 456; *vide* also Lowry *v.* Harris, 12 Minn. 255.

THE ANSWER.

SEC. 83 (79). *Answer shall contain, what.*—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 counterclaim, 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.

General denials.—Of indebtedness, not good, Freeman Survivor *v.* Curran *et al.*, 1 Minn. 169. A denial of each and every *material* allegation is bad, Montour *v.* Purdy *et al.*, 11 Minn. 384; Dodge *v.* Chandler, 13 Minn. 114. A denial of each and every allegation of complaint puts what in issue, Fetz *v.* Clark, 7 Minn. 217. A denial of each and every allegation except what the court may construe to be admitted is bad, Starbuck *v.* Dunklee, 10 Minn. 168. What amounts to a general denial, Kingsley *v.* Gilman, 12 Minn. 515. A general denial followed by special matter inconsistent therewith is controlled by latter, Derby *v.* Gallup, 5 Minn. 119; Scott *v.* King, 7 Minn. 494. What may be shown in, Caldwell *v.* Bruggerman, 4 Minn. 270. When fraud intended to be set up, insufficient, Cummings *v.* Thompson, 18 Minn. 246.

Qualified denial.—Admitting facts and denying intention or qualifying circumstances, Kingsley *v.* Gilman, imp., 12 Minn. 515. Setting up another and different contract, Becker *v.* Sweetzer, 15 Minn. 427.

Denial of knowledge or information.—Morton *v.* Jackson, 2 Minn. 222; Mower *v.* Stickney, 5 Minn. 406; Starbuck *v.* Dunkle, 10 Minn. 168; Ames *v.* St Paul and Pacific, 12 Minn. 412.

Of conclusions of law.—Freeman *v.* Curran *et al.*, 1 Minn. 169; Bennett *v.* Crowell *et al.*, 7 Minn. 385. Conclusions of law falls with the facts, on which it stands, and is not admitted by not being denied, Dana *v.* Porter *et al.*, 14 Minn. 478.

Inconsistent defenses, what are.—General denial and justification, Derby *v.* Gallup, 5 Minn. 119; Zimmerman *v.* Lamb, 7 Minn. 421; Barnsback *v.* Renier, 8 Minn. 58. Remedy for, Conway *v.* Wharton, 13 Minn. 158.

Allegation of new matter.—Finlay *v.* Quirk, 9 Minn. 194; Nash *v.* City of St Paul, 11 Minn. 174; Davenport *v.* Short, 17 Minn. 24.

Negative pregnant, what is.—McClung *v.* Bergfeld, 4 Minn. 148; Burt *v.* McKinstry, 4 Minn. 204; Truitt *v.* Caldwell, 3 Minn. 364; Lynd *v.* Picket, 7 Minn. 184; Dean *v.* Leonard, 9 Minn. 190; Hecklin *v.* Ess, 16 Minn. 51; Pottgeiser *v.* Dorn, 16 Minn. 204.

Denials in particular cases.—Of notice, Minor *v.* Willoughby, 3 Minn. 225. Of legal conclusion without denying facts, Johnson *v.* Piper, 4 Minn. 192. Of conveyance to plaintiff, Hill *v.* Edwards, 11 Minn. 22. Of account stated, Warner *v.* Myrick, 16 Minn. 91.

What must be denied.—Where an intent charged was material, Wilcox *v.* Davis, 4 Minn. 197.

Pendency of former action is matter in abatement, and is waived unless pleaded, Taylor *v.* Parker, 18 Minn. 88.

Equitable defenses.—Equities existing between the original parties to a note which originated subsequent to the indorsement thereof to the holder cannot be set up by maker against holder, Becker *v.* Sandusky City Bank, 1 Minn. 311; may be interposed to an action of ejectment, McLane *v.* White, 5 Minn. 178.

When answer constitutes no defense to action.—Yoss *v.* De Freudenrich, 6 Minn. 95; Lough *v.* Bragg, 18 Minn. 121.

Answer in particular actions.—Defense by maker and indorser, want of consideration, Dunning *v.* Pond, 5 Minn. 296. Denial of delivery controlled by facts pleaded, Heyward *v.* Grant, 13 Minn. 165; Wilson, C. J., dissents. Action for specific performance, statute of limitation need not be pleaded in answer, when, Wentworth *v.* Wentworth, 2 Minn. 277. By principal against surety, Hay *v.* Pinney, 5 Minn. 310. Against corporation, when defendant must plead its charter, Becht *v.* Harris, 4 Minn. 504.

SEC. 84 (80). *Counter-claim must be an existing one.*—The counter-claim, mentioned in the last section, must be an existing one in favour 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.

What not available as counter-claims.—Farrington *v.* Wright, 1 Minn. 241; Carpenter *et ux. v.* Leonard, 5 Minn. 155; Englebrecht *v.* Rickert, 14 Minn. 140.

When counter-claims will not be allowed.—Not after a general denial, Steele *v.* Etheridge, 15 Minn. 501. One joint defendant cannot set up individual claims, as Cooper *v.* Brewster, 1 Minn. 96. Separate debt cannot be set up as against a joint debt, Barker *v.* Walbridge, 14 Minn. 475; Birdsell *v.* Fisher *et al.*, 17 Minn. 100.

Distinction between partial failure of consideration and.—Lash *v.* McCormick, 17 Minn. 403.

Effect of counter-claims.—Admits plaintiff's cause of action, Mason *v.* Heyward, 3 Minn. 182; Whalon *v.* Aldrich, 8 Minn. 346; Kemple *v.* Shaw, 13 Minn. 488; Steele *v.* Etheridge, 15 Minn. 501. Admitted by not denying, Taylor *v.* Bissell, 1 Minn. 225. Admitted—require no proof, Bond *v.* Corbett, 2 Minn. 253. Immaterial whether damages are liquidated or unliquidated, Morrison *et al.*, *v.* Lovejoy, 6 Minn. 319. Must be one upon which an action can be maintained by defendant in law or equity, Swift *v.* Fletcher, 6 Minn. 550. Applies to all matters arising *ex contractu*, Folsom *v.* Carli, 6 Minn. 420.

In particular cases.—Illegal interest paid, not good counter-claim against the balance of the debt, Culbertson *v.* Lennon, 4 Minn. 51; Emmett, C. J., dissents. Claim for contribution as co-surety against rent of land, *doubted*, Schmidt *v.* Coulter, 6 Minn. 492. Claim against stranger, Spencer *v.* Levering *et al.*, 8 Minn. 461. Breach of covenant of seizin against mortgage foreclosure, Lowry *v.* Hurd *et al.*, 7 Minn. 356. Loss sustained by dealer for negligence of bank against dealer's note held by bank, Bidwell *v.* Madison, 18 Minn. 13.

SEC. 85 (81). *Defenses and counter-claims, how stated.*—The defendant may set forth by answer as many defenses 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.

Defendant may not only plead in reduction a bar of plaintiff's claim, but may establish a claim and recover judgment for damages against the plaintiff, Mason *v.* Heyward, 3 Minn. 182.

Defendant may set up as many defenses as he has, etc., Booth *v.* Sherwood, 12 Minn. 426. *Vide* also Conway *v.* Wharton, 13 Minn. 158, defenses consistent, when.

SEC. 86 (82). *Sham answers and frivolous demurrers may be stricken out.*—Sham and irrelevant answers or defenses and frivolous demurrers may be stricken out, or judgment rendered notwithstanding the same, on motion, as for want of an answer.

Irrelevancy defined, Morton *v.* Jackson, 2 Minn. 219; Brisbin *et al. v.* American Express Co., 15 Minn. 43; Smith *v.* Milliken, 2 Minn. 321.

Verified answer may be struck out as sham, Conway *v.* Wharton, 13 Minn. 158.

THE REPLY.

SEC. 87 (83). *Plaintiff may reply, when.*—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 defense 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 defense; and the plaintiff may demur to one or more of such defenses or counter-claims, and reply to the residue of the counter-claims.

When reply is proper.—Bass *v.* Upton, 1 Minn. 408.

New matter defined, Nash *v.* City of St Paul, 11 Minn. 174; McArdle *v.* McArdle, 12 Minn. 98; Leyde *v.* Martin *et al.*, 16 Minn. 38; *vide* also Cooper *v.* Stinson, 5 Minn. 201.

Complaint cannot be aided by reply.—Bernheimer *v.* Marshall *et al.*, 2 Minn. 85; Tullis *et al. v.* Orthwein, 5 Minn. 377; Webb *v.* Bidwell, 15 Minn. 479.

Departure from the complaint.—Estes *v.* Farnham, 11 Minn. 423.

Averment of conclusions of law needs no reply, Dunning *v.* Pond, 5 Minn. 302.

SEC. 88 (84). *Plaintiff failing to reply, defendant may have judgment, when.*—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.

SEC. 89 (85). *Reply demurable, when.*—If a reply to any counter-claim is insufficient, the defendant may demur thereto, stating the grounds thereof.

GENERAL RULES OF PLEADING.

SEC. 90 (86). *Pleadings, how subscribed, and when verified.*—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.

When verification by attorney defective, Smith *v.* Milliken, 2 Minn. 22.

SEC. 91 (87). *Verification how made and by whom.*—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.

SEC. 92 (88). *Account, how pleaded.*—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.

SEC. 93 (89). *Pleadings, how construed.*—In the construction of a pleading or the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

SEC. 94 (90). *Irrelevant or redundant matter in a pleading may be stricken out —whole pleading stricken out, when.*—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 not apparent, the court may strike it out on motion or require it to be amended.

Pleading must be clearly irrelevant, or court will not strike it out, Goodrich *v.* Rodney, 1 Minn. 195.

May be struck out for uncertainty, when, Colter *v.* Greenhagen, 3 Minn. 126. Pleading will not be disregarded, when, Barnsbeck *v.* Reiner, 8 Minn. 59. Matter, in answer, that is immaterial struck out, when, Freeman *v.* Curran, 1 Minn. 169; Lovejoy *et al. v.* Morrison, 10 Minn. 136; Berkey *v.* Judd *et al.*, 12 Minn. 52. Frivolousness of demurrer must be determined upon the demurrer and pleading to which it is interposed, Hurlburt *v.* Schulenberg, 17 Minn. 22; *vide* also Brisbin *v.* Amer Ex. Co., 15 Minn. 43.

SEC. 95 (91, AMENDED BY ACT OF FEBRUARY 27, 1868). *Pleading judgment, how regulated.*—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, in cases of special jurisdiction. If such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction.

S. L. 1868, 122. Foreign judgments, how pleaded, Karns *v.* Kunkle, 2 Minn. 313; Smith *v.* Milliken, *ib.* 317.

SEC. 96 (92). *What is necessary in pleading performance of conditions precedent.*—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. 97 (93). *Private statute, how pleaded.*—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.

Statutes of another state not judicially noticed, Hoyt *et al. v.* McNeil, 13 Minn. 390. Private statute recognized by public act judicially noticed, Webb *v.* Bidwell, 15 Minn. 479.

SEC. 98 (94). *In actions by or against corporations it is sufficient to refer to act of incorporation.*—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.

Corporation must plead facts showing its existence, when, St Paul, Div. No. 1, S. & T. *v.* Brown *et al.*, 9 Minn. 157. Actions by or against domestic, The Minn. Plastic Slate Roofing Co., 14 Minn. 49; *vide* also Wilson *et al. v.* Board of Education of Town of Minneapolis, 11 Minn. 371.

SEC. 99 (ACT OF FEBRUARY 27, 1867). *Actions against foreign corporations, what to allege.*—In actions in any court of this state, by or against any foreign corporation, it shall, in any pleading, be a sufficient allegation that the plaintiff or defendant is a corporation to aver substantially that the plaintiff or defendant, as the case may be, is a corporation, duly organized and created, under the laws of the state by which it may have been incorporated.

S. L. 1867, 131. Sec. 2 of said act repeals all inconsistent acts.

SEC. 100 (95). *What is sufficient in action for libel or slander.*—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.

In action for slander, St Martin *v.* Desnoyer, 1 Minn. 156; McCarty *v.* Barrett, 12 Minn. 494.

In action for libel, Hemphill *v.* Holley, 4 Minn. 233; Aldrich *v.* Press Printing Co., 9 Minn. 133; Simmons *v.* Holster *et al.*, 13 Minn. 249.

SEC. 101 (96). *Defendant may answer, how.*—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. 102 (97). *In action to recover possession of personal property, answer sufficient, when.*—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. 103 (98). *What causes of action may be united in same complaint.*—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.

The same transaction or transactions connected with the same subject of action may be united, Nichol's Adm. *v.* Randall *et al.*, 5 Minn. 304. Promise to plaintiff and also to another, Walsh *v.* Kattenburg, 8 Minn. 127. False warranty and deceit, Marsh *v.* Webber, 13 Minn. 109. To recover possession of real property and then of use thereof, Armstrong *v.* Hinds, 8 Minn. 254. Private and public interests in an action to oust usurper, Territory of Minn. *ex rel* Parker *v.* Smith, 2 Minn. 240. Claims against trustees as such, and individually or against others, Fish *v.* Berkey *et al.*, 10 Minn. 199. Legal and equitable causes of action, Montgomery *v.* McEwen, 7 Minn. 351.

What cannot be joined.—Claims by sub-contractor against contractor, and for lien on building, Lewis *et al. v.* Williams *et al.*, 3 Minn. 151. For the recovery of possession of certain real property, and damages for withholding it, with cause of action for withholding certain other property, Holmes *v.* Williams *et al.*, 16 Minn. 164. Against G on account, and B for his promise to pay the debt, Sanders *et al. v.* Clason *et al.*, 13 Minn. 379.

Query, whether claim for loss of child's services, and for suffering in body and mind, City of St Paul *v.* Kirby, 8 Minn. 154.

In an action to wind up partnership what may be joined, Palmer *v.* Tyler *et al.*, 15 Minn. 106.

SEC. 104 (99). *Allegations not controverted taken as true, when.*—Every material allegation of the complaint not specifically controverted by the answer as pre-

scribed, 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.

When allegations not denied taken as true, Bond *v.* Corbett, 2 Minn. 248; Lovejoy *et al. v.* Morrison, 10 Minn. 138. *Vide* also Taylor *v.* Parker, 17 Minn. 469.

MISTAKES IN PLEADINGS AND AMENDMENTS.

SEC. 105 (100). *Variance between allegation and proof material, when.*—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 when material, Lawrence *v.* Willoughby, 12 Minn. 87; Loomis *v.* Youle, 1 Minn. 175; Helfer *v.* Alden, 3 Minn. 332; Short *v.* McRea *et al.*, 4 Minn. 119. Party must show wherein he has been misled, Washburn *v.* Winslow, 16 Minn. 33. Must be material to be heard, Sonnenberg *v.* Reidel, 16 Minn. 83.

SEC. 106 (101). *Court may direct fact to be found or amendment made, when.*— 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.

SEC. 107 (102). *Failure of proof.*—When, however, the allegation of the cause of action, or defense 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 evidence on material point, White *et al. v.* Culver, 10 Minn. 102; Becker *v.* Sweetzer, 15 Minn. 427.

SEC. 108 (103, AS AMENDED BY ACT OF MARCH 9, 1867). *Amendment by parties without costs.*—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 twenty days after service of the answer, demurrer, or reply to such pleading; in such case the amended pleading shall be served on the adverse party, who shall have twenty 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 be amended on such terms as may be just.

S. L. 1867, 106.

SEC. 109 (104). *Amendment by the court.*—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 defense, by conforming the pleading or proceeding to the fact proved.

Of pleading on the trial, Caldwell *v.* Bruggerman, 8 Minn. 286. Of prayer for relief, Holmes *et al. v.* Campbell, 12 Minn. 221. By substituting different land, Rau *v.* The Minnesota Valley R. R. Co., 13 Minn. 442. An appeal from justice court, Bingham *v.* Stewart *et al.*, 14 Minn. 214. Request to amend must show wherein it is desired to amend, Barker *v.* Walbridge, 14 Minn. 469.

SEC. 110 (105). *Relief after default or judgment.*—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, inadvertance, 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.

Inexcusable neglect court will not relieve against, Myrick *v.* Edmundson, 2 Min. 259. *Statute a limiting, not a granting act,* Gerish *et al. v.* Johnson, 5 Minn. 23. Statute addressed to the discretion of the court, etc., Myrick *v.* Pierce, *ib.* 65; Groh *v.* Bassett, 7 Minn. 325; Merritt *v.* Putnam, *ib.* 493; Jorgensen *v.* Boehmer *et al.*, 9 Minn. 181; Reagan *v.* Madden, 17 Minn. 402.

Court has power to amend the record upon a judgment for default, etc., Dunwell *v.* Warden, 6 Minn. 287.

A writ of replevin void *ab initio* not amendable, Castle *et al. v.* Thomas *et al.*, 16 Minn. 490.

SEC. 111 (106). *Defendant designated by any name, when.*—When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any process, pleading, or proceeding by any name, and when his true name is discovered, the process, pleading, or proceeding may be amended accordingly.

SEC. 112 (107). *Court shall disregard errors not affecting substantial rights.*—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.

Hurd *v.* Simonton, 10 Minn. 423.

SEC. 113 (108). *Supplemental pleadings allowed.*—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.

Defect of title, cured since commencement of suit may be set up by supplemental complaint, Lowry *et al. v.* Harris *et al.*, 12 Minn. 255.

Supplemental complaint must be for the same substantive cause of action as that set out in original complaint, Eastman *v.* St A. W. & Co. *et al.*, 17 Minn. 48.

CONSOLIDATION AND INTERPLEADING.*

SEC. 114 (109). *Two or more actions consolidated, when.*—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.

* Title vii. chapter lxvi. G. S.

SEC. 115 (110). *Surety may bring action, when.*—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.

Equity will compel creditor to first sue debtor on being indemnified, Huey *v.* Pinney, 5 Minn. 310; Miller *v.* Rouse, 8 Minn. 126.

SEC. 116 (111). *Defendant may cause another party to be substituted in his place, when.*—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.

Two plaintiffs claiming the same demand in different suits may be compelled to interplead, Rohrer *v.* Turrill, 4 Minn. 190.

TITLE VI.

OF INJUNCTIONS AND RECEIVERS.

ARTICLE I.

OF INJUNCTIONS.

(*This Article is Titles XI. and XII. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 117 (181). *Writs of injunction may issue, how.*—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.

Courts ought not interfere by injunction except in what cases, Goodrich *v.* Moore, 2 Minn. 63; Hart *et al. v.* Marshall, 4 Minn. 294; Schurmier *v.* St P. & P. R. R. Co., 8 Minn. 113; Same *v.* Same, 10 Minn. 82. Writ of injunction will not be granted on a complaint stating the facts on information and belief, Armstrong *v.* Sanford, 7 Minn. 49. No injunction will be granted to restrain a motion to set aside a foreclosure sale, when, Rogers *v.* Holyoke, 14 Minn. 220. An infringement of a ferry franchise will be restrained by injunction, McRoberts *v.* Washburn *et al.*, 10 Minn. 23. Where there is another adequate remedy injunction will not issue, when, Scribner *v.* Allen *et al.*, 12 Minn. 148. Where no special damage is sustained in consequence of obstruction of highway injunction will not issue at suit of private person, Dawson *v.* St P. Fire and Marine Ins. Co., 15 Minn. 136. Where parties could not be prejudiced in case of redemption injunction should not be allowed, Chamblin *et ux. v.* Slichter *et al.*, 12 Minn. 276. To authorize issuance of writ, party must show that it is necessary to protect rights, etc., Montgomery *v.* McEwen, 9 Minn. 103. Injunction will be dissolved, when, Moss *v.* Pettengill *et al.*, 3 Minn. 217. Acts of a trespasser constituting a private nuisance as against plaintiffs entitle them to injunction, Harrington *et al. v.* St P. & Sioux City R. R. Co., 17 Minn. 215. Corporation employing its statutory powers outside of the scope of its institution will be restrained, Stewart *v.* E. & W. Trans. Co. *et al.*, *ib.* 372; *vide* Conkey *v.* Dike, *ib.* 457. Disapproving of doctrine in, Montgomery *v.* McEwen, *supra.*

SEC. 118 (182). *Temporary injunction granted, when.*—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.

SEC. 119 (183). *Affidavit to be made and filed—copy served.*—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.

Injunction could issue on complaint before the service of summons, Lash *v.* McCormick, 14 Minn. 482.

SEC. 120 (184). *Injunction after answer—defendant restrained, how.*—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.

SEC. 121 (185). *Bond to be given.*—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 thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.

SEC. 122 (186). *Injunction only allowed on notice, when.*—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.

Montgomery *v.* McEwen, 9 Minn. 109; *vide supra*, sec. 117.

SEC. 123 (187). *Motion to vacate or modify injunction.*—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.

SEC. 124 (188). *Motion made on affidavits, how opposed.*—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.

ARTICLE II.

OF RECEIVERS.

SEC. 125 (189). *Receiver may be appointed, when.*—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.

Receiver will not be appointed at suit of judgment creditor against mortgager and his grantee, when, Gale *v.* Battin *et al.*, 16 Minn. 148.

SEC. 126 (190). *Court may order deposit of money, when.*—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. 127 (191). *Disobedience of such order contempt—court may direct officer to enforce delivery.*—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 and deliver or convey it in conformity with the direction of the court.

TITLE VII.

OF ISSUES.

(*This Title is Title XIV. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 128 (193). *Issues arise, when.*—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:

First. Of law; and,

Second. Of fact.

SEC. 129 (194). *Issue of law.*—An issue of law arises upon a demurrer to the complaint, answer, or reply.

SEC. 130 (195). *Issue of fact.*—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.

SEC. 131 (196). *Trial is a judicial examination of issues.*—A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

What is a trial, Kent *v.* Brown, 3 Minn. 347.

SEC. 132 (197). *Issue of law, how tried.*—An issue of law shall be tried by the court, unless it is referred as provided by the statute relating to referees.

SEC. 133 (198). *Issue of fact shall be tried by jury unless jury trial is waived.*—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.

Part of the issues may be submitted to jury, but when too late to object that they were not, Davis *et al. v.* Smith, 7 Minn. 414. Questions to be submitted to jury, Chamberlain *v.* Porter, 9 Minn. 260; Wilder *v.* City of St Paul, 12 Minn. 192; Cochrane *v.* Tozer, 14 Minn. 385; Cole *v.* Curtis *et al.*, 16 Minn. 182; Dayton *v.* Buford, 18 Minn. 126. Issues tried by jury without formal consent of parties, Finch *v.* Green, 16 Minn. 355. Fraudulent intent of an assignor, question of fact for jury, Blackman *v.* Wheaton, 13 Minn. 326.

SEC. 134 (199). *Other issues of fact by the court.*—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.

Where all the issues are submitted to jury, a special verdict upon one not sufficient, Heighen *et al. v.* Strong, 6 Minn. 177. *Forms of the order of the court,* Birkey *v.* Judd *et al.*, 14 Minn. 394; *vide* also Finch *v.* Green, 16 Minn. 355, *supra.* What are questions for the court, Washburn *v.* Winslow, 16 Minn. 33; State *v.* Taunt, *ib.* 109.

SEC. 135 (200). *Notice of trial—note of issue—calendar.*—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.

Amendment of pleading does not make new notice necessary, Stevens *v.* Curry, 10 Minn. 316. Premature notice, what is, Starbuck *v.* Dunklee, 12 Minn. 161.

SEC. 136 (201). *Issues on calendar, disposed of in what order.*—The issues on the calendar shall be disposed of in the following order, unless for the convenience of parties, or the despatch 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.

SEC. 137 (202). *Either party may bring issues to trial.*—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.

The district court has no power to compel a party to enter judgment in an action, etc., Sherrard *v.* Frazer, 6 Minn. 574.

SEC. 138 (203). *Separate trial in case of several defendants, allowed when.*—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.

SEC. 139 (204, AMENDED BY ACT OF MARCH 4, 1868). *Continuance, how applied for.*—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, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

S. L. 1868, 117. What should be stated in an affidavit for continuance, McKubin *v.* Clarkson, 5 Minn. 247. No continuance on ground of absence of a witness not subpœned, but who had promised to attend, *ib.*, following Beaulieau *v.* Parsons, 2 Minn. 37. Motion addressed to discretion of court, State *v.* McCartey, 17 Minn. 76.

SEC. 140 (ACT OF MARCH 1, 1872). *Trial of issues of law and fact in vacation.*—The judges of the several district courts of this state may, with consent of parties, try issues of law and fact in vacation, and decide such issues either in or out of term, and thereupon judgment may be rendered with the same effect as upon issues tried and determined in term time.

S. L. 1872, 136.

TITLE VIII.

OF TRIAL AND ITS INCIDENTS.

ARTICLE I.

OF TRIAL BY THE COURT.

(This Article is Title XVII. of Chapter LXVI. of the Statutes of 1866.)

SEC. 141 (223). *Trial by jury, how waived.*—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:

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. 142 (224). *Decision of court, when and how given.*—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.

Requirement as to time directory only, Vogle *v.* Grace, 5 Minn. 297. Facts and conclusions of law must be stated separately, Ullmann *v.* Bazille, 2 Minn. 134; Baldwin *v.* Allison, 3 Minn. 83. Immaterial issues may be disregarded, Lowell *v.* North *et al.*, 4 Minn. 32. Need not find on demurrer facts admitted by pleadings, Dickenson *v.* Kinney, 5 Minn. 409. Omission to find on all issues, remedy, Couklin *v.* Hinds, 16 Minn. 457.

SEC. 143 (225). *Judgment on issue of law.*—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 failure to answer, Reynolds *v.* La Crosse & Minn. Packet Co., 10 Minn. 78.

SEC. 144 (226, AS AMENDED BY ACT OF FEBRUARY 22, 1868). *Court always open, for what kind of business.*—In addition to the general terms, the district court is always open for the transaction of all business; for the entry of judgments of decrees, of orders of course, and all such other orders as have been granted by the court or judges, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact. The judges of the several district courts may, by order, appoint such special terms in the counties of their respective districts, as may be deemed necessary or convenient, and at such terms all business hereinbefore mentioned may be transacted. When any matter is heard by the court or judge, the decision may be made out of term; and such decision may be an order or a direction that an order or judgment or decree 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 or decree, as the case may require, if any shall be entered by such clerk, in conformity with such decision.

S. L. 1868, 132. Sec. 227 of the Statutes of 1866 repealed by Act of February 22, 1868 (S. L. 1868, 132).

ARTICLE II.

TRIAL BY REFEREES.

(This Article is Title XVIII. of the Statutes of 1866.)

SEC. 145 (228). *Reference may be ordered by consent, when.*—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.

Appointment of a referee is constitutional, Carson *v.* Eaton *et al.*, 5 Minn. 78.
Order appointing need not be signed by judge, when, Leyde *v.* Martin *et al.*, 16 Minn. 38.

SEC. 146 (229). *By the court, when.*—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.

SEC. 147 (230). *Number and qualification of referees.*—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.

SEC. 148 (231). *Conduct of trial—powers of referees.*—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.

Power of referee.—To take disclosure of garnishee, Prince *v.* Hendy, 5 Minn. 347. Admitting testimony after close of trial, Cooper *v.* Stinson, *ib.* 201. Effect of stipulation entered

into by certain parties, and referee's power thereunder considered, Hatch *v.* Burbank, 17 Minn. 234.

Report of.—Effect, Russell *v.* Minn. Outfit, 1 Minn. 162. Presumption that referee was sworn where report is silent, Leyde *v.* Martin *et al.*, 16 Minn. 38; Young *v.* Young, 18 Minn. 90. Remedy when not sufficiently specific, Englebrecht *v.* Rickert, 14 Minn. 140.

Findings.—Admission in pleadings, Brainard *v.* Hastings, 3 Minn. 45. Should pass upon all material issues, etc., Bazille *v.* Ullman, 2 Minn. 138. Where facts and conclusions of law not reported separately, remedy, Califf *v.* Hillhouse, 3 Minn. 311.

Report will not be disturbed without most cogent reasons, Kumler *v.* Ferguson, 7 Minn. 442; Havens *v.* Humphrey, 12 Minn. 298; Dayton *v.* Buford, 18 Minn. 126. When report set aside as not sustained by evidence, Douglass *v.* Nat. Bank of Hastings, 17 Minn. 35.

Judgment on report.—Irregular for defeated party to move for judgment notwithstanding the report, Ames *v.* Miss. Boom Co., 8 Minn. 467.

SEC. 149 (232). *Referees shall all meet, but any two may act—general rule.*—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.

ARTICLE III.

OF TRIAL BY JURY.

(This Article is Title XV. of Chapter LXVI. of the Statutes of 1866.)

SEC. 150 (205). *Jury, how impanneled.* — 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.

What held correct practice in drawing jury to supply deficiency in regular panel, Dayton *v.* Warren, 10 Minn. 233.

SEC. 151 (206). *Plaintiff to pay jury fee.*—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.

Not unconstitutional to require party demanding jury trial to advance reasonable fee, Adams *v.* Corriston, 7 Minn. 456.

SEC. 152 (207). *Ballots, how kept.*—When the jury is completed and sworn, the ballot 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.

SEC. 153 (208, AS AMENDED BY ACT OF FEBRUARY 24, 1869). *Parties may challenge jurors—when to join challenge.*—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 individual jurors as in criminal actions except that there can be but three peremptory challenges on each side.

S. L. 1869, 83. Decision of court as to actual bias conclusive, where challenge is admitted, Morrison *et al. v.* Lovejoy *et al.*, 6 Minn. 319.

SEC. 154 (209). *Order of the trial.*—When the jury is completed and sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise directs:

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 defense, 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 defenses, appear by different counsel, the court shall determine their relative order in the evidence and argument.

Sixth. The court may then charge the jury.

Examination of witnesses.—Leading questions discretionary with the court, State *v.* Staley, 14 Minn. 105.

Discretionary with court to allow a re-examination of a witness, etc., Lynn *v.* Pickett *et al.*; 7 Minn. 184.

Admitting testimony after parties rest.—Not allowed, when, Beaujieau *v.* Parsons, 2 Minn. 37; Baze *v.* Arper, 6 Minn. 220; State *v.* Staley, 14 Minn. 105.

Arguments of counsel.—Error of counsel in his argument waived by not excepting to, St Martin *v.* Desnoyer, 1 Minn. 156.

Charging the jury.—Requests to charge must not be too broad, Castner *v.* Steamboat Franklin, 1 Minn. 78; Cole *v.* Curtis *et al.*, 16 Minn. 182. Must be wholly correct, Bond *v.* Corbett, 2 Minn. 257. Should be submitted to opposite counsel, Roehl *et al. v.* Baasen, 8 Minn. 26; Simmons *v.* St P. & Chi. R. R. Co., 18 Minn. 184. When several propositions are combined, and are erroneous, Foster *v.* Berkey *et al.*, 8 Minn. 351. May be denied when liable to mislead jury on question of law, Shartle *v.* Minneapolis, 17 Minn. 208. Time for entertaining requests to charge, Sanborn *v.* School Dist. No. 10, Rice Co., 12 Minn. 17. Province of the judge as to facts in issue, Caldwell *v.* Kennison, 4 Minn. 47 (Emmett, C. J., dissents); Derby *et al. v.* Gallup, 5 Minn. 119. All the different instructions must be construed together, Spencer *v.* Tozer, 15 Minn. 146. Assuming existence of a disputed fact, Smith *v.* Dukee, 5 Minn. 373; State *v.* Taunt, 16 Minn. 109; Cole *v.* Curtis *et al.*, 16 Minn. 182. Defective arrangement no error, Guerin *v.* Hunt *et al.*, 6 Minn. 375. When law applicable to different state of facts should be given, Marsh *v.* Webber, 13 Minn. 109. Charge confined to one issue not objectionable as ignoring other issues in the cause, Chamberlain *v.* Porter, 9 Minn. 260. Substantial compliance with request sufficient, Dodge *v.* Rogers, 9 Minn. 223. Parties must request more definite instructions if charge tends to mislead, Hunter *v.* Jones, 13 Minn. 307. Modification should follow the refusal to charge as requested, Selden *et al. v.* Bank of Commerce, 3 Minn. 166. Need not be stated in same connection, Gales *v.* Mowry *et al.*, 14 Minn. 21. Not error for court to refuse to charge a proposition of law correct, but not applicable to case, Marcotte *v.* Beaupre, 15 Minn. 152. Instructing jury to consider all the testimony, when none was objected to, correct, Chamberlain *v.* Porter, 9 Minn. 260. Court not bound to charge unless requested, *ib.* As to particular instructions *vide* Conihan *v.* Crosby, 15 Minn. 13; Johnson *v.* Wallower, *ib.* 472.

SEC. 155 (210). *Court may order view, when.*—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.

SEC. 156 (211). *Juror falling sick, how to proceed.*—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 impanneled.

SEC. 157 (212). *Sheriff to provide food for jury, when.*—If while the jury are kept together either during the progress of the trial or after their retirement for deliberation, the court orders 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.

SEC. 158 (213). *What papers jury may take.*—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.

SEC. 159 (214). *Court always open to receive verdict.*—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.

SEC. 160 (215). *When verdict is rendered jury may be polled.*—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.

Section declaratory of powers existing in all courts, Dana *et al. v.* Farrington, 4 Minn. 433.
Jury sent out for further deliberation in, Ætna Ins. Co. *v.* Grube, 6 Minn. 83.
Polling of jury not affected by agreement to seal verdict, Steele *et al. v.* Etheridge, 15 Minn. 501. After verdict recorded neither party can poll, *ib.*

SEC. 161 (216). *Verdict to be recorded and read to jury—proceedings when any juror disagrees.*—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.

ARTICLE IV.

OF THE VERDICT.

(*This Article is Title XVI. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 162 (217). *Verdict, general and special, defined.*—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 facts shall be so presented as that nothing remains to the court but to draw from them conclusions of law.

Special verdict must be requested, Board of Co. Coms., Dakota Co., *v.* Parker, 7 Minn. 267. General verdict in actions for money, *ib.* What is sufficient verdict, Desnoyer *v.* McDonald *et al.*, 4 Minn. 515. Majority verdict void, Snow *v.* Hardy, 3 Minn. 77. So of average verdict, St Martin *v.* Desnoyer, 1 Minn. 156. Juror cannot make up his verdict apart from his fellows, Ætna Ins. Co. *v.* Grube, 6 Minn. 82. All the issues not determined by special verdict it is void, Armstrong *v.* Hinds, 9 Minn. 356. Special verdict on one issue only insufficient, Meighan *v.* Strong, 6 Minn. 177. Special verdict in case of nuisance, Finch *v.* Green, 16 Minn. 355. Do. in replevin, Coit *v.* Waples, 1 Minn. 134; Caldwell *v.* Bruggerman, 4 Minn. 270. *Vide* also as to sufficiency of evidence to sustain, Hodgins *et al. v.* Heaney, 17 Minn. 45.

SEC. 103 (218). *What verdict jury may render—direction of court as to verdict.*—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.

Supra, Board of Co. Coms., Dakota Co., *v.* Parker, 7 Minn. 267. Special verdict discretionary with judge, McLean Adm. *v.* Burbank *et al.*, 12 Minn. 530.

SEC. 164 (219). *Special verdict controls general verdict, when.*—Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court shall give judgment accordingly.

SEC. 165 (220). *Jury to assess amount of recovery in certain cases.*—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. 166 (221). *Judgment in action to recover specific personal property.*—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.

SEC. 167 (222). *Entries to be made on receiving verdict.*—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.

Verdict will not be disturbed on ground of excessive damages unless so excessive as to warrant inference of partiality, etc., St Martin *v.* Desnoyer, 1 Minn. 156. Motion to set aside

verdict must be made before judgment, Eaton *v.* Caldwell, 3 Minn. 134. Motion in arrest of judgment after verdict a regular and valid proceeding under code, Wentworth *v.* Wentworth, 2 Minn. 277.

Receiving verdict in absence of parties erroneous, Kennedy *v.* Raught, 6 Minn. 235.

Corrections of verdict.—By court when intention is obvious, Coit *v.* Waples *et al.*, 1 Minn. 134. Cannot be made by clerk, Dana *et al. v.* Farrington *et ux.*, 4 Minn. 433. By jury of sealed verdict, when, Mininger *v.* Knox *et al.*, 8 Minn. 140.

ARTICLE V.

GENERAL PROVISIONS RELATING TO TRIAL.

(*This Article is Title XIX. and part of Title XXI. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 168 (233). *Exception, how stated and settled.*—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.

Party desiring to avail himself of error must except, Board of Co. Coms. of Dakota Co. *v.* Parker, 7 Minn. 267; Roehl *v.* Baasen, 8 Minn. 26; City of St Paul *v.* Kirby, *ib.* 154; Teller *v.* Bishop, *ib.* 226. How to be made, Gilbert *v.* Thompson, 14 Minn. 544; State *v.* Staley, *ib.* 105. Force of general objections, Califf *v.* Hillhouse, 3 Minn. 311; Schell *v.* Second Nat. Bank of St Paul, 14 Minn. 43; Clague *v.* Hodgson, 16 Minn. 329. Simple objection without stating grounds ineffectual, Weide *et al. v.* Davidson *et al.*, 15 Minn. 327; Tozer *v.* Hershey, *ib.* 257. Objection embodied in a request to charge, in time, Russell *v.* Schurmier, 9 Minn. 23. When objections are waived, Cooper *v.* Breckenridge, 11 Minn. 341; Allis *v.* Day, 14 Minn. 516. Exceptions must be to some particular point of law, State *v.* Staley, 14 Minn. 105; Baldwin *et al. v.* Blanchard, 15 Minn. 489; Judson *v.* Reardon, 16 Minn. 431; Simmons *v.* St P. and Chicago R. R. Co., 18 Minn. 184. Exception by two co-defendants, Curtis *v.* Moore, 3 Minn. 29; Cole *v.* Curtis *et al.*, 16 Minn. 182. Ruling of court must be obtained on all points, Zimmerman *v.* Lamb *et al.*, 7 Minn. 421. When exception is waived, Coit *v.* Waples, *et al.*, 1 Minn. 134; Weide *et al. v.* Davidson *et al.*, 15 Minn. 327. Further participation in suit no waiver, Bunday *v.* Dunbar, 5 Minn. 444.

SEC. 169 (234). *Form of exception.*—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.

SEC. 170 (238). *Rate of damages recoverable.* — 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.

Damages not recoverable in excess of amount claimed, Elfelt *v.* Smith, 1 Minn. 125. On demurrer plaintiff entitled to nominal damages, when, Cowley *v.* Davidson, 10 Minn. 392. In case of willful wrongs exemplary damages may be given, Fox *v.* Stevens, 13 Minn. 272. Not recoverable in action for the conversion of personal property where there has been no wrongful taking, Jones *v.* Rahilly, 16 Minn. 320. For the determination of liquidated damages, *vide* Mason *et al. v.* Callendar *et al.*, 2 Minn. 366.

Damages in certain cases.—Breach of contract, Williams *v.* Anderson, 9 Minn. 50; Converse *v.* Burrows *et al.*, 2 Minn. 235; Talcott *v.* Martin, 3 Minn. 339; Cooper *et al. v.* Reaney, 4 Minn. 528; Chapin *v.* Murphy, 5 Minn. 474; Morison *v.* Lovejoy, 6 Minn. 319, and 10 Minn. 136; Whalon *et al. v.* Aldrich, 8 Minn. 346; Cowley *v.* Davidson, 13 Minn. 92; Brackett *v.* Edgerton, 14 Minn. 174; Burke *et al. v.* Beveridge, 15 Minn. 205; Johnson *v.* Wallower *et al.*, *ib.* 472; Baldwin *v.* Blanchard, *ib.* 489.

Damages in tort.—Injuries to property, Sanborn *v.* Webster, 2 Minn. 328; Eaton *v.* Caldwell, 3 Minn. 134; Chase *v.* Blaidsell, 4 Minn. 90; Derby *et al. v.* Gallup, 5 Minn. 119; Borup *et al. v.* Minninger, *ib.* 523; Lyon *v.* Pickett *et al.*, 7 Minn. 184; Minninger *v.* Banning, *ib.* 274; Dorman *v.* Ames, 12 Minn. 451; Dodge *v.* Chandler, 13 Minn. 114; Berthold *v.* Fox, *et al.*, *ib.* 501; Marsh *v.* Webber, 16 Minn. 418.

Injuries to person, St Martin *v.* Desnoyer, 1 Minn. 156; Chamberlain *v.* Porter, 9 Minn. 260; Andrews *v.* Stone, 10 Minn. 72; Chapman *v.* Dodd, *ib.* 350; Fox *v.* Stearns, 13 Minn. 272; De Laurens *v.* St P. & P. R. R., 15 Minn. 49; Judson *v.* Reardon, 16 Minn. 431; Shartle *v.* Minneapolis, 17 Minn. 308; Minn. Val. R. R. Co. *v.* Doran, *ib.* 188. Harrington *et al.* *v.* St Paul and Sioux City R. R. Co., *ib.* 215; L. S. & M. R. R. Co. *v.* Greve, *ib.* 322.

SEC. 171 (239). *Court may require conclusions of fact and of law to be submitted.*—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.

SEC. 172 (240). *Application of certain provisions.*—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.

SEC. 173 (241). *Offer of judgment—costs.*—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.

When offer of judgment insufficient, Oleson *v.* Newell, 12 Minn. 186.

SEC. 174 (242). *Dismissal of action.*—The action may be dismissed without a final determination of its merits, in the following cases:

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.

Plaintiff may dismiss without leave of court, when, Fallmans *v.* Gilmore, 1 Minn. 179; Blandy *v.* Raguet, 14 Minn. 491. Dismissal upon the pleadings, Swift *v.* Fletcher, 6 Minn. 555. Dismissal for want of prosecution, Duell *v.* Hawke, 2 Minn. 50; Sherrard *v.* Fraser *et al.*, 6 Minn. 574. What amounts to a dismissal, Blandy *v.* Raguet, 14 Minn. 491. Not error for court to dismiss at close of plaintiff's testimony, when, Searles *v.* Thompson, 18 Minn. 316.

SEC. 175 (243). *Judgment on the merits.*—In every case, other than those mentioned in the last section, the judgments shall be rendered on the merits.

TITLE IX.

OF JUDGMENT.

ARTICLE I.

BY CONFESSION WITHOUT ACTION.

(*This Article is Chapter LXXXII. of the Statutes of* 1866.)

SECTION 176 (1). *Judgment by confession, in what cases allowed.*—A judgment by confession may be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

SEC. 177 (2). *Statement shall be made—shall contain what.*—A statement in writing shall be made, signed by the defendant, and verified by his oath, to the following effect:

First. It shall authorize the entry of judgment for a specified sum.

Second. If it is for money due or to become due, it shall state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

Third. If it is for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

What a sufficient signature of the statement, Kent *v.* Chalfant, 7 Minn. 487.

SEC. 178 (3). *Shall be filed with clerk who shall enter judgment—judgment roll, what.*—The statement may be filed with the clerk of the district court, who shall indorse upon it, and enter in a judgment book a judgment of the district court for the amount computed. The statement and verification, with the judgment indorsed thereon, become the judgment roll.

SEC. 179 (4, AS AMENDED BY ACT OF MARCH 4, 1870). *Judgment may be entered on plea of confession.*—Judgment may also be rendered in the district court in vacation, or in term, upon a plea of confession signed by an attorney of such court, although there is no action then pending between the parties, if the following provisions are complied with, and not otherwise.

First. The authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract, or other evidence of the demand for which judgment is confessed.

Second. Such authority shall be filed with the clerk of the court in which the judgment is entered at the time of filing and docketing such judgment.

S. L. 1870, 130.

SEC. 180 (5). *Clerk may enter judgment on plea of confession, when.*—When the authority mentioned in the last section is filed with the clerk of the district court, judgment may be entered thereon, in the same manner as is provided in section one of this chapter.

SEC. 181 (6). *Effect of judgment.*—Any judgment entered under either of the provisions of this article (chapter) in vacation, shall be as final and effectual as judgment rendered upon a verdict of a jury, and unless special provision is made for a stay of execution upon such judgment, execution may issue immediately.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SEC. 182 (7). *Matter in dispute may be submitted to court, when and how.*—Parties to a matter in dispute, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same, to any court which would have jurisdiction if an action had been brought; but it shall appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties; the court shall thereupon hear and determine the case at a general or special term, and render judgment thereon, as in civil actions.

SEC. 183 (8). *Judgment, how entered—judgment roll, what constitutes.*—Judgment shall be entered in the judgment book, as in other cases. The case, submission, and a copy of the judgment, constitute the judgment roll, and judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

ARTICLE II.

UPON FAILURE TO ANSWER.

(*This Article is Title XIII. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 184 (192, AS AMENDED BY ACT OF MARCH 3, 1868). *Plaintiff may file proof of service of summons.*—Judgment may be had if the defendant fails to answer the complaint as follows:

First. Wherein action arising on contract for the payment of money only, the summons has been personally served and the plaintiff shall file with the clerk, proof of the personal service of the summons, and that no answer has been received within the time allowed by law, the clerk shall thereupon 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.

Second. In other actions, the plaintiff may, upon like service and proof, 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. When plaintiff entitled to judgment.—When the service of the summons was by publication, or by leaving a copy thereof at the house of the usual abode of the defendant, in actions arising on contract for the payment of money only, the plaintiff upon filing with the clerk proof of such service, and that no answer has been received within the time allowed by law, together with the security hereafter mentioned, shall be entitled to judgment in the same manner as if the summons had been served upon the defendant personally; in other actions, upon filing the like proof the plaintiff may apply for judgment, and the court shall thereupon

require proof to be made of the demand set forth in the complaint, and may render judgment for the plaintiff for such amount, or such relief as he is entitled to recover. In all cases where the summons has not been served personally, the plaintiff, before judgment is entered, must file, or cause to be filed, satisfactory security to abide the order of the court touching the restitution of any money or property 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: *provided*, that when service of the summons is made by leaving a copy thereof at the house of the usual abode of the defendant, and the officer or person making such service shall return that he left such copy with some person of suitable age and discretion, then resident therein, it shall be deemed personal service, and in such cases judgment may be entered without filing the security herein provided for.

S. L. 1868, 123. Where plea of defendant's answering shows no cause of action plaintiff cannot have judgment against others, Williams *v.* McGrade *et al.*, 13 Minn. 46. Statute allowing clerk to enter judgment on default constitutional, Skillman *v.* Greenwood, 15 Minn. 102; following Reynolds *v.* La Crosse and Minn. Packet Co., 10 Minn. 186. What is not essential to the validity of a judgment obtained without personal service, Shaubhut *v.* Hilton *et ux.*, 7 Minn. 506.

ARTICLE III.

GENERAL PROVISIONS IN RELATION TO JUDGMENT.

(*This Article is part of Title XXI. of Chapter LXVI. of the Statutes of* 1866.)

SEC. 185 (244). *Judgment when there are several parties, plaintiff and defendant.*—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.

SEC. 186 (245). *Judgment against one or more of several defendants.*—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 in favor of some and against other joint defendants in assumpsit, could not be given prior to the revised statutes, Carlton *et al. v.* Choteau *et al.*, 1 Minn. 103; *vide* also Fetz *v.* Clark *et al.*, 7 Minn. 217.

SEC. 187 (ACT OF FEBRUARY 21, 1873). *Several judgments may be taken in failure to prove a joint cause of action.*—Whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against all, but proves a cause of action against one or more of the defendants, judgment may be rendered against him or them, against whom the cause of action is proved.

S. L. 1873, 188.

SEC. 188 (246). *Plaintiff may be granted, what relief.*—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.

Mortgagee has by statute two remedies, and should not be compelled to ask for affirmative relief, Montgomery *v.* McEwen, 9 Minn. 103. Court may render judgment absolute for rent, and judgment conditional for possession, etc., Hall *v.* Smith, 16 Minn. 58.

SEC. 189 (247). *Clerk to enter judgment in conformity to verdict, when.*—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.

Power to arrest the entry of judgment inherent, etc., Wentworth *v.* Wentworth, 2 Minn. 277. Judgment *non obstante veredicto* never granted except in a very clear case, Williams *v.* Anderson, 9 Minn. 50. Not proper, when, Lough *v.* Thornton, 17 Minn. 253. Clerk should sign judgment, Cathcart *v.* Peck *et al.*, 11 Minn. 45. But the omission does not vitiate, Jorgensen *v.* Griffen, 14 Minn. 468; Hotchkiss *v.* Cutting, *ib.* 537.

Judgment complete when entered in the judgment book, Williams *et al. v.* McGrade *et al.*, 13 Minn. 46. An erroneous order for judgment may be corrected in the entry, Hodgins *v.* Heaney, 15 Minn. 185. What requisite proof of service of summons on entry by default, Masterson *et al. v.* Le Claire, 4 Minn. 163.

SEC. 190 (248). *Judgment in case of counter-claim.*—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.

SEC. 191 (249). *Judgment in action to recover possession of personal property.* 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.

Where part of property can be obtained, plaintiff may elect to take part and judgment for value of the rent, etc., Caldwell *v.* Bruggerman, 4 Minn. 270.

SEC. 192 (250). *Judgment shall specify what.*—The judgment shall be entered in the judgment-book, and specify clearly the relief granted, or other determination of the action.

Entry referring to judgment which was without date a mere minute of the entry of judgment, Brown *v.* Hathaway, 10 Minn. 303.

SEC. 193 (251). *Judgment, after decease of party, not a lien on real estate.*—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.

SEC. 194 (252). *Judgment roll, what constitutes.*—Immediately after entering the judgment, the clerk shall attach together and file the following papers, which constitute the judgment roll:

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. 195 (253). *Copies may be filed, when.*—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.

SEC. 196 (254, AMENDED BY ACT OF FEBRUARY 12, 1870). *Judgment for payment of money to be docketed—lien on real estate of debtor—judgment in action on a judgment, not a lien.*—On filing a judgment roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the 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.

S. L. 1870, 129. Judgment lien attaches to what property of the debtor, Steele *v.* Taylor, 1 Minn. 274; Banning *et al. v.* Edes, 6 Minn. 402. Lien does not extend to personal property until after levy of execution, Tullis *v.* Browley, 3 Minn. 277. Lien is subject to an existing parol contract to convey, vendee being in possession, Seager *v.* Burn, 4 Minn. 114. No lien after five years, where no execution has been returned unsatisfied, under laws of 1862 (Comp. Statutes, Sec. 8, p. 567), Burwell *v.* Tullis, 12 Minn. 572; Wetherell *v.* Stone *et al.*, *ib.* 579; Dana *v.* Porter, *et al.*, 14 Minn. 478: Davidson *v.* Paston, 16 Minn. 230; Lamprey *v.* Davidson, *ib.* 480. Provision of Gen. Stat., ch. 66, sec. 254, does not apply to judgments entered and docketed prior to time it took effect, Davidson *v.* Gaston *et al.*, 17 Minn. 69; *vide* also last two cases immediately preceding. Effect of judgment against non-resident where summons was published, Stone *v.* Myers, 9 Minn. 303. Lien preserved on writ of error for original amount only, Daniels *v.* Winslow, 4 Minn. 318. Repeal of statute terminating a lien does not restore it, Grace *v.* Donovan, 12 Minn. 580. Lien on homestead prior to Act of 1860, Folsom *v.* Curtis, 5 Minn. 333; Tillotson *v.* Millard *et al.*, 7 Minn. 513. How affected by repealing Act of 1851, Marshall *v.* Hoyt, 4 Minn. 450. Judgment and sale passes what interest to purchaser, Dickenson *v.* Kinney, 5 Minn. 409.

SEC. 197 (255). *Satisfaction of judgment.*—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.

A levy upon sufficient personal property to satisfy a judgment is a satisfaction *sub modo* thereof First Nat. Bank of Hastings *v.* Rogers *et al.*, 13 Minn. 407. By whom satisfaction may be

made, Shelley *et al. v.* Lash, 14 Minn. 498. What is a satisfaction, Ives *v.* Phelps *et al.*, 16 Minn. 451. What is not, Davidson *v.* Gaston, 16 Minn. 230. Judgment satisfied in fact no matter by whom, judgment debtor has right to have same satisfied of record, Ives *v.* Phelps *et al.*, 16 Minn. 451.

Under this Title *vide* Coms. Hennepin Co. *v.* Jones, 18 Minn. 199; Cone *v.* Hooper, *ib.* 531.

TITLE X.

PROCEEDINGS SUPPLEMENTARY TO JUDGMENT.

(*This Title is Title XXII. of Chapter LXIV. of the Statutes of* 1866.)

SEC. 198 (256). *Parties not originally summoned may be summoned after judgment, when.*—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.

SEC. 199 (257). *Heirs, devisees, et als., may be summoned, when—proceedings in such case.*—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.

SEC. 200 (258). *Summons, what to contain.*—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 of the summons, and shall be served in the same manner as an ordinary summons.

SEC. 201 (259). *Affidavit to accompany summons.*—The summons shall be accompanied by an affidavit of the judgment creditor or his attorney, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

SEC. 202 (260). *Party summoned may answer, how*—Upon such summons, the party summoned may answer, within the time specified therein, denying the judgment, or setting up any defense 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 defense 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 defense which he might have made to an action upon the judgment.

SEC. 203 (261). *Demurrer allowed to answer or reply—issue, judgment, and costs, how regulated.*—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.

TITLE XI.

OF EXECUTION.

(This Title is Title XXIII. of Chapter LXVI. of the Statutes of 1866.)

SEC. 204 (262). *Judgment creditor may have execution.*—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.

When it issues, construction of section, Davidson *v.* Gaston, 16 Minn. 230; same case, 17 Minn. 69.

SEC. 205 (263). *Kinds of execution.*—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.

SEC. 206 (264). *Form and contents.*—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:

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.

SEC. 207 (265, AS AMENDED BY ACT OF FEBRUARY 15, 1871). *When returnable—may be renewed, when.*—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. On the return of an execution unsatisfied, in whole or in part, or just before the expiration of the period of sixty days, the clerk may renew the same for a further period of sixty days, on the oral or written request of the judgment creditor, or his attorney, by indorsing on said execution the words following: "Renewed for sixty days from the date hereof, at request of the judgment creditor," to which indorsement he shall add the true date of making the same, and attest the same by his signature, and the seal of the court, and shall thereupon redeliver the same so indorsed to the officer returning the same, and such renewal shall have the effect of extending the life of the execution for an additional period of sixty days, fully preserving all levies made and rights acquired under the execution before such renewal and such execution may be again so renewed, from time to time, by indorsement, by the clerk, as aforesaid, with the same effect as such first renewal.

S. L. 1871, 118.

SEC. 208 (266). *How enforced.*—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.

SEC. 209 (267). *May issue after death of party.*—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.

SEC. 210 (268). *To what officer issued—may issue to different counties.*—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.

Cannot issue to any county until judgment docketed therein, Dodge *v.* Chandler, 9 Minn. 97; Molison *v.* Eaton, 16 Minn. 426.

SEC. 211 (269). *May be levied on what property.*—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.

Promissory notes subject to levy, Mower *v.* Stickney, 5 Minn. 397. Personal property liable after five years, by leave of court, under chap. 27, Laws, 1862, Entrop *v.* Williams, 11 Minn. 381. Indebtedness payable out of particular fund, judgment must be satisfied out of same, Robbins *v.* School Dist. No. 1, Anoka County, 10 Minn. 340. Person holding goods of another to sell on commission has leviable interest, Vose *et al. v.* Stickney, 8 Minn. 75. Interest of bailee not subject to levy, Williams *v.* McGrade, 13 Minn. 174. Redemption money in hands of sheriff when not subject to levy, Davis *v.* Seymour, 16 Minn. 210. No effectual levy on lost mortgage of real estate which has never been recorded, Gale *v.* Battin, *ib.* 148.

SEC. 212 (270, AS AMENDED BY ACT OF MARCH 6, 1871). *Levy on property subject to lien of judgment.*—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. And the officer at the request of the judgment creditor may, at any time before or at the time of the execution sale, or during the progress of sale, release such property or such part thereof as may not have been actually sold from such levy before satisfaction in full of the judgment, and the judgment or such part thereof as shall not have been actually satisfied by a payment or sale, and the lien thereof shall not be in any way affected by such levy and release, but the same shall remain in full force and effect to the same extent as if no levy had been made.

S. L. 1871, 119. No formal levy on real property necessary, Folsom *v.* Carli, 5 Minn. 333; Bidwell *v.* Coleman, 11 Minn. 78; Lockwood *v.* Bigelow, *ib.* 113; Hutchins *v.* Coms. of Carver Co., 16 Minn. 13. Must follow the statute, Castner *v.* Symonds, 1 Minn. 432.

SEC. 213 (271). *Personal property, how levied on.*—Personal property capable of manual delivery shall be levied upon by the officer taking it into his custody.

Mower *v.* Stickney, 5 Minn. 397; *vide supra*, sec. 200. Levy on individual interest, how made, Caldwell *v.* Augur *et al.*, 4 Minn. 217.

SEC. 214. (272). *Bulky articles, how levied on.*—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.

SEC. 215 (273). *Duty of clerk—fees.*—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. 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 execution.

SEC. 216 (274). *Levy on debts, stock, etc.*—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.

Mower *v.* Stickney, 5 Minn. 397, *supra.*

SEC. 217 (275). *Copy of execution and inventory to be served on defendant.*—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.

SEC. 218 (276). *Officer shall return full inventory.*—The officer shall make a full inventory of the property levied on, and return the same with the execution.

What a sufficient return, Tullis *v.* Brawley, 3 Minn. 277; Rohrer *v.* Turrill, 4 Minn. 407; Folsom *v.* Carli, 5 Minn. 333; Hutchins *v.* Coms. of Carver Co., 16 Minn. 13. Return is *prima facie* evidence of facts therein stated, Castner *et al. v.* Symonds, 1 Minn. 430. When

generally conclusive, Tullis *v.* Brawley, 3 Minn. 277. When absolutely conclusive, Frasier *v.* Williams, 15 Minn. 288.

SEC. 219 (277). *Levy on gold, silver, etc.*—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.

SEC. 220 (278). *Levy on goods or chattels under pledge.*—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.

SEC. 221 (279, AS AMENDED BY ACTS OF FEBRUARY 7, 1868, FEBRUARY 11, 1870, FEBRUARY 27, 1871, MARCH 1, 1872, AND MARCH 10, 1873). *Property exempt from execution.*—No property hereinafter mentioned or represented shall be liable to attachment or sale on any final process issued from any court in this state.

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.

Ninth. One sewing machine.

Tenth. Necessary seed grain for the actual personal use of the debtor for one season, to be selected by him, not however in any case to exceed the following kinds and amounts respectively, viz.: fifty bushels of wheat, fifty bushels of oats, fifteen bushels of potatoes, three bushels of corn, and thirty bushels of barley.

Eleventh. The wages of any laboring man or woman, or of his or her minor children, in any sum not exceeding fifty dollars due for services rendered by him or them for any person, for and during ninety days preceding the issue of process of attachment, garnishment, or execution in any action against such laborer.

S. L. 1868, 112; S. L. 1870, 131; S. L. 1871, 122; S. L. 1872, 137; S. L. 1873. Exemption laws are to be strictly construed, Temple *et al. v.* Scott, 3 Minn. 419; Emmett, C. J., dissents. Law of August 1858, operated retrospectively, Grimes *v.* Byrne, 2 Minn. 95. Exemption law must receive a construction in accordance with its general terms, *ib.* Does not apply where there is a lien of chattel mortgage upon exempt property as security, Barker *v.* Kelderhouse, 8 Minn. 207. Exempt property may be levied on, Tullis *et al. v.* Orthwein, 5 Minn. 377. Exemption may be waived—is personal privilege, Howland *v.* Fuller, 8 Minn. 50. For further construction *vide* Lynd *v.* Picket, 7 Minn. 184, and Harley *v.* Davies *et al.* (action for purchase money), 16 Minn. 487. A silver watch and chain not "wearing apparel" or "household furniture," Rothschild *v.* Boelter, 18 Minn. 361.

SEC. 222 (ACT OF MARCH 7, 1867). *Earnings of minor children exempt.*—The earnings of any minor child of any debtor within this state, or the proceeds thereof, shall not be liable to attachment, garnishment, or sale on any final process of a court, in any action against such debtor, by reason of any debt or liability of such debtor not constructed for the especial benefit of such minor child.

S. L. 1867, 126.

SEC. 223 (280). *No exemption from attachment or execution, when.*—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.

SEC. 224 (281). *Damages recovered for levy on exempt property are exempt.*—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.

Temple *et al. v.* Scott, 3 Minn. 419, *supra.*

SEC. 225 (282). *Excess of exempt property may be levied on.*—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.

Vide Tullis *et al. v.* Orthwein, 5 Minn. 377, *supra.*

SEC. 226 (283, AS AMENDED BY ACT OF FEBRUARY 17, 1871). *Levy on*

grain, grass, or other unharvested crops.—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, or any court of record, 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.

S. L. 1871, 120.

SEC. 227 (284). *Duty of sheriff holding execution.*—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.

Sheriff must perfect the levy, Robertson *v.* Sibley, 10 Minn. 323.

SEC. 228 (285, AS AMENDED BY ACT OF MARCH 1, 1867). *Notice of sale of personal property on execution, how given.*—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, on a similar notice, describing the property with sufficient certainty to enable a person of common understanding to identify it, 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 printed and published in the county, if there is one, or if there is none then in a newspaper printed and published in an adjoining county, and if there is no such newspaper, then in a newspaper printed and published at the capitol of the state.

S. L. 1867, 113.

SEC. 229 (286). *Officer selling without notice—penalty.*—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.

Sale restrained by injunction—duty of sheriff as to notice, Pettengill *v.* Moss, 3 Minn. 223.

SEC. 230 (287). *Sale, when and how made.*—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.

SEC. 231 (288). *Sale absolute, when.*—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.

SEC. 232 (289). *Officer selling real estate to make and deliver certificate—what certificate shall contain.*—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—

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.

Sheriff's certificate of sale should contain only statement of facts, Castner *et al. v.* Symonds, 1 Minn. 427. Omission of sheriff to give the purchaser certificate does not vitiate the sale, Barnes *v.* Kerlinger, 7 Minn. 82. The law of 1856 did not require sheriff's certificate to be witnessed nor executed under sale, Bidwell *v.* Coleman, 11 Minn. 78. No note or memorandum other than the certificate of sale is required, Armstrong *v.* Vroman, *ib.* 220.

SEC. 233 (290). *Certificate to operate as a conveyance, when.*—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 passes the whole estate to the purchaser, Dickenson *v.* Kinney, 5 Minn. 409. Passes such as defendant could convey, Banning *et al. v.* Edes, 6 Minn. 402.

SEC. 234 (291). *Redemptions.*—Real estate sold upon execution, judgment, or decree, may be redeemed:

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.

Effect as to second incumbrance of redemption by debtor's grantee, Warren *et al. v.* Fish, 7 Minn. 422.

SEC. 235 (292). *Parties to redeem in what order.*—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.

SEC. 236 (293). *Redemption, how made.*—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.

Requisites to redemption, Warren *et al. v.* Fish, 7 Minn. 432. In what capacity redemption money received by officer, Davis *v.* Seymour, 16 Minn. 210.

SEC. 237 (294). *Party redeeming entitled to certificate—what certificate shall contain.*—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.

SEC. 238 (295). *Interest of purchaser subject to attachment or judgment.*—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.

SEC. 239 (296). *Waste may be restrained—waste defined.*—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.

SEC. 240 (297, AS AMENDED BY ACT OF MARCH 3, 1868). 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 the 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 at any time within ten years after such eviction, for the price paid on the sale, with interest; and for 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, where title or incumbrance has accrued before a levy on such new execution.

S. L. 1868, 121.

SEC. 241 (298). *Joint debtor or surety may compel contribution.*—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.

TITLE XII.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

(This Title is Title XXIV. of Chapter LXVI. of the Statutes of 1866.)

SEC. 242 (299). *Judgment debtor may be ordered to appear and answer concerning his property.*—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 a 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.

When creditor entitled to an order absolutely, Kay *v.* Vischers *et al.*, 9 Minn. 270. When creditor would be left to another execution, *ib.*

SEC. 243 (300). *Warrant may be issued—proceedings on arrest of defendant.*—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 meantime 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.

SEC. 244 (301). *Execution may be paid by person indebted to judgment debtor.*—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.

SEC. 245 (302). *Witnesses may be required to appear, when.*—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.

SEC. 246 (303). *Examination before referee—duty of referee—answer to be on oath.*—If the examination is before a referee the testimony and proceedings shall be certified by him to the judge; all examinations and 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.

SEC. 247 (304). *Judge may grant order concerning property of judgment debtor.*—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.

SEC. 248 (305). *May appoint receiver.*—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.

SEC. 249 (306). *Proceedings in case of adverse claimants of property.*—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.

SEC. 250 (307). *Disobedience of order of judge a contempt.*—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.

SEC. 251 (308). *Witness compelled to answer, but answer not evidence in criminal proceeding against him.*—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.

SEC. 252 (309, ADDED BY ACT OF MARCH 1, 1867). *Person or corporation having property of debtor may be made to appear and answer.*—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise to the satisfaction of the judge that any person or corporation has property of the judgment debtor, or is indebted to him in any amount exceeding ten dollars, the judge may by an order require such person or corporation or any officer or member thereof to appear at a specified time and place and answer concerning the same; the judge may also, in his discretion, require notice of such proceeding to be given to any party in the action in such manner as may seem to him proper.

S. L. 1867, 104.

TITLE XIII.

OF PETIT JURIES.

(*This Title is Chapter LXXI. of the Statutes of* 1866.)

SEC. 253 (1). *Petit jury, what is.*—A petit jury is a body of twelve men impanneled and sworn, in a district court, to try and determine, by a true and unanimous verdict, any question or issue of fact, in any civil or criminal action or proceeding according to law and the evidence as given them in court.

SEC. 254 (2). *Number of jurors to be drawn for each general term.*—A number of petit jurors, not less than twenty-four, shall be drawn for each general term of the district court, and no greater number shall be drawn unless the court otherwise orders, but in no case shall more than thirty-six petit jurors be drawn.

SEC. 255 (3). *Qualifications and disabilities.*—The qualifications and disabilities of petit jurors shall be the same as those prescribed by law for grand jurors.

SEC. 256 (4). *How drawn and summoned.*—The petit jurors shall be drawn and summoned at the same time and in the same manner as is by law prescribed for the drawing and summoning of grand jurors.

SEC. 257 (5). *Judge may order larger number to be drawn, when.*—The judge of the district court may, at least thirty days before the time for holding a general term of said court, order a number of petit jurors greater than twenty-four and not exceeding thirty-six, to be drawn and summoned for such term, and upon such order being made and entered upon record in the office of the clerk of the court in the county where such term is to be held, such clerk shall draw and issue a venire for the number of jurors mentioned in such order.

SEC. 258 (6). *Ballots, how prepared and deposited.*—At the opening of the court the clerk shall prepare separate ballots containing the names of the persons summoned as petit jurors, which shall be folded as nearly alike as possible, and so that the name cannot be seen, and be deposited in a sufficient box.

SEC. 259 (7). *Proceedings on trial of indictment.*—When an indictment is

called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attachment issue against those who are absent; but the court may, in its discretion, wait or not for the return of the attachment.

SEC. 260 (8). *Ballots, how drawn.*—Before the name of any juror is drawn, the box shall be closed, and shaken so as to intermingle the ballots therein; the clerk shall then, without looking at the ballots, draw them from the box through a hole in the lid, so large only as conveniently to admit the hand.

SEC. 261 (9). *Ballots, how kept.*—When the jury are completed, the ballots containing the names of the jurors sworn shall be laid aside, and kept apart from the ballots containing the names of the other jurors, until the jury so sworn are discharged.

SEC. 262 (10). *Ballots returned to box, when.*—After the jury are so discharged, the ballots containing their names shall be again folded and returned to the box; and so on, as often as a trial is had.

SEC. 263 (11). *Ballot of juror absent or excused, how disposed of.*—If a juror is absent when his name is drawn, or is set aside, or excused from serving on the trial, the ballot containing his name shall be folded and returned to the box as soon as the jury is sworn.

SEC. 264 (12). *Court may cause talesmen to be summoned, when.*—When, by reason of challenge or otherwise, a sufficient number of jurors duly drawn and summoned, cannot be obtained for the trial of any cause, the court shall cause jurors to be returned from the bystanders, or from the county at large, to complete the panel.

SEC. 265 (13). *Talesmen, how returned.*—The jurors so returned from the bystanders, shall be returned by the sheriff or his deputy, or by a coroner, or by any disinterested person appointed therefor by the court.

SEC. 266 (14). *Qualification of talesmen.*—The persons so returned shall be such as are qualified and liable to be drawn as jurors, according to the provisions of law.

STRUCK JURIES.

SEC. 267 (15). *Struck jury, how obtained.*—Whenever a struck jury is deemed necessary, by either party, for the trial of the issue in any action or proceeding in the district court, or brought there by appeal or otherwise, such party may file with the clerk of the court, a demand in writing for such jury, whereupon such clerk shall forthwith deliver a certified copy of such demand to the sheriff of the county, who shall give to both parties four days' notice of the time of striking the same. At the time designated, said sheriff shall attend at his office, and in the presence of the parties, or their attorneys, or such of them as attend for that purpose, shall select from the number of persons qualified to serve as jurors within the county, forty such persons as he shall think most indifferent between the parties, and best qualified to try such issue; and then the party requiring such jury, his agent, or attorney, shall first strike off one of the names, and the opposite party, his agent, or attorney, another, and so on alternately, until each have struck out twelve. If either party shall not attend in person, or by attorney, the sheriff shall strike for the party not attending. When each party has stricken out twelve names, as aforesaid, the sheriff shall make a fair copy of the names of the remaining sixteen

persons, and certify the same under his hand to be the list of jurors struck for the trial of such cause or proceeding, and shall deliver the same to the clerk, who shall thereupon issue and deliver to the sheriff or other officer a *venire facias*, with the names in said list contained, annexed thereto; and such sheriff or other officer shall summon the persons named, according to the command of such writ; and upon the trial of the cause, the jury so struck shall be called as they stand upon the panel, and the first twelve of them who shall appear, and are not challenged for cause, or set aside by the court, shall be the jury, and shall be sworn to try the issue joined in said cause or proceeding: *provided*, that if a sufficient number does not appear for the trial of said cause, the court shall cause talesmen to be called as in other cases.

SEC. 268 (16). *When sheriff is interested, court may direct who shall perform services.*—If the said sheriff is interested in the cause or proceeding, or related to either of the parties, or does not stand indifferent between them, the judge of the said court may name some judicious and disinterested person to strike the jury, and to do and perform all things required to be done by such sheriff, relating to the striking of the same; but in no case shall it be necesary to strike such jury more than six days previous to the term of the court at which the action or proceeding is to be tried, and three days' service of the venire shall be held sufficient.

SEC. 269 (17). *Party asking for struck jury, to pay fees.*—The party requiring such struck jury, shall pay the fees for striking the same, and the legal fees for mileage and attendance, for each juror so attending, and shall not have any allowance therefor in the taxation of costs.

SEC. 270 (18). *Struck jury may be continued, when.*—A jury struck for a trial of any issue at a particular term of the court, may be continued with the continuance of the cause, and summoned as jurors at a subsequent term, provided both parties consent thereto, but not otherwise.

SEC. 271 (19). *Limitation of provisions of this title.*—The provisions of this title shall not extend to the trial of any indictment for any offense where the party indicted is entitled to challenge peremptorily, or without cause shown, more than two jurors.

TITLE XIV.

OF WITNESSES AND EVIDENCE.

(*This Title is Chapter LXXIII. of the Statutes of* 1866.)

ARTICLE I.

OF WITNESSES.

SEC. 272 (1). *Subpœnas for witnesses, who may issue.*—Every clerk of a court of record, and every justice of the peace, may issue subpœnas for witnesses in all civil cases pending before the court, or before any magistrates, arbitrators, or other persons authorized to examine witnesses, and in all contests concerning lands before the register and receiver of any land office in this state.

SEC. 273 (2). *How served.*—Such subpœna may be served by any person

by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode.

SEC. 274 (3). *Person duly subpœnaed, failing to attend, liable in damages.*—If any person duly subpœnaed and obliged to attend as a witness fails to do so, without any reasonable excuse, he is liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action.

SEC. 275 (4). *Also guilty of a contempt.*—Such failure to attend as a witness, if the subpœna issues out of any court of record, is a contempt of the court, and may be punished by fine not exceeding twenty dollars.

SEC. 276 (5). *Court may issue attachment for delinquent witness.*—The court in such case may issue an attachment to bring such witness before it, to answer for the contempt, and also to testify as a witness in the action or proceeding in which he was subpœnaed.

Not liable for non-attendance unless regularly subpœnaed and fees tendered, etc., Beaulieu *v.* Parsons, 2 Minn. 37.

SEC. 277 (6). *Witness, definition of.*—A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination or by deposition or affidavit.

SEC. 278 (7, AS AMENDED BY ACT OF MARCH 6, 1868). *Who may be witnesses.*—All persons except as hereinafter provided, having the power and faculty to perceive and make known their perceptions to others may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although in every case the credibility of the witnesses may be drawn in question. And in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the courts.

S. L. 1868, 110. The evidence of co-defendants in a criminal prosecution inadmissible, Baker *v.* The United States, 1 Minn. 207, affirmed in State *v.* Dumphey, 4 Minn. 438; State *v.* Dee, 14 Minn. 35; but *vide* defendant being a proper witness, he stands in the same position as other witnesses, Chapman *v.* Dodd, 10 Minn. 351. Party may call his adversary, Simmons *v.* Holster, 13 Minn. 249.

SEC. 279 (8). *Party not allowed to testify, when.*—When one, or in case of a joint, or joint and several contract, all, of the original parties on the same side to a contract or cause of action in issue and on trial, are dead, or shown to the court to be insane, the other party or parties shall not be admitted to testify as to such contract in his or their own favor, unless such transaction was had and performed, on behalf of the party or parties so deceased or insane, by an agent whose testimony is received: *provided*, that whenever an assignor of a contract or thing in action, or the payee or indorser of a negotiable instrument is examined as a witness to matters transpiring prior to the transfer or assignment of such contract or instrument, on behalf of any person deriving title through or from him, the adverse party shall be received as a witness to the same matters in his own behalf.

Death of one party does not render other party incompetent witness, when, Foster *v.* Berkey *et al.*, 8 Minn. 351; McNab *et al.* Executors *v.* Stewart, 12 Minn. 407.

SEC. 280 (9). *Who are not competent as witnesses.*—The following persons are not competent to testify in any action or proceeding:

First. Those who are of unsound mind or intoxicated at the time of their production for examination.

Second. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly.

SEC. 281 (10). *Persons holding certain relations may be witnesses, when.*—There are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate, therefore a person cannot be examined as a witness in the following cases:

First. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other; nor to a criminal action or proceeding for a crime committed by one against the other.

Second. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional duty.

Third. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to the confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

Fourth. A regular physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

Fifth. A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

A prosecution for adultery does not fall within the cases in which a wife may testify against her husband, State *v.* Armstrong, 4 Minn. 335.

SEC. 282 (11). *Witness may affirm, when.*—Every person who declares that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation.

SEC. 283 (12). *Mode of administering oath most binding on witness to be used.*—Whenever the court before which any person is offered as a witness is satisfied that such person has any peculiar mode of swearing, which is more solemn and obligatory in the opinion of such person, than the usual mode, the court may, in its discretion, adopt such mode of swearing such person.

SEC. 284 (13). *Witness to be sworn according to the ceremonies of his religion.*—Every person believing in any other than the christian religion, shall be sworn according to the peculiar ceremonies of his religion, if there are any such ceremonies.

SEC. 285 (14). *Court to ascertain capacity of person offered as a witness, when.*—The court before whom an infant, or a person apparently of weak intellect, is produced as a witness, may examine such person to ascertain his capacity, and whether he understands the nature and obligations of an oath; and any court may inquire of any person, what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory.

ARTICLE II.

OF THE TAKING OF TESTIMONY OF WITNESSES WITHIN THIS STATE.

SEC. 286 (15). *Depositions authorized to be taken.*—Depositions may be taken in the manner and according to the regulations provided in this chapter, to be used before any magistrates or other persons authorized to examine witnesses in any other than criminal cases.

SEC. 287 (16). *When witness lives more than thirty miles from place of trial.*—When a witness whose testimony is wanted in any civil cause pending in this state, lives more than thirty miles from the place of trial, or is about to go out of the state, and not to return in time for trial, or is so sick, infirm, or aged as to make it probable that he will not be able to attend at the trial, his deposition may be taken in the manner hereinafter provided.

SEC. 288 (17). *Justice to appoint time and place of taking deposition.*—At any time after the cause is commenced by the service of process or otherwise, or after it is submitted to arbitrators or referees, either party may apply to any justice of the peace, who shall issue a notice to the adverse party, to appear before the said justice, or any other justice of the peace, at the time and place appointed for taking the deposition, and to put such interrogatories as he may see fit.

SEC. 289 (18). *Notice on agent or attorney good.*—The said notice may be served on the agent or attorney of the adverse party, and shall have the same effect as if served on the party himself.

SEC. 290 (19). *Notice to one of several plaintiffs or defendants, good.*—When there are several persons, plaintiffs or defendants, a notice served on either of them is sufficient.

SEC. 291 (20). *Notice, how served.*—The notice shall be served by delivering an attested copy thereof to the person to be notified, or by leaving such copy at his place of abode, allowing in all cases not less than twenty-four hours after such notice before the time appointed for taking the depositions, and also allowing time for his travel to the place appointed after being notified, not less than at the rate of one day, Sundays excepted, for every twenty miles travel.

SEC. 292 (21). *Notice may be waived.*—The written notice before prescribed may be wholly omitted, if the adverse party or his attorney, in writing, waives the right to it.

SEC. 293 (22). *Oath of deponent.*—The deponent shall be sworn to testify the whole truth, and nothing but the truth, relating to the cause for which the deposition is taken, and he shall then be examined by the parties if they see fit, or by the justice, and his testimony shall be taken in writing.

SEC. 294 (23). *Order of examination.*—The party producing the deponent shall be allowed first to examine him, either upon verbal or written interrogatories, on all points which he deems material, and then the adverse party may examine the deponent in like manner; after which either party may propose such further interrogatories as the case requires.

SEC. 295 (24). *Deposition to be written by justice or other person and read to deponent and be signed by him.*—The deposition shall be written by the justice or by the deponent, or by some disinterested person, in the presence and under the direction

of the justice, and be carefully read to or by the deponent, and shall then be subscribed by him.

SEC. 296 (25). *Certificate of justice to be annexed to deposition.*—The justice shall annex to the deposition a certificate substantially as follows:

State of Minnesota, } ss.
County of }

I, A. B., justice of the peace in and for said county, do hereby certify that the above deposition was taken before me, at my office in the in said county, on the day of , 18 , at o'clock, ; that it was taken at the request of the plaintiff (or defendant) upon verbal (or written) interrogatories; that it was reduced to writing by myself (or by deponent, or by , a disinterested person, in my presence and under my direction), that it was taken to be used in the suit of A. B. *v.* C. D., now pending in court, and that the reason for taking it was (here state the true reason) that attended at the taking of said deposition (or that a notice, of which the annexed is a copy, was served upon him, on the day of 18); that said deponent before examination was sworn to testify the whole truth, and nothing but the truth, relative to the said cause, and that the said deposition was carefully read to (or by) said deponent, and then subscribed by him.

Dated at the day of one thousand eight hundred and

A. B., *justice of the peace.*

SEC. 297 (26). *Deposition, how disposed of.*—The deposition shall be delivered by the justice to the court or arbitrators, or referees, before whom the cause is pending, or shall be inclosed and sealed by him, and directed to them, and shall remain sealed until opened by said court, or the clerk thereof, or arbitrators, or referees.

SEC. 298 (27). *Deposition shall be used, when.*—No deposition shall be used if it appears that the reason for taking it no longer exists: *provided,* that if the party producing the deposition in such case shows any sufficient cause then existing for using such deposition, it may be admitted.

Depositions taken before justice of the peace secondary evidence, Chapman *v.* Dodd, 10 Minn. 350.

SEC. 299 (28). *Objections, how and when taken.*—Every objection to the competency or credibility of the deponent, and to the propriety of any question put to him, or of any answer made by him, may be made when the deposition is produced, in the same manner as if the witness was personally examined on the trial: *provided,* that all objections to the form of any interrogatory shall be made before it is answered, and if the interrogatory is not withdrawn, the objection shall be noted in the deposition, otherwise the objection shall not be afterward entertained.

SEC. 300 (29). *Deposition used in second action, when.*—When the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterward commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken for the first action may be used in the second, in the same manner, and subject to the same conditions and objections as if originally taken for the second action: *provided,* that the deposition has been duly filed in the court where the first action was pending, and remained in the custody

of the court, from the termination of the first action until the commencement of the second.

Depositions taken on first trial need not be retaken for second trial, Chouteau *v.* Parker, 2 Minn. 118.

SEC. 301 (30). *Deposition used on appeal of action, how.*—When an action is appealed from one court to another, all depositions lawfully taken to be used in the court below may be used in the appellate court in the same manner, and subject to the same exceptions for informality or irregularity as were taken to such depositions in writing in the court below.

SEC. 302 (31). *Witness may be compelled to give deposition, when.*—Any witness may be subpœnaed and compelled to give his deposition, at any place within twenty miles of his abode, in like manner, and under the same penalties, as he may be subpœnaed and compelled to attend as a witness in any court.

ARTICLE III.

OF THE TAKING OF TESTIMONY OF WITNESSES OUT OF THIS STATE.

SEC. 303 (32). *Depositions of witnesses out of the state may be taken, how.*—The deposition of any witness without this state may be taken under a commission issued to any competent person in any state or country by the court in which the cause is pending, or upon a reference as hereinafter provided; and the deposition may be used in the same manner and subject to the same conditions and objections as if it had been taken in this state.

Parties to suits may be examined, Clafflin *v.* Lawler, 1 Minn. 299; Hart *et al. v.* Eastman *et al.*, 7 Minn. 74.

SEC. 304 (33). *Commission shall issue, in what cases.*—No commission shall be issued to take testimony out of this state, except in the following cases:

First. When an issue has been joined in an action in a court of record in this state, and it shall appear on the application of either party that any witness not residing in this state is material in the prosecution or defense of such action, and that due notice of such application was served upon the adverse party at least eight days before the application is made.

Second. When, in an action commenced in a court of record in this state, the time of answering the complaint has expired, and the defendant has not answered or demurred to the said complaint, and it appears upon the application of the plaintiff that the testimony of any witness not residing in this state is material and necessary to establish the facts stated in the complaint, and to enable the court to render judgment in such action.

SEC. 305 (34). *Interrogatories and cross-interrogatories, how settled.*—When the application is made by the plaintiff, and there has been no appearance for the defendant in the action, it may be made *ex parte* and without notice, and the deposition may be taken upon interrogatories filed by the plaintiff and annexed to the commission. In all other cases such deposition shall be taken under a commission, and upon written interrogatories, to be exhibited to the adverse party or his attorney, and cross-interrogatories to be filed by him if he sees fit: *provided*, that the parties may, by stipulation in writing, agree upon any other mode of taking depositions, and when taken, pursuant to such stipulations, they may be used upon the trial

with like force and effect in all respects as if taken upon the commission and written interrogatories as herein provided.

SEC. 306 (35). *Oaths and affidavits taken out of the state used as evidence, when.*—All oaths or affidavits taken out of the state before any officer authorized to administer oaths, and certified by the clerk of a court of record, may be used and read upon the argument of any motion, to the same extent, and with like effect, as if taken within this state: *provided,* that if such affidavit is taken before a notary public, or commissioner for this state, no such certificate shall be required.

SEC. 307 (1 OF ACT OF MARCH 11, 1873). *Deposition may be taken by any officer authorized to administer oaths.*—Whenever the testimony of any person without the state is wanted in any civil action or proceeding now pending, or hereafter commenced in any court of this state, the same may be taken by and before any officer authorized to administer an oath then and there, upon notice to the adverse party of the time and place of taking the same. Such notice shall be in writing, and shall be served as other notices in civil actions are required to be served, and it shall be served so as to allow the adverse party time sufficient to enable him to proceed to the place where the examination is to be conducted, and have one day for preparation: *provided,* that the justice of the peace before whom the action or proceeding is pending, or if it be pending in a court of record, then the judge thereof or a court commissioner may on motion and by an order in the cause designate the time and place for the taking of the testimony, and the time within which a copy of the order shall be served on the adverse party or his attorney; *and provided further,* that whenever the defendant in the action or proceeding is in default for want of an answer or other defense, such notice or order need not be served upon him.

SEC. 308 (2). *Proceedings upon the taking of testimony—form of certificate annexed to deposition.*—At the time and place specified in the notice or order, or within one hour thereafter, the examination shall commence. Each witness shall before testifying be sworn by the officer to testify the whole truth and nothing but the truth relative to the cause specified in the notice or order. The testimony shall be written by the officer. The proceeding may be adjourned from day to day until the examinations are closed. Either party may appear in person or by an agent or attorney, and take part in the examination. The testimony of each witness when completed shall be carefully read over by the officer to him, whereupon he may add thereto or qualify the same as he may desire. When the deposition is completed the witness shall sign his name or make his mark at the end thereof, as well as upon each piece of paper on which any portion of his testimony is written. Thereupon the officer taking such deposition shall annex thereto a copy of the notice or order, and a certificate under his hand and official seal (if he have one), stating what office he held and exercised when taking such depositions, and that by virtue thereof he was then and there authorized to administer an oath, and that each witness before testifying was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the notice or order, and that each of such depositions were taken pursuant to such notice or order, and who, if any, examined for the parties respectively. Such certificate shall be *prima facie* evidence of the matters therein stated, and it may be substantially in the following form:

State of }
County of } ss.

Be it known that I took the annexed depositions pursuant to the annexed notice (or order); that I was then and there (state the title of the officer); that I exercised the powers of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that each witness before testifying was duly sworn to testify the whole truth and nothing but the truth, relative to the cause specified in the annexed notice (or order); that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the plaintiff by ; that the examination was conducted on behalf of the defendant by .

Witness my hand and seal this day of , A.D. 187 .

Such depositions shall be returned by mail to the justice of the peace before whom the cause is pending, or if it be pending in a probate court, to the judge thereof, or if it be pending in any other court of record, then to the clerk thereof, and upon their return they shall be opened and subject to the inspection of either party.

SEC. 309 (3). *May be read in evidence.*—Such depositions may be read in evidence at the trial of the action or proceeding; but when the same is offered in evidence, objection may be interposed to the competency of the witness or to any question put to him, or to the whole or any part of his testimony in like manner, upon the same grounds and with the like effect as if the witness was then testifying in open court: *provided,* that no objection in the form of any question can be made unless such objection was made before and noted by the officer taking such deposition.

SEC. 310 (4). *No informality, error, or defect, etc., shall be valid, except.*—No informality, error, or defect in any proceeding under this statute shall be sufficient ground for excluding the deposition, unless the party making objection thereto shall make it appear to the satisfaction of the court that the officer taking such deposition was not authorized to administer an oath then and there, or that such party was by such informality, error, or defect precluded from appearing and cross-examining the witnesses; and every objection to the sufficiency of the notice, or to the manner of taking or certifying or returning such depositions, shall be deemed to have been for ever waived, unless such objections are taken by motion to suppress such depositions, which motion shall be made within ten days of the service of notice in writing of the return thereof.

S. L. 1873, 180.

ARTICLE IV.

OF PROCEEDINGS TO PERPETUATE THE TESTIMONY OF WITNESSES WITHIN THIS STATE.

SEC. 311 (36). *Testimony of witness may be perpetuated—application, how made.*—When any person is desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim, or interest, in or to the subject concerning which he desires to perpetuate the evidence, and the names of all other persons interested, or supposed to be interested therein, their residences, if known, and if unknown, shall be so stated,

and also the name of the witness proposed to be examined, and shall deliver the said statement to the judge of a court of record, requesting him to take the deposition of the said witness.

SEC. 312 (37). *Notice to be given.*—The said judge shall thereupon cause notice to be given of the time and place appointed for taking the deposition, to all persons mentioned in the said statement, as interested in the case, which notice shall be given in the same manner as is prescribed in this chapter respecting notice upon taking a deposition in this state, to be used in any cause here pending: *provided*, that in all cases where the judge is satisfied that by reason of the non-residence of any of the persons in this state, or for any other cause, it will be impossible to serve the notice as aforesaid, he may direct notice to be given by publishing the same for three successive weeks in a newspaper printed and published in the county where the applicant resides, or if there is none, then in a newspaper printed and published at the capital of the state.

SEC. 313 (38). *Testimony taken, how—judge to annex certificate.*—The deponent shall be sworn and examined, and his deposition shall be written, read, and subscribed in the same manner as is prescribed respecting the other depositions before mentioned, and the judge shall annex thereto a certificate under his hand, of the time and manner of taking it, and that it was taken in perpetual remembrance of the thing, and he shall also insert in the certificate the names of the persons at whose request it was taken, and of all those who were notified to attend, and of all those who did attend the taking thereof.

SEC. 314 (39). *Deposition and certificate to be recorded.*—The deposition with the certificate, and also the written statement of the party at whose request it was taken, shall, within ninety days after the taking thereof, be recorded in the registry of deeds in the county where the land lies, if the deposition relates to real estate, otherwise in the county where the party applying for such deposition resides.

SEC. 315 (40). *Deposition may be used, when.*—If any action, either at the time of taking such deposition, or at any time afterward, is pending between the person at whose request it was taken, and the persons named in the written statement, or any of them, or any person claiming under either of the said parties respectively, concerning the title, claim, or interest set forth in the statement, the deposition so taken, or a certified copy of it from the registry of deeds, may be used in such action, in the same manner and subject to the same conditions and objections as if it had been originally taken for the said action.

SEC. 316 (41). *Witness may be compelled to give deposition under this title.*—Any witness may be subpœnaed and compelled to give his deposition in perpetual remembrance of the thing, as before prescribed, in like manner and under the same penalties as are provided in this chapter, respecting other depositions taken in this state.

ARTICLE V.

OF PROCEEDINGS TO PERPETUATE THE TESTIMONY OF WITNESSES OUT OF THIS STATE.

SEC. 317 (42). *Depositions to perpetuate testimony of witnesses out of the state taken by commission.*—Depositions to perpetuate the testimony of witnesses living without the state, may be taken in any state, or in any foreign country, upon a

commission to be issued by any court of record in the manner hereinafter provided.

SEC. 318 (43). *Proceedings in such case.*—The person who proposes to take the deposition shall apply to the judge of any such court, and deliver to him a statement like that before prescribed, to be delivered to the judge or justice of the peace upon taking such a deposition within this state, and if the subject of the proposed deposition relates to real estate within this state, the statement shall be filed in the county where the lands, or any part thereof lies; otherwise in the county where the applicant resides.

SEC. 319 (44). *Notice to be given.*—The court shall order notice of such application, to be served on all the persons mentioned in such statement, and living within the state, which notice shall be served fourteen days at least before the time appointed for hearing the parties: *provided*, that if any of said parties reside out of this state, or if their residence is unknown to the applicant, the judge shall order notice to be served on them by publishing the same for three successive weeks in a newspaper printed and published in the county where the applicant resides, or if there is none, then in a newspaper printed and published at the capital of the state.

SEC. 320 (45). *Judge to issue commission, when.*—If, upon such hearing of the parties, or of the applicant alone, should no adverse party appear, the judge is satisfied that there is sufficient cause for taking the deposition, he shall issue a commission therefor, in like manner as for taking a deposition to be used in any cause pending in the same court.

SEC. 321 (46). *Deposition, how taken and returned.*—The deposition shall be taken upon written interrogatories, filed by the applicant, and cross-interrogatories filed by any party adversely interested, if he sees fit; and it shall be taken and returned substantially in the same manner as if taken to be used in any cause pending in said court.

SEC. 322 (47). *Such deposition how used, filed, and recorded.*—All depositions to perpetuate the testimony of witnesses taken at any place without this state, according to the provisions of this chapter, may be used in like manner as if taken within the state, and shall be filed and recorded within the same time and in the same manner.

ARTICLE VI.

OF DEPOSITIONS TAKEN IN THIS STATE TO BE USED IN COURTS OF OTHER STATES AND COUNTRIES.

SEC. 323 (48). *Witness may be compelled to give deposition to be used in another state.*—Any witness may be subpœnaed and compelled in like manner, and under the same penalties as are prescribed in this chapter, to give his deposition in any cause pending in a court in any state or government, which deposition may be taken before any justice of the peace in this state, or before any commissioners that may be appointed under the authority of the state or government in which the action is pending; and if the deposition is taken before such commissioners, the witness may be subpœnaed and compelled to appear before them by process from any justice of the peace in this state.

ARTICLE VII.

OF THE PRINTED STATUTES OF THIS STATE, THE RECORDS AND PROCEEDINGS OF COURTS, AND THE LAWS OF OTHER STATES, AND OF FOREIGN LAWS, AS EVIDENCE.

SEC. 324 (49). *Records of foreign courts admissible as evidence, when.*—The records and judicial proceedings of any court of any state or territory, or of the United States, shall be admissible in evidence, in all cases in this state, when authenticated by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

Court may take judicial notice of clerk's signature to file marks upon papers, Sherrard *v.* Fraser *et al.*, 6 Minn. 572.

SEC. 325 (50). *Printed copies of statutes are admissible.*—The printed copies of all statutes, acts, and resolves of this state, whether of a public or private nature, which are published under the authority of the state, are admissible as sufficient evidence thereof in all courts of law, and on all occasions whatsoever.

Presumptions as to what is the statute law of another state are not retrospective, State *v.* Armstrong, 4 Minn. 335. Public laws and treaties are judicially noticed, Dole *v.* Wilson, 16 Minn. 525.

SEC. 326 (51). *Printed copies of statutes of foreign states, admissible, when.*—Printed copies of the statute laws of any state or territory of the United States, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, are admissible in all courts of law and on all other occasions in this state as *prima facie* evidence of such laws.

SEC. 327 (52). *Common law of foreign states, how proved.*—The unwritten or common law of any state or territory of the United States, may be proved as facts by parol evidence, and the books of reports of cases, adjudged in their courts, may also be admitted as evidence of such law.

Laws of other states not judicially noticed, Brimhall *v.* Van Campen, 8 Minn. 13.

SEC. 328 (53). *Existence and effect of foreign laws, how proved.*—The existence and the tenor or effect of all foreign laws may be proved as facts, by parol evidence; but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law, that is not accompanied by a copy thereof.

ARTICLE VIII.

OF DOCUMENTARY EVIDENCE AND THE PRESERVATION THEREOF.

SEC. 329 (54). *Published notices may be filed, when and where.*—When notice of any application to any court, or judicial officer for any proceeding authorized by law, is required to be published in one or more newspapers, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the time when and the paper in which such notice was published, may be filed with

the proper officer of the court, or with the judicial officer before whom such proceeding is pending, at any time within six months after the last day of the publication of such notice, unless sooner specially required.

Vide pt. v., *infra*. S. L. 1866, 55; S. L. 1868, 116; S. L. 1870, 139; S. L. 1873, 177. What is defective affidavit of notice of publication, Ullman *v.* Lion, 8 Minn. 381.

SEC. 330 (55). *Printed notice of sale of real estate may be filed, when and where.*—When any notice of a sale of real property is required by law, to be published in any newspaper, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the times when, and the paper in which such notice was published, may be filed at any time within six months after the last day of such publication with the register of deeds in the county in which the premises sold are situated.

Vide pt. v., *infra*. S. L. 1866, 55; 1868, 116; 1870, 139; and 1873, 177.

SEC. 331 (56). *Affidavit of publication, or copies, duly certified, evidence.*—The original affidavit so filed pursuant to the two preceding sections and copies thereof, duly certified by the officer in whose custody the same may be, is evidence in all cases, and in every court or judicial proceeding, of the facts contained in such affidavit.

SEC. 332 (57). *Affidavit of printer, evidence, when.*—The affidavit of the printer, or foreman of such printer, of any newspaper published in this state, of the publication of any notice or advertisement which by any law of this state is required to be published in such newspaper, is *prima facie* evidence of such publication, and of the facts stated therein.

SEC. 333 (58). *Certificate to affidavit, how made.*—Whenever a certified copy of an affidavit, record, document, or other paper, is allowed by law to be evidence, such copy shall be certified by the officer, in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom; and if such officer have any official seal by law, such certificate shall be authenticated by such seal.

Kelly *v.* Wallace, 14 Minn. 236, *vide infra*, sec 348.

SEC. 334 (59). *Limitation of preceding section.*—But the preceding section shall not be construed to require the affixing of the seal of the court to any certified copy of a rule or order made by such court, or of any paper filed therein, when such copy is used in the same court or before any officer thereof.

SEC. 335 (60). *Instruments, how acknowledged and made evidence.*—Every written instrument except promissory notes, and bills of exchange, and except the last wills of deceased persons, may be proved or acknowledged in the manner now provided by law for taking the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer indorsed thereon, shall entitle such instrument to be read in evidence in all courts of justice, and all proceedings before any officer, body, or board, with the same effect, and in the same manner as if such instrument was a conveyance of real estate.

SEC. 336 (61). *Duty of register and clerk.*—The register of deeds and the clerk of any court of record in every county of this state upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any instruments or papers which any person shall offer them for that purpose, and if required shall give such person a written receipt therefor.

SEC. 337 (62). *Instruments, how indorsed and filed.*—Such instruments or papers, shall be properly indorsed so as to indicate their general nature and the names of the parties thereto, shall be filed by the officer receiving the same, stating the time when received, and shall be deposited and kept by him and his successors in office in the same manner as his official papers, in some place separate and distinct from such papers.

SEC. 338 (63). *Instruments on file, how withdrawn.*—The instruments and papers so received and deposited shall not be withdrawn from such office, except on the order of some court for the purpose of being read in evidence in such court, and then to be returned to such office; nor shall they be delivered without such order to any person, unless upon the written order of the person who deposited the same, or his executors or administrators.

SEC. 339 (64). *May be examined by any person.*—Such instruments or papers so deposited, shall be open to the examination of any person desiring the same, upon the payment of the fees allowed by law.

SEC. 340 (65). *Lost instruments, certificate of, evidence.*—When any officer to whom the legal custody of any documents, instrument, or paper belongs, shall certify under his official seal, that he has made diligent examination in his office for such paper, instrument, or document, and that it can not be found, such certificate is presumptive evidence of the facts so certified in all causes, matters, and proceedings, in the same manner and with the like effect as if such officer had personally testified to the same in the court, or before the officer before whom such cause, matter, or proceeding may be pending.

SEC. 341 (66). *Copies and transcripts of papers filed, duly certified, are evidence.*—Copies of all papers, documents, or writings required by law to be filed or left in any public office in this state, and transcripts of any public records kept therein, certified by the officer having custody of the same, under his official seal, if he has one, are admissible in evidence with the like effect and to the same extent as the originals.

ARTICLE IX.

OF THE LOSS OF INSTRUMENTS AND PROCEEDINGS THEREON.

SEC. 342 (67). *Loss of instruments, proof of.*—Whenever a party to an action is permitted to prove by his own oath the loss of any instrument, in order to admit other proof of the contents thereof, the adverse party may also be examined by the court, on oath, to disprove such loss and to account for such instrument.

SEC. 343 (68). *Evidence of contents of lost promissory note, etc., allowed, when.*—In any action founded on any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defence of any action, if it appears on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereupon, parol or other evidence of the contents thereof may be given on such trial, and, notwithstanding such note or bill was negotiable, such party shall be entitled to receive the amount due thereon, as if such note or bill had been produced.

Proof of loss of written instrument, Phœnix Ins. Co. *v.* Taylor, 5 Minn. 502: City of Winona *v.* Huff, 11 Minn. 119. Absence of written instrument must be explained, Guerin *v.* Hunt *et al.*, 6 Minn. 375; Lowry *et al. v.* Harris *et al.*, 12 Minn. 255.

Proof of *bona fide* search for lost instrument, Desnoyer *v.* McDonald *et al.*, 4 Minn. 515; Thayer *v.* Barney, 12 Minn. 502.

Non-residence of those who possess an instrument not sufficient excuse, Wood *v.* Cullen, imp. 13 Minn. 394.

SEC. 344 (69). *In such case, bond shall be given.*—But to entitle a party to a recovery on a negotiable promissory note or bill of exchange which has been lost, he shall execute a bond to the adverse party in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court in which the recovery is had, or the clerk thereof, in case no trial has been had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other persons on account of such note or bill, and against all costs and expenses by reason of such claim.

ARTICLE X.

OF ACCOUNT BOOKS, RECORDS, INSTRUMENTS, AND JUSTICES' DOCKETS AS EVIDENCE.

SEC. 345 (70). *Books of account evidence, when.*—Whenever a party in any cause or proceeding produces at the trial his account books, and swears that the same are his account books kept for that purpose, that they contain the original entries of charges for goods, or other articles delivered or work and labor or other services performed, or materials found, and that such entries are just to the best of his knowledge and belief, that said entries are in his own hand writing, and that they were made at or about the time said goods or other articles were delivered, said work and labor or other services were performed, or said materials were found, the party offering such books as evidence, being subject to all the rules of cross-examination by the adverse party that would be applicable by such rules to any other witness giving testimony relating to said books, if it appears upon the examination of said party that all of the interrogatories in this section contained, are satisfactorily established in the affirmative, then the said books shall be received as *prima facie* evidence of the charges therein contained.

SEC. 346 (71). *Books of account kept by clerk admissible, when.*—Whenever the original entries mentioned in the preceding section are in the handwriting of an agent, servant, or clerk of the party, the oath of such agent, servant, or clerk, may in like manner be admitted to verify the same, and said books are testimony in the same manner as the books mentioned in the preceding section: *provided*, that such books mentioned in this and the preceding section are not admissible as testimony of any item of money, delivered at one time, exceeding five dollars, or of money paid to third persons, or of charges for rent.

SEC. 347 (72). *Ledger to be produced, when.*—Where a book has marks which show that the items have been transferred to a ledger, the book shall not be testimony unless the ledger is produced.

SEC. 348 (73). *Entries by person deceased admissible, when.*—Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence in a case proper for the admission of such book as evidence, on proof that the same are in his handwriting, and in a book kept for such entries, without further verification.

SEC. 349 (74). *Minutes of conviction and judgment admissible, when.*—A

copy of the minutes of any conviction and judgment, duly certified by the clerk in whose custody such minutes are, under his official seal, together with a copy of the indictment on which the conviction was had, certified in the same manner, shall be evidence, in all courts and places, of such conviction and judgment, without the production of the judgment roll.

SEC. 350 (75). *Docket of justice of the peace admissible as evidence.*—Whenever it becomes necessary in an action before a justice of the peace to give evidence of a judgment, or other proceedings had before him, the docket of such judgment, or other proceeding, or a transcript thereof certified by him, shall be good evidence thereof before such justice.

Identifying justice's docket, Cole *v.* Curtis *et al.*, 16 Minn. 182.

SEC. 351 (76). *Transcript from justice's docket evidence, when.*—A transcript from the docket of any justice of the peace of any judgment had before him, of the proceedings in the case previous to such judgment, of the execution issued thereon, if any, and of the return to such execution, if any, when certified by such justice, is evidence to prove the facts contained in such transcript in any court in the county where such judgment was rendered.

SEC. 352 (77). *To have certificate of clerk, when.*—To entitle such transcript to be read in evidence in a different county than that in which the judgment was rendered, or the proceedings originated, there shall be attached thereto or indorsed thereon a certificate of the clerk of the district court of the county in which such justice resides, under the seal of said court, specifying that the person subscribing such transcript was at the date of the judgment therein mentioned a justice of the peace of such county.

SEC. 353 (78). *Proceedings before justice, not reduced to writing, how proved.*—The proceedings in any cause had before a justice, not reduced to writing by said justice, nor being the contents of any paper or document produced before said justice, unless such paper or document is lost or destroyed, may be proved by the oath of the justice. In case of his death or absence, they may be proved by producing the original minutes of such proceeding entered in a book kept by such justice, accompanied by proof of his handwriting; or they may be proved by producing copies of such minutes sworn to by a competent witness, as having been compared by him with the original entries, with proof that such entries were in the handwriting of the justice.

SEC. 354 (79). *Certificate of conviction before justice evidence, when.*—Every certificate of conviction made and filed by a justice under the provisions of law, or a duly certified copy thereof, is evidence in all courts and places of the facts therein contained.

SEC. 355 (80). *Exemplification of foreign judgment rendered by justice, evidence, when.*—An exemplification of a judgment rendered by any justice of the peace, in any state or territory of the United States, officially certified by such justice as a full and correct copy of all the proceedings in that case from his docket, with a certificate of magistracy thereon, signed and authenticated by a clerk of a court of record in the county where such judgment was rendered, with the seal thereof attached, is evidence in any court in this state to prove the facts contained in such exemplification.

SEC. 356 (81). *Court may order inspection of documents, when.*—The court before which an action is pending, or a judge thereof, may order either party to give to

the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein; if compliance with the order is refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.

SEC. 357 (82, AS AMENDED BY ACT OF MARCH 9, 1867). *Effect of possession of note sued on as evidence.*—In actions brought on promissory notes or bills of exchange by the indorser, the possession of the note is *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed, and every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit, but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof.

S. L. 1867, 108. Goenen *v.* Schroeder, 18 Minn. 66.

SEC. 358 (83). *Effect of indorsement of money received on note.*—An indorsement of money received, on any promissory note, which appears to have been made when it was against the interest of the holder to make it, is *prima facie* evidence of the facts therein contained.

SEC. 359 (84). *Land office receipt, effect of as evidence.*—The receipt or certificate signed by the register or receiver of any United States land office, of the entry or purchase of any tract of land, or of the location of any tract by a military land warrant, is *prima facie* evidence in the courts of this state, that the title of the lands mentioned or described in said receipt or certificate is in the person named therein, his heirs or assigns.

Township plats of surveys of the government lands on file in United States land offices, how proved, Walsh *v.* Kattenburg, 8 Minn. 127. Certified copy of letter in general land office, how authenticated, Kelly *v.* Wallace, 14 Minn. 236.

SEC. 360 (85). *Patents or duplicates issued by United States may be recorded and used as evidence, how.*—Patents issued by the United States of land in the state, or duplicates thereof, from the records in the general land office of the United States, certified by the commissioner of such land office, may be recorded in the registry of deeds of the county in which the land described in the patent is situated, and the record of such patents, or duplicates, or copies of such records certified by the register of deeds, are evidence in like manner and to the same extent as the records, or transcripts thereof, of other conveyances of real estate.

SEC. 361 (86). *Plats of surveys evidence, when.*—All plats of surveys of public lands certified by the register of the land office of the district in which such land is situated, to be a true copy of the certified copy on file in his office of the original plat thereof, and all certificates by the register of such land office, of the surveys or entry and location of, or other facts in relation to such lands, taken from the books of such land office, or from the certificate indorsed on the copy of the original plat on file therein, are *prima facie* evidence of the facts therein stated. The certifi-

cate of the county surveyor, or any of his deputies, shall be admitted as legal evidence, but the same may be explained or rebutted by other evidence.

When records of plat admissible as evidence, Walsh *v.* Kattenburg, 8 Minn. 127; City of Winona *v.* Huff, 11 Minn. 119; Slosson *v.* Hall, 17 Minn. 95.

SEC. 362 (87). *Conveyances and records thereof are evidence—may be rebutted by other evidence.*—All conveyances of real estate and other instruments authorized by law to be recorded, and which are acknowledged or proved as provided by law, and, if the same have been recorded, the record or a transcript thereof, certified by the register in whose office the same is recorded, may be read in evidence without further proof, but the effect of such evidence may be rebutted by other competent testimony.

S. L. 1866, 55; 1868, 118; 1871, 139; 1873, 173.

Records of deeds as evidence, Lamberton *v.* Windom, 18 Minn. 506. Certificate of notary public to acknowledgment of deed not conclusive of the facts certified, Dodge *v.* Hollingshead, 6 Minn. 25; Annan *v.* Folsom, 6 Minn. 500; Edgerton *et al. v.* Jones, 10 Minn. 427.

Record of the record of a copy of conveyance not admissible, when, Lund *v.* Rice, 9 Minn. 230. Record of deed executed by an attorney in fact with no recorded power not admissible, Lowry *et al. v.* Harris *et al.*, 12 Minn. 255. Sheriff deed as evidence of what, Goenen *v.* Schroeder, 18 Minn. 66.

SEC. 363 (88). *Certificates and records of marriage are evidence.*—The original certificates and records of marriage, made by the judge, justice, or minister, as prescribed by law, and the record thereof by the clerk of the district court, or a copy of such record duly certified by such clerk, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

ARTICLE XI.

OF THE CHARACTER, COMPETENCY, AND EFFECT OF EVIDENCE.*

SEC. 364 (89). *Fact of marriage, how proved.*—When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent.

Marriage may be proved by oral testimony of one of the parties, Leighton *v.* Sheldon, 16 Minn. 243.

SEC. 365 (90). *In prosecutions for forgery, etc., of notes or bank bills, what testimony is receivable.*—In all prosecutions for forging or counterfeiting any notes or bills of any banking company or corporation, or for uttering, publishing, or tendering in payment as true, any forged or counterfeit bank bills or notes, or for being possessed thereof with the intent to utter and pass them as true, the testimony of the president and cashier of such banks may be dispensed with, if their place of residence is without this state, or more than forty miles from the place of trial; and the testimony of any person acquainted with the signature of the president or cashier of such banks, or who has knowledge of the difference in the appearance of the

* *Vide* O'Brien *v.* City of St Paul, 18 Minn. 176; and State *v.* Shuttleworth, *ib.* 208.

true and counterfeit bills or notes thereof, may be admitted to prove that any such bills or notes are counterfeit.

SEC. 366 (91). *Certificate of secretary of treasury of United States, receivable, when.*—In all prosecutions for forging or counterfeiting any note, certificate, bill of credit, or security issued on behalf of the United States, or on behalf of any state or territory, or for uttering, publishing, or tendering in payment as true any such forged or counterfeit note, certificate, bill of credit, or security, or for being possessed thereof with intent to utter and pass the same as true, the certificate under oath of the secretary of the treasury, or of the treasurer of the United States, or of the secretary or treasurer of any state or territory on whose behalf such note, certificate, bill of credit, or security purports to have been issued, shall be admitted as evidence for the purpose of proving the same to be forged or counterfeit.

SEC. 367 (92). *What proof will sustain indictment for rape.*—Proof of actual penetration into the body is sufficient to sustain an indictment for rape, or for the crime against nature.

SEC. 368 (93). *Confessions when inadmissible as evidence.*—A confession of a defendant, whether made in the course of judicial proceedings, or to a private person, can not be given in evidence against him, when made under the influence of fear produced by threats, nor is it sufficient to warrant his conviction, without evidence that the offense charged has been committed.

Prisoner's confession unattended with other proof insufficient to convict, State *v.* Laliyer, 4 Minn. 368. Jury cannot wholly reject a confession, etc., State *v.* Staley, 14 Minn. 105.

SEC. 369 (94). *Testimony of accomplice not sufficient to convict, unless corroborated.*—A conviction can not be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, or the circumstances thereof.

SEC. 370 (95). *In cases of libel the truth may be given in evidence—jury to determine the law and the fact.*—In all criminal prosecutions or indictments for libel, the truth may be given in evidence: and if it appears to the jury that the matter charged as libelous is true, and was published with good motives and justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

SEC. 371 (96). *Divorces not to be granted on sole testimony of the parties.*—Divorces shall not be granted on the sole confessions, admissions, or testimony of the parties, either in or out of court.

In action for divorce facts must be substantiated by other than parties to the record, True *v.* True, 6 Minn. 458.

TITLE XV.

OF MOTIONS AND ORDERS.

(*This Title is the Act of March* 7, 1867.)

SEC. 372 (1). *Order defined.*—Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order.

Order to show cause, form, and contents, Marty *v.* Ahl, 5 Minn. 27. Order granting partial relief to both parties binds one, though the other appeals, Yale *v.* Edgerton, 11 Minn.

271. Order setting aside a stipulation of dismissal, and reinstating cause on the calendar, an order of the court, Rogers *v.* Greenwood, 14 Minn. 333.

SEC. 373 (2). *Motion defined.*—An application for an order is a motion.

The notice, form, and contents, Yale *v.* Edgerton, 11 Minn. 271. Time and place of hearing should be indicated, Marty *v.* Ahl, 5 Minn. 27; Johnson *v.* Higgins, 15 Minn. 486. Evidence on, contrary to stipulation, Dunnell *et al. v.* Warden *et al.*, 6 Minn. 287; Shaw *v.* Henderson, 7 Minn. 480. Affidavits always competent, Sherrard *v.* Fraser *et al.*, 6 Minn. 572. Second application on same facts, Irvine *v.* Meyers *et al.*, 6 Minn. 558; Goodrich *v.* Hopkins *et al.*, 10 Minn. 162. Court to afford any relief compatible with facts presented, Landis *v.* Olds *et al.*, 9 Minn. 90.

SEC. 374 (3). *Time for serving.*—When a notice of a motion is necessary it must be served eight days before the time appointed for the hearing; but the judge may by an order to show cause prescribe a shorter time.

Eight days' notice not necessary, etc., Goodrich *et al. v.* Hopkins *et al.*, 10 Minn. 162. Time for hearing discretionary with judge, Phœnix *et al. v.* Gardner *et al.*, 13 Minn. 294.

SEC. 375 (4). *Where motions must be made.*—Motions must be made in the district in which the action is pending, or in an adjoining district: *provided*, that no motion shall be made in an adjoining district which shall require the hearing of such a motion at a greater distance from the county seat where the action is pending in which such motion is made than the residence of the judge of the district wherein such action is pending from such county seat. Orders made out of court and without notice may be made by any judge of a district court at any place in the state; but no order to stay proceedings for a longer time than twenty days shall be made except upon notice to the adverse party. Motions for judgment upon demurrer or upon the pleadings may be made and determined in vacation; and when any motion is made in a district court other than that in which the action is pending, the order, determination, or judgment thereon is to be entered in the same manner and have the same force and effect as when made in and by the judge of the district and in the county in which the action is pending.

S. L. 1867. The subject-matter, not signature of judge, determines whether he acts as a court or at chambers, Marty *v.* Ahl, 5 Minn. 27. Of the service entry filing, etc., Ætna Ins. Co. *v.* Swift *et al.*, 12 Minn. 437.

TITLE XVI.

OF NEW TRIALS.

(This Title is Title XX. of Chapter LXVI. of the Statutes of 1866.)

SEC. 376 (235). *For what causes, new trial may be granted.*—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:

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.

Admission or exclusion of evidence when not grounds for a new trial, Coit *v.* Waples *et al.*, 1 Minn. 134. Where no harm resulted, Illingworth *v.* Greenleaf, 11 Minn. 235; Winona and St P. R. R. Co. *v.* Waldron *et al.*, *ib.* 515; Cole *v.* Maxfield, 13 Minn. 235; Yale *v.* Edgerton, 14 Minn. 194; Baldwin *et al. v.* Blanchard, 15 Minn. 489; Clague *v.* Hodgson, 16 Minn. 329; Madigan *v.* De Graff, 17 Minn. 52; Stearns *v.* Johnston, *ib.* 142; Rudsdill *v.* Slingerland, 18 Minn. 380. Where immaterial testimony has gone to the jury, but in such a way as to be severable from the rest, Shelly *et al. v.* Lash, 14 Minn. 498. Admission of incompetent testimony when also immaterial, State *v.* Staley, 14 Minn. 105. Admission of parol testimony of a levy where same is not in issue, Dodge *v.* Chandler, 13 Minn. 114. Admission of irrelevant question unless it appeared that complainant is prejudiced, Lynd *v.* Picket *et al.*, 7 Minn. 184; Thayer *v.* Barney, 12 Minn. 502. *Where new trial will be granted.*—Where amount of testimony improperly admitted was large, etc., Lowry *et al. v.* Harris *et al.*, 12 Minn. 255. Where written correspondence is the only competent evidence, and oral evidence submitted to jury, etc., Steele *et al. v.* Etheridge, 15 Minn. 501. Where plaintiff set up two distinct libels, and the damages not being apportionable, admission of incompetent evidence in support of one, Simmons *v.* Holster *et al.*, 13 Minn. 249. Where evidence is manifestly insufficient, State *v.* Armstrong, 10 Minn. 313.

Misdirection or omission of the court, new trial not granted, when.—Where no injury could result from instruction though erroneous, Blackman *v.* Wheaton, 13 Minn. 326; Shelly *et al. v.* Lash, 14 Minn. 498. Upon refusal to charge upon state of facts not disclosed by evidence, Sanborn *v.* School Dist. No. 10, Rice Co., 12 Minn. 17; Cowley *v.* Davidson, 13 Minn. 92. Erroneous charge upon point not necessary where no injury resulted, Ames *v.* St Paul & P. R. R. Co., 12 Minn. 412. Where jury passed upon questions of fact which had been withdrawn from their consideration by court, Dike *v.* Pool *et al.*, 15 Minn. 315. Where competent evidence is rejected and exception taken, and party excepting afterwards introduces evidence of same fact, Sanborn *v.* Sturtevant *et al.*, 17 Minn. 200. Where court refuses to charge and party sits quietly by, Roehl *v.* Baasen, 8 Minn. 26.

When new trial will be awarded.—Where verdict is general and passes upon more than one issue, an erroneous charge as to one reverses the whole, Whitacre *v.* Culver, 8 Minn. 133. Erroneous charge upon question of diligence, McLean *v.* Burbank, 11 Minn. 277.

Verdict not justified by the evidence.—New trial not awarded, when. Unless plainly contrary to the weight of evidence, Dixon *v.* Merritt *et al.*, 6 Minn. 160. Where any evidence before jury from which they could find as they did, Maroney *et al. v.* State, 8 Minn. 218. On ground of insufficiency, when, Groh *v.* Bassett, 7 Minn. 325; Heinlin *v.* Fish, 8 Minn. 70; Johnson *et ux. v.* W. & St P. R. R. Co., 11 Minn. 296; Tozer *et al. v.* Hershey, 15 Minn. 257; Eich *v.* Taylor, 17 Minn. 172; Carson *v.* Smith, 12 Minn. 546; Tuttle *v.* Howe, 14 Minn. 145; Spencer *v.* Tozer, 15 Minn. 146, considered in. When verdict is uncertain, State *v.* Coon, 18 Minn. 518.

Irregularity or misconduct of jury—Not awarded, when.—St Martin *v.* Desnoyer, 1 Minn. 156; State *v.* Dumphey, 4 Minn. 438; McNulty *v.* Stewart, 12 Minn. 434; Knowlton *v.* McMahon, 13 Minn. 386. Returning special verdict not carry all questions, when, Finch *v.* Green, 16 Minn. 355; Williams *v.* McGrade, 18 Minn. 82. *Awarded, when.*—Where after charge jury were permitted to go at large without officer, State *v.* Parrant, 16 Minn. 178, in which the question of drunkenness of juror is discussed.

On ground of surprise—Not awarded, when.—What is not surprise discussed, Beaulieau *v.* Parsons, 2 Minn. 37. Party leaving for home on advice of counsel, and not being present when case is reached, Desnoyer *v.* McDonald *et al.*, 4 Minn. 515. *Awarded when.*—In case of parol testimony to prove record erroneous, Shaw *v.* Henderson, 7 Minn. 480.

Newly discovered evidence—Not awarded, when.—Where contrary finding on one issue will not

alter the result, Sharp *v.* Traver *et al.*, 8 Minn. 273. Where result would not be changed, Mead *v.* Constants, 5 Minn. 171. In case of cumulative evidence, State *v.* Dumphey, 4 Minn. 438; Mead *v.* Constants, 5 Minn. 171; Mininger *v.* Knox *et al.*, 8 Minn. 140. Where by exercise of prudence it might have been discovered before trial, Knoblauch *v.* Kronschnabel, 18 Minn. 300. Affidavit that deponent is informed, and believe a certain individual will testify to a particular fact insufficient, Keough *v.* McNitt, 6 Minn. 513. Affidavit of witness himself must be produced, Fenner *et al. v.* Caldwell, 7 Minn. 225. *Awarded, when.*—Humphreys *et al. v.* Havens *et al.*, 9 Minn. 318.

In case of excessive damages.—Caldwell *v.* Eaton, 3 Minn. 134.

Variance between the pleadings and proof does not authorize granting of new trial, Short *v.* McRae *et al.*, 4 Minn. 119.

Delay in filing referee's report no ground for new trial, when, Leyde *v.* Martin *et al.*, 16 Minn. 38. Under proper statement of facts, court will not look behind findings of referee, etc., when, Cooper *v.* Breckenridge, 11 Minn. 341. Erroneous examination of witness, no ground, Dodge *v.* Chandler, 13 Minn. 114.

Motion for new trial, when made and how.—When after judgment, Eaton *v.* Caldwell, 3 Minn. 134. On trial by the court, Groh *v.* Bassett, 7 Minn. 325. After appeal, McArdle *v.* McArdle, 12 Minn. 122. Counter affidavits admissible, Finch *v.* Green, 16 Minn. 335. Time for making, Conklin *v.* Hinds, 16 Minn. 457.

Power of district court to grant a new trial inherent, McNamara *v.* Minn. Cen. R. Co., 12 Minn. 388. May be granted not only for error in law in ruling or charge, but for other reasons, Marsh *v.* Webber, 13 Minn. 109. Generally when new trial should be granted or denied, Bond *v.* Corbett, 2 Minn. 258; Cole *v.* Maxfield, 13 Minn. 235; Dow *v.* Mickley, 16 Minn. 20; Clague *v.* Hodgson, *ib.*, 329. New trial will not be granted when evidence is conflicting upon question of fact, Johnson *v.* Wallower, 18 Minn. 288. Nor where there was evidence reasonably tending to support verdict, Hinkle *v.* L. S. & Miss. R. R. Co., 18 Minn. 297.

SEC. 377 (236). *Application for new trial, how made.*—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.

Case to be made on appeal from trial by jury only, Morrison *et al. v.* March, 4 Minn. 422; Irvine *v.* Meyers *et al.*, 6 Minn. 558. Failure to take exception below, party deemed to have acquiesced in decision whether the error is assigned on a case or bill of exception, Roehl *et al. v.* Baasen, 8 Minn. 26. Appellant on bill of exceptions must show affirmatively the existence of error, Day *et al. v.* Raguet *et al.*, 14 Minn. 273. In bill of exceptions testimony must be given if objections are to be made to charge, State *v.* Taunt, 16 Minn. 109.

SEC. 378 (237, AS AMENDED BY ACT OF FEBRUARY 28, 1870). *Bill of exceptions, how served and settled.*—The party preparing a bill of exceptions or case shall, within twenty days after the trial, serve it upon the adverse party, who may within ten days after such service propose amendments thereto; and within fifteen days after service of such amendments, the same with the 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, or such further time as may be stipulated or granted, the same shall be deemed abandoned: *provided*, that whenever the judge who tried the cause shall die or become incapable of acting from sickness or other cause before a bill of exceptions is allowed or case made, or shall depart from and remain without the state at the time limited for the same allowance or settlement, the said bill may be allowed or case settled by or before the judge of an adjoining judicial district in which the action is pending, or in case a referee shall so die or become incapacitated or remain absent as herein set forth, such bill may be allowed or case settled by the judge of the district court in which such action is pending, and in either case such allowance or settlement shall be made upon the files in the cause, the minutes of the judge or

referee, if attainable, and upon such proof of what transpired at the trial, as may be presented by affidavit on behalf of the parties to the action with like effect in all respects as if such bill was allowed or case settled by the judge or referee who tried the cause. The case or bill being examined and found or made conformable to the truth shall be allowed and signed by the judge, referee, or other officer acting instead of such judge or referee as provided herein.

S. L. 1870, 141. Judge having settled the record of trial upon arguments of counsel cannot after examination and upon his own motion correct, etc., State *v.* Laliyer, 4 Minn. 379. Presumption in case, duly made and settled below, Teick *v.* Board of Coms. of Carver Co., 11 Minn. 292; State *v.* Brown, 12 Minn. 538.

TITLE XVII.

OF APPEALS.

(*This Title is Chapter LXXXVI. of the Statutes of* 1866.)

SEC. 379 (1). *Judgment or order may be removed to supreme court by appeal.*—A judgment or order, in a civil action, in any of the district courts, may be removed to the supreme court, by appeal, as provided in this chapter, and not otherwise.

An order of the district court granting new trial is discretionary, and not subject to review, Dufolt *v.* Gorman, 1 Minn. 307. Supreme court will not entertain a case and review a judgment of the district court, where it has been settled by the parties, Babcock *v.* Banning, 3 Minn. 191. Judgments or orders of district court only removed to supreme court by appeal or writ of error, Rathbun *v.* Moody, 4 Minn. 364. Statute gives an appeal from every order which passes upon and determines the positive legal rights of either party, Piper *v.* Johnston *et al.*, 12 Minn. 60. No appeal lies from order admitting or refusing evidence on trial, Hulett *v.* Matteson, 12 Minn. 349. Does not lie from an *ex parte* order made at chambers by district court judge, Schurmeier *v.* St P. & P. R. R. Co. *et al.*, *ib.* 351. Appeal from order granting new trial, great weight given to opinion of judge below, Hicks *v.* Stone *et al.*, 13 Minn. 434. Order or decision constituting part of the record need not be excepted to, to entitle appellant to have it reviewed, Ely *v.* Titus, 14 Minn. 125. Will lie from judgment of district in case removed to that court on appeal, when, Barker *v.* Walbridge, *ib.* 469. Will not lie from an order made on the trial of an action granting a motion for judgment, Rogers *v.* Holyoke, *ib.* 514. Nor from an order confirming costs, Minn. Valley R. R. Co. *v.* Flynn, *ib.* 552. Judgment sustained in case of default, when, Smith *v.* Dennett, 15 Minn. 81. From an order denying new trial upon report of referee, Bennett *v.* McGrade *et al.*, *ib.* 133. Ground for allowing certiorari after time for appeal had passed considered, State *v.* Milner, 16 Minn. 55. Where a question is *res adjudicata*, it will not be reviewed upon second appeal, when, Ayer *v.* Stewart *et al.*, *ib.* 89. Does not lie from an order made by district court dismissing an action before trial upon application of a party, Jones *v.* Rahilly, *ib.* 177. What is a waiver of plaintiff's right to appeal from an order granted in the alternative, Lamprey *v.* Henk, *ib.* 405. Decision of a justice will not be reviewed on appeal, unless objected to, Witherspoon *v.* Price, 17 Minn. 337.

SEC. 380 (2). *Title of action.*—The party appealing is known as the appellant, and the adverse party as the respondent; but the title of the action is not to be changed in consequence of the appeal.

SEC. 381 (3). *Appeal, how made.*—An appeal shall be made by the service of a notice in writing, on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. When a party gives in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect

the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just.

Appeal will not be dismissed because notice addressed to attorneys of the respondent, Baberick *v.* Magner, 9 Minn. 232.

SEC. 382 (4). *Clerk shall transmit papers to supreme court.*—Upon an appeal being perfected, the clerk shall transmit to the supreme court a certified copy of the judgment roll, or order appealed from, and the papers upon which the order was granted, at the expense of the appellant. When a case is made, or bill of exceptions allowed, it may, for the purpose of the appeal, stand in place of or be attached to the judgment roll, and certified to the appellate court as aforesaid.

Clerk shall send up record—what is part of, Claflin *v.* Lawler, 1 Minn. 297. Supreme court will entertain motion to correct the record, Daniels *v.* Winslow, 2 Minn. 113. Weight to be attached to the record, Day *et al. v.* Raguet *et al.*, 14 Minn. 273.

SEC. 383 (5). *Judgment in appellate court.*—Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all the property and rights lost by the erroneous judgment.

Supreme court will act upon only those questions raised below, Babcock *et al. v.* Sanborn *et al.*, 3 Minn. 141; Milwain *v.* Sanford, *ib.* 147; Emmett, C. J., dissents in both cases. Case not properly a part of the record, motion should be made to strike out the same, Mower *et al. v.* Hanford *et al.*, 6 Minn. 535. Case brought into supreme court on appeal remains until remittitur is issued, La Crosse and Minn. Packet Co. *v.* Reynolds, 12 Minn. 213.

SEC. 384 (6, AS AMENDED BY ACT OF FEBRUARY 22, 1869). *Time within which appeal may be taken.*—The appeal from a judgment hereafter rendered may be taken within six months after the entry thereof, and from an order within thirty days after written notice of the same.

S. L. 1869, 84; *vide* also 1868, 113. Writ of error issued more than one year after the date of a judgment will not bring it into supreme court for review, Gerish *et al. v.* Johnson, 5 Minn. 23. Time for bringing appeal dates from the entry of the order or judgment, Humphrey *et al. v.* Havens *et al.*, 9 Minn. 318.

SEC. 385 (7). *Appellant to furnish papers—appeal dismissed, when.*—The appellant shall furnish the court with copies of the notice of appeal, and of the order or judgment roll. If he fails to do so the appeal may be dismissed.

SEC. 386 (8, AS AMENDED BY ACT OF MARCH 1, 1867). *In what cases appeal may be taken.*—An appeal may be taken to the supreme court by the aggrieved party in the following cases:

First. From a judgment in an action commenced in the district court, or brought there from another court, from any judgment rendered in such court, and upon the appeal from such judgment the court may review any intermediate order involving the merits or necessarily affecting the judgment.

Second. From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve, an injunction, or an order vacating or sustaining an attachment.

Third. From an order involving the merits of the action, or some part thereof.

Fourth. From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer.

Fifth. From an order, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.

Sixth. From a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.

S. L. 1867, 107.

When an appeal will lie.—From an order of district court setting aside a sale upon execution and vacating sheriff's return thereon, etc., Tilman *et al. v.* Jackson, 1 Minn. 183. From an order setting aside a stipulation settling the issues to be tried and allowing an amendment to an answer, Bingham *v.* Supervisors of Winona Co., 6 Minn. 136. From an order striking out portions of an answer, Starbuck *v.* Dunklee, 9 Minn. 168; Kingsley *v.* Gilman, imp. 12 Minn. 515; Brisbin *v.* Amer. Ex. Co., 15 Minn. 43. Judgment set aside on ground of irregularity, order appealable, but when not, Barker *v.* Keith, 11 Minn. 65. From an order setting aside stipulation for dismissal of the action, Rogers *v.* Greenwood, 14 Minn. 333. From an order dismissing motion to compel satisfaction of judgment, Ives *v.* Phelps *et al.*, 16 Minn. 451. From an order striking out answer of *feme covert*, Wolfe *et ux. v.* Banning *et al.*, 3 Minn. 202. From an order made on demurrer to pleading, St P., Div. No. 1, S. of T., *v.* Brown *et al.*, 9 Minn. 151. From an order overruling demurrer though appellant in default, Hall *v.* Williams *et al.*, 13 Minn. 260. From an order denying a motion to set aside and vacate a judgment, Piper *v.* Johnston *et al.*, 12 Minn. 69. From an order involving the merits of an action, Holmes *et al. v.* Campbell, 13 Minn. 66. From order compelling entry of judgment after default, etc., Duell *v.* Hawke, 2 Minn. 50. From order setting aside or opening judgment, Marty *v.* Ahl, 5 Minn. 27. From motion denying opening of judgment entered by default, when, Swift *v.* Fletcher, 6 Minn. 550. From an order allowing issuance of execution after five years, Entrop *v.* Williams, 11 Minn. 381. In proceeding to condemn land for railroad purposes, where district court desires a new trial, Minn. V. R. R. Co. *v.* Doran, 15 Minn. 230. From an order vacating attachment, Davidson *v.* Owen *et al.*, 5 Minn. 69. From an order granting second trial to plaintiff in ejectment, Howes *v.* Gillett, 10 Minn. 397. From an order vacating appointment of receiver, Folsom *v.* Evans *et al.*, 5 Minn. 418. From an order denying peremptory mandamus, State *ex rel. v.* Churchill, 15 Minn. 455. From an order directing party to be imprisoned for contempt, Register *v.* State *ex rel.*, 8 Minn. 214. From order of district court reversing order of court commissioner discharging prisoner on *habeas corpus*, State *v.* Hill, 10 Minn. 63. From order vacating and quashing warrant of attachment, Humphrey *v.* Hezlep, 1 Minn. 239. From proceedings of street commissioner, Weller *v.* City of St Paul, 5 Minn. 95.

When appeal will not lie.—From an order admitting or refusing evidence on trial, Hulett *v.* Matteson, 12 Minn. 349. From interlocutory orders, Choteau *v.* Rice, 1 Minn. 24. From decision of judge on trial without jury, Van Glahn *v.* Summer, 11 Minn. 203. From an order granting motion for judgment, Lamb *v.* McCanna, 14 Minn. 513; Rogers *v.* Holyoke, *ib.* 514. From order opening judgment, when, Myrick *v.* Pierce, 5 Minn. 65; Groh *v.* Bassett, 7 Minn. 325; Merritt *v.* Putnam, *ib.* 493. From order refusing to entertain motion, Mayall *et al. v.* Burke *et al.*, 10 Minn. 285. From order granting motion for nonsuit, Hodgins *et al. v.* Heaney, 15 Minn. 185. From order overruling or sustaining demurrer, Cummings *v.* Heard, 2 Minn. 34. From motion to amend on ground of failure of proof, White *et al. v.* Culver, 10 Minn. 192. From order refusing to amend pleading, Fowler *et al. v.* Atkinson, 5 Minn. 505. From order allowing supplemental complaint, and refusing to dismiss garnishee, Prince *v.* Hendy, 5 Minn. 347. From order striking out portions of answer, Starbuck *v.* Dunklee, 12 Minn. 161; Brisbin *et al. v.* Amer. Ex. Co., 15 Minn. 43. From order denying motion for judgment on the pleadings, for insufficiency of facts, etc., McMahon *v.* Davidson, imp. 12 Minn. 357. From the granting or refusal of application to file case after time, Irvine *v.* Myers *et al.*, 6 Minn. 558. From an order for payment of costs on continuance, Fay *v.* Davidson, 13 Minn. 298. From *ex parte* order made by judge at chambers, Hoffman *v.* Mann, 11 Minn. 364. From assessment by county commissioners of damages in laying out road, when, Koenig *v.* County of Winona, 10 Minn. 238. From order appointing commissioners to assess damages caused by mill dam, Turner *et al. v.* Holleran *et al.*, 11 Minn. 253. From order granted on proceedings to determine compensation for right of way to railroad, McNamara *v.* Minn. Central R. R. Co., 12 Minn. 388. On behalf of state from judgment of district court in criminal case, State *v.* McGrorty, 2 Minn. 224. From acts of court commissioner, Gere *v.* Weed *et al.*, 3 Minn. 352; Pulver *v.* Grooves, *ib.* 359. Where justice is sued for not setting up a fee bill in his office and acquitted, Kennedy *v.* Raught, 6 Minn. 235. Question of when an appeal will lie in summary proceedings discussed and commented on, in Tierney *et al. v.* Dodge, 9 Minn. 166. Appeal will always lie when its allowance is clearly intended by statute Paddock *et al. v.* The Saint Croix Boom Corporation discussed, 8 Minn. 277. Will not lie from order made on the trial dismissing an action, Searles *v.* Thompson, 18 Minn. 316.

From a final order affecting a substantial right made in a special proceeding, Warren *v.* 1st Div. St P. & P. R. R. Co., 18 Minn. 384.

SEC. 387 (9). *Bond on appeal.*—To render an appeal effectual for any purpose, a bond shall be executed by the appellant, with at least two sureties, conditioned that the appellant will pay all costs and charges, which may be awarded against him on the appeal, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars, or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the judgment of the court of appeal; but such bond or deposit may be waived by a written consent on the part of the respondent.

SEC. 388 (10). *Effect of appeal.*—Such appeal when taken from an order, shall stay all proceedings thereon, and save all rights affected thereby, if the appellant, or some one in his behalf, as principal, executes a bond in such sum, and with such sureties as the judge making the order, or in case he can not act, the court commissioner or clerk of the court where the order is filed, directs and approves, conditioned to pay the costs of said appeal and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, which bond shall be filed in the office of said clerk.

Appeal from an order striking out portions of an answer operates as a *supersedeas*, Starbuck *v.* Dunklee, 12 Minn. 161.

An appeal from a judgment does not supersede proceedings taken prior to such appeal, Robertson *v.* Davidson, 14 Minn. 554.

SEC. 389 (11). *In what cases appeal is not a stay unless bond is executed.*—If the appeal is from a judgment, directing the payment of money, it does not stay the execution of the judgment, unless a bond is executed by the appellant, with at least two sureties, conditioned that if the judgment appealed from, or any part thereof is affirmed, the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the appellant upon the appeal.

SEC. 390 (12). *In what cases appeal is not a stay unless documents, etc., are brought into court, or bond given.*—If the judgment appealed from, directs the assignment or delivery of documents, or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver, as the court may appoint; or unless a bond is executed by the appellant, with at least two sureties, and in such amount as the court or judge thereof, may direct, conditioned that the appellant will obey the order of the appellant court, upon the appeal.

SEC. 391 (13). *Conveyance to be deposited with clerk, or appeal not a stay.*—If the judgment appealed from, directs the execution of a conveyance, or other instrument, the execution of the judgment is not stayed by the appeal, until the instrument is executed and deposited with the clerk, with whom the judgment is entered, to abide the judgment of the appellate court.

SEC. 392 (14). *If real property is to be sold, etc., appeal not a stay unless bond is given.*—If the judgment appealed from directs the sale or delivery of

possession of real property, the execution of the same is not stayed, unless a bond is executed on the part of the appellant, with two sureties, conditioned that during the possession of such property by the appellant, he will not commit or suffer to be committed, any waste thereon; and that if the judgment is affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal, until the delivery of the possession thereof, pursuant to the judgment.

SEC. 393 (15). *When appeal is perfected it stays proceedings—court below may proceed, how—may dispense with or limit security.*—Whenever an appeal is perfected, as provided by sections eleven, twelve, and fourteen, it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

Starbuck *v.* Dunklee, 12 Minn. 161; *supra* sec. 377.

SEC. 394 (16). *Judgment may be enforced notwithstanding appeal and security for stay has been given, when.*—In an action arising on contract for the recovery of money only, notwithstanding an appeal and security given for a stay of proceedings therein, if the respondent gives adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained in the manner hereinafter provided from the court below, proceed to enforce the judgment. Such security shall be a bond executed by the respondent or some one in his behalf, to the appellant, with at least two sufficient sureties, to the effect that if the judgment is reversed or modified, the respondent will make such restitution as the appellate court directs. Such leave shall only be granted upon motion and notice to the adverse party, and in case when it satisfactorily appears to the court that the appeal has been taken for the purpose of delay.

SEC. 395 (17). *Bonds may be in one instrument—how served.*—The bonds prescribed by sections nine, eleven, twelve, and fourteen, may be in one instrument, or several, at the option of the appellant; and a copy including the names and residences of the sureties, shall be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section nine, and notice thereof given.

SEC. 396 (18). *Bond of no effect unless sureties justify.*—A bond upon an appeal is of no effect, unless it is accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein; the adverse party may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal, and unless they or other sureties justify before a judge of the court below, as prescribed by law in other cases, within ten days thereafter, the appeal shall be regarded as if no such bond had been given; the justification shall be upon a notice of not less than five days.

SEC. 397 (19). *Court may order sale of perishable property, notwithstanding stay.*—In the cases not specified in sections eleven, twelve, thirteen, and fourteen, the perfecting of an appeal by giving the bond mentioned in section nine, stays proceedings in the court below, upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the pro-

perty to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

SEC. 398 (20). *Dismissal of appeal not to preclude party from taking another.* —No discontinuance, or dismissal of an appeal in the supreme court, shall preclude the party from taking another appeal in the same cause within the time limited by law.

In connection with this title, *vide* Act of March 5, 1868. S. L. 1868; S. L. 1868, 119, pt. v. of this compilation.