THE

GENERAL STATUTES

OF THE

STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated All General Laws of the State in Force December 31, 1894

COMPILED AND EDITED BY

HENRY B. WENZELL, Assisted by EUGENE F. LANE

WITH ANNOTATIONS BY

FRANCIS B. TIFFANY and Others

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CHAPTER 66.

CIVIL ACTIONS.

TITLE 1.

OF THE FORM OF CIVIL ACTIONS.

§ 5131. Forms of actions abolished—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.

(G. S. 1866, c. 66, § 1; G. S. 1878, c. 66, § 1.)

The same court possesses both law and equity jurisdiction, and hence is competent to take cognizance alike of legal and equitable rights, and to administer legal remedies, or grant equitable relief, or do both, according as the nature of the case may require, and as may be permitted by the statute. First Div. St. Paul & Pac. R. Co. v. Rice, 25 Minn. 278, 292. See, also, Holmes v. Campbell, 12 Minn. 221, (Gil. 141, 149.)

The distinction in the forms of actions, that is, in the modes of commencing them, in the number, names, and forms of the pleadings, and in those matters of practice necessary for presenting causes to the court for its determination, and for enforcing such determination, can be and has been abolished. The distinction in the mode of trial, or rather in the tribunal which may try causes, is substantially preserved by §§ 5341–5343. Berkey v. Judd, 14 Minn. 394, (Gil. 300, 302.)

This provision effects no change whatever concerning the nature of the demand that might be pleaded, to bar or reduce a recovery by the plaintiff from the law as it existed before the passage of the act. Folsom v. Carli, 6 Minn. 420, (Gil. 284, 288.)

An election contest, under c. 1, G. S. 1866, is not a "civil action," but is a special proceeding. Ford v. Wright, 13 Minn. 518, (Gil. 480.)

§ 5132. Parties, how styled.

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

(G. S. 1866, c. 66, § 2; G. S. 1878, c. 66, § 2.)

TITLE 2.

THE TIME OF COMMENCING ACTIONS.

§ 5133. 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.

(G. S. 1866, c. 66, § 3; G. S. 1878, c. 66, § 3.)

The statute of limitations of this state runs only from the time the party to be charged comes within the jurisdiction. Hoyt v. McNeil, 13 Minn. 390, (Gil. 362.)

The statute of limitations in this state controls in actions brought here, except that in an action against a person by one not a citizen of this state, or a citizen who has not had the cause of action ever since it accrued, the defendant may avail himself of the law of limitations of the state or country in which the cause of action arose, if it be more favorable to him than our own. Fletcher v. Spaulding, 9 Minn. 64, (Gil. 54.)

The statute of limitations has no application in the case of an express trust, where there has been no denial of the trust. Bostwick v. Dickson, (Wis.) 26 N. W. Rep. 549.

A claim for interest is barred after the expiration of the period limited for recovering the principal. Jones v. Orton, (Wis.) 26 N. W. Rep. 172.

In an action against two, on a joint contract, judgment may be recovered against one, though as to the other the action is barred by the statute. Town v. Washburn, 14 Minn. 268, (Gil. 199.)

When the right of action against the principal debtor is barred, the surety is discharged, although, by reason of the latter's change of residence, the statute would not be a bar as against him had he been a principal debtor. Auchanpaugh v. Schmidt, (Iowa,) 27 N. W. Rep. 805.

For a discussion of the statute of limitations in relation to the various actions, see note to Bradley v. Cole, (Iowa,) 25 N. W. Rep. 851–864.

On dismissal of an action, the court has no power to authorize the bringing of a new action after the period limited. Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. Rep. 67.

§§ 5133–5141 were intended to include every case of an action by a private person. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, 396, 48 N. W. Rep. 17.

§ 5134. Actions to recover real property.

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 fifteen years before the commencement of the action. The periods prescribed in the preceding section for the commencement of actions, are as follows.

(G. S. 1866, c. 66, § 4; G. S. 1878, c. 66, § 4; as amended 1889, c. 91, § 1.)

By § 2, Laws 1889, c. 91, is not to affect any pending action or proceeding. In effect January 1, 1891.

See chapter 75.

The language "seized or possessed" is not to be construed to mean that seizin may be complete without possession, actual or constructive, so as to prevent the statute running in favor of an actual adverse occupant, though a stranger to the legal title. Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. Rep. 495.

By analogy, 20 years' uninterrupted, adverse enjoyment are necessary to the acquirement of an easement by prescription. Mueller v. Fruen, 36 Minn. 273, 30 N. W. Rep. 886.

Where privity exists between several successive adverse holders, the several periods during which they have held may be tacked together to make out the statutory period. Sherin v. Brackett, 36 Minn. 152, 30 N. W Rep. 551. To be adverse, possession must be actual, open, hostile, continuous, exclusive, and accompanied by an intention to claim adversely. Id.

The period need not be the statutory one next before the action was commenced. If the title becomes complete, it is not lost by subsequent interruption of possession except for such length of time as would create title. Dean v. Goddard, (Minn.) 56 N. W. Rep. 1060.

The intention with which possession is held constitutes the essence of adverse possession. Youngs v. Cunningham, (Mich.) 23 N. W. Rep. 626.

Whether, in order to gain title by adverse possession, the entry must be made by one in the *bona fide* belief that he has title, see Watts v. Owens, (Wis.) 22 N. W. Rep. 720.

As to adverse possession between mortgagor and mortgagee, see Hodgdon v. Heidman, (Iowa,) 24 N. W. Rep. 257; McKeighan v. Hopkins, (Neb.) 26 N. W. Rep. 614.

See, further, as to when possession is adverse, Heinricks v. Terrell, (Iowa,) 21 N. W. Rep. 171; Brett v. Farr, (Iowa,) 24 N. W. Rep. 275; Donahue v. Lannan, (Iowa,) 30 N. W. Rep. 8.

See, also, O'Brien v. City of St. Paul, 18 Minn. 183, (Gil. 167;) City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, 398, 48 N. W. Rep. 17.

§ 5135. Actions upon judgments or decrees.

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.

(G. S. 1866, c. 66, § 5; G. S. 1878, c. 66, § 5.)

Chapter 20, Laws 1865, bringing within the limitation of six years for commencing actions, judgments or decrees in the courts of any other state, was retrospective, but nevertheless constitutional. Stine v. Bennett, 13 Minn. 153, (Gil. 138.)

A judgment was recovered in 1840, when the time limited by the statute for commencing actions on such judgments was 20 years. In 1849 the statute was amended, limiting the time to six years. The Revised Statutes fix the limitation at 10 years. Held, that the Revised Statutes applied to the judgment, and that the time which had run under former statutes was to be computed as a part of the 10 years. Holcombe v. Tracy, 2 Minn. 241, (Gil. 201.)

Statutes of limitation may apply to existing demands, if a reasonable time be allowed for commencing actions thereon. Id.

An action on a judgment commenced within 10 years from its rendition may be continued after the expiration of such 10 years. Sandwich Manuf'g Co. v. Earl (Minn.) 57 N. W. Rep. 938.

See Pine County v. Lambert (Minn.) 58 N. W. Rep. 990.

§ 5136. 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.*

Seventh. Actions to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same.

(G. S. 1866, c. 66, § 6, as amended 1877, c. 24, § 1; G. S. 1878, c. 66, § 6.)

*As to actions to set aside judgments for fraud, see § 5434.

See note to § 5134, and Brown v. Brown, 28 Minn. 501, 11 N. W. Rep. 64.

SUBD. 1. Where the right of action depends upon making a demand, if the demand is not made within the period prescribed by the statute, it is not made within a reasonable time, and the right of action is barred. Ball v. Railroad Co., (Iowa,) 16 N. W. Rep. 592.

An action to foreclose a mortgage does not come within the operation of this subdivision. Ozmun v. Reynolds, 11 Minn. 459, (Gil. 341.)

An action for an accounting between partners comes under this subdivision. McClung v. Capehart, 24 Minn. 19.

Where, upon the foreclosure under the power of the first of two mortgages on the same real estate to different mortgagees, the owner of the land demanded and received from the sheriff making the sale the surplus of the money made on the foreclosure over what was due on the mortgage foreclosed, and costs, and eight years afterwards the second mortgagee sued the owner for the surplus so paid to him, held, the right of action was barred by lapse of time. Ayer v. Stewart, 14 Minn. 97, (Gil. 68.)

As to a claim for wages, part of which became due more than six years before suit, see Butler v. Kirby, (Wis.) 10 N. W. Rep. 373.

An action to compel specific performance of a contract for sale of real estate comes within this section. Lewis v. Prendergast, 39 Minn. 301, 39 N. W. Rep. 802.

In an action to foreclose a mortgage, the right to personal judgment for the debt is

subject to the limitation of this section, and not to the 15-years limitation of § 5141. Slingerland v. Sherer, 46 Minn. 423, 49 N. W. Rep. 237.

See Blakeley v. Le Duc, 22 Minn. 476.

SUBD. 2. See County of Redwood v. Winona & St. P. L. Co., 40 Minn. 512, 41 N. W. Rep. 465, and Pine County v. Lambert, cited in note to § 5142; Merchants' Nat. Bank v. Northwestern Manuf'g & Car Co., cited in note to § 5137; Easton v. Sorenson, 53 Minn. 309, 55 N. W. Rep. 128.

SUBD. 3. See Drake v. Railroad Co., (Iowa,) 19 N. W. Rep. 215; National Copper Co. v. Minnesota Min. Co., (Mich.) 23 N. W. Rep. 781.

SUBD. 6. Where there has been a fraudulent conversion, the time limited for the commencement of an action is to be counted from the discovery of the fraud. Commissioners of Mower County v. Smith, 22 Minn. 97.

In an action for relief on the ground of fraud, constructive notice alone of the facts constituting it, such as the record of a deed in the register's office, is insufficient to set in motion the statute of limitations. Berkey v. Judd, 22 Minn. 288.

But it has been held that the record of a deed given in fraud of creditors is a discovery to them of the fraud. Laird v. Kilbourne, (Iowa,) 30 N. W. Rep. 9.

An action to remove a cloud upon title held not barred by the general statute of limitations, as an action for relief on the ground of fraud. Bausman v. Kelley, 38 Minn 197, 36 N. W. Rep. 333.

See Cock v. Van Etten, 12 Minn. 522, (Gil. 431;) O'Dell v. Burnham, (Wis.) 21 N. W. Rep. 635.

The limitation of actions "for relief on the ground of fraud" embraces both legal and equitable actions. Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. Rep. 67.

Plaintiff, claiming the benefit of the suspension of the statute until discovery, must plead in his complaint the facts in relation to the discovery. Id.; Morrill v. Little Falls Manuf'g Co., 53 Minn. 371, 55 N. W. Rep. 547.

In a suit by heirs to claim the benefit of a purchase of their ancestor's estate secretly made by the administrator, the limitation begins to run on the discovery of the fraud. Lewis v. Welch, 47 Minn. 193, 48 N. W. Rep. 608, and 49 N. W. Rep. 665.

SUBD. 6 applies to an action based on legal fraud involved in the refusal of a person who has become invested with the legal title to lands to convey them to the real owner or to account for the proceeds. St. Paul, S. & T. F. Ry. Co. v. Sage, 1 C. C. A. 256, 49 Fed. Rep. 315. See Id., 44 Fed. Rep. 817. See Jones v. Van Doren, 130 U. S. 684, 9 Sup. Ct. Rep. 685.

SUBD. 7. See Burk v. Western Land Ass'n, 40 Minn. 506, 507, 42 N. W Rep. 479.

The statute does not run against the trustee of an express trust so long as the trust relation is not repudiated. Smith v. Glover, 44 Minn. 260, 46 N. W. Rep. 406.

The statute followed in the federal court. Naddo v. Bardon, 47 Fed. Rep. 782.

§ 5137. Actions against certain officers, or for a penalty.

Within three years:

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

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

(G. S. 1866, c. 66, § 7; G. S. 1878, c. 66, § 7.)

See Litchfield v. McDonald, 35 Minn. 167, 28 N. W. Rep. 191.

An action by a creditor of an insolvent corporation against its directors to enforce the liability created by § 2825 is governed by this section. Merchants' Nat. Bank v. Northwestern Manuf'g & Car Co., 48 Minn. 349, 51 N. W. Rep. 117.

§ 5138. 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.

(G. S. 1866, c. 66, § 8; G. S. 1878, c. 66, § 8.)

See, as to repetition of slander, Jean v. Henness, (Iowa,) 28 N. W. Rep. 645.

SUBD. 2. See Merchants' Nat. Bank v. Northwestern Manuf'g & Car Co., 48 Minn. 349, 51 N. W. Rep. 117.

§ 5139. 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.

(G. S. 1866, c. 66, § 9; G. S. 1878, c. 66, § 9.)

The construction to be given to this provision is that the statute of limitations will commence to run from the date of the last item, and not that no interest shall be allowed on any item from a date anterior thereto. Taylor v. Parker, 17 Minn. 469, (Gil. 447.)

Accounts between parties held to have been open, mutual, and running, with reciprocal or cross-demands existing, each against the other, and this section applicable thereto; distinguishing Leyde v. Martin, 16 Minn. 38, (Gil. 24.) Id.

See Fitzpatrick v. Henry, (Wis.) 16 N. W. Rep. 606; Keller v. Jackson, (Iowa,) 12 N. W. Rep. 618.

An account consisting of items for goods sold and payments made at various dates does not fall within this section. Cousins v. St. Paul, M. & M. Ry. Co., 43 Minn. 219, 45 N. W. Rep. 429.

§ 5140. 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 offence; 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 offence was committed.

(G. S. 1866, c. 66, § 10; G. S. 1878, c. 66, § 10.)

See Merchants' Nat. Bank v. Northwestern Manuf'g & Car Co., 48 Minn. 349, 51 N. W. Rep. 117.

§ 5141. Action to foreclose mortgage.

Every action to foreclose a mortgage heretofore or hereafter made upon real estate shall be commenced within fifteen years after the cause of action occurs, and said fifteen years shall not be enlarged or extended by reason of any nonresidence.

(G. S. 1866, c. 66, § 11, as amended 1870, c. 60, § 1; G. S. 1878, c. 66, § 11; 1887, c. 69.)

This provision does not apply to the foreclosure of a mortgage under a power of sale. Golcher v. Brisbin, 20 Minn. 453, (Gil. 407.)

The statute may be a bar to an action upon the note secured by a mortgage, and not a bar to a foreclosure of the mortgage. Cerney v. Pawlot, (Wis.) 28 N. W. Rep. 183. And see as to the enforcement of the lien of a mortgage, after the debt is barred, Conner v. Howe, 35 Minn. 518, 29 N. W. Rep. 314.

The time within which an action to redeem must, as a general rule, be brought, is, in analogy to the statute limiting the time for commencing an action to foreclose, 10 years; and the time for the mortgagor to bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his action to foreclose after the 10 years. Parsons v. Noggle, 23 Minn. 328. Until the right to foreclose expires, the right to redeem exists. When the former is barred the latter is also. King v. Meighen, 20 Minn. 264, (Gil. 237.) To same effect, Holton v. Meighen, 15 Minn. 80, (Gil. 58.)

See Ayer v. Stewart, cited in note to § 5136, subd. 1, and Whalley v. Eldridge, 24 Minn. 358.

Right of action to redeem held barred in 10 years after entry of purchaser at an abortive foreclosure sale by advertisement, as mortgagee in possession. Rogers v. Benton, 39 Minn. 39, 38 N. W. Rep. 765.

Temporary interruption of the mortgagee's occupancy held not to enlarge the time to redeem. Id.

The right to personal judgment for the debt is subject to § 5136. Slingerland v. Sherer, 46 Minn. 423, 49 N. W. Rep. 237.

A partial payment prevents the statute from running against the remedy on the mortgage security as well as against the debt. Carson v. Cochran, 52 Minn. 67, 53 N. W. Rep. 1130.

A purchaser from the mortgagor with notice of the mortgage will be bound by any previous acknowledgment of the debt by his grantor. Id.

Under Laws 1887, c. 69, the statute applies to nonresident as well as resident defendants, and also to mortgages executed before its passage. The act is constitutional. Hill v. Townley, 45 Minn. 167, 47 N. W. Rep. 653.

§ 5142. Limitations apply to actions 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.

(G. S. 1866, c. 66, § 12; G. S. 1878, c. 66, § 12.)

The six-years limitation of actions "upon a liability created by statute" held applicable to proceedings to enforce payment of delinquent taxes on real estate. County of Redwood v. Winona & St. P. Land Co., 40 Minn. 512, 41 N. W. Rep. 465, overruling County of Brown v. Winona & St. P Land Co., 38 Minn. 397, 37 N. W. Rep. 949.

See, also, Pine Co. v. Lambert (Minn.) 58 N. W. Rep. 990.

The statutes of limitation under this section and Laws 1881, Ex. S. c. 24, § 1 (§ 5155), are applicable to actions brought by the state or a municipal corporation, whether brought in a "sovereign capacity" or in a proprietary capacity. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, 48 N. W. Rep. 17.

§ 5143. Action, when deemed commenced and pending.

An action is commenced as to each defendant, when the summons is served on him, or on a codefendant 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.

(G. S. 1866, c. 66, § 13; G. S. 1878, c. 66, § 13.)

Applied, Hooper v. Farwell, 3 Minn. 106, (Gil. 58;) Blackman v. Wheaton, 13 Minn. 332, (Gil. 304:) Bartleson v. Thompson, 30 Minn. 163, 14 N. W. Rep. 795.

After a judgment is reversed, and the cause is remanded, the action is pending until it is disposed of. Capehart v. Van Campen, 10 Minn. 158, (Gil. 127.)

Where a judgment has been recovered in the district court by a party deceased since its recovery, if the judgment has not been satisfied or extinguished in any way, the action in which it was recovered is pending. Notwithstanding the death of the party recovering it, as the action is pending and does not abate, if the administrator of the deceased desires to have execution issued, he may move the court in which the action is pending to allow it to be continued in his name as that of the representative of the deceased. His motion having been granted, he becomes a party to the action in place of the deceased, and may thereupon have execution. Lough v. Pitman, 25 Minn. 121.

As to the effect of the death of the defendant pending the publication of the summons, on the pendency of the action, see Auerbach v. Maynard, 26 Minn. 421, 4 N. W. Rep. 816.

§ 5144. 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 publication of the summons, or the service thereof, within sixty days.

(G. S. 1866, c. 66, § 14; G. S. 1878, c. 66, § 14.)

Cited, Blackman v. Wheaton, 13 Minn. 332, (Gil. 304.)

An attempt to commence an action, under this section, is equivalent to a commencement by service of summons, when the attempt is, within 60 days, followed by the first publication of a summons, which is published for six consecutive weeks, as provided in § 5205 of the same chapter. Auerbach v. Maynard, 26 Minn. 421, 4 N. W. Rep. 816.

§ 5145. Effect of absence from the state.

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.

(G. S. 1866, c. 66, § 15; G. S. 1878, c. 66, § 15.)

This section is applicable to an action to foreclose a mortgage. Whalley v. Eldridge, 24 Minn. 358.

The departure from and residence out of the state, suspending the operation of the statute, must be an actual and *bona fide* change of domicile and place of abode, and not a mere temporary or occasional absence. Venable v. Paulding, 19 Minn. 488. (Gil. 422.)

September 27, 1860, defendant, in an action for specific performance, executed his bond for the conveyance of certain land to the assignor of plaintiff, on payment of the unpaid portion of the purchase price thereof at a date named one year thereafter. Bond and notes for purchase money were executed in this state, but no place of payment was designated. After the execution of the bond, defendant resided in North Carolina, and for more than eleven years, and until October, 1872, no tender of the purchase money was made. The obligee in the bond was in the mean time in possession of the land, paying taxes, ready to pay the residue. Defendant acquiesced in the delivery by removing out of the state, demanding no payment, tendering no deed, and giving no notice of any intention to terminate the contract. Held that, so far as the mere right to commence the action for the specific performance was concerned, defendant would be presumed to come within the operation of this section, and that, as it did not appear that plaintiff had any opportunity to tender payment before October 3, 1872, the plaintiff was entitled, so far as the matter of tender was concerned, to a specific performance of the contract to convey. Gill v. Bradley, 21 Minn. 15.

See Parsons v. Noggle, cited in note to § 5141, and Town v. Washburn, cited in note to § 5133. See, also, Wilkinson v. Winne, 15 Minn. 159, (Gil. 123;) Duke v. Balme, 16 Minn. 312, (Gil. 276;) Hoyt v. McNeil, 13 Minn. 390, (Gil. 362.)

The defendant having been a nonresident, the action held not barred. Smith v. Glover, 44 Minn. 260, 46 N. W. Rep. 406.

See Foster v. Johnson, 44 Minn. 290, 46 N. W. Rep. 350.

Formerly it was held that this section was applicable to an action to foreclose a mortgage. Whalley v. Eldridge, 24 Minn. 358. See Rogers v. Benton, 39 Minn. 39, 42, 38 N. W. Rep. 765. But the rule was changed by Laws 1887, c. 69. (See § 5141.) Hill v. Townley, 45 Minn. 167, 47 N. W. Rep. 653.

The exception as to nonresidents does not apply to actions for recovery of real property (specified in § 5134), but only to cases where the time to commence suit begins to run when the cause of action against the defendant accrues. City of St. Paul v. Chicago, M. & St. P. Ry. Co., 45 Minn. 387, 48 N. W. Rep. 17; St. Paul, M. & M. Ry. Co. v. City of Minneapolis, 45 Minn. 409, 48 N. W. Rep. 22; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. Rep. 322.

See O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. Rep. 543; Carson v. Cochran, 52 Minn. 67, 53 N. W. Rep. 1130.

Where a United States senator, during the sessions of congress, lived in Washington, and, between the sessions of congress returned to Minnesota, held, upon the facts, that he did not reside out of the state, so as to prevent the running of the statute. Kerwin v. Sabin, 50 Minn. 320, 52 N. W Rep. 642.

§ 5146. Limitation, when cause of action accrues out of the state.

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.

(G. S. 1866, c. 66, § 16; G. S. 1878, c. 66, § 16.)

The general rule is that the time of limitation of actions on contract depends on the law of the place where the action is brought. Bigelow v. Ames, 18 Minn. 527, (Gil. 471.)

The statute does not begin to run in favor of the party to be charged until he comes within the jurisdiction. Ruggles v. Keeler, 3 Johns. 263, 1 Pars. Cont. 96; Olcott v. Tioga R. Co., 20 N. Y. 210; Hoyt v. McNeil, 13 Minn. 390, (Gil. 362, 364.)

See Fletcher v. Spaulding, cited in note to § 5133.

Where a cause of action not arising in this state, nor accruing to a citizen thereof, has come under the limitation law of another state, and continued under its operation until it became a bar, such limitation will be recognized here as a bar. Luce v. Clarke, 49 Minn. 356, 51 N. W. Rep. 1162.

See O'Mulcahey v. Gragg, 45 Minn. 112, 114, 47 N. W. Rep. 543.

§ 5147. 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 com-

mencement 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.

(G. S. 1866, c. 66, § 17, as amended 1869, c. 60, § 1; G. S. 1878, c. 66, § 17.)

Prior to the amendment of 1869, striking out subdivision fourth, a married woman was within the express terms of this section, and was entitled to avail herself of the exception therein provided. Burke v. Beveridge, 15 Minn. 205, (Gil. 160.)

See Finch v. Green, 16 Minn. 355, (Gil. 315, 322.)

§ 5148. Effect of death of party.

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.

(G. S. 1866, c. 66, § 18; G. S. 1878, c. 66, § 18.)

See Wilkinson v. Estate of Winne, 15 Minn. 159 (Gil. 123); Rogers v Benton, 39 Minn. 39, 45, 38 N. W. Rep. 765. §§ 5148 and 5149 may be construed together, and effect given to both. St. Paul Trust Co. v. Sargent, 44 Minn. 449, 47 N. W. Rep. 51.

This section does not apply to a suit to foreclose a mortgage, and delay in appointing an administrator is no excuse for failure to bring the suit in time. Hill v. Townley, 45 Minn. 167, 47 N. W Rep. 653.

§ 5149. Same—Period between death of party and granting of letters.

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.

(G. S. 1866, c. 66, § 19; G. S. 1878, c. 66, § 19.)

See St. Paul Trust Co. v. Sargent, cited in note to § 5148.

§ 5150. Period of war not included, when.

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.

(G. S. 1866, c. 66, § 20; G. S. 1878, c. 66, § 20.)

§ 5151. 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.

(G. S. 1866, c. 66, § 21; G. S. 1878, c. 66, § 21.)

See Davidson v. Fisher, 41 Minn. 363, 43 N. W. Rep. 79.

§ 5152. Disability available, when.

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

(G. S. 1866, c. 66, § 22; G. S. 1878, c. 66, § 22.)

§ 5153. Two or more co-existing disabilities.

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.

(G. S. 1866, c. 66, § 23; G. S. 1878, c. 66, § 23.)

§ 5154. Evidence of new promise 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 there-

by; but this section shall not alter the effect of any payment of principal or interest.

(G. S. 1866, c. 66, § 24; G. S. 1878, c. 66, § 24.)

A conditional promise will not, unless the condition is performed, take a debt out of the operation of the statute. McNab v. Stewart, 12 Minn. 407, (Gil. 291.)

An offer to compromise will not postpone the bar of the statute. Brenneman v. Edwards, (Iowa,) 7 N. W. Rep. 621.

S. held three promissory notes against M. Held, that a general acknowledgment by M. of indebtedness to S., not mentioning any of the notes, cannot be held as evidence of a promise to pay any one of them, and does not take any one of them out of the operation of the statute. Smith v. Moulton, 12 Minn. 352, (Gil. 229.)

R. & H. were indebted to W. S. & Co. on two promissory notes, and gave them a writing as follows: "Gentlemen: You are hereby authorized to compromise with Charles Hoyt, Esq., for his acceptance, dated May 11, 1846, for $394.94, which you now hold as collateral on our debt. We hereby agree that the balance of said draft, and interest, shall be charged against us. R. & H." Held not a promise to pay the notes, that will take them out of the operation of the statute. Whitney v. Reese, 11 Minn. 138, (Gil. 87.)

Where the records of a school-district showed that at a certain district meeting one S., who had a claim against the district, in response to a motion of the meeting, submitted a proposition in writing agreeing to accept a certain sum in full satisfaction thereof, and upon a vote by ballot being had a majority of the voters voted to accept the proposition, and at a subsequent meeting it was voted that the directors be directed to draw the money, in the county treasury, and pay it to S. to apply on the indebtedness of the district, held, that such action was both an acknowledgment and promise sufficient to take such claim out of the statute; that the record thereof was sufficient memorandum, within the meaning of the section; and that the action of the district could not be rescinded so as to bring the claim again within the statute. Sanborn v. School-Dist. No. 10, Rice Co., 12 Minn. 17, (Gil. 1.)

Sufficiency of acknowledgment, see Bayliss v. Street, (Iowa,) 2 N. W. Rep. 437; Pierce v. Seymour, (Wis.) 9 N. W. Rep. 71.

After the adoption of this section, § 7515 did not save the operation of § 24, c. 60, Comp. St., upon a payment, to take a case out of the statute of limitations, the full time not having run; but this section applied to the case. Brisbin v. Farmer, 16 Minn. 215. (Gil. 187.)

A payment in full settlement and satisfaction does not operate to take a cause of action out of the operation of the statute. Conway v. Wharton, 13 Minn. 158, (Gil. 145.)

A payment before the debt is barred by the statute, made by one joint debtor, revives the debt as to all the joint debtors, even though the debtor paying is principal debtor and the others sureties, and the payment is made without their knowledge or consent. Whitaker v. Rice, 9 Minn. 13, (Gil. 1.)

Where one of the conditions of a loan made upon real property, and the transfer of the legal title thereto as security, is that it may stand as long as the borrower may desire, upon the annual interest being kept paid up, each successive annual payment and receipt of the interest operates as a renewal of the agreement, and keeps alive both the right of foreclosure and of redemption, as against the statute of limitations. Fisk v. Stewart, 24 Minn. 97.

An indorsement signed by the debtor on a note, after it has become barred, acknowledging the indebtedness, takes the note out of the statute. Drake v. Sigafoos, 39 Minn. 367, 40 N. W Rep 257.

A statement of account, unless evidenced by some writing signed by the party to be charged, will not prevent the running of the statute against previously existing liabilities included therein. Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. Rep. 829.

An entry of credit in an account for the amount then claimed by the debtor to have been previously paid by him, held not a part payment at the date of the entry, so as to prevent the statute from running. Id.

See Willoughby v. Irish, 35 Minn. 63, 27 N. W. Rep. 379.

§ 5155. Reversal on appeal—New action—Application of title to corporations.

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. That all the provisions of this title as to the time of the commencement of civil actions shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons.

(G. S. 1866, c. 66, § 25; G. S. 1878, c. 66, § 25; as amended 1881, Ex. S. c. 24, § 1.)

See City of St. Paul v. Chicago, M. & St. P. Ry. Co., cited in note to § 5142.

TITLE 3.

THE PARTIES TO CIVIL ACTIONS.

§ 5156. Real party in interest — Assignment of causes of action.

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.

(G. S. 1866, c. 66, § 26; G. S. 1878, c. 66, § 26.)

A receiver of partnership property, appointed in an action to dissolve the partnership, with authority to bring suits to collect debts due the firm, may maintain such actions in his own name. Henning v. Raymond, 35 Minn. 303, 29 N. W. Rep. 132.

One tenant in common of personal property may maintain an action against a stranger for a wrong done to it, if his co-tenants refuse to join, and they are non-residents of, and are out of, the state. Peck v. McLean, 36 Minn. 228, 30 N. W. Rep. 759.

Upon a policy of life insurance, payable to "their children for their use, or to their guardian if under age," the children, if under age, may bring the action by their guardian *ad litem*. Price v. Phœnix Mut. Life Ins. Co., 17 Minn. 497, (Gil. 473.)

A mechanic's lien may be assigned, and the assignee may enforce it in his own name. Tuttle v. Howe, 14 Minn. 145, (Gil. 113.)

A voluntary assignee, holding title to property under a general assignment for the benefit of creditors, may maintain an action in respect to such property in his own name, without joining the creditors, and without disclosing the representative character in which he sues. Langdon v. Thompson, 25 Minn. 509.

A firm may assign to a third person a claim held by it against one of the partners, for services rendered by it to him, and such assignee may maintain an action at law, in his own name, against the debtor partner, to recover the claim. Russell v. Minnesota Outfit, 1 Minn. 162, (Gil. 137.)

A pledgee may sue in his own name upon a promissory note payable to order, though it is not indorsed to him. White v. Phelps, 14 Minn. 27, (Gil. 21.)

A promissory note, payable to order, may be transferred without indorsement, so that the transferee may maintain suit on it in his own name. Pease v. Rush, 2 Minn. 107, (Gil. 89.)

One to whom promissory notes are assigned upon the agreement that, if paid to him, he will, with the proceeds, satisfy a debt due from the assignor to him, and pay the remainder to the assignor, is the proper plaintiff, in a suit on the notes, and need not join his assignor. Castner v. Austin, 2 Minn. 44, (Gil. 32.)

An indorsement on a note, "Pay to A. B., or order, for collection," and signed by the payee or owner of the note, merely makes the indorsee agent for the indorser to collect the note, but does not vest in him such title as to make him a proper party plaintiff in a suit on it. Rock County Bank v. Hollister, 21 Minn. 385; followed in Third Nat. Bank v. Clark, 23 Minn. 263.

The payee of a bill of exchange may sue the acceptor in his own name, though the bill was really given him for collection. Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. Rep. 555.

See Elmquist v. Markoe, 45 Minn. 305, 47 N. W. Rep. 970; Minnesota Thresher Manuf'g Co. v. Heipler, 49 Minn. 395, 52 N. W. Rep. 33.

The assignee of a chose in action in trust for another may sue. Anderson v. Reardon, 46 Minn. 185, 48 N. W. Rep. 777.

As to the right to a set-off against the beneficial owner. Felsenthal v. Hawks, 50 Minn. 178, 52 N. W. Rep. 528.

Before the passage of the Revised Statutes, a written agreement to cut and split rails, and deliver them to a bearer, was not negotiable, and as it was not assignable by the statute in force when it was made, the assignee could not maintain an action at law on it. Spencer v. Woodbury, 1 Minn. 105, (Gil. 82.)

Where the cause of action, as stated in the complaint, relates to property and property rights belonging to a corporation as the absolute owner, vested with the legal title, such corporation is the real party in interest to prosecute the action. It is no defense to such an action that another party has become the owner "of the sole beneficial interest in the rights, property, and immunities" of the corporation, and an averment of that character in the answer may properly be stricken out, on motion, as immaterial and irrelevant. Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 23 Minn. 359.

The debtor of an assignor, when sued for the debt by the assignee, cannot allege that the assignment was fraudulent as to creditors. Rohrer v. Turrill, 4 Minn. 407, (Gil. 309.) If an officer has process in his hands, valid upon its face, and levies upon notes which have been assigned by the judgment debtor, for the purpose of defrauding his creditors, and upon the levy the officer takes the notes into his possession, he can, under

the statute, maintain an action on them and collect them, and the assignee cannot sue upon them. Id.

The assignee of a cause of action *pendente lite* becomes the real party in interest, and may sue in his own name on an appeal-bond given by defendant after the assignment, though such bond runs to, and the action continues to be prosecuted in the name of, the original plaintiff. Bennett v. McGrade, 15 Minn. 132, (Gil. 99.)

Upon the transfer of a cause of action *pendente lite*, the assignee must further prosecute the action, but it may be continued in the name of the original plaintiff; but, until the transfer is brought to the notice of the court, the parties to the record are *prima facie* entitled to proceed. The assignee, if he wish to continue the action, must apply to the court, establish his assignment, and be permitted to continue the action, with notice to all the parties. Chisholm v. Clitherall, 12 Minn. 375, (Gil. 251.) And where the original parties, the defendant having no notice of the assignment of the cause of action, compromised the suit, and stipulated for a judgment to be entered, and judgment was accordingly entered, the assignee could not have the judgment set aside. Id.

See Rock County Bank v. Hollister, 21 Minn. 385; Maloney v. Finnegan, 40 Minn. 281, 41 N. W. Rep. 979.

A right to recover damages for a personal tort is not assignable after verdict and before judgment. Hunt v. Conrad, 47 Minn. 557, 50 N. W. Rep. 614.

A suit in favor of a minor should be brought in the name of the infant, by his guardian or next friend; but, if brought in the name of the guardian, the court may amend the record by inserting the name of the ward as plaintiff. Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. Rep. 1022.

The general guardian refusing to collect the purchase price of real estate of his minor wards, an action for its recovery may be prosecuted by the minors through a guardian ad litem. Peterson v. Baillif, 52 Minn. 386, 54 N. W. Rep. 185.

§ 5157. Action by assignee subject to set-off, etc.—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 defence existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before due.

(G. S. 1866, c. 66, § 27; G. S. 1878, c. 66, § 27.)

Under this section, where a claim has been assigned, the debtor, until he has notice of such assignment, has the same right to interpose a set-off, or other defense, as he would have if the thing in action was still held by the assignor. Martin v. Pillsbury, 23 Minn. 175.

The assignee of an overdue negotiable promissory note is put on the same footing as the assignee of any other chose in action, and takes subject to any demand against his assignor, and in favor of the maker, existing at the time of the assignment, which might have been set off against such assignor while the note belonged to him. Tuttle v. Wilson, 33 Minn. 422, 23 N. W. Rep. 864.

A claim by the maker against the payee, acquired after a transfer of the note and notice to the maker, cannot be set up in an action by the holder on the note. Linn v. Rugg, 19 Minn. 181, (Gil. 145.)

The assignee of a judgment takes subject to the right of the debtor to set off an indebtedness of the judgment creditor. Way v. Colyer, 54 Minn. 14, 55 N. W. Rep. 744.

See Wilcox v. Comstock, 37 Minn. 65, 33 N. W. Rep. 42; La Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. Rep. 426.

§ 5158. Executor, trustee, etc., 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.

(G. S. 1866, c. 66, § 28; G. S. 1878, c. 66, § 28.)

An assignee of a chose in action, assigned for the benefit of creditors, is a trustee of an express trust, within the meaning of this section, and, as such, may bring an action thereon in his own name and without joining his *cestui que trust*. St. Anthony Mill Co. v. Vandall, 1 Minn. 246, (Gil. 195.)

In an action against a trustee to set aside a trust deed, the *cestui que trusts* are not necessary parties; but if facts exist to justify it, they may, in the discretion of the court, be admitted to defend. Winslow v. Minnesota & Pacific R. Co., 4 Minn. 313, (Gil. 230.)

A sheriff selling real estate on execution may maintain an action in his individual name for the sum bid at the sale. Armstrong v. Vroman, 11 Minn. 220, (Gil. 142.)

The board of county commissioners may sue the county treasurer either on the bond

or independent of it, for the conversion of funds belonging in the county treasury, and in such suit may recover for all the funds converted,—state, county, town, school, and other funds. Commissioners of Mower County v Smith, 22 Minn. 97.

One with whom or in whose name a contract is made for the benefit of another may sue thereon in his own name. Lake v. Albert, 37 Minn. 453, 35 N. W Rep. 177.

See Castner v. Austin, Price v Phœnix Mut. Life Ins. Co., and Langdon v. Thompson, cited in note to § 5156, and Rock County Bank v. Hollister, 21 Minn. 385, 386.

On a contractor's bond to pay laborers pursuant to the charter of Duluth, the city alone is authorized to sue. State Bank of Duluth v. Heney, 40 Minn. 145, 41 N. W. Rep. 411.

An agent who takes a contract in his own name for his principal's benefit may sue in his own name as trustee of an express trust. Cremer v. Wimmer, 40 Minn. 511, 42 N. W. Rep. 467; Murphin v. Scovell, 44 Minn. 530, 47 N. W. Rep. 256.

See, also, Lundberg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. Rep. 685.

§ 5159. Married women.

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.

(G. S. 1866, c. 66, § 29, as amended 1869, c. 58, § 1; G. S. 1878, c. 66, § 29.)

Real estate devised to a married woman, prior to the repeal of § 106, c. 61, Pub. St., is her separate property, within this section before the amendment of 1869, and an action in regard thereto may be maintained in her own name. Spencer v. Sheehan, 19 Minn. 338, (Gil. 292.)

Where a married woman is sued with her husband, in an action to foreclose a mortgage executed by both upon her separate estate, she and her husband should answer jointly; and it is irregular for her to answer separately, either by herself, or next friend, without leave of court. Such separate answer, without leave, will, on plaintiff moving for it, be struck out. Wolf v. Banning, 3 Minn. 202, (Gil. 133.)

In an action for a personal tort upon the wife, the joinder of the husband as plaintiff with her is only an irregularity, which may be disregarded or corrected at any time by striking out the name of the husband. Colvill v. Langdon, 22 Minn. 565.

See Shanahan v. City of Madison, (Wis.) 15 N. W. Rep. 154; chapter 69, *post*, and notes.

§ 5160. Infant plaintiff—Guardian—Appointment—Bond—Removal.

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.

(G. S. 1866, c. 66, § 30, as amended 1871, c. 58, § 1; G. S. 1878, c. 66, § 30.)

If, during the pendency of his action, an infant plaintiff reaches majority, it is competent for him to adopt an action commenced, without a guardian *ad litem*, and to ratify what has been done therein; and thereafter there is no good reason why the action should not proceed with the same effect as if it had been properly commenced. Germain v. Sheehan, 25 Minn. 339.

In an action brought by a guardian *ad litem*, the allegation in a complaint that the guardian has been duly appointed by the judge of the district court in which the action is brought, is not put in issue by an answer denying the allegations of the complaint. If such alleged appointment has not been duly made, or a person assumes to act as such guardian without any appointment, the better and more convenient practice is to take preliminary objection, by motion, before interposing an answer to the merits. Schuek v. Hagar, 24 Minn. 340.

See Perine v. Grand Lodge A. O. U. W. and Peterson v. Baillif, cited in note to § 5156.

§ 5161. Infant defendant—Guardian.

That 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.

(G. S. 1866, c. 66, § 31, as amended 1871, c. 58, § 2; G. S. 1878, c. 66, § 31.)

A judgment rendered on default against an infant over 14 years of age after service of summons on him, but without the appointment of a guardian ad litem, is voidable, but not void. Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. Rep. 784.

§ 5162. Guardian for infant party—Appointment.

That whenever it shall be necessary to appoint a guardian for any infant, a party to any action, such guardian shall be appointed as follows:

First. When the infant is plaintiff, upon the application of the infant, if he is of the age of fourteen years, or, if under that age, upon the application of a relative or friend, or the general or testamentary guardian of the infant; if upon the application of a relative or friend of the infant, notice thereof shall first be given to the general or testamentary guardian of the infant, if he has one within this state; if he has none and resides within this state, then to the person with whom such infant resides.

Second. When the infant is defendant, upon the application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons; if he is under the age of fourteen, or neglects so to apply, then, upon the application of any other party to the action, or of the general or testamentary guardian, or of a relative or friend of the infant, notice of such application, when made by such party, relative, or friend, first being given to such general or testamentary guardian, if the infant has one within this state; if he has none, then to the infant himself, if over fourteen years of age, and within this state; or, if under that age, and within the state, then to the person with whom such infant resides. If such infant have no general or testamentary guardian within this state, and if such infant be not within this state, notice of such application shall be given by the publication of a copy thereof once in each week, for three successive weeks, in a newspaper printed and published in the county in which the action is brought; and if there is no such newspaper in the county, then in a newspaper printed and published at the capital of the state. The return of the sheriff of the county in which the action is brought, made upon the summons, that such infant defendant cannot be found within such county, shall be *prima facie* evidence that such infant is not within this state, and that he has no general or testamentary guardian therein.

(1877, c. 80, § 1; G. S. 1878, c. 66, § 32; as amended 1885, c. 117.)

§ 5163. Parents or guardians 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.

(G. S. 1866, c. 66, § 32; G. S. 1878, c. 66, § 33.)

Whether under §§ 5163, 5164, the action may be brought in the name of the guardian, quaere. Perine v. Grand Lodge A. O. U. W., 48 Minn. 82, 50 N. W. Rep. 1022.

§ 5164. Parents may sue for injuries to infants.

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.

(G. S. 1866, c. 66, § 33; G. S. 1878, c. 66, § 34.)

Under this section a father may, except where he has deserted his family, maintain an action for injury to his minor child in all cases where, at common law, an action might have been maintained on behalf of such minor. Gardner v. Kellogg, 23 Minn. 463. In such an action the damages recoverable are those sustained by the minor only, and do not include those resulting to the parent from loss of services. Id.

See Perine v. Grand Lodge A. O. U. W., cited in note to § 5163.

§ 5165. 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.

(G. S. 1866, c. 66, § 34; G. S. 1878, c. 66, § 35.)

In an action of forcible entry and detainer it appeared that plaintiff and wife had occupied the premises for 12 years; that six months prior to the entry complained of, he deserted his wife, she remaining in the possession of the premises. Held, that until change of possession was affirmatively shown his possession presumptively continued, and her occupancy was possession under him and his right; and under this section she had a right to bring the action on his behalf and in his name. Davis v. Woodward, 19 Minn. 174, (Gil. 137.)

§ 5166. Joinder of parties to instruments.

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.

(G. S. 1866, c. 66, § 35; G. S. 1878, c. 66, § 36.)

The absolute guarantor, upon the same instrument, of the payment of a promissory note may be joined as defendant in the same action with the maker. Hammel v. Beardsley, 31 Minn. 314, 17 N. W. Rep. 858; followed in Lucy v. Wilkins, 33 Minn. 21, 21 N. W. Rep. 849.

The surety on a promissory note may, at any time after it becomes due, pay the same and proceed to enforce it against the principal; or, when several judgments have been recovered against him and the principal, may pay the one against himself, and take an assignment of and proceed to enforce the one against his principal. This section does not change this rule, and a surety paying such judgment may have the same assigned to himself or a third person, and proceed to enforce it against his principal. Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

In a suit on a joint and several bond, all or any of the obligors may be made defendants. Steffes v. Lemke, 40 Minn. 27, 41 N. W. Rep. 302.

§ 5167. Discharge of one or more partners or joint debtors.

Any creditor who now has, or hereafter may have, a debt, demand or judgment against any copartnership or several joint obligors, or promisors, or debtors, may discharge one or more of such copartners, obligors, promisors or debtors, without impairing his right to recover the residue of his debt or demand against the other copartners, obligors, promisors or debtors, or preventing the enforcement of the proportionate share of any or all undischarged judgment debtors under such judgment.

(1867, c. 78, § 1; G. S. 1878, c. 66, § 37.)

§ 5168. Same—Action against parties not discharged.

In all such cases a suit may be brought and maintained against all or any of such copartners, joint obligors, promisors or debtors, not so discharged, setting forth, in the complaint thereof, that the contract was made with the defendants and the party so discharged, and that such party has been discharged. Such discharge shall have no other effect than such as is in this act mentioned.

(1867, c. 78, § 2; G. S. 1878, c. 66, § 38.)

§ 5169. Effect of discharge.

Such discharge shall have the same effect for all purposes, and as to all persons, as a payment, by the party so discharged, of his equal part of the debt, according to the number of debtors, aside from sureties.

(1867, c. 78, § 3; G. S. 1878, c. 66, § 39.)

§ 5170. Same—Rights of partners, etc., inter se.

This act shall not be construed so as to affect or change the liability of such copartners, joint obligors, promisors or debtors to each other.

(1867, c. 78, § 4; G. S. 1878, c. 66, § 40.)

§ 5171. Action not to abate by death, etc.—Proceedings in such case.

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, 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. After a verdict of a jury, decision or finding of a court, or report of a referee, in any action for a wrong, such action shall not abate by the death of any party.

(G. S. 1866, c. 66, § 36, as amended 1876, c. 46, § 1; G. S. 1878, c. 66, § 41.)

The right of a ward to recover his estate survives, and is assignable. Jordan v. Secombe, 33 Minn. 220, 22 N. W. Rep. 383.

Where a cause is in this court, so that the court below has lost control of it, this court may make a substitution of an assignee of the cause of action, as plaintiff. This is not the case where it is here only on an appeal from an order overruling a demurrer to a supplemental answer. Keough v. McNitt, 7 Minn. 29, (Gil. 15.)

An action may be continued in the name of the original plaintiff, although he may have assigned the cause of action, pending the action. Whitacre v. Culver, 9 Minn. 295, (Gil. 280.)

A plaintiff to whom a bond to release an attachment had been executed made an assignment, pursuant to statute, for the benefit of creditors. The assignee was substituted as plaintiff in the action, and recovered judgment. Held, that the obligors in the bond became liable to the assignee thereon. Slosson v. Ferguson, 31 Minn. 448, 18 N. W. Rep. 281.

Where a court of general jurisdiction has jurisdiction of the subject-matter and parties in an action, and the plaintiff dies, and after his death the court renders judgment in his favor, the judgment is not void. Hayes v. Shaw, 20 Minn. 405, (Gil. 355.)

An administrator cannot maintain an action for the purpose of procuring the issue of an execution upon a judgment recovered in the district court by his intestate. Such execution should be procured by motion in the action in which the judgment was recovered. Lough v. Pitman, 25 Minn. 120.

A continuance of an action by bringing in new parties in place of others, deceased, must be made under this section, and not under § 5266. Lee v. O'Shaughnessy, 20 Minn. 173, (Gil. 157.) Where the proceeding to continue is not taken till more than a year after the death of the party, it must be taken, unless the substitution is stipulated, by supplemental complaint in the nature of a bill of revivor. Id. Until a substitution, the successors in interest of the deceased party are not affected by the action or judgment, and, such judgment being as to them a nullity, they need not apply within a year to vacate it, under § 5267. Id. Upon an application, in such case, to vacate the judgment, it is not necessary for the party to show a defense. Id.

Before defendant can avail himself of the fact that since the commencement of the action plaintiff has conveyed part of the property for injury to which the action is brought, he must plead the fact by supplemental answer. Harrington v. St. Paul & Sioux City R. Co., 17 Minn. 215, (Gil. 188.)

A motion to substitute, in an action, the successor in interest of a party deceased, takes the place of the former bill of revivor and original bill, in the nature of a bill of revivor, and is the proper mode for obtaining such substitution in all cases. Upon such motion the facts on which it is based may be contested. Landis v. Olds, 9 Minn. 90, (Gil. 79.) Where the notice of motion asks for specific relief, and also "such further or other relief in the premises as to the court shall seem meet and proper," the court may grant any relief compatible with the facts presented, taking care, however, that the opposite party is not taken by surprise as to such further relief. Id.

Application to substitute the personal representative in an action, under this section, is, if made within a year, *prima facie* in time, and will be granted almost as a matter of course. After a year it is, *prima facie*, too late, and a party must excuse the delay. Stocking v. Hanson, 22 Minn. 542. After personal representatives are substituted for a deceased party, they may move to set aside a judgment entered after decease of the party for whom they are substituted, and appeal from an order denying such motion, or, if the action relates to real estate, elect to take a second trial, under § 5845. Id.

See Nichols v. Railroad Co., 36 Minn. 452, 32 N. W. Rep. 176; Chisholm v. Clitherall, cited in note to § 5156; Rogers v. Holyoke, 14 Minn. 220, (Gil. 158.)

Proceedings instituted by the Lake Superior & Mississippi Railroad Company held properly prosecuted by the St. Paul & Duluth Railroad Company, as its successor. Bradley v. Northern Pac. R. Co., 38 Minn. 234, 36 N. W. Rep. 345.

A defendant having died, one who has succeeded to the estate of the deceased since

the rendition of judgment may be let in to defend. Waite v. Coaracy, 45 Minn. 159, 47 N. W. Rep. 537.

See Boeing v. McKinley, 44 Minn. 392, 46 N. W. Rep. 766.

Where the plaintiff in an action for personal injury dies after verdict, the action may be continued by his representative. Cooper v. St. Paul City Ry. Co. (Minn.) 56 N. W. Rep. 588.

§ 5172. Abatement of action against members, etc., of legislature, when.

Whenever in any action heretofore or hereafter commenced in any court of the state of Minnesota against any member or members or officer or employe of the legislature of said state it shall appear from the pleadings or evidence therein that the cause of such action arises from or is based upon any act or transaction performed by him or them in the performance of his or their duties, it shall be the duty of the court before or in which the said action is pending to dismiss the same forthwith as to said party or parties upon motion at any regular or special term of the said court; and any judgment rendered in any such action shall be void.

(1893, c. 53, § 1.[1])

§ 5173. Same—Evidence.

In the trial of any such action all the legislative proceedings in either house or in any committee of the same shall be deemed competent evidence, and may be introduced either in mitigation of damages or in justification of the cause of action set out in the complaint.

(Id. § 2.)

§ 5174. Actions against receivers and assignees.

That every receiver, assignee or manager of any property appointed by a court or managing the same under the direction of any court of this state, may be sued in respect to any act or transaction of his in carrying on the business connected with such property or corporation without the previous leave of the court by whom or in which such receiver, assignee or manager was appointed or under which he is acting.

(1893, c. 54, § 1.[2])

§ 5175. Same—Trial.

Any such suit may be brought in such county or jurisdiction as the same could have been brought against the person or corporation represented by such receiver, assignee or manager before such receiver, assignee or manager had been appointed or taken charge of such property, and such action shall be tried against such receiver, assignee or manager in the same manner and subject to the same rules of procedure as against the person or corporation for whom he acts under the court in case no receiver, assignee or manager had been appointed.

(Id. § 2.)

§ 5176. Same—Payment of judgment.

Any judgment recovered as aforesaid against such receiver, assignee or manager in any court shall be paid by said receiver as a part of the expenses of managing said property.

(Id. § 3.)

§ 5177. Actions against defendants under firm 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

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[1] An act to provide for the abatement of actions in certain cases. Approved March 31, 1893.

[2] An act providing for suits against receivers and assignees or managers of property under the control of the courts of this state. Approved April 11, 1893.

shall bind the joint property of all the associates in the same manner as if all had been named defendants.

(G. S. 1866, c. 66, § 37; G. S. 1878, c. 66, § 42.)

The mere fact that one is an agent for certain persons in a particular business does not authorize him to transact the business for them by a common name, so as to make them severally liable. Cooper v. Breckenridge, 11 Minn. 341, (Gil. 241.)

In an action against partners, as such, the allegation of partnership is material. Fetz v. Clark, 7 Minn. 217, (Gil. 159.)

Service of a garnishee summons upon one member of a firm is sufficient to justify a judgment against the firm which will bind the firm property. Hinkley v. St. Anthony Falls Water Power Co., 9 Minn. 55, (Gil. 44.)

In an action against partners by their firm name, personal judgment against the partners served is authorized. Gale v. Townsend, 45 Minn. 357, 47 N. W. Rep. 1064.

§ 5178. Bringing in additional parties defendant.

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.

(1868, c. 79, § 1; G. S. 1878, c. 66, § 43.)

In mandamus proceedings to compel a railway company to build a bridge over its tracks at a street crossing, the proceedings may properly be amended by bringing in another company claiming an interest in one of the tracks of the former company. State v. Minneapolis & St. L. Ry. Co., 39 Minn. 219, 39 N. W. Rep. 153.

See Chadbourn v. Rahilly, 34 Minn. 346, 25 N. W. Rep. 633.

§ 5179. Same—Service of order.

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.

(1868, c. 79, § 2; G. S. 1878, c. 66, § 44.)

§ 5180. Same—Stay of proceedings.

The said court or judge may, upon application of the plaintiff, at the time of applying for the order in the first section of this act 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.

(1868, c. 79, § 3; G. S. 1878, c. 66, § 45.)

§ 5181. Same—Further proceedings.

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.

(1868, c. 79, § 4; G. S. 1878, c. 66, § 46.)

See § 5339 as to suits affecting real property against unknown heirs.

TITLE 4.

THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 5182. What actions to be tried in county where subject is situated.

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.]

But see § 5183.

Second.—For the partition of real property.

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

Fourth.—For the recovery of personal property detained for any cause.

(G. S. 1866, c. 66, § 38, as amended 1876, c. 51, § 1; G. S. 1878, c. 66, § 47.)

As to actions against receivers and assignees, see § 5175.

The objection to the place of trial designated in the complaint is not to be taken by demurrer. Gill v. Bradley, 21 Minn. 15.

The objection that the county named in the complaint is not the proper county must be made by motion, not by answer. Merrill v. Shaw, 5 Minn. 148, (Gil. 113.)

See Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733.

SUBD. 4. Prior to the amendment of 1876, (c. 51, § 1,) the word "distrained" was used instead of "detained." See Dutcher v. Culver, 24 Minn. 588, 589.

See Hinds v. Backus, 45 Minn. 170, 47 N. W. Rep. 655, and note to § 5183.

§ 5183. Same.

All actions 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, shall be brought and 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 in the cases specified in subdivisions second, third, and fourth, of section fifty-one of chapter sixty-six of General Statutes of one thousand eight hundred and seventy-eight. If the county designated in the complaint is not the proper county, the court therein shall have no jurisdiction of said action.

(1885, c. 169; G. S. 1878, v. 2, c. 66, § 47a.)

By § 2, c. 169, Laws 1885, all inconsistent acts and parts of acts are repealed.

Prior to the enactment of this section, it was held that the court of the county designated in the complaint had jurisdiction to try an action brought to determine a right or interest in real property situated in another county, unless, before the time for answering expired, a demand was made for a change of place of trial to the proper county, and the venue was actually changed. Gill v. Bradley, 21 Minn. 15; Kipp v. Cook, 46 Minn. 535, 49 N. W. Rep. 257. This rule became a rule of property. Kipp v. Cook, supra.

§ 5184. What 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 offence 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.

(G. S. 1866, c. 66, § 39; G. S. 1878, c. 66, § 48.)

See § 5200.

See Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733; Hinds v. Backus, 45 Minn. 170, 47 N. W. Rep. 655.

§ 5185. Other actions, where triable—Replevin—Change of venue—Corporations.

In all other cases, except when the state of Minnesota is plaintiff, the action shall be tried in the county in which the defendants, or any of them, shall reside at the commencement of the action; or if none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the same may be tried in any county which the plaintiff shall designate in his

complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by law. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial shall be thereupon changed to the proper county, by the order of the court, unless the parties consent thereto: *provided*, that in an action for the claim and delivery of personal property wrongfully taken, the action may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides. A corporation shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section. The court may change the place of trial of actions included in this section, as provided by law, as in other actions: *provided*, that where defendants reside in different counties, and appear and answer by different attorneys, the action shall, on motion, be transferred to the county agreed on by such defendants, or which is designated by the largest number of defendants who join in an answer.

(G. S. 1866, c. 66, § 40, as amended 1877, c. 68, § 1; 1878, c. 38, § 1; G. S. 1878, c. 66, § 49; 1881, Ex. S. c. 25, § 1.)

The provision is not mandatory, and the objection that the proper county is not named in the complaint, if desired to be made, must be by motion on the part of the defendants who have answered. Merrill v. Shaw, 5 Minn. 148, (Gil. 113.)

Actions of the kind mentioned in Gen. St. 1866, c. 66, § 40, against a foreign corporation may be brought in any county designated by the plaintiff in his complaint. Olson v. Osborne & Co., 30 Minn. 444, 15 N. W. Rep. 876.

An action for the claim and delivery of personal property, wrongfully taken, may be tried in the county where the plaintiff resides, though the taking was by the defendant, as sheriff, in another county. Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733.

Replevin against a sheriff for property taken under process against a third party may be brought in the county where the plaintiff resides. Hinds v. Backus, 45 Minn. 170, 47 N. W. Rep. 655.

The provisions of this title do not authorize the transfer of an action from the municipal court of Minneapolis to the district court of another county, where defendant resides. Janney v. Sleeper, 30 Minn. 473, 16 N. W. Rep. 365.

An action having been commenced in a county other than that of the defendant's residence, the neglect of the defendant for seven months after the joining of issue to move for a change of venue considered, with other circumstances, as justifying the court in refusing the motion, in view of the provisions of rule 21 of the district court, although plaintiff's attorney had, before the joining of issue, verbally agreed to stipulate that the venue be changed. The denial of a motion, after such laches, for change of venue on the ground of the convenience of witnesses, sustained. Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. Rep. 4.

After the time to answer has expired, the right to demand a change of venue is gone. An order granting leave to answer does not revive that right. Allen v. Coates, 29 Minn. 46, 11 N. W. Rep. 132.

Where a proceeding in *mandamus* was pending in this court on and before the 7th day of March, 1881, in which there then was and now is an issue of fact not finally heard or determined, the defendant, under the second proviso of c. 40, Laws 1881, is entitled, upon the request of his attorney, to have the record therein transmitted to the district court of the county in which he resides. For such purposes a town is to be taken as residing in the county of which it is a part. State v. Town of Lake, 28 Minn. 362, 10 N. W. Rep. 17.

See Keith v. Briggs, 32 Minn. 185, 20 N. W. Rep. 91. Tullis v. Brawley, 3 Minn. 277, (Gil. 191;) Nininger v. Commissioners, 10 Minn. 133, (Gil. 105;) Gill v. Bradley, 21 Minn. 15; In re Barnard, 30 Minn. 512, 16 N. W. Rep. 403.

Action against four defendants in a county where one resides. Motion for change of place of trial to a county agreed on by three of them, in which two reside, held properly denied when not made until the case was called for trial, so that the plaintiff lost the benefit of a term in the county to which the change was demanded. McNamara v. Eustis, 46 Minn. 312, 48 N. W. Rep. 1123.

See Walker v. Nettleton, 50 Minn. 305, 52 N. W. Rep. 864.

An action brought in a county where but one of three defendants resides is triable in that county, though the resident defendant dies before any of the three appears or answers, where no steps are taken to change the place of trial before his death, as provided by Laws 1881, c. 132, § 1 (§ 5190) or Laws 1881, Ex. S. c. 25, § 1. Collins v. Bowen, 45 Minn. 186, 47 N. W. Rep. 719.

Defendant's motion for a change of the place of trial to the county in which he re-

sided at the commencement of the action may be denied on the ground that the convenience of witnesses and ends of justice will be promoted by such denial. Jones v. Swank, 54 Minn. 259, 55 N. W. Rep. 1126.

§ 5186. Actions by attachment against non-residents.

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.

(G. S. 1866, c. 66, § 41; G. S. 1878, c. 66, § 50.)

§ 5187. Actions on recognizance.

All actions for the recovery of any penalty brought against a principal or surety in any recognizance entered into either by a party or a witness in any criminal prosecution in any of the courts in this state, shall be brought and tried in the county in which the action or proceeding in which such recognizance is taken is pending, unless the court shall for cause other than the place of residence of the defendants change the place of trial of said action to any other county as now provided by law.

(1893, c. 52, § 1.[3])

§ 5188. Change of venue, in what cases—In what manner.

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.

(G. S. 1866, c. 66, § 42; G. S. 1878, c. 66, § 51.)

SUBD. 1. Although the county designated in the complaint is not the proper place for the trial of an action in the district court, the district court of the designated county has jurisdiction to try the same, unless, before the time for answering expires, a written demand for a trial in the proper county is granted, and the place of trial thereupon changed as provided in this section. Gill v. Bradley, 21 Minn. 15.

The rule in Gill v. Bradley, supra, followed in an action in which the summons was served by publication only. Kipp v Cook, 46 Minn. 535, 49 N. W. Rep. 257. Cf. note to § 5183.

Where condemnation proceedings were pending in one county, and the land proposed to be taken lay in another, a change of the place of trial to the latter was proper. Lehmicke v. St. Paul, S. & T. F. R. Co., 19 Minn. 464, (Gil. 406.)

SUBD. 3. An action having been commenced in another county than that of the defendant's residence, the neglect of the defendant, for seven months after the joining of issue, to move for a change of venue considered, with other circumstances, as justifying the court in refusing the motion, in view of the provisions of rule 21 of the district court, although plaintiff's attorney had, before the joining of issue, verbally agreed to stipulate that the venue be changed. The denial of a motion, after such laches, for change of venue on the ground of the convenience of witnesses, sustained. Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. Rep. 4.

See Chesterson v. Munson, cited in note to § 5071; Curtis v. St. Paul, S. & T. F. R. Co., 20 Minn. 28, (Gil. 19;) Wilson v Richards, 28 Minn. 337, 9 N. W. Rep. 872; Collins v. Bowen, 45 Minn. 186, 47 N W. Rep. 719.

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[3] An act in reference to the place of trial of actions brought upon recognizances in criminal prosecutions. Approved April 4, 1893.

§ 5189. Same—In actions for wages, when.

That in any action hereafter commenced or pending in any court of this state, for wages, or money due for manual labor, or for the enforcement of any lien for such wages, or money, when such action is brought in the county in which such labor was performed, no change of the place of the trial thereof shall be had, without the express consent of the plaintiff in writing duly filed with said court. Provided this act shall not apply to change of venue from one justice of the peace to another, or from one municipal court to another, in the same county.

(1893, c. 67, § 1.[4])

§ 5190. Change of venue—Procedure.

In any civil action now pending, or that may be hereafter commenced, in any court of this state against one or more defendants residing in a county or counties other than that wherein such action is pending, or may hereafter be instituted, and one or more defendants residing in the county wherein such action is pending, or may be commenced, and in which any of such defendants shall have demanded that the place of trial of such action be changed to the proper county, as required by section forty-nine, chapter sixty-six, of the General Statutes one thousand eight hundred and seventy-eight, if any one or more of the defendants therein, having made such demand, shall make and file in the office of the clerk of the court of the county wherein such action has been or shall be commenced an affidavit stating that he or they have good reason to believe, and does believe, that any one or more of the parties to such action have been made defendants therein for the purpose of evading the law relating to changing place of trial, or to deprive any of the defendants therein of their right to have the place of trial of said action changed, and setting forth the reason of such belief, and shall execute and file a bond or undertaking, with one or more sureties, conditioned to pay to the other defendants, or any of them, all such additional costs and expenses as they shall incur by reason of the place of trial of said action being changed, and to pay to the plaintiff all such additional costs and expenses as he may incur in case he recover judgment against the defendant so joined with such non-resident defendants, in case such defendant in good faith defends such action, a copy of said affidavit shall be served upon the plaintiff's attorney, together with a notice that a motion will be made before the judge of the court in which said action is pending, at a time therein mentioned, for a change of place of trial to the county named in such demand. Said copy and notice shall be served at least eight days before the day of hearing, and on such hearing the said judge shall, if he deems proper, make an order changing the place of trial to the county named in said demand.

(1881, c. 132, § 1; G. S. 1878, v. 2, c. 66, § 51a.)

On an application to change the place of trial under Laws 1881, c. 132, opposing affidavits may be read. Walker v. Nettleton, 50 Minn. 305, 52 N. W. Rep. 864.
See Collins v. Bowen, 45 Minn. 186, 47 N. W. Rep. 719.

§ 5191. Municipal courts—Change of venue, when.

In any action hereafter brought in any municipal court of any city or town of this state if the county designated as the place of trial in the summons be not the county where the defendant or defendants reside, the action may notwithstanding be tried therein unless the defendant, after answering, and before the time fixed for the trial of said cause demands in writing that the trial be had in the district court of the county where the defendant or defendants reside, and the place of trial shall thereupon be changed to the proper county by the order of the court, and thereupon the clerk of such municipal court shall transmit to the clerk of the district court

[4] An act relating to the change of place of trial of actions, commenced in any court of this state for wages, or money due for labor, or for the enforcement of liens for such labor. Approved April 17, 1893.

where the defendant or defendants reside, copies of all papers and files relating to said cause.

(1889, c. 161, § 1.[5])

§ 5192. In district courts—On appeal from justice courts.

When an action has been instituted in any county of this state in any justice court of any county against any person not a resident of the county where the justice issuing the process resides, and said action shall be appealed to the district court in said county where said justice resides, the action may be transferred to the district court of the county where the defendant resides upon filing with the clerk of the district court of the county to which said action has been appealed, an affidavit of the defendant of his attorney setting forth that the defendant, or when there is more than one defendant, a majority, resides in some other county in this state, which affidavit shall be filed within ten days after the appeal has been perfected, and thereupon such action shall be transferred by order of the court to the district court of the county where the defendant or majority of the defendants reside, and the clerk of such district court shall thereupon transmit to the clerk of the district court of the proper county, certified copies of all papers and files in said cause.

(Id. § 2.)

In an action against a railroad company, any county in which it has an officer, agent, or place of business is to be deemed the residence of such company. And the same rule applies on application to change the place of trial in cases appealed from justice's court to the district court, or in actions brought in the latter court. Schoch v. Winona & St. P. R. Co., (Minn.) 57 N. W. Rep. 208.

TITLE 5.

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

§ 5193. 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.

(G. S. 1866, c. 66, § 43; G. S. 1878, c. 66, § 52.)

As to the appointment, by a non-resident land-owner, of an agent to accept service, and as to service on unknown heirs, see §§ 5816, 5839.

See Crombie v. Little, 47 Minn. 581, 587, 50 N. W. Rep. 823.

§ 5194. Requisites of summons.

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.

(G. S. 1866, c. 66, § 44, as amended 1867, c. 62, § 1; G. S. 1878, c. 66, § 53.)

In a summons in the district court, words indicating the state (or territory) and number of the districts are unnecessary, and, if erroneous, do not render the summons void. Hanna v. Russell, 12 Minn. 80, (Gil. 43.) A summons in the district court is not process within the meaning of § 14, art. 6, Const., requiring process to run in the name of the state. Id.; followed in Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

That another person subscribed the name of the plaintiff to the summons in his presence does not invalidate the summons. Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.) A summons required a copy of the answer to be served on the plaintiff, "at his office, in the city of Rochester, Minnesota." Held, the summons was regular, and, if the plaintiff had in fact no office in Rochester, the judgment could not be assailed collaterally for that reason. Id.

The signature of the party or attorney to a summons must be written, not printed.

[5] An act entitled "An act providing for changing the place of trial of actions commenced in municipal courts and courts of justices of the peace in certain cases." Approved April 24, 1889. By § 3, all inconsistent acts are repealed.

Ames v. Schurmeier, 9 Minn. 221, (Gil. 206.) Contra, Herrick v. Morrill, 37 Minn. 250, 33 N. W. Rep. 849.

See, also, West Publishing Co. v. Bottineau, 34 Minn. 239, 25 N. W. Rep. 405.

See, as to service upon municipal corporations, § 1498.

Where the published summons was in the form prescribed for personal service with the complaint, held not a jurisdictional defect. Lane v. Innes, 43 Minn. 137, 45 N. W. Rep. 4.

The omission of the attorney's name in the superscription of the copy of the summons served with a copy of the complaint, which was duly subscribed, the originals being complete, held a mere irregularity. Lee v. Clark, 53 Minn. 315, 55 N. W. Rep. 127.

§ 5195. Notice to be contained in summons.

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.

(G. S. 1866, c. 66, § 45; G. S. 1878, c. 66, § 54.)

SUBD. 1. Where the summons contains the proper notice prescribed in the case of "an action arising on contract for the payment of money only," but the complaint on file indicates an "action for the recovery of money" other than one arising on contract, etc., held, that an order denying a motion made to set aside the complaint, on the ground of such non-conformity, is not an appealable order. Sibley v. Young, 21 Minn. 335.

SUBD. 2. Where the complaint states a cause of action arising on a contract for the payment of money only, and demands judgment for a certain sum, but the summons contains the form of notice prescribed by this section, and the summons and complaint are served together on defendant, a judgment in default of answer, entered by the clerk without application to the court, is valid. Heinrich v. Englund, 34 Minn. 395, 26 N. W. Rep. 122.

SUBD. 3. A summons which states that, upon failure of defendant to answer, "application will be made to the court for the relief demanded in the complaint," sufficiently notifies defendant that the plaintiff will make such application. Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

§ 5193. Service of complaint — Proceedings when complaint is not served.

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 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 till the expiration of the time.

(G. S. 1866, c. 66, § 46, as amended 1867, c. 62, § 2; G. S. 1878, c. 66, § 55.)

Under § 51, p. 537, Comp. St., a defendant, upon whom the complaint is not served with the summons, and who serves notice of appearance, has, after service of the complaint on him, the time to answer which was unexpired when he served his notice. Swift v. Fletcher, 6 Minn. 550, (Gil. 386.)

See Lane v. Innes, cited in note to § 5194.

§ 5197. 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.

(G. S. 1866, c. 66, § 47; G. S. 1878, c. 66, § 56.)

The return of the sheriff as to the time of service of the summons is in that action conclusive. Frasier v. Williams, 15 Minn. 283, (Gil. 219.)

The act repealing the special law requiring the summons in Ramsey county to be

served by the sheriff restored the general law in that county. Miller v. Miller, 39 Minn. 376, 40 N. W. Rep. 261.

§ 5198. Fees for service not allowed, when.

Whenever any person, other than a sheriff or other proper officer, shall serve a summons issued out of the district court, no fee shall be allowed therefor, either for travelling in making such service, or for serving such summons. (1874, c. 80, § 1; G. S. 1878, c. 66, § 57.)

§ 5199. Summons, how served and on whom.

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: provided, that in case none of the officers named can be found within the state, of which the return of the sheriff that they cannot be found within his county shall be prima facie evidence, then the summons may be served by publication; 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.

(G. S. 1866, c. 66, § 48, as amended 1878, c. 14, § 1; G. S. 1878, c. 66, § 59.)

As to service of summons on election day, see Const. art. 7, § 5.

As to service of summons on insurance companies, see §§ 3158, 3303.

SUBD. 1. The act of February 28, 1866, p. 494, G. S. (see §§ 5200, 5201), in regard to the service of process upon corporations, controls §§ 48 and 56, c. 66, G. S. 1866, and personal service of summons upon the general agent of a foreign corporation, made within this state, is sufficient service upon the corporation, and subjects it to the jurisdiction of the court. See §§ 5199, 5211. Wilson, C. J., dissents. Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

A summons against a foreign corporation cannot be served within this state on an officer of the corporation, but must be served by publication. Sullivan v. La Crosse & Minn. Packet Co., 10 Minn. 386, (Gil. 308.)

SUBD. 2. See Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. Rep. 784.

SUBD. 4. A judgment recovered by default, upon service of the summons by delivery of a copy to a third person, not a resident at the house of defendant's abode, is void for want of jurisdiction. Heffner v. Gunz, 29 Minn. 108, 12 N. W. Rep. 342.

Service of a garnishee summons upon one member of a firm is sufficient to justify a judgment against the firm which will bind the firm property. Hinkley v. St. Anthony Falls Water Co., 9 Minn. 55, (Gil. 44.)

A resident defendant being temporarily in Europe, service of summons by leaving it at a boarding house held a service at his usual abode. Lee v. Macfee, 45 Minn. 33, 47 N. W. Rep. 309.

A person 14 years old is prima facie "of suitable age and discretion." Temple v. Norris, 53 Minn. 286, 55 N. W. Rep. 133.

A summons directed to the defendant was served on another person, who mailed to the defendant the copy served upon him, and the defendant received it. Held no service. Savings Bank of St. Paul v. Authier, 52 Minn. 98, 53 N. W. Rep. 812.

See Keller v. Carr, 40 Minn. 428, 430, 42 N. W. Rep. 292; Bausman v. Tilley, 46 Minn. 66, 67, 48 N. W. Rep. 459; Kerwin v. Sabin, 50 Minn. 320, 52 N. W. Rep. 642.

§ 5200. Service on foreign corporations.

That the summons or any process in any civil action or proceeding wherein a foreign corporation or association is defendant, which has property within this state, or the cause of action arose therein, may be served by delivering a copy of such summons or process to the president, secretary or any other officer, or to any agent of such corporation or association; and such service shall be of the same force, effect and validity as like service upon domestic corporations; provided, If any such corporation or association has, by an appointment in writing filed with the secretary of this state, appointed or designated some person or resident of this state upon whom summons or process can be served, such summons or process shall be served upon such

person so designated; and provided further, that any such action or proceeding may be commenced and tried in any county in which the cause of action arose, subject to be removed for cause as in other cases.

(G. S. 1866, p. 494, § 1; G. S. 1878, c. 66, § 60; as amended 1891, c. 79, § 1.)

See Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

§ 5201. An act to supersede other provisions.

This act shall have full force and effect, notwithstanding any provisions of the general statutes or other law of the state inconsistent herewith.

(G. S. 1866, p. 494, § 2; G. S. 1878, c. 66, § 61; as amended 1891, c. 79, § 1.)

§ 5202. Service on railroad companies.

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.

(1871, c. 64, § 1; G. S. 1878, c. 66, § 62.)

This section does not apply to proceedings under *c.* 34, tit. 1. In re St. Paul & N. P. Ry. Co., 36 Minn. 85, 30 N. W. Rep. 432.

See Schoch v Winona & St. P. R. Co., cited in note to § 5192.

§ 5203. Service on domestic corporations without resident officers.

Whenever any corporation created by the laws of this state, or late territory of Minnesota, does not have an officer in this state upon whom legal service of process can be made, of which the return of the sheriff shall be conclusive evidence, an action or proceeding against such corporation may be commenced in any county where the cause of action or proceeding may arise, or said corporation may have property; and service may be made upon such corporation by depositing a copy of the summons, writ, or other process or citations, in any proceeding for the collection of unpaid personal property taxes, in the office of the secretary of state, which shall be taken, deemed, and treated as personal service on such corporation: *provided*, that whenever any process, writ, or citation against or affecting any corporation aforesaid is served on the secretary of state, the same shall be by duplicate copies, one of which shall be filed in the office of said secretary of state, and the other by him immediately mailed, postage prepaid, to the office of the company, or to the president, secretary, or any director or officer of said corporation, as may appear or be ascertained by said secretary from the articles of incorporation on file in his office.

(1875, c. 43, § 1; G. S. 1878, c. 66, § 63; as amended 1885, c. 62.)

See In re St. Paul & N. P. Ry. Co., 36 Minn. 85, 30 N. W. Rep. 432.

§ 5204. Service by publication, when allowed.

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 court has jurisdiction of the subject of the action.

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

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

Sixth. When the action is to foreclose a mortgage, or to enforce a lien of any kind, on real estate in the county where the action is brought.

(G. S. 1866, c. 66, § 49, as amended 1869, c. 73, § 1; 1878, c. 9, § 1; G. S. 1878, c. 66, § 64; 1881, c. 28, § 1.)

An affidavit for publication of summons, under the law in force in August, 1859, (§ 54, *c.* 60, Comp. St.,) stating facts not inconsistent with the presence or residence of defendant at the date of the affidavit, is insufficient. Following Mackubin v. Smith, 5 Minn. 367, (Gil. 296.) Harrington v. Loomis, 10 Minn. 366, (Gil. 293.)

Filing the affidavit is a condition precedent to an authorized publication. Barber v. Morris, 37 Minn. 194, 33 N. W. Rep. 559

The judgment having been obtained upon publication of summons, notwithstanding the defendant was in fact a resident of this state, and the summons might have been personally served upon him, *quære* whether the judgment was not absolutely void. Covert v. Clark, 23 Minn. 539.

"Berlah" in a published summons, for "Beulah," held not fatal to the jurisdiction. Lane v. Innes, 43 Minn. 137, 45 N. W. Rep. 4.

The published summons was in the form prescribed for personal service with the complaint. Held not a jurisdictional defect. Id.

The affidavit may be sworn to within such period before the publication that no presumption can fairly arise that the facts have changed. It is not void, though sworn to before the action is begun. Crombie v. Little, 47 Minn. 581, 50 N. W. Rep. 823.

Failure to file the complaint before publishing the summons is a mere irregularity. Id.

Filing with the clerk is sufficient, though he keep no office at the county seat. Id.

A return, on a summons to two defendants, that they (naming them conjunctively) could not be found, held sufficient. Blinn v. Chessman, 49 Minn. 140, 51 N. W. Rep. 666.

Evidence that defendant cannot be found must be filed before service by publication. Corson v. Shoemaker (Minn.) 57 N. W. Rep. 134.

As to the evidence required. Id.

See Auerbach v. Maynard, 26 Minn. 421, 4 N. W. Rep. 816; Bardwell v. Collins, 44 Minn. 97, 98, 46 N. W. Rep. 315; Cousins v. Alworth, 44 Minn. 505, 507, 47 N. W. Rep. 169.

SUBD. 1. Under §§ 52-54, *c.* 60, Comp. St., a summons against a foreign corporation could not be served within this state upon an officer of such corporation, but had to be served by publication. Sullivan v. La Crosse & Minn. Packet Co., 10 Minn. 386, (Gil. 308.)

In an affidavit for publication of the summons, a statement that "the defendant is a corporation or company, established and doing business under and by virtue of the laws of the state of Illinois," sufficiently shows the corporate character of the defendant. Broome v. Galena, D. D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.) The affidavit for publication of the summons against a foreign corporation need not show that there is no person within the state upon whom service might legally be made. Id.

Notice of garnishee proceedings, in an action against foreign corporation, may be served on the principal defendant by publication. Id.

SUBD. 3. The affidavit must state positively, and not on information and belief, that the defendant has property within the state. Feikert v. Wilson, 38 Minn. 341, 37 N. W. Rep. 585.

See Crombie v. Little, 47 Minn. 581, 586, 50 N. W. Rep. 823.

A lien by attachment in a suit against nonresident partners may be acquired against the individual property of one of the partners within the state, and the judgment, rendered upon substituted service, though in form against all, may be enforced against the property so attacked. Daly v. Bradbury, 46 Minn. 396, 49 N. W. Rep. 190.

An action against a stockholder to recover on his personal liability, under the statute, for corporate debts, is one "arising on contract" within the meaning of G. S. 1866, c. 66, § 49. Hencke v. Twomly (decided Oct. 26, 1894) 60 N. W. Rep. 667.

SUBD. 5. An action to avoid a fraudulent transfer falls within this subdivision. Lane v. Innes, 43 Minn. 137, 45 N. W. Rep. 4.

Under the law as it stood in 1864-65, the summons in a suit to foreclose a mortgage

might be served by publication against nonresident defendants. Crombie v. Little, 47 Minn. 581, 50 N. W. Rep. 823.

Summons in an action to reform a deed may be served by publication. Corson v. Shoemaker (Minn.) 57 N. W. Rep. 134.

§ 5205. Publication, how made.

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.

(G. S. 1866, c. 66, § 50, as amended 1867, c. 68, § 1; G. S. 1878, c. 66, § 65.)

See Auerbach v. Maynard, cited in note to § 5144.

Affidavit of publication for "seven" weeks, but showing the dates of the first and last publication, held sufficient. Lane v. Innes, 43 Minn. 137, 45 N. W. Rep. 4.

Proof of publication for "six successive weeks" does not show publication "once in each week." Godfrey v. Valentine, 39 Minn. 336, 40 N. W Rep. 163.

A publication in a daily newspaper on Tuesdays, February 7th and 14th, on Thursdays, February 23d, March 2d and 9th, and on Wednesday, March 15th, held sufficient. Raunn v. Leach, 53 Minn. 84, 54 N. W. Rep. 1058.

See Burr v. Seymour, 43 Minn. 401, 45 N. W. Rep. 715; Crombie v. Little, 47 Minn. 581, 50 N. W. Rep. 823.

§ 5206. When defendant may appear and defend—Restitution.

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.

(G. S. 1866, c. 66, § 51; G. S. 1878, c. 66, § 66.)

The year within which to move begins with the entry of judgment. It is enough if the application be made within the year, though the court do not act on it till after the year. Washburn v. Sharpe, 15 Minn. 63, (Gil. 43.) Granting leave to answer under this section, and the terms of leave, are in the discretion of the court, and will not be reversed except for abuse. Id.

A defendant, against whom judgment by default was rendered, upon a return on the summons that it was served by leaving a copy at his last usual place of abode, made, within a year after the judgment, a motion to set it aside, and for leave to answer, based on his belief that the summons was returned personally served, and on that theory the motion was denied. Execution was issued, and his real estate sold on it, and within the time to redeem he paid to the sheriff the money for redemption; he being all the time ignorant, from mere neglect to examine the record, of what the return on the summons was. Held, that his neglect to examine the return was inexcusable, and although he may have a good defense to the action in which the judgment was rendered, his ignorance, or mistake of fact as to what the return was, is no ground for an injunction to restrain the sheriff from paying, and the judgment creditor from receiving, the redemption money. Myrick v. Edmundson, 2 Minn. 259, (Gil. 221.)

As to application by non-resident to open default, see Frankoviz v. Smith, 35 Minn. 278, 28 N. W. Rep. 508.

A judgment for a divorce cannot be granted upon default of defendant to answer, except upon proof of the facts other than the evidence of the parties. Where such a judgment is obtained through fraud, it will be vacated. True v. True, 6 Minn. 458, (Gil. 315.)

Nonresident defendant, served by publication, and having suffered default by reason of the sickness of his attorney, held to be entitled of right to be admitted to defend. Nye v. Swan, 42 Minn. 243, 44 N. W. Rep. 9.

See Lord v. Hawkins, 39 Minn. 73, 38 N. W. Rep. 689; Boeing v. McKinley, 44 Minn. 392, 394, 46 N. W. Rep. 766; Drew v. City of St. Paul, 44 Minn 501, 503, 47 N. W. Rep. 158.

Unexcused laches in making an application under this section will justify the court

in refusing it, though made within the year. Cutler v. Button, 51 Minn. 550, 53 N. W. Rep. 872.

A nonresident defendant, to whom a copy of the summons has been mailed as provided in § 5204 has not been "personally served," although he fails to deny that he received such copy by due course of mail. Bausman v. Tilley, 46 Minn. 66, 48 N. W. Rep. 459.

See Carlson v. Phinney (Minn.) 58 N. W. Rep. 88.

§ 5207. Proceedings when some of the defendants are not served.

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.

(G. S. 1866, c. 66, § 52; G. S. 1878, c. 66, § 67.)

See § 5412.

In an action against four defendants jointly indebted upon a contract, a judgment by default, entered by the clerk of the district court, against the three only of them who alone were served with summons, is not void, but only irregular or erroneous. Dillon v. Porter, 36 Minn. 341, 31 N. W. Rep. 56. The action of the clerk in such case is the action of the court. Id.

In an action founded on a joint demand arising on contract, whether all the defendants are served with summons or not, the only judgment that can be rendered is a joint one in favor of or against them all. Johnson v. Lough, 22 Minn. 203. Where, in such an action, the summons is served on one only of two joint debtors, and judgment is thereupon entered in form against both jointly, to vacate and set aside such judgment on that ground, as against the defendant not served, is error. Id.

Where, upon an appeal in an action commenced before a justice of the peace, judgment was for one defendant, and against the other, and the latter appeals, the trial in the district court proceeds against both defendants, and judgment may be rendered against both. Hooper v. Farwell, 3 Minn. 106, (Gil. 58.)

Propriety, in an action against makers of a joint and several note, of entry of judgment against some makers, and later, on an ex parte order, of entry of judgment against another. Wolford v. Bowen (Minn.) 59 N. W. Rep. 195.

§ 5208. 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.

(G. S. 1866, c. 66, § 53; G. S. 1878, c. 66, § 68.)

SUBD. 1. An affidavit of service of summons, made by a private person, sufficient in form under this section, is good, though it do not comply with rule 30, district court rules, requiring him to state that he knew the person served to be the defendant. Young v. Young, 18 Minn. 90, (Gil. 72.)

The return of the sheriff as to the time of service of the summons is in that action conclusive. Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

The return of an officer of the service of summons may be impeached in proceedings to set aside the judgment on default. Crosby v. Farmer, 39 Minn. 305, 40 N. W. Rep. 71.

See, also, Burton v. Schenck, 40 Minn. 52, 41 N. W. Rep. 244; Gray v. Hays, 41 Minn. 12, 42 N. W. Rep. 594; Knutson v. Davies, 51 Minn. 363, 53 N. W. Rep. 646; Allen v. McIntyre (Minn.) 57 N. W. Rep. 1060.

In an action against partners by their firm name, the affidavit that the persons served are members of the firm gives jurisdiction over them. Gale v. Townsend, 45 Minn. 357, 47 N. W. Rep. 1064.

SUBD. 2. See notes to §§ 5204, 5205.

SUBD. 3. Where service of the summons is admitted in writing indorsed on it, the signature of the defendants must be proved, or the proof of service is defective. The court will not take notice of the signature of an attorney of the court signed to such an admission, whether signed for himself or for another. Masterson v. Le Claire, 4 Minn. 163, (Gil. 109.)

Where the clerk of the district court, upon a default, enters judgment, his action is the action of the court. His decision as to the sufficiency of the proof of service of the summons is of equal validity with that of the judge, and binding upon the parties till set aside or reversed by a direct proceeding in the same action. Kipp v. Fullerton, 4 Minn. 473, (Gil. 366.)

§ 5209. When jurisdiction of court attaches—Voluntary appearance.

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.

(G. S. 1866, c. 66, § 54; G. S. 1878, c. 66, § 69.)

Objections to the summons are waived by a general appearance, (in this case by appeal on questions of law from a judgment of a justice taken by default.) Johnson v. Knoblauch, 14 Minn. 16, (Gil. 4.)

An application for an extension of the time to answer, though a motion be pending to set aside the summons, is a recognition of the jurisdiction of the court over the person. Yale v. Edgerton, 11 Minn. 271, (Gil. 184.)

By demurring to the complaint for want of jurisdiction over the person, the defendant appears, and becomes subject to the jurisdiction of the court. Reynolds v. La Crosse & Minn. Packet Co., 10 Minn. 178, (Gil. 145.)

When a motion to vacate a judgment is founded upon grounds taken solely with reference to their supposed bearing upon the jurisdiction of the court to render the judgment, and solely for the purpose of attacking said jurisdiction, the appearance of the judgment defendant's attorney, for the purposes of the motion only, is a special appearance, which has no effect in curing any objection to the judgment for want of jurisdiction over such defendant's person. Covert v. Clark, 23 Minn. 539.

The defendant obtained an order to show cause why a judgment should not be vacated, and he be allowed to answer. Held, that he appeared generally. Frear v. Heichert, 34 Minn. 96, 24 N. W Rep. 319.

In an action by attachment the defendant answered, setting up facts showing fraud, and objected to the jurisdiction. Held, that he merely appeared specially. Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. Rep. 362.

An appearance for any other purpose than to question the jurisdiction is general. St. Louis Car Co. v. Stillwater St. Ry. Co., 53 Minn. 129, 54 N. W. Rep. 1064.

Appearance, though not expressly stated to be special, to move to set aside service of summons because no complaint was filed, and no copy served, does not waive the irregularity of service. Houlton v Gallow (Minn.) 57 N. W. Rep 141.

Appearance after a judgment void for want of jurisdiction does not render the judgment valid. (Overruling Curtis v Jackson, 23 Minn. 268.) Godfrey v. Valentine, 39 Minn. 336, 40 N. W. Rep. 163.

See, also, Kanne v. Minneapolis & St. L. Ry. Co., 33 Minn. 419, 23 N. W Rep. 854; Roberts v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 521, 51 N. W. Rep. 478.

Where a party claiming to be owner of real property appears generally, and contests on the merits an application for judgment for a special assessment, he confers jurisdiction so far as his interest is concerned, and it is immaterial whether notice of the application was given. State v. District Court of Ramsey Co., 51 Minn. 401, 53 N. W. Rep. 714.

Under § 21, c. 57, Comp. St., an injunction could be allowed upon a complaint before service of the summons. If in such case the summons is not served, the parties' remedy is by motion to dissolve the injunction, but until dissolved it is obligatory. Lash v. McCormick, 14 Minn. 482, (Gil. 359.)

See Auerbach v. Maynard, cited in note to § 5144.

§ 5210. 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.

(G. S. 1866, c. 66, § 55; G. S. 1878, c. 66, § 70.)

Stone v. Myers, 9 Minn. 303 (Gil. 287), and Cleland v. Tabernier, 11 Minn. 194 (Gil. 126); doubted, Kenney v. Goergen, 36 Minn. 190, 31 N. W. Rep. 210, overruled, Lydiard v. Chute, 45 Minn. 277, 280, 47 N. W. Rep. 967

In what cases service by publication against nonresidents in personal actions was allowed by statute in 1863 and subsequently. Id.

For the purposes of attachment, a debt has a situs wherever the debtor is found. Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. Rep. 905.

Where, in an action to enforce a pecuniary liability against a nonresident, process is served by publication, and he does not appear, and no property is attached, the judgment is a nullity. Plummer v. Hatton, 51 Minn. 181, 53 N. W. Rep. 460.

See note to § 5204.

§ 5211. 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.

(G. S. 1866, c. 66, § 56; G. S. 1878, c. 66, § 71.)

See Broome v. Galena, etc., Packet Co., cited in note to § 5204, and Reynolds v. La Crosse, etc., Packet Co., cited in note to § 5209; also, Guernsey v. American Ins. Co., 13 Minn. 278 (Gil. 256).

§ 5212. Appearance and its effect.

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.

(G. S. 1866, c. 66, § 57; G. S. 1878, c. 66, § 72.)

Where the defendant appears, while his motion to set aside the summons is under advisement, a motion by plaintiff to dismiss the prior motion should be granted. Yale v. Edgerton, 11 Minn. 271, (Gil. 185.)

A written admission of service indorsed on a summons is not an appearance in the action entitling defendant to notice of subsequent proceedings. Hastings v. Rogers, 12 Minn. 529, (Gil. 437.) A stipulation, signed by the plaintiffs and some of the defendants to an action, for a settlement and dismissal of the action, is not such an appearance as entitles the defendants to notice of further proceedings in the action. Grant v. Schmidt, 22 Minn. 1.

In all actions judgment may be entered on the verdict, report, or decision, without special application to the court, or notice to the opposite party. Piper v. Johnston, 12 Minn, 60, (Gil. 27;) followed in Whitaker v. McClung, 14 Minn. 170, (Gil. 131.) Judgment upon the report of a referee may be entered without notice. Leyde v. Martin, 16 Minn. 38, (Gil. 24;) following Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

A judgment is notice to the party from the time of its entry. Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

See, also, cases cited in note to § 5209.

§ 5213. Notice, on whom to be 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.

(G. S. 1866, c. 66, § 58; G. S. 1878, c. 66, § 73.)

Notice of an appeal from probate by a contestant of a will may properly be served upon the attorney of the proponent. In re Brown, 32 Minn. 443, 21 N. W. Rep. 474.

See Thorson v. St. Paul F. & M. Ins. Co., 32 Minn. 434, 21 N. W. Rep. 471.

§ 5214. Service of notices, 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.

(G. S. 1866, c. 66, § 59; G. S. 1878, c. 66, § 74.)

Retaining a paper not served in time, or defective in form, is a waiver of the defect. Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

See In re Brown, 32 Minn. 443, 445, 21 N. W. Rep. 474, and § 5216, note.

Service can be made by leaving in a conspicuous place only when there is in the office no clerk or person having charge. Mies v. Thompson, 53 Minn. 273, 55 N. W. Rep. 44.

§ 5215. 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.

(G. S. 1866, c. 66, § 60; G. S. 1878, c. 66, § 75.)

To constitute proper service of a paper it must be mailed at the place of residence of the attorney or party mailing it. Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. Rep. 381.

§ 5216. 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.

(G. S. 1866, c. 66, § 61; G. S. 1878, c. 66, § 76.)

§§ 5215, 5216, providing for the service of notice by mail, do not apply to notices served on the clerk of the court; so that such a service on the clerk is not good, unless the notice actually reach him within the proper time. Thorson v. St. Paul Fire & Marine Ins. Co., 32 Minn. 434, 21 N. W. Rep. 471.

The paper must be mailed at the place of residence of the attorney or party serving it. Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. Rep. 381.

Where a complaint is served by mail after a seasonable demand, defendant has double time to answer. Gillette-Herzog Manuf'g Co. v. Ashton (Minn.) 56 N. W. Rep. 576.

§ 5217. Service on party, when and how—On attorney—On clerk for party.

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.

(G. S. 1866, c. 66, § 62, as amended 1872, c. 72, § 1; G. S. 1878, c. 66, § 77.)

Notice of an appeal to the supreme court, from an order of the district court refusing to set aside a tax judgment, must be served upon the county attorney. Commissioners of Nobles Co. v. Sutton, 23 Minn. 299.

§ 5218. 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.

(G. S. 1866, c. 66, § 63; G. S. 1878, c. 66, § 78.)

See State v. District Court of Hennepin County, 42 Minn. 40, 43 N. W. Rep. 686; Savings Bank of St. Paul v. Authier, 52 Minn. 98, 53 N. W. Rep. 812.

§ 5219. Notices not insufficient, when—Amendment—Extension of time.

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.

(G. S. 1866, c. 66, § 64; G. S. 1878, c. 66, § 79.)

The court has no power under this section to extend the periods of limitation. Humphrey v. Carpenter, 39 Minn 115, 39 N. W. Rep. 67; Burns v. Phinney, 53 Minn. 431, 55 N. W. Rep. 541.

See Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79; Burns v. Phinney, 53 Minn. 431, 55 N. W. Rep. 540.

§ 5220. Filing of pleadings, bonds, affidavits, etc.

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 clerk of the court.

(G. S. 1866, c. 66, § 65, as amended 1867, c. 62, § 3; G. S. 1878, c. 66, § 80.)

§ 5221. Defendant, without answering, may demand assessment of damages.

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.

(G. S. 1866, c. 66, § 67; G. S. 1878, c. 66, § 81.)

§ 5222. 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.

(G. S. 1866, c. 66, § 68; G. S. 1878, c. 66, § 82.)

In computing the ten-years time during which an execution may be issued on a judgment, the day of the entry of the judgment should be excluded. Davidson v. Gaston, 16 Minn. 230, (Gil. 202.)

In a claim for a mechanic's lien, which includes different items of material, delivered at different times, the account is to be treated as a unit, and the time within which the account and affidavit must be filed for record begins to run from the date of the last item, providing they were all delivered for the same job of work; as for constructing the building, if that was the job in hand, or for doing the same job of repairing. But if some of them were delivered for some other work, as where the construction is com-

pleted and afterwards some further thing to be done is determined on, the furnishing of such items cannot suspend the running of the time for filing as to the account for constructing. Frankoviz v. Smith, 34 Minn. 403, 26 N. W. Rep. 225.

In computing the time upon service of notice of trial, the day of service is excluded, and the first day of the term included. State v Weld, 39 Minn. 426, 40 N. W. Rep. 561. Cf. Greve v. St. Paul, S & T. F. R. Co., 25 Minn. 327.

This section was intended to establish a uniform rule applicable to the construction of statutes, as well as to matters of practice. Spencer v Haug, 45 Minn. 231, 47 N. W. Rep. 794; Johnson v. Merritt, 50 Minn. 303, 52 N. W. Rep. 863.

See Coe v. Caledonia & Miss. Ry. Co., 27 Minn. 197, 202, 16 N. W. Rep. 621; Atkinson v. Duffy, 16 Minn. 45, (Gil. 30, 35;) Worley v Naylor, cited in note to § 5223.

§ 5223. Publication of legal notices.

The publication of legal notices, public statements, tax lists, or official proceedings, 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, if a weekly newspaper, and if a daily newspaper, then upon some day on which such daily newspaper is published—not Sunday—and shall always be upon the same day of the week that it was first published; and all such publications shall be made in the English language, and shall not be made or published in any newspaper unless said newspaper shall have been published and circulated in the county where said notice, statement, tax list, or official proceeding is to be published, for at least one year next preceding the date of the first publication thereof. Provided, That if no newspaper has been previously published in said county for one year, as above required, then the same may be published in any newspaper of general circulation in said county which has been published in said county for less than one year, if there be one, but if there be neither, then in any newspaper published at the capital of the state, having a general circulation in the state.

(G. S. 1866, c. 66, § 69; G. S. 1878, c. 66, § 83; as amended 1887, c. 42, § 1; 1889, c. 86, § 1.)

By § 2, Laws 1889, c. 86, all inconsistent acts are repealed.

See § 7992, et seq as to what constitutes a newspaper.

In computing time for publishing notice of sale under a power in a mortgage, the general rule prescribed by the statute of excluding the first and including the last day is to apply; thus, a notice first published on the 3d of August, and published to and including the 14th of September, is sufficient. Worley v. Naylor, 6 Minn. 192, (Gil. 123.)

Where the notice was required to be published once in each week for six successive weeks, and there were seven weekly publications, the first on January 4th and the last on February 15th, for a sale February 23d, it was held good. Atkinson v. Duffy, 16 Minn. 45, (Gil. 30.)

Those copies of a newspaper which are sent from the publication office to the post-office, some to be delivered to subscribers in the same city, others to be carried by mail to subscribers elsewhere, are published when deposited in the post-office. Pratt v. Tinkcom, 21 Minn. 142.

§ 5224. Order defined.

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

(1867, c. 67, § 1;[6] G. S. 1878, c. 66, § 84.)

§ 5225. Motion defined.

An application for an order is a motion.

(1867, c. 67, § 2; G. S. 1878, c. 66, § 85.)

§ 5226. Notice of motion—Order to show cause.

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.

(1867, c. 67, § 3; G. S. 1878, c. 66, § 86.)

An order made without the necessary notice is irregular, but not void. Danner v. Capehart, 41 Minn. 294, 42 N. W. Rep. 1062.

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[6] An act in relation to motions and orders. Approved March 7, 1867 (Laws 1867, c. 67).

§ 5227. Where motions to 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, unless the place where such motion is made, in such adjoining district, is nearer by direct railway communication to said county-seat than said residence of the judge of the district is by such railway communication. 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: *provided*, that demurrers in civil actions may be brought on for argument by either party at any time the court may fix for that purpose, at chambers or at any regular or special term of court, in any county in the judicial district in which the action is pending.

(1867, c. 67, § 4; G. S. 1878, c. 66, § 87; as amended 1881, c. 7, § 1; 1885, c. 267.)

See State v. District Court First Judicial Dist., 52 Minn. 283, 53 N. W. Rep. 1157, 1159.

TITLE 6.

PLEADINGS IN CIVIL ACTIONS.

(1) WHAT PLEADINGS ALLOWED.

§ 5228. Pleadings, etc., 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.

(G. S. 1866, c. 66, § 70; G. S. 1878, c. 66, § 88.)

Cited, First Div. St. Paul, etc., R. Co. v. Rice, 25 Minn. 292.

§ 5229. 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.

(G. S. 1866, c. 66, § 71; G. S. 1878, c. 66, § 89.)

(2) THE COMPLAINT.

§ 5230. Complaint defined.

The first pleading on the part of the plaintiff is the complaint.

(G. S. 1866, c. 66, § 72; G. S. 1878, c. 66, § 90.)

§ 5231. 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.

(G. S. 1866, c. 66, § 73; G. S. 1878, c. 66, § 91.)

See § 4944 as to attached counties.

The number of the judicial district is no part of the title of the district court, and, if erroneously given, may be rejected. State v. Munch, 22 Minn. 67.

Even in form, the statute blending law and equity has not made, and cannot make, so important a change as might be inferred from a first reading of it. The complaint must, as before the passage of the act, be drawn with a special view to the relief demanded; and, unless it is so drawn, the action must fail, except in cases where the error is cured by amendment. Russell v. Minnesota Outfit, 1 Minn. 165, (Gil. 140.)

A defective complaint, or one which does not contain facts sufficient to constitute a cause of action, cannot be cured by the necessary averments in the reply. The complaint must contain all the allegations necessary for the plaintiff to maintain his action. Bernheimer v. Marshall, 2 Minn. 85, (Gil. 68.)

See Young v. Young, cited in notes to §§ 4795 and 4943; Stewart v. Erie & W. Transp. Co., 17 Minn. 372, (Gil. 348, 375.)

An allegation as to the corporate existence of a defendant may be stated independently of a cause of action, and is no part of it. West v. Eureka Improvement Co., 40 Minn. 394, 42 N. W. Rep. 87.

(3) THE DEMURRER.

§ 5232. Defendant may demur, when—On what grounds.

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.

(G. S. 1866, c. 66, § 74, as amended 1867, c. 62, § 5; G. S. 1878, c. 66, § 92.)

A complaint is not demurrable because the summons was not served on a co-defendant. St. Paul Land Co. v. Dayton, 37 Minn. 364, 34 N. W. Rep. 335.

SUBD. 1. That an action is commenced in the wrong county does not affect the jurisdiction, and cannot be reached by demurrer. Nininger v. Commissioner of Carver Co., 10 Minn. 133, (Gil. 106.) To same effect, Gill v. Bradley, 21 Minn. 15.

To warrant a demurrer of a complaint, on the ground that the court has no jurisdiction of the subject of the action, it must affirmatively appear from the complaint that the court has not jurisdiction. Powers v. Ames, 9 Minn. 178, (Gil. 164.)

SUBD. 2. The omission to obtain leave to sue a receiver or other officer of court, appointed by it to hold or administer property or an estate under its control and direction, is not ground of demurrer to the complaint. Leuthold v. Young, 32 Minn. 122, 19 N. W. Rep. 652.

To sustain a demurrer upon the ground that it appears upon the face of the complaint "that the plaintiff has not legal capacity to sue," it is not enough that it does not appear that the plaintiff has legal capacity to sue, but the want of such legal capacity must appear affirmatively. Minneapolis Harvester Works v. Libby, 24 Minn. 327.

A demurrer will not lie to a complaint on the ground that it appears from it that the plaintiff has not legal capacity to sue, unless the want of legal capacity appears affirmatively from the complaint. State v. Torinus, 22 Minn. 272. An allegation in a complaint on a note that the note was duly indorsed and transferred to plaintiff, and that it is the owner and holder of the note, shows sufficiently that the plaintiff has capacity, *i. e.*, authority, to take and hold the note. Id.

Objection that one suing as receiver in supplementary proceedings was not duly appointed cannot be taken by general demurrer, but only by demurrer for want of capacity to sue. Walsh v. Byrnes, 39 Minn. 527, 40 N. W. Rep. 831.

SUBD. 3. See Majerus v. Hoscheid, 11 Minn. 243, (Gil. 160.)

SUBD. 4. An excess of parties is not ground of demurrer as "a defect of parties," in the meaning of subd. 4. Hoard v. Clum, 31 Minn. 186, 17 N. W. Rep. 275.

Excess of parties defendant is not ground of demurrer by a party properly sued. A defendant, improperly joined, may demur to the complaint on the ground that no cause of action is stated against him. Lewis v. Williams, 3 Minn. 151, (Gil. 95;) followed in Nichols v. Randall, 5 Minn. 304, (Gil. 240.)

The objection of a defect of parties must be taken advantage of by answer or demur-

rer; otherwise it is waived. Baldwin v. Canfield, 26 Minn. 44, 62, 1 N. W. Rep. 261, 276, 585; McRoberts v. Southern Minn. R. Co., 18 Minn. 108, (Gil. 91;) Stewart v. Erie & W. Transp. Co., 17 Minn. 372, (Gil. 348, 375.) And so where all the partners are not joined in an action to recover a firm debt. Davis v. Chouteau, 32 Minn. 548, 21 N. W. Rep. 748. The objection that there is a defect of parties must be made, if it appear from the complaint, by demurrer; if it do not so appear, by answer. If the objection is not so made it is waived. Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

A demurrer for defect of parties held properly sustained, when the complaint showed on its face that a third person named owned the claim, the payment of which by the defendant the plaintiff sought to enjoin. Graham v. City of Minneapolis, 40 Minn. 436, 42 N. W. Rep. 291.

In the absence of a proper objection by answer or demurrer, an owner of personal property, in common with others, may, without joining his co-owner, maintain an action of claim and delivery to recover possession of the same or of any part thereof. Miller v. Darling, 22 Minn. 303.

A defect of parties defendant, by reason of the non-joinder of one of several joint obligors, if not taken by answer, is waived. Christian v. Bowman, 49 Minn. 99, 51 N. W. Rep. 663.

SUBD. 5. A cause of action to recover possession of real estate, and a cause of action to recover the value of the use while occupied by defendant, may be united in the same action. Armstrong v. Hinds, 8 Minn. 254, (Gil. 221.)

Where a conveyance, absolute on its face, is given as security for the note of a third person, and an instrument of defeasance (quitclaim deed) is executed and deposited in *escrow*, to be delivered upon payment of the note, upon default in payment of the note, an action will lie by the grantee in such conveyance against the grantor therein, the maker of the note and the depositary of the quitclaim deed, for a sale of the mortgaged premises, a surrender of the quitclaim deed, and a judgment against the maker of the note for any deficiency after applying the proceeds of the sale upon the amount due on the note. There is no misjoinder of defendants. Several causes of action are not improperly united. Nichols v. Randall, 5 Minn. 304, (Gil. 240.)

Objection to a complaint for misjoinder of causes of action must be taken by demurrer or answer, or it is waived. James v. Wilder, 25 Minn. 305.

See, also, Connor v. St. Anthony Bd. of Education, 10 Minn. 439, (Gil. 352.)

SUBD. 6. A pleading must allege facts, and not inferences or conclusions of law. Griggs v. City of St. Paul, 9 Minn. 246, (Gil. 231.)

If a pleading set forth substantially a good cause of action or defense, it is not obnoxious to a demurrer, though it has immaterial and redundant statements in it. To prune the pleading of such matter, the proper course is by motion to strike out. Loomis v. Youle, 1 Minn. 175, (Gil. 150.) If a complaint shows plaintiff entitled to some relief, even though not that prayed for, it is not liable to a general demurrer. Leuthold v. Young, 32 Minn. 122, 19 N. W. Rep. 652.

The objection to a bill that its statements are vague and uncertain is to their form and manner, and not good on general demurrer. Chouteau v. Rice, 1 Minn. 106, (Gil. 84.)

That a complaint does not ask for the proper relief, or asks for inconsistent relief, is no ground of demurrer. Connor v. St. Anthony Board of Education, 10 Minn. 439, (Gil. 352.)

A demurrer will not lie to a part of a cause of action in a complaint. Daniels v. Bradley, 4 Minn. 158, (Gil. 105.)

A complaint in an action to recover possession of real estate, and the value of the use, must show right of possession in plaintiff. Armstrong v. Hinds, 8 Minn. 254, (Gil. 221.) The allegation of title in plaintiff, some time anterior to the commencement of the action, does not show title and right of possession when the action is commenced. Id.

To sustain a demurrer to a complaint on the ground that the cause of action is barred by the statute, it must clearly appear that the statute has run against it. Eastman v. St. Anthony Falls Water-Power Co., 12 Minn. 137, (Gil. 77.) If it does not clearly appear by the complaint that the cause of action is barred by the statute, the defense must be made by answer. Davenport v. Short, 17 Minn. 24, (Gil. 8.) A complaint upon a promissory note due more than six years before the action commenced, but which alleges a payment on the note, without stating the time of payment, does not show the cause of action to be barred by the statute of limitations. Kennedy v. Williams, 11 Minn. 314, (Gil. 219.) It is proper to allege in the complaint facts which will take the cause of action out of the operation of the statute of limitations. Hoyt v. McNeil, 13 Minn. 390, (Gil. 362.)

Upon a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, which specifies several points, the demurring party may use in the supreme court any points in support of that ground of demurrer, although not mentioned in his demurrer. Monette v. Cratt, 7 Minn. 234, (Gil. 176.) If it appears from the complaint that the subject-matter has already been conclusively adjudicated, that will support a demurrer to the complaint on the ground of no cause of action. Id.

See, also, Baldwin v. Winslow, 2 Minn. 213, (Gil. 174.)

A complaint is not demurrable because it demands the wrong relief. Alworth v. Seymour, 42 Minn. 526, 44 N. W. Rep. 1030.

§ 5233. Requisites of demurrer—To what it may be taken.

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.

(G. S. 1866, c. 66, § 75; G. S. 1878, c. 66, § 93.)

A general demurrer will not reach an improper joinder of causes of action. Smith v. Jordan, 13 Minn. 264, (Gil. 246.)

See Stewart v. Erie & W. Transp. Co., 17 Minn. 372, (Gil. 348, 375.)

§ 5234. Objection may be taken by answer, when.

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

(G. S. 1866, c. 66, § 77; G. S. 1878, c. 66, § 94.)

§ 5235. 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.

(G. S. 1866, c. 66, § 78; G. S. 1878, c. 66, § 95.)

A defendant does not, by answering, waive the objection that the court has not jurisdiction of the subject-matter, or that the complaint does not state facts sufficient to constitute a cause of action. Stratton v. Allen, 7 Minn. 502, (Gil. 409.)

The objection that the plaintiff has not legal capacity to sue is waived unless raised by answer or demurrer. Tapley v. Tapley, 10 Minn. 448, (Gil. 360.)

Defect of parties defendant can be objected to only by answer or demurrer. Blakeley v. Le Duc, 22 Minn. 477. The objection that there is a defect of parties must be made, if it appear by the complaint, by demurrer; if it do not so appear, by answer. If the objection is not so made, it is waived. Lowry v. Harris, 12 Minn. 255, (Gil. 166.) To same effect, McRoberts v. South Minn. R. Co., 18 Minn. 108, (Gil. 91.) Where a supplemental complaint is objectionable on the ground that the original complaint is wholly defective, the objection must be taken by demurrer or by objection to its being filed. The objection is waived by answering. Lowry v. Harris, 12 Minn. 255, (Gil. 166.) Where a stockholder in a corporation brought suit for himself alone to set aside a contract entered into by the corporation, on the ground that it was injurious to the rights of the stockholders, held, that the objection that there was a defect of parties plaintiff, not having been taken by demurrer or answer, was waived. Stewart v. Erie & West. Transp. Co., 17 Minn. 372, (Gil. 348.) The provisions that where there is a defect of parties plaintiff or defendant, if the defect appears on the face of the complaint, the objection may be taken by demurrer; that if the defect does not appear on the face of the complaint, the objection may be taken by answer; and if no such objection is taken either by demurrer or answer, the defendant is deemed to have waived the same,—apply to a defect of parties plaintiff in actions *ex contractu*, as where a member of a partnership is not joined as plaintiff in an action on a demand due the firm; and if objection is not taken to this defect by answer, it cannot be raised upon the trial upon a motion for nonsuit on the ground of a variance or failure of proof. Davis v. Chouteau, 32 Minn. 548, 21 N. W. Rep. 748. If the objection be taken by answer, it must distinctly set up the defect of parties as a defense, and must allege wherein the defect consists, specifically stating who should have been joined as plaintiff. Id.

The want of an essential averment in a complaint is not cured by a verdict for the plaintiff. Lee v. Emery, 10 Minn. 187, (Gil. 151.) The objection made for the first time in the supreme court, on appeal from a judgment by default, that the complaint does not state a cause of action, should not be favored, and the judgment should be sustained if a cause of action is fairly inferable by any reasonable intendment from the facts in the complaint. Smith v. Dennett, 15 Minn. 81, (Gil. 59.)

Although a complaint is objectionable as containing matter relating to two distinct causes of action improperly joined, it is too late to raise the objection in this court, after trial in the court below without objection, and when the evidence was confined to one of such causes, and the trial was had alone in reference to that. Gardner v. Kellogg, 23 Minn. 463.

The objection of misjoinder of causes of action or of defect of parties is waived if not taken advantage of by demurrer or answer. Densmore v. Shepard, 46 Minn. 54, 48 N. W. Rep. 528, 681.

See notes to § 5232.

(4) THE ANSWER.

§ 5236. Contents of answer—Denials—New matter—Equities.

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.

(G. S. 1866, c. 66, § 79; G. S. 1878, c. 66, § 96.)

SUBD. 1. A denial of each and every material allegation of a pleading is bad. Montour v. Purdy, 11 Minn. 384, (Gil. 278.)

"The defendant, for answer to plaintiff's complaint, respectfully states and shows to this court that he denies each and every allegation in said plaintiff's complaint contained." Held to be a sufficient denial, though not commendable in form. Carpenter v. Comfort, 22 Minn. 539.

An answer stating, "The said defendant denies each and every statement and averment, and every part of the same, in said amended complaint contained, as therein stated or otherwise, save as hereinafter stated, admitted, or qualified," if there is no ambiguity in what is afterwards stated, admitted, or qualified, is a sufficient denial. Kingsley v. Gilman, 12 Minn. 515, (Gil. 425.)

In an action purporting to be brought by plaintiff as a foreign administrator, allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly-authenticated copy of his appointment, are put in issue by an answer denying the complaint, and "each and every part and portion thereof." Fetz v. Clark, 7 Minn. 217, (Gil. 150,) followed. Fogle v. Schaeffer, 23 Minn. 304.

A general denial in an answer of the allegation in a complaint "that before the maturity of said note the said A. M., for value received, sold, transferred, indorsed, and delivered it to plaintiff," puts in issue only the time, not the fact, of transfer. Frasier v. Williams, 15 Minn. 288, (Gil. 219.)

A general denial of all allegations not expressly admitted or qualified is inapplicable to a subject as to which specific answer is made. Davenport v. Ladd, 38 Minn. 545, 38 N. W. Rep. 622.

See, also, Horn v. Butler, 39 Minn. 515, 40 N. W. Rep. 833.

A general denial of all the allegations "except that which is hereinafter admitted, specifically denied, or qualified" is effectual, if there is no uncertainty as to what is specially pleaded. Jellison v. Halloran, 40 Minn. 485, 42 N. W. Rep. 392.

A general denial puts in issue every allegation of the pleading answered, and can never be construed as a negative pregnant. (Overruling Dean v. Leonard, 9 Minn. 190 [Gil. 176] and other cases.) German American Bank v. White, 38 Minn. 471, 38 N. W. Rep. 361.

See, also, Stone v. Quaal, 36 Minn. 46, 29 N. W. Rep. 326; Nunnemacher v. Johnson, 38 Minn. 390, 38 N. W. Rep. 351.

A denial, in the answer, of the allegation of value of the complaint, in these words, "The defendant denies any knowledge or information thereof sufficient to form a belief as to the value of all or any of said goods," makes a good issue as to value. Ames v. First Division St. Paul & Pacific R. Co., 12 Minn. 412, (Gil. 295.)

When a complaint in an action to set aside conveyances of real estate as fraudulent as to creditors charged that the conveyances were made to cheat, delay, and defraud, and also set forth facts and circumstances from which fraud might be inferred, as that the conveyances were made without consideration, and at a different time from that at which they purported to have been executed, it is not sufficient, in an answer, to deny the general charge of fraud, without denying the facts and circumstances alleged from which it might be inferred. Johnston v. Piper, 4 Minn. 192, (Gil. 134.)

In an action on a judgment, by the judgment creditor, an answer alleging that the judgment is not owned by the plaintiff, but by another person, naming him, presents a good defense, though the particulars of the assignment be not stated. Holcombe v. Tracy, 2 Minn. 241, (Gil. 201.)

An averment, in a complaint to set aside a mortgage sale, that the sale did not take place at the time specified in the notice, and that no postponement of the sale was ever

given, alleges no fact upon which issue can be taken. Ramsey v. Merriam, 6 Minn. 168, (Gil. 104.)

A denial of any knowledge or information sufficient to form a belief as to a judgment pleaded by the opposite party, by one not a party to the judgment, is good. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

Where the complaint alleged the receipt by defendant for transportation of a specified quantity of wood, and the answer admitted the receipt of a large quantity, but denied any knowledge or information sufficient to form a belief as to the quantity, without showing any reason for want of knowledge or information, the denial was held insufficient. Starbuck v. Dunklee, 10 Minn. 168, (Gil. 136.) A denial of each and every allegation in a complaint, except so far as the court may construe the statements in the answer as admissions, is bad. Id.

Under a general denial the defendant may show anything that tends directly to disprove the allegations in the complaint. So, where plaintiff's title to personal property, under an alleged transfer to him, was put in issue, defendant may show that the property never was delivered to plaintiff, such delivery being held necessary to the vesting of title in plaintiff. Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 191.)

A denial of information and belief cannot be disregarded while it remains in the answer, though it might be stricken out as a sham. Smalley v. Isaacson, 40 Minn. 450, 42 N. W. Rep. 352; Schroeder v. Capehart, 49 Minn. 525, 52 N. W. Rep. 140.

SUBD. 2. A defendant may set up as a counter-claim any cause of action arising *ex contractu*, whether the damages are liquidated or unliquidated. Morrison v. Lovejoy, 6 Minn. 319, (Gil. 225.)

In an action to foreclose a mortgage given for purchase money, the mortgagor may plead as a counter-claim damages from breach of the covenants in the deed to him. Lowry v. Hurd, 7 Minn. 356, (Gil. 282.)

Although matter set up in an answer may be a complete defense to the cause of action alleged in the complaint, it may also be pleaded as a counter-claim if it constitutes a cause of action in favor of defendant against the plaintiff, and is connected with the subject of plaintiff's action. Griffin v. Jorgenson, 22 Minn. 92. Where such matter is pleaded as a counter-claim, the plaintiff cannot, of his own motion, dismiss the action. Id.

In an action to enforce a mechanic's lien upon the estate of a married woman, in which her husband was joined as a party defendant, a claim of the husband against the plaintiff is not a proper set-off. Carpenter v. Leonard, 5 Minn. 155, (Gil. 119.)

The allegation in pleading a counter-claim of what defendant charged for the services set up, without any allegation of their value, or of an agreed price, is insufficient to admit proof of the counter claim. Farrington v. Wright, 1 Minn. 241, (Gil. 191.)

In an action to recover the value of work and material, the defendant cannot avail himself of an express contract that the rate of compensation shall be submitted to the arbitrament of a third person, and that from his decision there shall be no appeal, without pleading it. The contract cannot be proved under a general denial of the allegations in the complaint. Lautenschlager v. Hunter, 22 Minn. 267.

In a suit to enforce specific performance of a contract to convey land, the defendant cannot avail himself of the facts that the land is his homestead; that he is a married man; and that his wife did not join in the contract,—as a defense to the action, without pleading such facts as a defense, unless the plaintiff consents to try that defense without it being pleaded. Those facts cannot be proved under a mere denial of the execution. Brown v. Eaton, 21 Minn. 409.

A defendant may plead matters that will be a defense or a counterclaim to any cause of action provable within the allegations of the complaint, though not precisely such as alleged, and though such matters might not be a defense or a counterclaim if all the allegations of the complaint should be proved. Smalley v. Isaacson, 40 Minn. 450, 42 N. W. Rep. 352.

The defendant may have such relief, though not specifically demanded, as the matters pleaded as a counterclaim entitle him to. Wilson v. Fairchild, 45 Minn. 203, 47 N. W. Rep. 642.

Matter expressly pleaded as a counterclaim, though not proper as such, may be available as a defense. Townsend v. Minneapolis Cold-Storage Co., 46 Minn. 121, 48 N. W. Rep. 682.

See Curtiss v. Livingston, 36 Minn. 312, 30 N. W. Rep. 814; Davenport v. Short, 17 Minn. 24, (Gil. 8, 9;) Crockett v. Phinney, 33 Minn. 157, 159, 22 N. W. Rep. 292.

See, also, note to § 5237.

SUBD. 5. In ejectment an equitable defense may be set up, but the equities should be strong, such as would entitle the defendant to a conveyance on a bill filed for that purpose. McClane v. White, 5 Minn. 178, (Gil. 140.) The owner of the legal title to real estate may bring ejectment, whatever equities may be claimed by defendant. The defendant may, in his answer, set up his equities, so far at least as they relate to the right of possession, and the action is a proper one in which to litigate them. Williams v. Murphy, 21 Minn. 534. To prevail against the plaintiff's legal right to the possession, the equities pleaded as a defense must be such that, under the former practice, a court of equity would, upon a bill filed setting up the facts, have enjoined the legal owner from proceeding at law. Id.

Plaintiffs gave their bond for the conveyance of certain real estate, on payment of purchase price, in five installments, according to five notes given by defendant, a cancellation of which was asked on the ground that defendant had failed to pay the first of said notes. Defendant averred an indebtedness due him from plaintiff, Nicholas Wallrich, to the amount of $225, which he asked to have offset against said first note, and paid the balance due into court. Held, such amount being found due, that the same was an "equity," within this section, and proper set-off to the first note; and the judgment of the court below allowing the same as such, and that plaintiff take nothing by his action, that said note be surrendered up and canceled on filing same with the clerk, and that he be entitled to the money paid into court, and no costs be allowed either party, was proper. Wallrich v. Hall, 19 Minn. 383, (Gil. 329.)

An equity may well rest upon the justice of requiring the tenant who seeks to charge his co-tenant for receiving more than his just proportion of the rents and profits, to make allowance for moneys expended in the defense or protection of the common estate, as, for instance, in preserving it from forfeiture on account of non-payment of taxes. Kean v. Connelly, 25 Minn. 222, 228.

In an action to recover the possession of leased premises, on the ground of non-payment of rent, an overdue note of the landlord, held by the tenant, is not an equity within this subdivision, unless it is shown that there is no adequate remedy at law; nor is it a counterclaim, under subdivision 1 or 2 of § 5237. Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

In an action on a promissory note, indorsed by the payee to plaintiff as security, a defense arising subsequent to the indorsement cannot be set up. Becker v. Sandusky City Bank, 1 Minn. 311, (Gil. 243.)

As a general rule, a party cannot set up a separate debt against a joint one, as an equity, under this subdivision. The fact that plaintiffs are non-residents, and have no property within the state out of which it can be collected, and that defendant cannot procure service of summons so as to subject them to the jurisdiction of the courts of this state, there being no allegation of plaintiff's insolvency, will not authorize such allowance. Birdsall v. Fischer, 17 Minn. 100, (Gil. 76.)

Nature of the "equities" that may be pleaded in an answer. Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. Rep. 865.

See Probstfield v. Czizek, 37 Minn. 420, 34 N. W. Rep. 896.

In an action against a surety, the principal debtor being a party and insolvent, the surety may set off a debt from the plaintiff to the principal. Becker v. Northway, 44 Minn. 61, 46 N. W. Rep. 210.

The demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though the plaintiff is insolvent. Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. Rep. 1115.

See Young v. Young, cited in note to § 4796; Wheaton v. Thompson, 20 Minn. 204, (Gil. 183;) Banning v. Bradford, 21 Minn. 313; Weide v. Gehl, Id. 454; Crockett v. Phinney, 33 Minn. 161, 22 N. W. Rep. 292; Schmidt v. Coulter, 6 Minn. 492, (Gil. 340;) Freeman v. Curran, 1 Minn. 169, (Gil. 144;) Wallrich v. Hall, 19 Minn. 383, (Gil. 329;) Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. Rep. 865; Birdsall v. Fischer, 17 Minn. 100, (Gil. 76, 80.)

§ 5237. Requisites of counterclaim.

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

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

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

(G. S. 1866, c. 66, § 80; G. S. 1878, c. 66, § 97.)

See Campbell v. Jones, 25 Minn. 155, 157; Matthews v. Torinus, 22 Minn. 132, 136; Reed v. Newton, Id. 541.

A counter-claim must contain the substance of a cause of action in favor of the defendant against the plaintiff. Linn v. Rugg, 19 Minn. 181, (Gil. 145.) A counter-claim must be one upon which an action can be maintained by the defendant, at law or in equity. Swift v. Fletcher, 6 Minn. 550, (Gil. 386.)

In an action for conversion a cause of action arising upon contract is not a proper counter-claim. Illingworth v. Greenleaf, 11 Minn. 235, (Gil. 154.)

A counter-claim setting up a claim for goods sold and delivered, which does not allege any value or promise to pay a particular sum, is insufficient. Holgate v. Broome, 8 Minn. 243, (Gil. 210.)

In an action on an alleged sale and delivery of goods the answer denied that the transaction was a sale, and alleged that the goods were delivered to him, as agent for plaintiff, to be sold by him, and to be paid for by him when they were all sold; that the de-

fendant had fully performed on his part, but had not yet sold all the goods. Held not a counter-claim, because the answer did not show any claim against defendant on account of the transaction. Steele v. Etheridge, 15 Minn. 501, (Gil. 413.)

When, in an action to recover the value of goods sold and delivered, the defendant pleads that the goods were delivered under an express contract, and pleads a counter-claim for damages for a breach of the contract, he thereby admits the plaintiff's right to recover for the goods actually delivered. Following Mason v. Heyward, 3 Minn. 182, (Gil. 116.) Paine v. Sherwood, 21 Minn. 225.

Where, in an action on an express contract, the defendant sets up a counter-claim, founded on alleged failures by plaintiff to perform the contract, he thereby consents to put in issue all the equities between the parties upon the contract, and debars himself from claiming that plaintiff cannot maintain his action because of such failures. Craig v. Heyward, 3 Minn. 182, (Gil. 116;) followed, Whalon v. Aldrich, 8 Minn. 346, (Gil. 305;) distinguished, Koempel v. Shaw, 13 Minn. 488, (Gil. 451.)

The right of a defendant in an action of claim and delivery to a return of the property replevied, and to damages for the taking and detention of the same in such action, is not a cause of action which can constitute a counter-claim in such action of claim and delivery. Sylte v. Nelson, 26 Minn. 105, 1 N. W. Rep. 811.

The allegation in the answer of a junior judgment creditor, in an action to foreclose a mortgage, that a portion of the mortgage debt is also secured by a mortgage upon property in another state, not subject to the lien of his judgment, and to which the plaintiff should first resort, does not constitute a counter-claim, and is therefore not admitted by the plaintiff's failure to reply thereto. First Nat. Bank of Memphis v. Kidd, 20 Minn. 234, (Gil. 212.)

In an action, under § 1, c. 75, G. S. 1866 (see § 5817), to determine adverse claims to real estate, an answer denying plaintiff's title and right of possession, alleging title in defendant, that plaintiff wrongfully withholds possession from defendant, and demanding judgment for the possession and damages and mesne profits, alleges a counter-claim, and is in effect a cross-action in ejectment. Eastman v. Linn, 20 Minn. 433, (Gil. 387.)

A cause of action by a tenant against his landlord, for wrongfully interfering with his enjoyment of premises rented, is a counter-claim in an action against him by the landlord to recover rent for a period including that of such interference. Goebel v. Hough, 26 Minn. 252, 2 N. W. Rep. 847.

A claim due from decedent to defendant cannot be set off in an action brought by the administrator upon a contract made with him as such. McLaughlin v. Winner, (Wis.) 23 N. W. Rep. 402.

A separate debt cannot, under this section, be offset as a counter-claim against a joint debt. Birdsall v. Fischer, 17 Minn. 100, (Gil. 76.)

See, also, Peck v. Snow, 47 Minn. 398, 50 N. W. Rep. 470.

Under § 71, c. 60, Comp. St., any cause of action arising *ex contractu*, whether for liquidated or unliquidated damages, might be set up as a counter-claim. Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.)

In an action on a contract, a claim for the use and occupation of lands held by plaintiff adversely to defendant cannot be set up as a counter-claim, under section 71, c. 60, p. 541, Comp. St. Folsom v. Carli, 6 Minn. 420, (Gil. 284.) A cause of action that, before the adoption of the Code, would not have been proper as a set-off in an action on a contract, will not come within the provision of subdivision 2, § 71, p. 541, Comp. St., in regard to counter-claims. *Id.*

In a proceeding under c. 84, G. S. 1866, for non-payment of rent, a note held by the tenant against the landlord cannot be set up as an equity unless there is no remedy on it by action; nor is it a counter-claim in such proceeding. Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

In an action for the price of personal property, a claim in the answer for breach of warranty of quality constitutes a counterclaim. Schurmeier v. English, 46 Minn. 306, 48 N. W. Rep. 1112.

In a suit to enforce a purchase-money chattel mortgage, the mortgagor may set up his damages for breach of warranty of quality of the thing sold, though the suit is by an assignee. Massachusetts Loan & Trust Co. v. Welch, 47 Minn. 183, 49 N. W. Rep. 740.

See, also, Rugland v Thompson, 48 Minn. 539, 51 N. W. Rep. 604.

Defendants were indebted to a corporation on account. They also held the agreement of the corporation to deliver certain goods. The corporation made an assignment for the benefit of creditors, no demand having been made for the goods. Held, in an action by the assignee on the account, that since, by the assignment, the corporation disabled itself from delivering the goods, the defendants' right to damages could be set off under this section, or in equity. Laybourn v. Seymour, 53 Minn. 105, 54 N. W. Rep. 941.

In an action on a note, the defendant may counterclaim for breach of a ne exeat bond. Midland Co. v. Broat, 50 Minn. 562, 52 N. W. Rep. 972.

In an action on a contract, a counterclaim for an independent tort cannot be set up. Warner v. Foote, 40 Minn. 176, 41 N. W. Rep. 935.

An action on a judgment is "an action arising on contract." Way v. Colyer, 54 Minn. 14, 55 N. W. Rep. 744.

A cause of action in tort cannot be set up as a counter-claim in an action upon an accounting for services. Steinhart v. Pitcher, 20 Minn. 102, (Gil. 86.)

In an action to enforce a mechanic's lien, an allegation in the answer that the premises are defendant's homestead is not a counter-claim requiring a reply. Englebrecht v. Rickert, 14 Minn. 140, (Gil. 108.)

To constitute new matter set up in an answer, a counter-claim so as to require a reply, it must be pleaded as such, and so that, if true, the court must grant affirmative relief to the defendant upon it. Broughton v. Sherman, 21 Minn. 431.

See, also, Bidwell v. Madison, 10 Minn. 1, (Gil. 13;) Schmidt v. Coulter, 6 Minn. 495, (Gil. 342;) Banning v. Bradford, 21 Minn. 313; Lace v. Fixen, 39 Minn. 46, 38 N. W. Rep. 762: Osborne v. Williams, 39 Minn. 353, 40 N. W. Rep. 165; and note to § 5236, subd. 2.

§ 5238. Pleading counter-claim not an admission.

The pleading of a set-off or counter-claim by a defendant in any action, in any of the courts of this state, shall not be held or construed to be an admission of any cause of action on the part of plaintiff against such defendant.

(1883, c. 101, § 1; G. S. 1878, v. 2, c. 66, § 97a.)

By § 2, c. 101, Laws 1883, all inconsistent laws are repealed.

§ 5239. Several defences, etc., how stated—Demurrer and answer.

The defendant may set forth by answer as many defences and counterclaims 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.

(G. S. 1866, c. 66, § 81; G. S. 1878, c. 66, § 98.)

Matters in abatement may be united with other defenses in the same answer. Page v. Mitchell, 37 Minn. 368, 34 N. W. Rep. 896.

In an action for damages for an injury to real property, an answer setting up title in defendant, and also a license from the plaintiff, does not set up inconsistent defenses. Booth v. Sherwood, 12 Minn. 426, (Gil. 310.)

The answer denied the publication of the words charged, and then in mitigation of damages alleged previous provocation by plaintiff, and that whatever was said by the defendant on the occasion referred to in the complaint was spoken in the heat of passion, caused by the abusive language of plaintiff. Held, that these were not inconsistent; that the matters set up in mitigation did not admit the speaking of the words charged. Warner v. Lockerby, 31 Minn. 421, 18 N. W. Rep. 145, 821.

Where, in an action in replevin, the answer alleged payment by defendant, a warehouseman, at plaintiff's request, of the carrier's charges for transporting goods, shipped by plaintiff and consigned to defendant, and claimed a lien on them by reason thereof, and also alleged his charges as warehouseman, in receiving and storing the goods at plaintiff's request, and claimed a lien on that account, held, that the facts relating to each lien was, if good, a distinct defense, and, although they were not "separately stated," the plaintiff might demur to one and reply to the other. Bass v. Upton, 1 Minn. 408, (Gil. 292.)

In an action for services, a plea of payment is not necessarily inconsistent with a general denial. Steenerson v. Waterbury, 52 Minn. 211, 53 N. W. Rep. 1146.

§ 5240. Sham and frivolous defenses, etc.

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

(G. S. 1866, c. 66, § 82; G. S. 1878, c. 66, § 99; as amended 1881, c. 49, § 1.)

A sham answer is one setting up new matter, clearly and indisputably false. Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

A frivolous answer is one, the insufficiency of which is so glaring that the court can determine it upon a bare inspection without argument. Id.

An irrelevant pleading is one which has no substantial relation to the controversy between the parties to the suit. Id.

If, from mere inspection, a pleading can be determined to be good, a demurrer to it is frivolous. Hurlburt v. Schulenburg, 17 Minn. 22, (Gil. 5.)

The statute does not authorize a defense to be struck out for inconsistency. Conway v. Wharton, 13 Minn. 158, (Gil. 145.)

An answer may be struck out as sham, though verified. Hayward v. Grant, 13 Minn. 165. (Gil. 154.)

Upon a demurrer to, or motion to strike out, an answer, the defendant may attack the complaint. Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

See Stevens v. McMillin, 37 Minn. 509, 35 N. W. Rep. 372; Wheaton v. Briggs, 35 Minn. 470, 29 N. W. Rep. 170.

An answer is improperly stricken out as a sham if its falsity does not indisputably appear. McDermott v. Deither, 40 Minn. 86, 41 N. W. Rep. 544.

See Smalley v. Isaacson, 40 Minn. 450, 42 N. W. Rep. 352.

When a verified answer may be stricken out as a sham upon affidavits. Dobson v. Hallowell, 53 Minn. 98, 54 N. W. Rep. 939.

See, also, Fletcher v. Byers (Minn.) 57 N. W. Rep. 139.

In what cases a demurrer may be stricken out as frivolous. Perry v. Reynolds, 40 Minn. 499, 42 N. W. Rep. 471; Hatch & Essendrup Co. v. Schusler, 46 Minn. 207, 48 N. W. Rep. 782.

An answer setting forth only conclusions of law may be stricken out. Dennis v. Nelson (Minn.) 56 N. W. Rep. 589.

(5) THE REPLY.

§ 5241. When allowed — Contents — Demurrer to answer.

When the answer contains new matter, the plaintiff shall within twenty 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 in the answer.

(G. S. 1866, c. 66, § 83; G. S. 1878, c. 66, § 100; as amended 1879, c. 15, § 1.)

Cited, First Nat. Bank v. Rogers, 22 Minn. 231, 232.

Upon an answer showing the pendency of a former action it is competent for plaintiff to dismiss the first suit and set up such dismissal in his reply. Page v. Mitchell, 37 Minn. 368, 34 N. W. Rep. 896.

A defective complaint, or one which does not contain facts sufficient to constitute a cause of action, cannot be cured by the necessary averments in the reply. The complaint must contain all the allegations necessary for the plaintiff to maintain his action. Bernheimer v. Marshall, 2 Minn. 85, (Gil. 68.)

Admissibility of evidence under a general denial in the reply. Ellingsen v. Cooke, 37 Minn. 400, 34 N. W. Rep. 747.

Under this section an answer is demurrable upon but one ground; that is, that it does not contain a counter-claim or defense. Campbell v. Jones, 25 Minn. 155. See, also, Nelson Lumber Co. v. Phelan, 34 Minn. 243, 25 N. W. Rep. 406.

By failing to demur, the plaintiff waives objection to the answer as a counterclaim. Lace v. Fixen, 39 Minn. 46, 38 N. W. Rep. 762; Walker v. Johnson, 28 Minn. 147, 9 N. W. Rep. 632.

Part of the statement of a defense cannot be demurred to. Knoblauch v. Foglesong, 38 Minn. 459, 38 N. W. Rep. 366; Pratt v. Sparkman, 42 Minn. 448, 44 N. W. Rep. 663; Dean v. Howard, 40 Minn. 350, 51 N. W. Rep. 1102.

A reply in terms denying specifically each and every allegation of new matter in the answer is not so uncertain as to warrant the court in disregarding it. Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. Rep. 768.

A reply alleging and asking relief on a cause of action different from that alleged in the complaint is, except so far as it is a defense to new matter in the answer, a departure in pleading. A counterclaim can be pleaded in the reply only to defeat a counterclaim in the answer. Townsend v. Minneapolis Cold Storage Co., 46 Minn. 121, 48 N. W. Rep. 682.

A plaintiff cannot rely on allegations in the answer to make out his cause of action, and at the same time deny them. Mosness v. German American Ins. Co., 50 Minn. 341, 52 N. W. Rep. 932.

As to what constitutes a departure in the reply. Id.; Rosby v. St. Paul, M. & M. Ry. Co., 37 Minn. 171, 33 N. W. Rep. 693; Bishop v Travis, 51 Minn. 183, 53 N. W. Rep. 461.

An answer of new matter, requiring a reply, is in the nature of a pleading in confession and avoidance. Olson v. Tvete, 46 Minn. 225, 48 N. W. Rep. 914.

Where the answer set up a counterclaim on a note not due, and no objection was made at the trial that the counterclaim was premature, held, that the objection was waived. Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. Rep. 910.

§ 5242. Judgment for want of reply.

If the answer contains new matter, 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, or order a reference or assessment of damages by jury, as the case requires.

(G. S. 1866, c. 66, § 84; G. S. 1878, c. 66, § 101; as amended 1881, c. 44, § 1.)

In ejectment allegations in the answer that defendant entered under an official deed, has had no notice of any defects invalidating the deed, and has made improvements and paid taxes, are not admitted by failure to reply. Reed v. Newton, 23 Minn. 541.

In an action to foreclose a mortgage, facts set up in the answer of one of the defendants, a lien creditor subsequent to the mortgage, upon which he claims that plaintiff should be required to exhaust other security held for the debt, before resorting to the mortgaged property, is not a counter-claim requiring a reply. First Nat. Bank of Memphis v. Kidd, 20 Minn. 234, (Gil. 212.)

Where the answer sets up a counter-claim connected with the subject of the plaintiff's action, but it manifestly appears that the case was tried below upon the theory that the matter set up in the answer was not a counter-claim, but was in issue, without any reply, the counter-claim is not to be taken as admitted. Matthews v. Torinus, 22 Minn. 132.

The objection that the facts alleged as a counterclaim do not constitute a cause of action is not waived by a failure to reply. Schurmeier v. English, 46 Minn. 306, 48 N. W. Rep. 1112.

When the answer admits the cause of action, and sets up a counterclaim, and the plaintiff fails to reply, judgment should be ordered on the pleadings. Id.

Where the counterclaim is merely for nominal damages, it is not error to order judgment for the plaintiff on the pleadings. Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. Rep. 153.

§ 5243. Demurrer to reply.

If a reply to any new matter set up in the answer is insufficient, the defendant may demur thereto, stating the ground thereof.

(G. S. 1866, c. 66, § 85; G. S. 1878, c. 66, § 102; as amended 1881, c. 44, § 2.)

(6) GENERAL RULES OF PLEADING.

§ 5244. Pleadings, how subscribed—When to be 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.

(G. S. 1866, c. 66, § 86; G. S. 1878, c. 66, § 103.)

A pleading not properly verified may be treated as not verified at all. Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

§ 5245. 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.

(G. S. 1866, c. 66, § 87; G. S. 1878, c. 66, § 104.)

A judgment is not a written instrument within the meaning of the act of 1856, requiring an attorney who verifies a pleading to set forth his knowledge, or the grounds of his belief, on the subject, except where the action or defense is founded on a written instrument for the payment of money. Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

§ 5246. Account, how pleaded—Bill of particulars.

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.

(G. S. 1866, c. 66, § 88; G. S. 1878, c. 66, § 105.)

In a suit for conversion of public funds, against a county treasurer, the defendant is not entitled to demand a bill of particulars. If the allegations in the complaint are not sufficiently specific, his remedy is by motion to have it made more definite and certain.. Commissioners of Mower County v. Smith, 22 Minn. 97.

See Dillon v. Porter, 36 Minn. 341, 31 N. W. Rep. 56.

If the parties stipulate that a copy of the items of an account pleaded in the answer shall be given, on the defendant's failure to furnish the copy he is "precluded from giving evidence thereof." Tuttle v. Wilson, 42 Minn. 233, 44 N. W. Rep. 10.

Failure to serve, on demand, copy of account, is not matter for answer. Henry v. Bruns, 43 Minn. 295, 45 N. W. Rep. 444.

If the account served is insufficient, the proper course is to demand a further and more particular bill before trial. Minneapolis Envelope Co. v. Vanstrom, 51 Minn. 512, 53 N. W Rep. 768.

See Lousdale v. Oltman, 50 Minn. 52, 52 N. W. Rep. 131.

§ 5247. Pleadings to be liberally construed.

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

(G. S. 1866, c. 66, § 89; G. S. 1878, c. 66, § 106.)

§ 5248. Correcting irrelevant, redundant, and indefinite pleadings.

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.

(G. S. 1866, c. 66, § 90; G. S. 1878, c. 66, § 107.)

A good test of relevancy is to examine and ascertain whether the facts, if admitted or proved, would establish, or have a tendency to establish, the issuable matter contained in the bill. Goodrich v. Parker, 1 Minn. 195, (Gil. 169.)

A copy attached to the bill, and referred to as a part of it, of an instrument already sufficiently and properly pleaded, is impertinent, and will be struck out. Goodrich v. Parker, 1 Minn. 195, (Gil. 169.)

To a suit on a note, the defendant's amended answer alleged that "about two weeks" before the note came due the parties agreed that it should be payable at a particular place, and that in consideration thereof, and in about ten days thereafter, this defendant paid the said plaintiff the sum of three hundred dollars on said note. Held, that this was a good answer of part payment, and could not be struck out, but that defendant might be required to make the answer more definite and certain as to the time of the alleged agreement and part payment. Colter v. Greenhagen, 3 Minn. 126, (Gil. 75.)

In an action on a promissory note, an allegation in the answer that plaintiffs have not now the possession of the note, and that when the action was commenced the note was in the possession of a third party, is immaterial. Hayward v. Grant, 13 Minn. 165, (Gil. 154.)

When, on the trial, the objection is made that the complaint is double, a motion that the plaintiff be required to elect upon which cause of action he will proceed, or to strike out the second statement of the cause of action, is addressed to the discretion of the court. Hawley v. Wilkinson, 18 Minn. 525, (Gil. 469.)

Where a pleading contains substantially the necessary averments, though defective or uncertain in the manner of stating them, and the parties go to trial on it, it is too late to object to the pleading for such defects. Barnsback v. Reiner, 8 Minn. 59, (Gil. 38.)

Whether it is correct practice to strike out answers as frivolous, doubted. Demurrer is a preferable course. Morton v. Jackson, 2 Minn. 219, (Gil. 180.)

The particular allegations objected to should be specifically pointed out in the moving papers. Truesdell v. Hull, 35 Minn. 468, 29 N. W. Rep. 72.

An order refusing to strike out portions of a pleading for duplicity is not appealable. Exley v. Berryhill, 36 Minn. 117, 30 N. W. Rep. 436.

See Lee v. Railroad, 34 Minn. 225, 25 N. W. Rep. 399; followed, Todd v. Minneapolis

& St. L. Ry. Co., 37 Minn. 358, 35 N. W. Rep. 5; Lovejoy v. Morrison, 10 Minn. 136, (Gil. 108;) Morton v. Jackson, cited in note to § 5240; Spottswood v. Herrick, 22 Minn. 548; Fraker v. St. Paul, etc., Ry. Co., 30 Minn. 103, 14 N. W. Rep. 366.

In an action for libel, matter in mitigation is not to be stricken out when there is any doubt whether or not it would be received in evidence. Stewart v. Minnesota Tribune Co., 41 Minn. 71, 42 N. W. Rep. 787.

§ 5249. Judgment, how pleaded—Proof of jurisdiction.

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.

(G. S. 1866, c. 66, § 91, as amended 1868, c. 83, § 1; G. S. 1878, c. 66, § 108.)

A complaint upon a foreign judgment need not allege that the court rendering it had jurisdiction either of the cause or of the parties. Gunn v. Peakes, 36 Minn. 177, 30 N. W. Rep. 466.

See Karns v. Kunkle, 2 Minn. 313, (Gil. 268;) Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

See, also, Bailey v. Merritt, 7 Minn. 164, (Gil. 107;) Andrews v. School-District, 35 Minn. 70, 27 N. W. Rep. 303.

It is enough to allege that the judgment was rendered in an action pending, without pleading the jurisdictional facts, or using the words employed in this section. Scanlan v. Murphy, 51 Minn. 536, 53 N. W. Rep. 799.

§ 5250. 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.

(G. S. 1866, c. 66, § 92; G. S. 1878, c. 66, § 109.)

A stipulation in a contract for the delivery of personal property, to be paid for by measurement, that the measurement shall be made by a third person, is binding; and a complaint to recover for such delivery must aver such measurement, or state facts which relieve plaintiff from the necessity of having such measurement. A general allegation of performance by plaintiff is not sufficient. Johnson v. Howard, 20 Minn. 370, (Gil. 322.)

See, also, Minneapolis, etc., Ry. Co. v. Morrison, 23 Minn. 303.

Under a statute specifying the conditions to be performed before a cause of action can accrue, the complaint must allege the facts showing compliance. Biron v. Board of Water Comr's of St. Paul, 41 Minn. 519, 43 N. W. Rep. 482.

See Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. Rep. 932.

§ 5251. 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.

(G. S. 1866, c. 66, § 93; G. S. 1878, c. 66, § 110.)

§ 5252. Pleading municipal ordinance.

It shall not be necessary, in any pleading or complaint in civil or criminal proceedings for a violation of any ordinance of any city or village in this state, to set out or recite such ordinance, or any section thereof, at large; but it shall be sufficient in all such pleadings or complaints to state that the offense set forth in such complaint was committed contrary to the form of such ordinance, or of any specified section thereof.

(1881, Ex. S. c. 59; G. S. 1878, v. 2, c. 66, § 110a.)

§ 5253. Pleading existence of corporation.

In actions by or against corporations, domestic or foreign, 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, territory or government by which it may have been incorporated.

(G. S. 1866, c. 66, § 94, as amended 1877, c. 25, § 1; G. S. 1878, c. 66, § 111.)

An allegation in a pleading that a party is a corporation, "constituted and organized under the laws of the state of Minnesota," sufficiently alleges its corporate existence. Dodge v. Minnesota Plastic State Roofing Co., 14 Minn. 49, (Gil. 39.)

An affidavit of garnishment need not state that the garnishee is a corporation. Howland v. Jenel (Minn.) 56 N. W. Rep. 581.

§ 5254. Proof of existence of corporation, when unnecessary.

In all actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall in his answer expressly aver that the plaintiff or defendant is not a corporation.

(1876, c. 32, § 1; G. S. 1878, c. 66, § 112.)

The answer must expressly aver that plaintiff or defendant is not a corporation. State v. Ames, 31 Minn. 444, 18 N. W. Rep. 277.

This section has no application to a petition under G. S. 1878, c. 34, § 17, as amended by Laws 1879, c. 35, § 1 (§ 2608), for the appointment of commissioners in a condemnation proceeding. Chicago, B. & N. R. Co. v. Porter, 43 Minn. 529, 530, 46 N. W. Rep. 75.

§ 5255. Proof of partnership.

In all actions brought by any persons as copartners, upon any contract, verbal or written, made or entered into by or between the defendant and the plaintiff as copartners, it shall not be necessary to prove on the trial of the cause that the persons named as plaintiffs were, at the time of making such contract, or any time subsequent thereto, the persons composing such copartnership, unless the defendant shall in his answer expressly deny that the persons named as plaintiffs are or were such copartners.

(1876, c. 32, § 2; G. S. 1878, c. 66, § 113.)

§ 5256. Same—Denial must be positive.

In all actions herein named, an averment in the answer, upon information and belief, shall not be construed as an express averment that the plaintiff or defendant is not a corporation, or that the plaintiffs are or were not copartners.

(1876, c. 32, § 4; G. S. 1878, c. 66, § 114.)

In an action by a corporation, a denial, in the answer, of knowledge or information sufficient to form a belief as to whether plaintiff is a corporation, will not impose upon plaintiff the necessity of proving on the trial its corporate existence. First Nat. Bank of Rock Island v. Loyhed, 28 Minn. 396, 10 N. W. Rep. 421.

§ 5257. Complaint for slander or libel.

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.

(G. S. 1866, c. 66, § 95; G. S. 1878, c. 66, § 115.)

In what cases extrinsic facts should be set up in the complaint, not "for the purpose of showing the application to the plaintiff of the defamatory matter," but for the purpose of showing the actionable quality of the matter as respects the plaintiff, see Smith v. Coe, 22 Minn. 277.

Where, in a complaint for libel, a person of ordinary understanding would know that certain words were intended to be charged as published by the defendant, it is a sufficient allegation that they were published, although there may be errors in punctuation in the complaint. Hemphill v. Holley, 4 Minn. 233, (Gil. 166.)

If the meaning of words claimed to be slanderous is doubtful, it is a question for the jury to determine it. St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131.)

The complaint must identify the plaintiff with the person libeled. Carlson v. Minnesota Tribune Co., 47 Minn. 337, 50 N. W. Rep. 229.

See Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. Rep. 1034.

§ 5258. Same—Answer—Justification—Mitigating circumstances.

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.

(G. S. 1866, c. 66, § 96; G. S. 1878, c. 66, § 116.)

Applied. Marks v. Baker, 28 Minn. 165, 9 N. W. Rep. 678.

In an action for libel the defendant (the fact being properly pleaded) may, in mitigation of the damages, prove that, prior to publishing the alleged libel, it had seen the same matter published in other newspapers. Hewitt v. Pioneer Press Co., 23 Minn. 178.

§ 5259. Answer in action to recover property distrained.

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.

(G. S. 1866, c. 66, § 97; G. S. 1878, c. 66, § 117.)

§ 5260. Joinder of causes of action.

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.

(G. S. 1866, c. 66, § 98; G. S. 1878, c. 66, § 118.)

SUBD. 1. Several causes of action, if they arise out of the same transaction, may be united in one action, though some be legal and others equitable. Montgomery v. McEwen, 7 Minn. 351, (Gil. 276.)

A cause of action upon contract and one for a tort cannot be united, unless the complaint show that they are parts of the same single transaction, or of a series of transactions, all connected together, and not independent of each other, and all connected with the same subject of action. Gertler v. Linscott, 26 Minn. 82, 1 N. W. Rep. 579. The statement of facts in one cause of action will not help the statement of another cause of action, except so far as it is referred to in, and by such reference made part of, the statement of such other cause of action. Id.

The rule in respect to uniting, in the same complaint, several causes of action, arising out of the same transaction, adopted in Montgomery v. McEwen, 7 Minn, 351, (Gil. 276,) approved and followed. First Division, St. Paul & P. R. Co. v. Rice, 25 Minn. 278.

The mere fact that the several paragraphs of a complaint are separately numbered is of itself insufficient to determine their character as separate and distinct counts or causes of action. Merrill v. Dearing, 22 Minn. 376.

See Humphrey v. Merriam, 37 Minn. 502, 35 N. W Rep. 365; Nichols v. Randall, 5 Minn. 304, (Gil. 240.)

SUBD. 5. Claims to recover real property, with damages for withholding thereof, and the rents and profits of the same, may be united in the same complaint. Merrill v. Dearing, 22 Minn. 376. A cause of action to recover possession of real estate, and a cause of action to recover the value of the use while occupied by defendant, may be united in the same action. Armstrong v. Hinds, 8 Minn. 254, (Gil. 221.)

A cause of action for damages for withholding one piece of real estate cannot be united with a cause of action to recover possession of another, with damages for retaining the same. Holmes v. Williams, 16 Minn. 164, (Gil. 146.)

See Lord v. Dearing, 24 Minn. 110, 112.

SUBD. 7. A cause of action against a trustee, as such, may be joined with one against

him personally, if they relate to the same transaction, or transactions connected with the same subject of action. Fish v. Berkey, 10 Minn. 199, (Gil. 161.)

In an action by one partner against the others, the complaint praying an accounting, the appointment of a receiver, that the fraudulent transfer by the defendant partner be adjudged void, and the property delivered to the receiver, and for an injunction against the transferee, held not a misjoinder of causes of action, there being but one, to-wit, to accomplish a complete and final settlement of the partnership business. Palmer v. Tyler, 15 Minn. 106, (Gil. 81.)

Where the liability of one defendant for a wrongful act depends on a state of facts not affecting his co-defendant, a joint action cannot be maintained against them, though each may be liable. Trowbridge v. Forepaugh, 14 Minn. 133, (Gil. 100.) Followed in Berg v. Stanhope, 43 Minn. 176, 45 N. W. Rep. 15; Langevin v. City of St. Paul, 49 Minn. 189, 51 N. W. Rep. 817.

In an action by a husband and wife to avoid usurious securities given by them upon a loan made to the wife, it is improper to join a cause of action by the wife alone, to recover back money paid by her upon the usurious contract. Anderson v. Scandia Bank, 53 Minn. 191, 54 N. W. Rep. 1062.

§ 5261. Allegations not controverted.

Every material allegation of the complaint not specifically controverted by the answer as prescribed, and every material allegation of new matter in the answer not controverted by the reply as prescribed, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the defendant, who may on the trial controvert it by proofs, either in direct denial or by way of avoidance.

(G. S. 1866, c. 66, § 99; G. S. 1878, c. 66, § 119; as amended 1881, c. 44, § 3.)

In an action to foreclose a mortgage, facts set up in the answer of one of the defendants, a lien creditor subsequent to the mortgage, upon which he claims that plaintiff should be required to exhaust other security held for the debt before resorting to the mortgaged property, is not a counter-claim requiring a reply. First Nat. Bank of Memphis v. Kidd, 20 Minn. 234, (Gil. 212.)

To constitute new matter set up in an answer a counter-claim, so as to require a reply, it must be pleaded as such, and so that, if true, the court must grant affirmative relief to the defendant upon it. Broughton v. Sherman, 21 Minn. 431.

To a complaint in an action under the statute concerning actions to determine adverse claims to real property, (c. 64, Comp. St.,) the answer alleged title in the United States at a certain date, and the issuance on that date of a patent to a person under whom the defendant claims title. Held, that in his reply the plaintiff might set forth matter impeaching the patent. State v. Batchelder, 5 Minn. 223, (Gil. 179.)

A defective complaint cannot be cured by the reply. Bernheimer v. Marshall, 2 Minn. 78, (Gil. 61.)

A general denial is the same in effect as a specific denial of each allegation, and is a negative pregnant only where a mere specific denial would be. (Overruling Dean v. Leonard, 9 Minn. 190 [Gil. 176]; Frasier v. Williams, 15 Minn. 288 [Gil. 219].) Stone v. Quaal, 36 Minn. 46, 29 N. W. Rep. 326.

See, also, Nunnemacher v. Johnson, 38 Minn. 390, 38 N. W. Rep. 352; German-American Bank v. White, 38 Minn. 471, 38 N. W. Rep. 361.

Where a transaction set up in the complaint is put in issue, the defendant may prove any fact connected with that particular transaction which will disprove the allegations of the complaint. Bond v. Corbett, 2 Minn. 248, (Gil. 209.)

See, also, Estes v. Farnham, 11 Minn. 423, (Gil. 312;) First Nat. Bank v. Rogers, 22 Minn. 232; Cummings v. Taylor, 21 Minn. 366; Matthews v. Torinus, cited in note to § 5242.

See notes to §§ 5236, 5241

(7) MISTAKES IN PLEADINGS, AND AMENDMENTS.

§ 5262. Variances to be disregarded—Exceptions.

No variance between the allegation in the 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.

(G. S. 1866, c. 66, § 100; G. S. 1878, c. 66, § 120.)

Applied. Short v. McRea, 4 Minn. 119, (Gil. 78;) City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125.) Followed in Messerschmidt v. Baker, 22 Minn. 81; Blackman v. Wheaton,

13 Minn. 326, (Gil. 299;) Hartz v. St. Paul, etc., R. Co., 21 Minn. 358; Rogers v. Hastings, etc., Ry. Co., 22 Minn. 27; Blakeman v. Blakeman, 31 Minn. 397, 18 N. W. Rep. 103.

A variance as to an immaterial matter will not be regarded. Sonnenberg v. Riedel, 16 Minn. 83, (Gil. 72.)

A variance will not be regarded in this court, unless the party satisfy the court below that he was misled, and wherein. Washburn v. Winslow, 16 Minn. 33, (Gil. 19.)

In an action for injury to a lot described in the complaint by number, the court may allow an amendment at trial correcting a mistake in the number, if the defendant was not misled by it. Rau v. Minnesota Val. R. Co., 13 Minn. 442, (Gil. 407.)

Where a complaint alleges that defendant hired plaintiff to work, and agreed to pay him, defendant may prove, under a general denial, that he made the contract as agent for another, and disclose the agency. Scone v. Amos, 38 Minn. 79, 35 N. W. Rep. 575.

Under a complaint for one kind of nuisance, one of an essentially different character cannot be proved. O'Brien v. City of St. Paul, 18 Minn. 176, (Gil. 163.)

The absence of an allegation indispensable to the maintenance of an action is not cured by the provisions in regard to variance, nor can a decree be founded upon the proof of such fact without the allegation. Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

In an action for money loaned, proof of delivery of a third person's note, and not of money, is an immaterial variance. Fravell v. Nett, 46 Minn. 31, 48 N. W. Rep. 446.

See Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380; Iverson v. Dubay, 39 Minn. 325, 40 N. W. Rep. 159; Erickson v. Schuster, 44 Minn. 441, 46 N. W. Rep. 914.

§ 5263. Proceedings where variance is immaterial.

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.

(G. S. 1866, c. 66, § 101; G. S. 1878, c. 66, § 121.)

See cases cited in § 5262.

§ 5264. Failure of proof.

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

(G. S. 1866, c. 66, § 102; G. S. 1878, c. 66, § 122.)

The complaint disclosed a contract terminable at the pleasure of either party. On the trial the contract proved by plaintiff was one that by its terms was to continue in force for a period of time longer than one year from the making thereof. Held a fatal variance. Cowles v. Warner, 22 Minn. 449.

When the case is one of failure of proof, and not of variance, a denial of an application, on trial, for leave to amend the complaint, will not be reviewed if there be no abuse of discretion. Marks v. Culver, 10 Minn. 192, (Gil. 155.)

See Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

Under an allegation of a contract between the plaintiff and the defendant, proof of a contract made between the defendant and a third person, and assigned to the plaintiff, is not an immaterial variance, but a failure of proof. Dennis v. Spencer, 45 Minn. 250, 47 N. W. Rep. 795.

§ 5265. Amendments of course—After decision of demurrer.

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.

(G. S. 1866, c. 66, § 103, as amended 1867, c. 62, § 6; G. S. 1878, c. 66, § 123.)

Time for serving amended pleadings in municipal court of Minneapolis. Keyes v. Clare, 40 Minn. 84, 41 N. W. Rep. 453.

§ 5266. Amendment by order.

The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by

adding or striking out the name of any party, or by correcting a mistake in the name of a party, a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the fact proved.

(G. S. 1866, c. 66, § 104; G. S. 1878, c. 66, § 124.)

By leave of court a complaint may be amended so as to ask equitable relief, though it originally asked for damages. Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

An entire failure of any link in a chain of facts necessary to confer jurisdiction cannot be supplied; but a slight defect, when tending to substantial justice, may always be. Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55, (Gil. 53.)

When a party asks leave to amend his pleading, unless he inform the court in what particular he desires to amend, there is nothing for the court to exercise its discretion upon. Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

Upon an application at the trial for leave to file an amended answer containing two inconsistent defenses, the court may require, as a condition of granting leave, that defendant elect on which defense he will rely, and also that a written reply should be waived. Caldwell v. Bruggerman, 8 Minn. 286, (Gil. 253.) It is in the discretion of the trial court to allow an amendment of the pleadings at any time during the trial, or to receive further testimony after a party has rested his case. Id.

We have been unable to find any authority holding that, where an amendment is asked for under this section, the denial of the motion will be error, reviewable by an appellate court, unless it is clear that the denial was a gross and palpable abuse of discretion. White v. Culver, 10 Minn. 192, (Gil. 159.) The trial court must necessarily exercise its discretion, in view of the circumstance of each particular case, and no fixed rule can be laid down by which the propriety of allowing such amendments shall be determined. So long as the court in such matters acts within the limits of its discretion, its action will not be reviewed and its propriety and expediency considered. It is only when it is claimed that the limits of discretion have been exceeded that an appellate court will look into the matter, and only when there has been a plain abuse of discretion will the action of the court below be set aside. City of Winona v. Minnesota Ry. Const. Co., 29 Minn. 68, 72, 11 N. W. Rep. 228.

A defective pleading, clearly amendable in the discretion of the trial court, cannot be taken advantage of in this court by a party who had an opportunity to make his objection to it in the court below, but omitted so to do. Merriam v. Pine City Lumber Co., 23 Minn. 315.

Where suit is brought in the name of the guardian, the court may amend the record by inserting the name of the ward. Perine v. Grand Lodge, A. O. U. W., 48 Minn. 82, 50 N. W. Rep. 1022.

The misjoinder of two parties plaintiff, where the cause of action is in one alone, may be corrected at any time by striking out the name of the party improperly joined. Wiesner v. Young, 50 Minn. 21, 52 N. W. Rep. 390.

Amendment held not to change the claim. Dougan v. Turner, 51 Minn. 330, 53 N. W. Rep. 650.

An amendment after verdict, under which testimony objected to at the trial would become admissible, is an abuse of discretion. Guerin v. St. Paul F. & M. Ins. Co., 44 Minn. 20, 46 N. W. Rep. 138.

The trial court may, in the exercise of its discretion, allow pleadings to be amended so as to raise new issues after the cause has been disposed of in the supreme court on findings of fact and conclusions of law, and, as a result, may grant a new trial. The court should, however, act with great caution. Burke v. Baldwin, 54 Minn. 514, 56 N. W. Rep. 173.

See Rau v. Minnesota Val. R. Co., cited in note to § 5262; also Bidwell v. Whitney, 4 Minn. 76, (Gil. 45;) Gerrish v. Pratt, 6 Minn. 61, (Gil. 17;) Davis v. Chouteau, 32 Minn. 550, 21 N. W. Rep. 748; Lee v. O'Shaughnessy, 20 Minn. 173, (Gil. 157;) Wilcox v. Railroad Co., 35 Minn. 439, 29 N. W. Rep. 148; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. Rep. 371; Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79; Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

§ 5267. Extensions of time—Relief against mistakes—Opening judgments, etc.

The court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by this chapter, or by an order enlarge such time; and may also, in its discretion, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, suspense, or excusable neglect; and the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered, or proceedings had, in or out of term, upon good cause shown, set

aside or modify its judgments, orders, or proceedings, although the same were made or entered by the court, or under or by virtue of its authority, order, or direction, and may supply any omission in any proceeding. And, whenever any proceeding taken by a party fails to conform to the statute, the court may permit an amendment to such proceeding, so as to make it conformable thereto; but this section does not apply to a final judgment in an action for divorce: *Provided, however,* that no relief to be granted hereunder shall operate to affect any title to or estate in real estate affected by such judgment, as against a *bona fide* purchaser or incumbrancer, in any case where such judgment, or a certified copy thereof, shall have been of record in the office of the register of deeds of the county wherein such real estate is situated for a period of not less than three years prior to the date of the application for such relief; but nothing herein contained shall operate to prevent the granting of such relief as may be just and equitable against a party to such action, his heirs or devisees.

(G. S. 1866, c. 66, § 105, as amended 1876, c. 49, § 1; G. S. 1878, c. 66, § 125; 1887, c. 61.)

It is not in the power of a party, by his own act, to extend the statutory period for appealing from an order; nor has the court power, by an order made for that purpose, to grant an extension of such period. It may, however, result, from the exercise of the authority of the court to review, set aside, or modify its own orders, that upon an appeal from an order redetermining a matter once passed upon by a former order, made more than 30 days before such appeal was taken, there may be brought up for review the same questions involved in the former order. First Nat. Bank of Fargo v. Briggs, 34 Minn. 266, 267, 26 N. W. Rep. 6.

A proposed case was served July 22d, and proposed amendments thereto served August 3d. Nothing further was done in respect to the case till November 28th, when the judge issued an order to show cause why the proposed case should not be settled and signed. Held, that this order was granting "further time" for presenting the case for settlement, within *c.* 74, Laws 1870, so that the case was not to be deemed abandoned. Cook v. Finch, 19 Minn. 407, (Gil. 350.) When leave is given to make a case after the expiration of the time prescribed by G. S. 1866, c. 66, § 237, (no judgment having been entered,) the effect is to grant further time to make it, as authorized by this section. Volmer v. Stagerman, 25 Minn. 234. See § 5400.

After judgment by default, the court may correct a mistake in the date of the affidavit of no answer. Dunwell v. Warden, 6 Minn. 287, (Gil. 194.)

The affidavit of publication being insufficient, if the summons was in fact duly published, and no facts appear to show that it would be unjust, the court ought to allow a proper affidavit to be filed nunc pro tunc. Burr v. Seymour, 43 Minn. 401, 45 N. W. Rep. 715.

See, also, Bigelow v. Chatterton, 2 C. C. A. 402, 51 Fed. Rep. 614.

The power given by this section enables the court to allow, as between the parties, any correction of mistakes or omissions which justice may require. But we do not think it was intended that the power should be exercised to the prejudice of rights accrued meantime in strangers to the proceeding. For instance, a case might occur where a plaintiff in an action or proceeding would, through accident, mistake, or inadvertence, be prevented from obtaining, so early as he might desire, an entry and docketing of his judgment. And, if justice between the parties required it, no doubt the court might date back such entry and docketing. But we think no one would contend that it might be done so as to affect the rights of another creditor of the same defendant, who by due proceedings had first procured his judgment to be docketed. Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380. Followed in Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. Rep. 946.

In an action of replevin, where the defendant has a verdict, in the alternative, for a return of the replevied property, or for its value as assessed by the jury in case a return cannot be had, but the clerk erroneously enters an absolute money judgment for the defendant, the district court may, in its discretion, amend the judgment so that it shall conform to the verdict. Berthold v. Fox, 21 Minn. 51. Such amendment is inoperative to affect the rights of third persons not parties to the suit, but a clause saving such rights should be inserted in the order allowing it. Id. The application for such amendment being made by the defendant more than two years after the entry of judgment, notice of such application should be served upon the plaintiff; and service on his attorney is insufficient where the attorney's only authority to represent his client is that implied in his retainer to prosecute the action. Id.

When judgment is ordered on the conclusion of a trial, findings of fact may be made after judgment nunc pro tunc. Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. Rep. 455.

The court may correct its own clerical errors and mistakes, so as to make the findings and judgment conform to what it intended. The limitation of one year after notice of judgment does not apply. McClure v. Bruck, 43 Minn. 305, 45 N. W. Rep. 438.

When the clerk enters judgment not conforming to the decision, the proper practic is a motion to correct the judgment. The right to have it corrected is not lost unles the correction will work prejudice to persons who have relied on the record. Nell v Dayton, 47 Minn. 257, 49 N. W. Rep. 981, Hall v. Merrill, 47 Minn. 260, 49 N. W. Rep. 980.

See, also, Knappen v. Freeman, 47 Minn. 491, 50 N. W. Rep. 533.

The findings may be amended after appeal taken, but before return made. State Sash & Door Manuf'g Co. v Adams, 47 Minn. 399, 50 N. W. Rep. 360.

A formal defect in the verdict, or one made through inadvertence, may be amended. Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441, 48 N. W. Rep. 198.

VACATING JUDGMENTS. An application for relief from a judgment taken against a party through his mistake, etc., must be made with diligence after notice of the judgment. Unreasonable delay in making it is good ground for denying it. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

A motion, under this section, to be relieved from a judgment entered against a defendant by default, made within one year from its rendition, is addressed to the discretion of the court, and will not be reviewed except for abuse of discretion. Reagan v. Madden, 17 Minn. 402, (Gil. 378.)

The year limited within which a party may have relief against a judgment taken through his mistake, inadvertence, surprise, or excusable neglect, commences to run from the time when he has actual notice of such judgment. Personal service of the summons is not personal notice of the judgment. Wieland v. Shillock, 23 Minn. 227.

An application for relief from a judgment, order, or other proceeding taken against a party through his mistake, inadvertence, surprise, or excusable neglect, must be made with diligence, and it by no means follows that because a party makes such motion within a year that he has always a year in which to make it. Gerish v. Johnson, 5 Minn. 23, (Gil. 10.)

Where a defendant, against whom a judgment had been recovered, he having made default in the action, delayed for more than 11 months, after knowledge of the hearing of the case by the court, to seek relief from his default, such delay being not sufficiently excused, the default should not be set aside, and a defense allowed. To do so is not within the limits of judicial discretion. Altmann v. Gabriel, 28 Minn. 132, 9 N. W. Rep. 633.

No one but a party to a judgment is entitled to relief on the ground that the same was entered through his inadvertence, etc., and an application to open such judgment must be made within a year after its rendition. Kern v. Chalfant, 7 Minn. 487, (Gil. 393.)

When other persons are substituted in place of a deceased party to an action under the provisions of G. S. 1866, c. 66, § 36, (§ 5171,) it is open to them to move to set aside a judgment entered after the decease of the party whom they succeed, on account of error in entering the same after such decease. If the motion be denied, they may appeal to the supreme court from the order of denial, as a final order affecting a substantial right, made upon a summary application in an action after judgment. If the action be one for the recovery of real property, they may elect to let the judgment stand, and take a second trial under G. S. 1866, c. 75, § 5. See § 5845. Stocking v. Hanson, 22 Minn. 543.

An understanding at the time of plaintiff's extending the time for defendant to answer, that if the answer is not served within the extended time plaintiff may take judgment, does not deprive defendant of the right to move, on the ground of surprise and excusable neglect, to set aside the judgment entered according to the understanding. Dupries v. Milwaukee & St. P. Ry. Co., 20 Minn. 156, (Gil. 139.)

Where a stipulation provided that, in consideration of an extension of time to answer, plaintiff should, if another party failed by another day to appear and apply to defend, have judgment for the amount claimed in his complaint, held, that it did not operate to waive the defendant's right to apply to have a judgment entered as by default vacated, under this section. Barker v. Keith, 11 Minn. 65, (Gil. 37.)

The proper mode of proceeding to obtain a new trial on the ground of newly-discovered evidence, or the mistake of a witness in giving his testimony, in a proper case for relief on those grounds, after judgment, and within one year after notice thereof, is by motion in the original suit, and not by the old methods. Sheffield v. Mullin, 28 Minn. 251, 9 N. W. Rep. 756. The affirmance of the judgment on appeal is not an obstacle to such relief in a case where the final judgment is in the district court, and the new evidence was discovered after such affirmance, and could not, by the use of reasonable diligence, have been discovered before. Id.

Chapter 131, Laws 1877, authorizing the vacation of a judgment procured through perjury, subornation of perjury, or fraud of prevailing party, within three years from its discovery, is in terms applicable to all judgments, whenever recovered. Wieland v. Shillock, 24 Minn. 345. The discretion vested in the district court by this section, for the opening of judgments entered on default, is a sound legal discretion, not a mere arbitrary one. Id.

Chapter 131, Laws 1877, authorizing the opening of judgments procured by fraud or perjury at any time within three years after discovery, in so far as it is applicable to judgments absolute at the time of its passage, is unconstitutional and void. Id.

An application to be relieved from a judgment, under this section, is in the discretion

of the court, and no appeal lies from its decision. Merritt v. Putnam, 7 Minn. 493, (Gil. 399;) S. P. Jorgensen v. Boehmer, 9 Minn. 181, (Gil. 166;) Whitcomb v. Shafer, 11 Minn. 232, (Gil. 153.)

A motion for an order setting aside a judgment and verdict, obtained in the absence of defendant, on the ground that they were taken against him, through his mistake, inadvertence, surprise, or excusable neglect, is addressed to the discretion of the court, and the order granting it is not appealable. Myrick v. Pierce, 5 Minn. 65, (Gil. 47.)

See, as to the discretion of the court on an application to open a default, Sandberg v. Berg, 35 Minn. 212, 28 N. W. Rep. 255; Frankoviz v. Smith, 35 Minn. 278, 28 N. W. Rep. 508.

An action cannot be maintained to set aside a judgment on an award on the ground that the award was procured by means of false testimony, in a case where the court rendering it has full power to grant adequate relief, upon proper application and showing, in the same suit. Johnston v. Paul, 23 Minn. 46.

Errors appearing upon the face of a judgment, or in the proceedings resulting in a judgment, are to be corrected either by a motion for a new trial or on appeal. Semrow v. Semrow, 23 Minn. 214.

Where, upon an application to the court in vacation for judgment for want of an answer, the court orders judgment, and the judgment is accordingly entered, the court cannot review its decision upon a motion to vacate the judgment. The only remedy of the defendant for error in the decision is by appeal from the judgment. Grant v. Schmidt, 22 Minn. 1.

An order permitting defendants to answer, made under this section more than one year after the entry of judgment, involves the merits of the action, or some part thereof, under subd. 3, § 8, c. 86, G. S. 1866, (§ 6140,) and is appealable. Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

A defendant served only by publication may be relieved from a judgment by default within one year after notice of its entry. Lord v. Hawkins, 39 Minn. 73, 38 N. W. Rep. 689. See Welch v. Marks, 39 Minn. 481, 40 N. W. Rep. 611.

An application under this section, unlike an application under § 5206, is addressed to the discretion of the court. Lord v. Hawkins, supra.

Neglect of defendant, before and after judgment, to interfere with plaintiff's adverse occupancy of the land, or to pay taxes, or to assert any rights in respect to it, held proper ground for refusing to set aside judgment on default, on service by publication in action to quiet title. Nauer v. Benham, 45 Minn. 252, 47 N. W. Rep. 796.

Judgment set aside, though the default was occasioned by the willful omission of the defendant's officer on whom the summons was served. Bray v. Church of St. Brandon, 39 Minn. 390, 40 N. W. Rep. 518.

The default of a landowner in condemnation proceedings may be opened under this section. In re Minneapolis Railway Terminal Co., 38 Minn. 157, 36 N. W. Rep. 105.

A judgment on default in a foreclosure suit may be set aside or modified. Russell v. Blakeman, 40 Minn. 463, 42 N. W. Rep. 391.

Relief from a judgment by default may be given to defendants or their grantees in an action against unknown heirs, when the summons was served by publication. Boeing v. McKinley, 44 Minn. 392, 46 N. W. Rep. 766.

A judgment may be set aside, though the default occurred by the erroneous advice of the defendant's attorney. Baxter v. Chute, 50 Minn. 164, 52 N. W. Rep. 379.

The court cannot, under this section, extend the period within which real property must be redeemed from a sale in proceedings to foreclose a mechanic's lien. State v. Kerr, 51 Minn. 417, 53 N. W. Rep. 719.

An affidavit of merits is essential, and must be made by the party, or some one having personal knowledge of the facts. People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. Rep. 219.

See Myrick v. Edmundson, cited in note to § 5206; Covert v. Clark, cited in note to § 5209; Wilcox v. Railway Co., 35 Minn. 439, 29 N. W. Rep. 148; Washburn v. Sharpe, 15 Minn. 63, (Gil. 43;) Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79; Blake v. Sherman, 12 Minn. 420, (Gil. 305;) Hildebrandt v. Robbecke, 20 Minn. 100, (Gil. 83;) Woods v. Woods, 16 Minn. 81, (Gil. 69;) Dawson v. Shillock, 29 Minn. 189, 192, 12 N. W. Rep. 526; Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. Rep. 381; Hallam v. Doyle, 35 Minn. 337, 338, 29 N. W. Rep. 130; Webb v. Paxton, 36 Minn. 532, 32 N. W. Rep. 749; State v. Bechdel, 28 Minn. 278, 37 N. W. Rep. 338; Sturm v. School Dist. No. 70, 45 Minn. 88, 47 N. W. Rep. 462; Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. Rep. 530; Stickney v. Jordain, 50 Minn. 258, 52 N. W. Rep. 861; Reilly v. Bader, 50 Minn. 199, 52 N. W. Rep. 522; Carlson v. Carlson, 49 Minn. 555, 52 N. W. Rep. 214; Caughey v. Northern P. Elevator Co., 51 Minn. 324, 53 N. W. Rep. 545; Meister v. Russell, cited in note to § 5071; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. Rep. 58; Carlson v. Phinney, (Minn.) 58 N. W. Rep. 38.

Protection of bona fide purchasers.

The amendment of Laws 1887, c. 61, is constitutional. Drew v. City of St. Paul, 44 Minn. 501, 47 N. W. Rep. 158.

Before the amendment it was held that a purchaser from the successful party in an action to determine adverse claims takes subject to defeat by the subsequent reversal

or vacation of the judgment, and is not in the position of a purchaser at a judicial sale. Lord v. Hawkins, 39 Minn. 73, 38 N. W. Rep. 689.

See Welch v. Marks, 39 Minn. 481, 40 N. W. Rep. 611.

The amendment applies only to such judgments as (1) affect the title to real estate, and (2) may be recorded in the office of the register of deeds. Gowen v. Conlow, 51 Minn. 213, 53 N. W. Rep. 365.

The setting aside of a judgment for the recovery of money, upon grounds not affecting its original validity, does not avoid a prior sale of real estate, under execution, to a bona fide purchaser. Id.

Failure to index the record of a judgment against one party cannot be taken advantage of by another party, against whom it has been properly recorded and indexed. Whitacre v. Martin, 51 Minn. 421, 53 N. W. Rep. 806.

§ 5268. 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.

(G. S. 1866, c. 66, § 106; G. S. 1878, c. 66, § 126.)

See Gale v. Townsend, 45 Minn. 357, 359, 47 N. W. Rep. 1064.

§ 5269. 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.

(G. S. 1866, c. 66, § 107; G. S. 1878, c. 66, § 127.)

A complaint in replevin, which alleges that the property is wrongfully detained, but does not allege a demand and refusal, is cured by a verdict for plaintiff. Hurd v. Simonton, 10 Minn. 423, (Gil. 340.)

The omission from a judgment in favor of defendant of the words that defendant go without day, or words to that effect, where the record shows defendant entitled to judgment on the merits, is only a formal defect, and must be disregarded. Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

The omission of the clerk to sign the judgment does not affect its validity. Jorgensen v. Griffin, 14 Minn. 464, (Gil. 346.)

A motion to set aside the docket of a judgment and the execution and subsequent proceedings for mere technical irregularity, after a delay of three years unexplained, is too late. Id.

§ 5270. Supplemental pleadings allowed, when.

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.

(G. S. 1866, c. 66, § 108; G. S. 1878, c. 66, § 128.)

A supplemental complaint cannot be filed for the purpose of setting aside a settlement and discontinuance for mistake of facts. Such a supplemental complaint is upon a new cause of action, while the pleading should be based on the cause of action in the original complaint. Eastman v. St. Anthony Falls Water-Power Co., 17 Minn. 48, (Gil. 31.)

Though, where the original complaint is wholly defective it cannot be sustained by a supplemental complaint founded on matter subsequent to the original complaint, yet if the original complaint is sustainable, and the supplemental complaint only enlarges the extent and changes the kind of relief, it may be sustained. So in an action to quiet title to real estate, if at the commencement of the action the plaintiff has the equitable title, he may show by a supplemental complaint that he subsequently acquired the legal title. Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

Before defendant can avail himself of the fact that since the commencement of the action plaintiff has conveyed part of the property for injury to which the action is brought, he must plead the fact by supplemental answer. Harrington v. St. Paul & Sioux City R. Co., 17 Minn. 215, (Gil. 188.)

TITLE 7.

CONSOLIDATION AND INTERPLEADING.

§ 5271. 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 been joined, the court may order the actions to be consolidated.

(G. S. 1866, c. 66, § 109; G. S. 1878, c. 66, § 129.)

§ 5272. 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.

(G. S. 1866, c. 66, § 110; G. S. 1878, c. 66, § 130.)

In view of this provision, the surety cannot require the creditor to bring suit, and enforce his debt against the principal debtor. Huey v. Pinney, 5 Minn. 310, (Gil. 246.)

Under the former statute, the maker of a promissory note, which he had paid, might sue the holder to determine a claim made by him that there was a sum still due on it. Miller v. Rouse, 8 Minn. 124, (Gil. 97.)

See, also, Metzner, v. Baldwin, 11 Minn. 150, (Gil. 92.) Benedict v. Olson, 37 Minn. 431, 35 N. W. Rep. 10.

When one partner, after dissolution, pays one-half of a debt which his copartner is equally bound to pay, he can maintain an action under the statute to compel the copartner to pay the other half. Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. Rep. 700.

§ 5273. Interpleader.

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.

Intervention.

Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto.

(G. S. 1866, c. 66, § 111, as amended 1876, c. 50, § 1; G. S. 1878, c. 66, § 131.)

The interest which entitles a party to intervene must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment thereon. Lewis v. Harwood, 28 Minn. 428, 10 N. W. Rep. 586. The interest essential to the right of intervention, must be an interest in the matter in litigation in the action, and of such a direct and immediate character that the intervenor will either gain or suffer loss by the direct legal operation and effect of the judgment that may

be rendered therein. Bennett v. Whitcomb, 25 Minn. 148. An order preventing a party from intervening, when he shows no such interest, is not an appealable order. Id.

An intervention complaint may be demurred to for its failure to state a cause of action or ground of intervention, as the case may be. Shepard v. County of Murray, 33 Minn. 519, 24 N. W. Rep. 291.

Under this section, it is the proper practice for the court, in its order of interpleader, to direct that the summons and complaint as amended, with a copy of the order, be served by plaintiff upon the substituted defendant within a specified time thereafter, or, in default thereof, that the action be dismissed. Hooper v. Balch, 31 Minn. 276, 17 N. W. Rep. 617. Such party may voluntarily appear, and move for such dismissal, upon plaintiff's default in making such service; and the court may order the property or fund in controversy, and in its custody, to be delivered over to him. Its right to make such disposition of the property is not affected by a voluntary dismissal of the action by plaintiff, pending such application. Id.

Where two defendants have properly interpleaded in an action brought by plaintiff to determine as to which he shall pay an acknowledged debt, and the money has been paid into court, upon its order, for the benefit of the successful litigant defendant, it is not competent for the plaintiff thereafter to participate in the litigation between such contesting defendants, nor to object to any ruling or decision made in the action affecting alone their rights as between themselves. St. Louis Life Ins. Co. v. Alliance Mut. Life Ins. Co., 23 Minn. 7.

The report of a referee in such an action will not be set aside or disturbed because it allows costs against the plaintiff, when the evidence before him reasonably tends to the conclusion that the action was instituted by the plaintiff in bad faith, rather with the view of delaying and prejudicing the successful defendant in obtaining his rights than of protecting himself against the risk of payment to one of two conflicting claimants. Id.

See Rohrer v. Turrill, 4 Minn. 407, (Gil. 309;) Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. Rep. 333.

A chattel mortgagee held entitled to intervene in an action by the mortgagor for damages for destruction of the property. Wohlwend v. J. I. Case Threshing Mach. Co., 42 Minn. 500, 44 N. W. Rep. 517.

In an action against a surety, the principal debtor may intervene for the purpose of defeating a recovery, and may set off debt due him from the plaintiff. Becker v Northway, 44 Minn. 61, 46 N. W. Rep. 210.

A complaint in intervention alleged that the amount which the plaintiff was attempting to recover was due to a third person, who was a judgment debtor of the intervenor. It appeared from the complaint that garnishment proceedings had been begun, in which the intervenor was plaintiff, and the present defendant garnishee, and the debtor defendant, and that the proceedings were pending. Held, that the judgment creditor was not entitled to intervene, since he could protect his rights in the garnishment proceedings. Dennis v. Spencer, 51 Minn. 259, 53 N. W. Rep. 631.

TITLE 8.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 5274. Possession of personal property claimed, when.

The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, in the manner following:

(G. S. 1866, c. 66, § 112; G. S. 1878, c. 66, § 132.)

Where goods are taken from the lawful possession of an administrator, under a fraudulent conveyance by the intestate, replevin will lie without previously having such conveyance set aside. Bennett v. Schuster, 24 Minn. 383.

Replevin will lie for personal property, although not in the actual possession of the defendant, if it be under his control in the hands of another, upon a demand of, and refusal by, defendant to deliver it to the party entitled to the possession. Bradley v. Gamelle, 7 Minn. 331, (Gil. 260.)

The action is properly brought against the person in the actual physical possession. Flatner v. Good, 35 Minn. 395, 29 N. W. Rep. 56.

A complaint in replevin must show that at the time of commencing the action the plaintiff has an existing legal right to have the property delivered to him. Loomis v. Youle, 1 Minn. 176, (Gil. 151.)

Pleading ownership. See Tancre v. Reynolds, 35 Minn. 476, 29 N. W. Rep. 171.

In an action in replevin the plaintiff must identify the specific property as his, and he is not relieved from this by the fact that the defendant has so mingled his own property with plaintiff's as to render its specific identification impossible. Ames v. Mississippi Boom Company, 8 Minn. 467, (Gil. 417.)

A defendant in replevin who, in his answer, justifies the taking under an execution

against one person whom he alleges to have been the owner at that time, cannot prove that such person, before the taking, had assigned the property to another person. McClung v. Bergfeld, 4 Minn. 148, (Gil. 99.)

In an action of replevin, where the defendant alleges a seizure by him as United States marshal, under a writ of attachment issuing out of the United States court against a party other than plaintiff in the replevin suit, if this is admitted, it entitles defendant to a judgment for a return of the property, (it having been taken from him in the action,) or the value thereof, if a return cannot be had. Lewis v. Buck, 7 Minn. 104, (Gil. 72.)

Replevin is not changed to trover by failure to claim immediate delivery. Benjamin v. Smith, 43 Minn. 146, 44 N. W. Rep. 1083.

See Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

§ 5275. Affidavit to be made—Contents thereof.

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

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

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

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

Fourth. The actual value of the property.

If the subject of the action be personal property which has been severed from real estate, the title thereto may be proven by proving title to the real estate from which such property was severed, and for such purpose the title to the real estate may be tried in such action.

(G. S. 1866, c. 66, § 113; G. S. 1878, c. 66, § 133; as amended 1893, c. 86, § 1.)

Replevin by the owner will lie for things which have been severed and taken away from the realty, unless the land is held in adverse possession. Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

Before foreclosure a mortgagee is not entitled to possession of the real estate, nor of logs cut thereon. Berthold v. Fox, 13 Minn. 501, (Gil. 462.)

A purchaser at foreclosure sale, not being entitled to the possession of the premises during the time allowed for redemption, is not during that time entitled to the possession of logs cut on the land after the sale, and cannot bring replevin for them. Berthold v. Holman, 12 Minn. 335, (Gil. 221.)

See In re Brown, 32 Minn. 443, 444, 21 N. W. Rep. 474; Castle v. Thomas, 16 Minn. 490, (Gil. 443;) Whitney v. Swensen, 43 Minn. 337, 338, 45 N. W. Rep. 609.

§ 5276. Requisition to sheriff—Bond—Duty of sheriff.

The plaintiff or his attorney may thereupon, by endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff; and upon the receipt of the affidavit, with the endorsement thereon, together with a bond executed to the defendant by the plaintiff, or some one in his behalf, with one or more sureties, to be approved by the sheriff, in an amount double the value of the property, conditioned that the property shall be returned to the defendant, if a return shall be adjudged, and for the payment to him of such sum as for any cause may be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody until delivered, as hereinafter provided. He must also serve on the defendant, without delay, a copy of the affidavit, endorsement and bond, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

(G. S. 1866, c. 66, § 114, as amended 1868, c. 76, § 1; G. S. 1878, c. 66, § 134.)

Action brought against a sheriff to recover personal property was instituted under §§ 112–117, c. 66, Gen. St. 1866, after the adoption of c. 76, Laws 1868, repealing §§ 115, 116, and 117, and amending § 114, (this section,) the plaintiff being in ignorance of the change. The sureties on the bond, executed in pursuance of § 116, repealed, were excepted to, justified under § 120, and, being held insufficient, a new bond under § 120 was given, with one surety only, who justified under § 122, was accepted by the sheriff, further justification being waived. Judgment being entered in favor of the sheriff, suit was brought on the bond for amount adjudged in case property was not returned, damages,

and costs. Held, that the proceedings taking the property from the sheriff were *coram non judice;* that no action lay on the bond, notwithstanding the sheriff's waiver; and that the officer so taking the same was liable as a trespasser. Hicks v. Mendenhall, 17 Minn. 475, (Gil. 453;) S. P. Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

Where, in an action to recover the possession of personal property, the plaintiff, to obtain possession of the property pending the action, joins with sureties in the undertaking, upon judgment being rendered against him in the action he may be sued with the sureties upon the undertaking. Buck v. Lewis, 9 Minn. 314, (Gil. 298.)

If an action in replevin before a justice is simply dismissed with costs, there being no judgment for a return, the defendant cannot recover the value of the property in an action on the replevin bond. Clark v. Norton, 6 Minn. 412, (Gil. 278.)

§ 5277 Defendant may except to sufficiency of sureties.

The defendant may, within three days after the service of a copy of the writ and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fails to do so, he shall be deemed to have waived all objections to them; if the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section.

(G. S. 1866, c. 66, § 118; G. S. 1878, c. 66, § 135.)

§ 5278. Defendant may give bond and retain property.

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

(G. S. 1866, c. 66, § 119; G. S. 1878, c. 66, § 136.)

An officer taking property in an action of replevin in the district court should retain it three days. But if, during the three days, he deliver it to the plaintiff, and the defendant, instead of giving an undertaking for its return to him, except to the plaintiff's sureties, he waives his right to a return, and the plaintiff is entitled to the possession of the property until the rights of the parties are determined in the action; and the defendant cannot countermand his exception so as to become entitled to the possession. Vanderburgh v. Bassett, 4 Minn. 242, (Gil. 171.)

Where property taken by an officer under a writ of attachment is replevied from him, and delivered to the plaintiff in replevin, it cannot be retaken on the same attachment, pending the replevin suit. Id.

An assignment of the judgment operates as an assignment of the bond. Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. Rep. 879.

§ 5279. Notice and justification of sureties.

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

(G. S. 1866, c. 66, § 120; G. S. 1878, c. 66, § 137.)

§ 5280. Delivery to plaintiff—Waiver of justification.

Upon due justification of the plaintiff's sureties, the sheriff shall deliver the property to the plaintiff, except as prescribed in section one hundred and thirty-eight; and upon like justification of the defendant's sureties, the property shall be delivered to the defendant. When sureties fail to justify as aforesaid, or when justification is waived as herein provided, the sheriff shall forthwith deliver the property to the party entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties until such justification or waiver is

made, or there is a failure to justify. Either party may, in writing, waive the justification of sureties, as well after as before notice.

(G. S. 1866, c. 66, § 121; G. S. 1878, c. 66, § 138.)

§ 5281. Qualification of sureties.

The qualification of sureties is as follows:

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

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

(G. S. 1866, c. 66, § 122; G. S. 1878, c. 66, § 139.)

§ 5282. Sureties shall justify, how.

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

(G. S. 1866, c. 66, § 123; G. S. 1878, c. 66, § 140.)

§ 5283. Approval of sureties to be indorsed on bond.

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

(G. S. 1866, c. 66, § 124; G. S. 1878, c. 66, § 141.)

§ 5284. Proceedings when property is concealed.

If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it is not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and, if necessary, he may call to his aid the power of his county. Whenever, by the return of the officer, or by the affidavit of the plaintiff, his agent or attorney, it shall appear that any of the property described in the affidavit for the claim and delivery of any personal property required by said chapter to be made has been concealed by the defendant, or cannot, after diligent search, be found, the court, or a judge thereof, shall require the defendant, and such other persons as to the said court or judge may seem proper, to attend and be examined on oath touching any disposition of such property, to the end that the same may be made subject to seizure by the officer in said action; and the court or judge may enforce said order, and any subsequent orders in said matter, as in the case of contempt.

(G. S. 1866, c. 66, § 125, as amended 1877, c. 26, § 1; G. S. 1878, c. 66, § 142.)

§ 5285. Sheriff to keep and deliver property.

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

(G. S. 1866, c. 66, § 126; G. S. 1878, c. 66, § 143.)

§ 5286. To file affidavit, etc., and return.

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

(G. S. 1866, c. 66, § 127, as amended 1868, c. 76, § 2; G. S. 1878, c. 66, § 144.)

TITLE 9.

ATTACHMENT.

§ 5287. Attachment of property allowed.

In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defend-

ant attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover.

(G. S. 1866, c. 66, § 128; G. S. 1878, c. 66, § 145.)

An attachment may issue in any action for the recovery of money, whether such action is in form *ex contractu* or *ex delicto*. Davidson v. Owens, 5 Minn. 69, (Gil. 50;) Morrison v. Lovejoy, 6 Minn. 183, (Gil. 117.)

An attachment in a civil action may issue at the time of issuing the summons. Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

See State v. Penner, 27 Minn. 269, 275, 6 N. W. Rep. 790; Heffner v. Gunz, 29 Minn. 108, 12 N. W. Rep. 342; Cole v. Anne, 40 Minn. 80, 41 N. W. Rep. 934; Cousins v. Alworth, 44 Minn. 505, 507, 47 N. W. Rep. 169; Daly v. Bradbury, cited in note to § 5204, subd. 3.

§ 5288. Who may allow writ.

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

(G. S. 1866, c. 66, § 129; G. S. 1878, c. 66, § 146.)

The allowance of a writ of attachment is a judicial act, and § 142, c. 60, Comp. St., so far as it permits the clerk to allow such writ, is unconstitutional and void. Morrison v. Lovejoy, 6 Minn. 183, (Gil. 117.)

The clerk of the district court has no power to allow an attachment. Guerin v. Hunt, 8 Minn. 477, (Gil. 427;) Zimmerman v. Lamb, 7 Minn. 421, (Gil. 336.) An undertaking executed for an attachment allowed by the clerk of the district court is void. Jacoby v. Drew, 11 Minn. 408, (Gil. 301.)

A writ of attachment signed by the judge, but not by the clerk, and without the seal of the court, is void, and no levy thereunder is of any effect. Wheaton v. Thompson, 20 Minn. 196, (Gil. 175.)

A writ of attachment need not show by what officer it was allowed. Shaubhut v. Hilton, 7 Minn. 506, (Gil. 412.)

See State v. Penner, 27 Minn. 269, 275, 6 N. W. Rep. 790.

§ 5289. Writ, when allowed—Affidavit.

The writ of attachment shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof; and that the plaintiff's debt was fraudulently contracted; or that the defendant is either a foreign corporation, or not a resident of this state; or has departed therefrom, as deponent verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or has assigned, secreted or disposed of, or is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors: provided, that the writ of attachment shall not be allowed in actions for libel, slander, seduction, breach of promise of marriage, false imprisonment or assault and battery.

(G. S. 1866, c. 66, § 130, as amended 1867, c. 66, § 1; G. S. 1878, c. 66, § 147.)

An attachment procured is only a provisional remedy in an action, prosecuted, not as an independent proceeding, but in aid of the action, and "as security for the satisfaction of such judgment as the plaintiff may recover." The action is not commenced by the attachment, but by summons; and the failure to make such service of the summons, actual or constructive, as is authorized by statute, leaves the court without jurisdiction to enter a judgment against the defendant. Heffner v. Gunz, 29 Minn. 110, 12 N. W. Rep. 342.

It is not necessary that an affidavit to obtain an attachment should contain any statement as to the commencement of the action. Blake v. Sherman, 12 Minn. 420, (Gil. 305.)

The proof required to justify the issuance of a writ of attachment is legal evidence, such as would be received in the ordinary course of legal proceeding, not mere hearsay or belief. Pierse v. Smith, 1 Minn. 82, (Gil. 60.)

An affidavit for an attachment, before a justice of the peace, stating the facts justifying the issuance of an attachment, in the words of the statute, is sufficient. It need not, as is required in the district court, set forth the evidence of such facts. Curtis v. Moore, 3 Minn. 29, (Gil. 7.)

In an affidavit for attachment under this section, based upon the ground that defendant is about to assign, secrete, or dispose of his property with intent to delay and defraud his creditors, the facts must be stated positively, and not upon the belief of deponent. Murphy v. Purdy, 13 Minn. 422, (Gil. 390;) Ely v. Titus, 14 Minn. 125, (Gil. 93.) An affidavit to procure an attachment, which states merely that the defendant has assigned, or that he is about to assign, property, with intent to defraud his creditors, without setting forth any facts and circumstances to show such intent, is insufficient. Hinds v. Fagebank, 9 Minn. 68, (Gil. 57.) Such an affidavit, referring to a single item of property, and stating that the defendant is about to dispose of it, and has

disposed of it, is contradictory, and bad for that reason. Id. Such an affidavit, stating that defendant, with intent to defraud his creditors, conveyed specified real estate worth three hundred and fifty dollars to his natural daughter, without any actual consideration, but upon the nominal consideration of one dollar, and that defendant has no other real estate out of which an execution can be satisfied, does not show an intent to defraud. Id. An affidavit for an attachment, stating that defendant has assigned and disposed of his property, with intent to delay and defraud his creditors, and that he is about to assign and dispose of his property with like intent, is not necessarily objectionable for inconsistency. Nelson v. Munch, 23 Minn. 229.

Upon an application for an attachment upon the ground that the plaintiff will be in danger of losing his debt, the affidavit must state facts and circumstances to establish that conclusion. Keigher v. McCormick, 11 Minn. 545, (Gil. 420.)

The affidavit for attachment against a non-resident debtor need not state that he has property in the state subject to attachment. Kenney v. Georgen, 36 Minn. 190, 31 N. W. Rep. 210.

See, also, Bigelow v. Chatterton, 2 C. C. A. 402, 51 Fed. Rep. 614, 621.

Where a sheriff, sued in replevin by a mortgagee of personal property, for taking it on attachment against the mortgagor, attacks the mortgage as made in fraud of creditors, he must prove that the attachment debt existed. Braley v. Byrnes, 20 Minn. 435, (Gil. 389.) This may be done by any evidence which would prove it in an action against the mortgagor. But the papers in the attachment suit are not competent evidence of it. Id.

The language, where "the plaintiff's debt was fraudulently contracted," includes a case where the defendant embezzled the plaintiff's money. Cole v. Anne, 40 Minn. 80, 41 N. W. Rep. 934.

As to who is a nonresident. Keller v. Carr, 40 Minn. 426, 428, 42 N. W. Rep. 292; Lawson v. Adlard, 46 Minn. 244, 48 N. W. Rep. 1019.

In the absence of a rule of court requiring it, the affidavit need not be subscribed by the affiant. Norton v. Hauge, 47 Minn. 405, 50 N. W. Rep. 368.

§ 5290. Bond.

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

(G. S. 1866, c. 66, § 131; G. S. 1878, c. 66, § 148; as amended 1885, c. 125.)

Under this section a bond is necessary upon an application for an attachment. An undertaking is not sufficient. Blake v. Sherman, 12 Minn. 420, (Gil. 305.) But the court may, under its power to allow amendments, permit, in such case, a bond to be filed *nunc pro tunc*. Id.

The condition of an attachment bond, under this section, makes the liability of the plaintiff to pay the damages mentioned therein (as well as the costs) dependent upon the recovery of judgment by the defendant. Crandall v. Rickley, 25 Minn. 119.

The obligors in the bond are liable for all costs awarded the defendant in the action, not merely for those resulting from the attachment. Greaves v. Newport, 41 Minn. 240, 42 N. W. Rep. 1059.

§ 5291. Form of writ.

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

(G. S. 1866, c. 66, § 132; G. S. 1878, c. 66, § 149.)

§ 5292. Property subject to attachment.

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

(G. S. 1866, c. 66, § 133; G. S. 1878, c. 66, § 150.)

Equipment of any member of National Guard exempt. See § 1749.

Wages exempt in certain cases. See § 5314.

The levy of an attachment on the interest of one member of a partnership in a debt due to the partnership, does not affect the right of the remaining members to sue for, in the firm name, and collect the debt. Day v. McQuillan, 13 Minn. 205, (Gil. 193.)

§ 5293. Execution of writ.

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

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

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

Third. When an attachment is made of articles of personal estate, which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the writ and of the return of the attachment may, at any time within three days thereafter, be deposited in the office of the town clerk of the town, or clerk or recorder of the village or city, in which the attachment is made, and such attachment shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer. (*As amended* 1881, c. 63, § 1.)

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

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

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

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

(G. S. 1866, c. 66, § 134; G. S. 1878, c. 66, § 151; amended as supra.)

Where a sheriff levies attachment on personal property, the value of his special property thereby acquired is limited to the amount of the judgments recovered in the attachment suits. And, although in an action of replevin against him for such levies, if tried before the recovery of such judgments, the judgment in his favor may assess the property at its full value, his recovery on the replevin bond will be limited to the amount of the attachment judgments. Wheaton v. Thompson, 20 Minn. 196, (Gil. 175.)

SUBD. 1. Under the Revised Statutes of 1851, an unrecorded deed of real estate took precedence of an attachment levied after its execution. The attaching creditor was not a *bona fide* purchaser within the meaning of that statute. See chapter 52, Laws of 1858. Greenleaf v. Edes, 2 Minn. 265, (Gil. 226.)

See, also, Folsom v. Carli, 5 Minn. 333, (Gil. 264;) Knox v. Randall, 24 Minn. 496.

The record of attachment of real property in the registry of deeds is admissible in evidence on the trial of an action involving title. Cousins v. Alworth, 44 Minn. 505, 47 N. W. Rep. 169.

The writ, with the sheriff's certificate, is admissible, though not returned and filed till after the entry of judgment. Id.

SUBD. 2. Bonds issued by a state are personal property, within the meaning of this subdivision, providing that "personal property capable of manual delivery to the sheriff, must be attached by taking it into his custody." And to constitute a levy upon them, they must be actually taken into the custody of the sheriff. Caldwell v. Sibley, 3 Minn. 406, (Gil. 300.)

SUBD. 3. Where it appears that, in executing a writ of attachment, an officer made a valid levy upon certain piles of cord-wood, by marking the different piles levied on,

taking the same into his actual control and custody, so far as manual possession under the circumstances was practicable, by then leaving the same in the charge and custody of a third person to hold for him, and by also filing in the proper town clerk's office a certified copy of the writ and return pursuant to statute, the officer exercises such dominion over the property, to the exclusion of the lawful owner of the same, (not being the defendant in the attachment,) as, being wrongful, constitutes a conversion as respects such owner. Molm v. Barton, 27 Minn. 530, 8 N. W. Rep. 765.

See, also, Ide v. Harwood, 30 Minn. 196, 14 N. W. Rep. 884.

SUBD. 5. The interest of a pledgeor of a promissory note, in the note, is subject to levy and sale under execution, if the pledgee consent to surrender possession to the sheriff. The maker cannot object that the pledgee need not have parted with the note. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

A return on an execution of a levy "upon the books" of the judgment debtor does not show a levy upon, or right to sell, the accounts and debts entered in the books. Tullis v. Brawley, 3 Minn. 277, (Gil. 191.)

SUBD. 7. A return of the sheriff that he has attached the real property "as the property of" the defendant is sufficient. Cousins v. Alworth, supra.

§ 5294. Certificate to be furnished sheriff in certain cases.

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

(G. S. 1866, c. 66, § 135; G. S. 1878, c. 66, § 152.)

§ 5295. Sheriff to sell perishable property, collect debts, etc.

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

(G. S. 1866, c. 66, § 136; G. S. 1878, c. 66, § 153.)

Whether the conversion of the goods into money arises from a sale thereof as perishable, under this section, or from the collection of a judgment for the value thereof in an action of claim and delivery, is unimportant; the sheriff in either case holding the proceeds of the goods as security, as provided by statute, and by virtue of his special property therein. Wheaton v. Thompson, 20 Minn. 196, (Gil. 180.)

If an officer has process in his hands, valid upon its face, and levies upon notes which have been assigned by the judgment debtor, for the purpose of defrauding his creditors, and upon the levy the officer takes the notes into his possession, he can, under the statute, maintain an action on them, and collect them, and the assignee cannot sue upon them. Rohrer v. Turrill, 4 Minn. 407, (Gil. 310.)

§ 5296. Claim of property by third person—Affidavit—Indemnity by plaintiff.

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

the defendant or his agent shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made, he may retain such property under levy a reasonable time to demand such indemnity.

(G. S. 1866, c. 66, § 137, as amended 1877, c. 27, § 1; G. S. 1878, c. 66, § 154.)

The notice by a third person of a claim of ownership of property levied upon is only necessary where the property is, at the time of the levy, in the possession of defendant or his agent. Barry v. McGrade, 14 Minn. 163, (Gil. 126;) Butler v. White, 25 Minn. 432. No affidavit of title by a claimant of property seized by an officer under process against another party is necessary where the property was taken from the possession of the claimant, and not of the defendant in the writ. Lampsen v. Brander, 28 Minn. 526, 11 N. W. Rep. 94.

The provisions of this section, that no claim by a stranger to the suit, against the sheriff, for property levied upon or taken by virtue of a writ of attachment or execution shall be valid unless the claimant shall serve upon the sheriff an affidavit setting up his title, and the grounds thereof, etc., apply only to cases where the property was levied upon or taken by the sheriff while in the possession of the defendant in the writ, or his agent, under circumstances which would create a presumption, *prima facie*, of ownership in him. Following and applying Barry v. McGrade, 14 Minn. 163, (Gil. 126.) Tyler v. Hanscomb, 28 Minn. 1, 8 N. W. Rep. 825. Followed, Ohlson v. Manderfield, 28 Minn. 390, 10 N. W. Rep. 418; Granning v. Swensen, 49 Minn. 381, 52 N. W. Rep. 30.

The section does not apply to a case where an assignee under the insolvent law claims from the sheriff property of the assignor taken prior to the assignment, on attachment which has been dissolved by the insolvency proceedings. Johnson v. Bray, 35 Minn. 248, 28 N. W. Rep. 504.

The affidavit required to be made by any person other than the defendant in the writ claiming property levied on by a sheriff, may be served on the deputy who made the levy, and has the property. Williams v. McGrade, 13 Minn. 174, (Gil. 165.) The party making such affidavit need not furnish a contract, or a copy of it, under which he claims the property. If the affidavit disclose the legal effect of the contract so as to distinctly inform the officer that the execution debtor has no rights in the property, and what the general nature of the affiant's rights are, it is sufficient. Id.

No action can be maintained against a sheriff for a wrongful levy on goods of a third person, in the hands of the judgment debtor, except by defendant or his agent, unless the affidavit provided by this section is made and served before sale or other legal disposition of the property; and the fact that the owner may have been ignorant of the levy until after sale will make no difference. Barry v. McGrade, 14 Minn. 163, (Gil. 126.) Followed, Moulton v. Thompson, 26 Minn. 120, 1 N. W. Rep. 836. An attorney in an execution, who advises and directs a levy and sale of personal property which is in the possession of defendant or agent, under circumstances creating a *prima facie* presumption of ownership in him, no affidavit of claim on part of third person required by this section being served upon the sheriff, is not liable in an action brought by a third person for the conversion of such property. Id. This provision, regulating the manner in which claims of third persons to property levied upon in the possession of defendant shall be made, affects the remedy only, and is constitutional. Id.

The "undertaking" provided for by this section (which is a transcript of Code N. Y. § 216) need not be executed by the plaintiffs in the suit personally. Schoregge v. Gordon, 29 Minn. 363, 371, 13 N. W. Rep. 194.

See, also, Livingston v. Brown, 18 Minn. 308, (Gil. 278;) Flower v. Grace, 23 Minn. 32; Lesher v. Getman, 30 Minn. 321, 15 N. W. Rep. 309; Perkins v. Zarracher, 32 Minn. 71, 19 N. W. Rep. 385; Carpenter v. Bodkin, 36 Minn. 183, 30 N. W. Rep. 453; Hazeltine v. Swensen, 38 Minn. 424, 425, 38 N. W. Rep. 110; Whitney v. Swensen, 43 Minn. 337, 338, 45 N. W. Rep. 609; Heberling v. Jaggar, 47 Minn. 70, 49 N. W. Rep. 396; Richardson v. McLaughlin (Minn.) 57 N. W. Rep. 210.

§ 5297. Plaintiff to be impleaded with sheriff in action against him.

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

(G. S. 1866, c. 66, § 138; G. S. 1878, c. 66, § 155.)

See Lesher v. Getman, 30 Minn. 321, 324, 15 N. W. Rep. 309; Robertson v. Sibley, 10 Minn. 323 (Gil. 253); Banning v. Sibley, 3 Minn. 405 (Gil. 299); Whitney v. Swensen, 43 Minn. 337, 45 N. W. Rep. 609; Richardson v. McLaughlin (Minn.) 57 N. W. Rep. 210.

§ 5298. Judgment against defendant, how satisfied.

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

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

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

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

(G. S. 1866, c. 66, § 139; G. S. 1878, c. 66, § 156.)

Where a sheriff, intending to sell, on execution, real estate previously attached by him in the action, by mistake advertises and sells by a wrong description, and the judgment creditor, ignorant of the mistake, and supposing the property sold to be that attached, bids it in for the full amount of the execution and costs, and the execution is in consequence returned satisfied in full, and satisfaction of the judgment is thereupon entered of record, the court will, even as against subsequent liens by attachment and judgment, relieve against the mistake by vacating the sale and satisfaction, restoring the judgment creditor to his rights as they were under the attachment and judgment prior to the advertisement and sale, and permitting him to issue execution, and proceed as though none had ever issued, except as against those who, relying on the apparent satisfaction of the judgment, have purchased such part of the property as was apparently released from the lien of the attachment and judgment by the entry of satisfaction on the record. Lay v. Shaubhut, 6 Minn. 273. (Gil. 182.)

§ 5299. Discharge of attachment on defendant giving bond.

A defendant whose property has been attached, may, at any time before trial, execute to the plaintiff a bond, in double the amount claimed in the complaint, or, if the value of the property attached be less than the amount claimed, then in double the value of the property, with two or more sureties, to be approved by the officer allowing the writ of attachment, or by the court commissioner of the county in which the defendant resides, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereof equal to the value of the property attached; and the officer approving such bond shall make an order discharging such attachment.

(G. S. 1866, c. 66, § 140, as amended 1868, c. 69, § 1; G. S. 1878, c. 66, § 157.)

It is only the defendant whose property has been attached to whom this section gives the right to procure a discharge of the attachment upon executing a bond to the plaintiff in the writ. A stranger to the suit, although he has an interest in the attached property, has not this right. Kling v. Childs, 30 Minn. 366, 15 N. W. Rep. 673.

A bond in favor of the plaintiff, specifically named as obligee, conditioned that if "said plaintiff recover judgment in the said action," etc., is a compliance with the statute providing for a bond to the plaintiff, conditioned that "if the plaintiff recovers judgment in the action," etc. Slosson v. Ferguson, 31 Minn. 448, 18 N. W. Rep. 281.

The judge may excuse compliance with the rule requiring the bond to be acknowledged by the sureties. Gale v. Slifert, 39 Minn. 171, 39 N. W. Rep. 69.

Remedy when unacknowledged bond is approved without noticing the defect. Id.

An order discharging an attachment upon bond given is appealable. Id.

A defendant who procures the discharge of an attachment by giving bond waives the right to move for a vacation of the writ, and cannot maintain an action for wrongfully procuring the attachment. Rachelman v. Skinner, 46 Minn. 196, 48 N. W. Rep. 776. See Johnston v. Higgins, 15 Minn. 486, (Gil. 400, 402.)

§ 5300. Motion to vacate writ of attachment.

The defendant may, at any time before the time for answering expires, or at any time thereafter when he has answered, and before trial, apply to the

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

(G. S. 1866, c. 66, § 141, as amended 1867, c. 66, § 3; G. S. 1878, c. 66, § 158.)

Where a void warrant of attachment is issued and executed, the parties procuring its issuance and execution are trespassers, and the defendant does not waive the objection to it by not moving to vacate it. The parties procuring it to be issued are not protected by the fact that it was issued under a statute which is unconstitutional. Merritt v. City of St. Paul, 11 Minn. 223, (Gil. 145.)

It is no ground for vacating an attachment that an action between the same parties, relative to the same subject-matter, has been decided in favor of defendant in another court of competent jurisdiction. Davidson v. Owens, 5 Minn. 69, (Gil. 50.) Nor is it any ground to vacate an attachment that the property levied on under it is not subject to attachment. Id.

An assignor for the benefit of creditors has such an interest in the assigned estate as to entitle him to defend it when attached for his debts, and to move to vacate the attachment. Richards v. White, 7 Minn. 345, (Gil. 271.)

A motion to vacate an attachment may be made on notice, and need not be an order to show cause. Blake v. Sherman, 12 Minn. 420, (Gil. 305.) A notice of motion for the "next special or adjourned term of * * * to be held * * * on the 28th day," the opposite party not being misled, is sufficient. Id.

On a motion to vacate an attachment the court may determine the truth of the allegations in the affidavit on which it issued. Drought v. Collins, 20 Minn. 374, (Gil. 325;) Nelson v. Gibbs, 18 Minn. 541, (Gil. 485.)

Upon a motion to dissolve an attachment, a defendant may properly use his verified answer as an affidavit so far as its contents are pertinent. Nelson v. Munch, 23 Minn. 229. In the exercise of sound discretion it is competent for the court, upon the hearing of such motion, to permit the defendant to read affidavits rebutting the affidavits of the plaintiff read upon such hearing. Id.

The defendant may move to vacate while his answer is undisposed of, though it is insufficient, and although he has made an assignment. First Nat. Bank v. Randall, 38 Minn. 382, 37 N. W. Rep. 799.

Order vacating writ sustained on appeal, the affidavits conflicting. Id.

See Rachelman v. Skinner, note to § 5299.

Upon dissolution, the sheriff is not bound to hold the property to enable the plaintiff to appeal and give a stay bond. Proper course for the plaintiff in such case. Ryan Drug Co. v. Placock, 40 Minn. 470, 42 N. W. Rep. 298.

§ 5301. Return to be made by sheriff.

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

(G. S. 1866, c. 66, § 142; G. S. 1878, c. 66, § 159.)

The return of a sheriff to a writ of attachment is conclusive upon him as to the truth of all matters stated in it, concerning which it was his duty to make a return, so far as to estop him from contradicting the same in any action between him and the attaching creditor, involving the question of his liability to such creditor in respect to property attached under the writ, or its proceeds. The legal representatives of the sheriff, in case of his decease, are affected by the same rule. State v. Penner, 27 Minn. 269, 6 N. W. Rep. 790.

See Cousins v. Alworth, cited in note to § 5293, subd. 7; Ryan Drug Co. v. Placock, 40 Minn. 470, 42 N. W. Rep. 298.

§ 5302. Attachment of real estate—Lien—Release.

Whenever any real estate has been attached by virtue of any writ of attachment, such real estate shall be bound, and the attachment shall be a lien thereon, from the time that a certified copy of the attachment, with the description of the real estate, has been delivered for record in the office of the register of deeds in the county where the same is situated, and not otherwise. Each register of deeds shall note the day, hour, and minute when he receives such certified copy, and shall record and index the same in the books kept for the recording and indexing of mortgages. Such real estate may be discharged and released of record from such attachment in the following manner, to-wit:

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

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

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

Fourth. By filing for record in the office of such register of deeds a satisfaction and discharge of such attachment executed by the plaintiff in said action, or by the attorney of record of the said plaintiff, in the same manner as is required by law for the execution of conveyances of real estate. (*As amended* 1868, *c.* 68, § 1; 1883, *c.* 102, § 1.)

Fifth. Whenever any attachment has been or shall be levied, and more than three years have or shall have elapsed without judgment being entered in the action, any person having any interest in the attached property, although not a party to the original action, may move for the release of any such property from the lien of such attachment, and if it shall appear to the satisfaction of the court that no proceedings have been had in said action for a period of three years, or from other evidence that said action has been abandoned, said attachment shall be vacated and the lien thereof released. (Added 1885, c. 110.)

(G. S. 1866, c. 66, § 143; G. S. 1878, c. 66, § 160; amended as supra.)

See Cousins v. Alworth, 44 Minn. 505, 508, 47 N. W. Rep. 169.

A motion to vacate cannot be made after final judgment. McDonald v. Clark, 53 Minn. 230, 54 N. W. Rep. 1118.

§ 5303. Release by plaintiff of real estate attached.

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

(G. S. 1866, c. 66, § 144; G. S. 1878, c. 66, § 161.)

§ 5304. Release of attachment to be recorded.

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

(G. S. 1866, c. 66, § 145; G. S. 1878, c. 66, § 162.)

§ 5305. Attachment of personal property, how released.

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

(G. S. 1866, c. 66, § 146; G. S. 1878, c. 66, § 163.)

TITLE 10.

GARNISHMENT.

§ 5306. Affidavit—Garnishee summons—Title of action.

In any action in a court of record or justice's court, for the recovery of money, if the plaintiff, his agent or attorney, at the time of filing the complaint or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files, with the

clerk of the court, or, if the action is in a justice's court, with the justice, an affidavit stating that he believes that any person (naming him) has property, money or effects in his hands, or under his control, belonging to the defendant in such action, or that such person is indebted to the defendant, and that the value of such property or effects, or the amount of such money or indebtedness, if the action is in the district court, exceeds the sum of twenty-five dollars, or, if the action is in a justice's court, ten dollars, a summons may be issued against such person, as hereinafter provided; in which summons and all subsequent proceedings the plaintiff in the action shall be known and designated as plaintiff, the defendant as defendant, and the person against whom the summons is issued as garnishee.

(G. S. 1866, c. 66, § 147, as amended 1867, c. 65, § 1; G. S. 1878, c. 66, § 164.)

Until the filing of the proper affidavit, the summons in garnishee proceedings cannot be properly issued; and when proceedings are so commenced, they do not bind the assignee of the debt from the garnishee defendant to the defendant in the action, when such assignee gives the garnishee defendant notice, before hearing, of the assignment, and of the irregularity in the garnishee proceedings. Black v. Brisbin, 3 Minn. 360, (Gil. 253.)

An affidavit as a basis for garnishee proceedings, which states that the party sought to be charged is indebted, or has property, etc., is insufficient. It may state that he is indebted, and has property, etc., or that he is indebted, or that he has property, etc., but the language must not be in the alternative. A proper affidavit is necessary to give jurisdiction over the proceedings. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

An objection to the affidavit, made after the garnishee defendant has appeared in obedience to the summons, a referee been appointed to take the disclosure, a disclosure had before the referee, and his report filed, is in time. Id.

A garnishee summons may be issued by the parties' attorney without allowance by a judicial officer; but it must run in the name of the state. Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55, (Gil. 44.)

The garnishee may waive any irregularity in the summons against him, and does so by appearing without objection; but the principal defendant cannot object to any irregularity in the summons against the garnishee. Id.

Garnishment of an assignee under a fraudulent assignment is ineffectual to attach book-accounts. It can only be made by service of the proper garnishee summons upon the debtors owing such debts. Ide v. Harwood, 30 Minn. 191, 14 N. W. Rep. 884.

The affidavit need not state that the garnishee is a corporation. Howland v. Jenel, (Minn.) 56 N. W. Rep. 581.

§ 5307. Proceedings in justice's court.

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

(G. S. 1866, c. 66, § 148; G. S. 1878, c. 66, § 165.)

§ 5308. Proceedings in district court—Summons—Service—Notice to defendant—Fees, etc.

In actions in a district court, such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant in other cases in said court, except that the service shall in all cases be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or the clerk thereof, or the court commissioner in the county in which the action is pending, at a time and place mentioned therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property, money or effects of the defendant

in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place and manner of service thereof upon the garnishee, and signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring such defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the same for the appearance of the garnishee. Such notice and copy of the summons may be served in the manner provided by law for the service of a summons in ordinary cases. The garnishee shall be entitled in all cases, whether the action is in a district court or before a justice of the peace, to the same fees as if he were subpoenaed as a witness in such action, and may be compelled to testify and disclose respecting any matters contained in the affidavit, in the same manner as if he were a witness duly subpoenaed for that purpose. But no person shall be obliged to appear as garnishee, unless his fees for one day's attendance, and mileage according to law, is paid or tendered in advance.

(G. S. 1866, c. 66, § 149, as amended 1871, c. 66, § 1; G. S. 1878, c. 66, § 166.)

§ 5309. Effect of service of summons on garnishee.

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

(G. S. 1866, c. 66, § 150; G. S. 1878, c. 66, § 167.)

The garnishee cannot be held for property, money, or effects coming into his hands or possession, or under his control, or for indebtedness accrued, after the service of the summons in the proceeding against him. Nash v. Gale, 2 Minn. 310, (Gil. 265.)

See Lord v. Meachem, 32 Minn. 66, 67, 19 N. W. Rep. 346.

§ 5310. Legacies, etc., subject to garnishment.

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

(G. S. 1866, c. 66, § 151; G. S. 1878, c. 66, § 168.)

§ 5311. Garnishment of corporations.

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

(G. S. 1866, c. 66, § 152; G. S. 1878, c. 66, § 169.)

Public corporations, such as counties, etc., are not liable to garnishment. McDougal v. Board of Supervisors of Hennepin County, 4 Minn. 184, (Gil. 130.)

§ 5312. In what cases garnishment not allowed.

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

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

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

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

(G. S. 1866, c. 66, § 153; G. S. 1878, c. 66, § 170.)

In case of an assignment under our insolvent act, the assignee is not garnishable in a suit against his assignor. Lord v. Meachem, 32 Minn. 66, 19 N. W. Rep. 346. Where

the validity of such assignment stands admitted, a purported garnishment of the assignee may properly be dissolved upon his motion upon that ground, and without disclosure. Id.

When a policy of insurance against fire contains conditions requiring the insured, in case of loss, to give notice of the loss, and furnish a particular account of it, and other proofs, they are, unless waived, conditions precedent to the right of the insured to maintain an action. Until they are complied with or waived, the claim may never become payable, and until then it is not the subject of garnishment. Gies v. Bechtner, 12 Minn. 279, (Gil. 183.) And where there is a condition that "any fraud, or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy," till the preliminary proofs of loss are furnished, the claim is contingent. Id.

On a sale of chattels, the buyer agreed to pay the balance of the price after the claims of third persons against the seller had been settled. Held, that the buyer was not liable to garnishment till the amount of such claims was ascertained. Durling v. Peck, 41 Minn. 317, 43 N. W. Rep. 65.

When an assignment of wages to be earned is good against garnishment. O'Connor v. Meehan, 47 Minn. 247, 49 N. W. Rep. 982.

Money held by a clerk of court extraofficially may be garnished. Marine Nat. Bank v. Whiteman Paper Mills, 49 Minn. 133, 51 N. W. Rep. 665.

An indebtedness incurred by the receivers of a railway company, appointed by the federal court, while operating the road under the authority of the court, may be garnisheed in a state court. But no executory process can be issued against the receivers on the judgment rendered therein. It can only be satisfied by an application, to the court in which the receivership proceedings are pending, for an order directing its payment. Irwin v. McKechnie (Minn.) 59 N. W. Rep. 987.

As to the right of the garnishee to set off accommodation notes made by him for the defendant. Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. Rep. 139.

See Wheeler v. Day, 23 Minn. 545.

§ 5313. Exemption—Police and fire department associations.

That any and all police department relief associations and fire department associations organized under the laws of this state shall not be subject to the laws relating to life insurance companies, and shall not be summoned, nor liable as garnishee or trustee, in any garnishee proceeding, nor in any action or proceeding against any person or persons who may be entitled to assistance from said association or associations under the articles of incorporation, or by-laws thereof.

(1887, c. 136;[7] G. S. 1878, v. 2, c. 66, § 170b.)

§ 5314. Same—Wages.

The wages of any person or of the minor children of any person in any sum not exceeding twenty-five dollars due for any services rendered by any such person or the minor children of any such person for any other person during thirty days preceding the issue of any process of attachment, garnishment or execution in any action against any such person or persons shall be exempt from such process.

(1889, c. 204, § 1.[8])

The title of Laws 1889, c. 204, sufficiently indicates the purpose of the act. Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. Rep. 396.

The evident purpose of the act was to exempt wages, to the extent of $25, earned within 30 days next preceding the levy of the process, and such should be the construction. Blan v. Germania Life Ins. Co., 54 Minn. 366, 56 N. W. Rep. 127.

§ 5315. Money, etc., may be attached before due, when.

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

(G. S. 1866, c. 66, § 154; G. S. 1878, c. 66, § 171.)

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[7] An act to exempt police department relief associations and fire department associations from insurance laws and garnishee process. Approved March 3, 1887.

[8] An act to fix the amount of wages of laborers exempt from process of attachments, garnishments or execution. Approved April 16, 1889. By § 2, all inconsistent acts are repealed.

§ 5316. What shall be deemed "effects."

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

(G. S. 1866, c. 66, § 155; G. S. 1878, c. 66, § 172.)

The maker of a promissory note cannot be garnished upon it, before maturity in an action against the payee. Hubbard v. Williams, 1 Minn. 54, (Gil. 37.)

A United States voucher, (property of a defendant,) which has been given to him for personal, but not official, services rendered by him to the United States, may be a proper subject of garnishment. Leighton v. Heagerty, 21 Minn. 42.

§ 5317. Examination of garnishee—Proof of service on defendant—Non-resident defendant.

After the appearance of the garnishee before the court or officer named in the summons, on the day specified therein, or on the day to which an adjournment may be had, the said garnishee shall be examined on oath touching the matters alleged in the affidavit, and the examining officer shall take full minutes of such examination, and file the same with the other papers in the cause: provided, that, unless the defendant in the action appears at the time and place specified in the summons for the appearance of the garnishee, such officer or court shall not proceed to the examination of such garnishee, or to the taking of any evidence whatever therein, until the plaintiff produces and files an affidavit, or return of an officer, showing the service of the summons and notice upon the defendant as prescribed in sections one hundred and forty-eight and one hundred and forty-nine aforesaid; but in case the plaintiff is unable so to notify such defendant, the said court or officer may postpone the examination for such reasonable time as may be necessary to enable the plaintiff to notify such defendant, and he may then be notified of the day to which such postponement is had in the manner provided by law for the service of a summons in ordinary cases, except that it shall be a notice of ten days in a district court, and of four days in a justice court: provided, that when the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and the plaintiff, or his agent or attorney, files an affidavit stating that the defendant is not a resident of this state, and is not within the same, as the affiant verily believes, it shall not be necessary to serve upon the defendant a copy of such garnishee summons, or any notice to the defendant in such action, in any court; and the examination shall proceed in the same manner as if the defendant had been duly served with such copy and notice, or had appeared at the time and place specified in the summons for the appearance of the garnishee.

(G. S. 1866, c. 66, § 156, as amended 1871, c. 66, § 1; G. S. 1878, c. 66, § 173.)

Notice of garnishee proceedings, in an action against foreign corporation, may be served on the principal defendant by publication. Broome v. Galena, D. D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.)

Under c. 80, Comp. St., regulating garnishments, the plaintiff is bound by the answer of the garnishee, and cannot contradict him. Chase v. North, 4 Minn. 381, (Gil. 288.)

A garnishee must be tried upon his disclosure, and cannot be contradicted. If the disclosure leaves any doubt as to his indebtedness, he must be discharged. Cole v. Sater, 5 Minn. 468, (Gil. 378.)

In garnishee proceedings, although the garnishee deny any indebtedness, if the facts which he discloses clearly show that he owes the defendant a debt which is subject to the garnishee proceedings, judgment should go against him. Donnelly v. O'Connor, 22 Minn. 309.

See, also, Banning v. Sibley, 3 Minn. 389, (Gil. 282.)

Voluntary appearance by the garnishee waives defects in the garnishee summons and in its service on him. Howland v. Jenel (Minn.) 56 N. W. Rep. 581.

§ 5318. Claimant may appear and be joined as party.

If it appears from the evidence taken, or otherwise, that any person, not a party to the action, is interested or claims any interest in any of the property or effects in the hands of the garnishee, by virtue of any agreement or matter which existed prior to the service of the summons, the examining officer, upon application, may permit such person to appear in the action and

maintain his right; and if he does not voluntarily appear, notice may be given him to appear or be barred of his claims, which notice may be served as such officer shall direct. In case such person voluntarily appears, or notice is given as aforesaid, he shall be joined as a party to the action, and judgment therein shall bind him in the same manner as if he had been an original party.

(G. S. 1866, c. 66, § 157; G. S. 1878, c. 66, § 174.)

Where indebtedness from the garnishee to the defendant is disclosed by the garnishee, a third person claiming an interest in such indebtedness, existing prior to the service of the garnishee summons, may be permitted to appear and be made a party to the proceedings. This section is intended to cover a case of indebtedness as well as property or effects. Crone v. Braun, 23 Minn. 239.

The affirmative in maintaining his right to garnished property is upon the "claimant." North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381, 20 N. W. Rep. 334. Where the amount secured by a fire insurance policy upon A.'s goods, running to A., is made payable to B. as his interest may appear, (that interest being represented by a chattel mortgage,) and a loss occurs, a creditor of A. may properly garnish the insurance money in the hands of the insurer; and in the garnishment proceedings, into which B. has come as a "claimant," such creditor may properly attack and call in question B.'s mortgage as being fraudulent and void as to A.'s creditors. Id.

A claimant in such proceedings, claiming under an indorsement on a policy of insurance, making it payable to him to the extent of his interest, the character and extent of such interest not appearing, must, to protect his claim to the debt, prove what his interest is. Donnelly v. O'Connor, 22 Minn. 309.

Where the court in which the garnishee proceeding is instituted gives to a claimant full opportunity to establish his claim, and he omits to do so, and the court thereupon renders judgment upon the disclosure of the garnishee, discharging the garnishee, upon an appeal by the plaintiff upon questions of law alone, the appellate court may, upon reversing the judgment of the court below, render judgment on the disclosure against the garnishee. Id.

A stranger to a garnishee proceeding cannot sue out a writ of error in the name of the garnishee defendant. Hollinshead v. Banning, 4 Minn. 116, (Gil. 77.)

A claimant who succeeds is entitled to the same costs as a defendant in an action. Mahoney v. McLean, 28 Minn. 63, 9 N. W. Rep. 76.

Where the garnishee's disclosure shows a debt claimed by a third person, such claimant cannot be barred unless summoned to appear, and made a party. Levy v. Miller, 38 Minn. 526, 38 N. W. Rep. 700.

As to manner of service on nonresident claimant. Id.

See, also, Lewis v. Bush, 30 Minn. 244, 15 N. W. Rep. 113; Levy v. Miller, 38 Minn. 526, 38 N. W. Rep. 700; Oberteuffer v. Harwood, 6 Fed. Rep. 828; Dennis v. Spencer, cited in note to § 5273.

Where the money or property is claimed by a person not a party, the procedure is governed by this section, and not by § 5319. Smith v. Barclay, 54 Minn. 47, 55 N. W. Rep. 827.

See Leslie v. Godfrey (Minn.) 56 N. W. Rep. 818.

§ 5319. Proceedings when garnishee denies debt, or title to property is disputed.

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

manner, in all respects, as civil actions. The provisions of this section shall not apply to proceedings in justices' courts.

(G. S. 1866, c. 66, § 158; G. S. 1878, c. 66, § 175.)

Section 1, c. 141, Sp. Laws 1874, provides that the municipal court of the city of Minneapolis "shall not have jurisdiction of any action where the relief asked for in the complaint is purely equitable in its nature." Held, that this provision has no reference to proceedings in garnishment under this section. Benton v. Snyder, 22 Minn. 247.

When a garnishee expresses an opinion that, at the time of the service of the summons, he had no property of defendant in his possession or control, but, upon full disclosure, develops facts showing that such opinion is incorrect, the case is not one which calls for a supplemental complaint. Farmers' & Mechanics' Bank v. Welles, 23 Minn. 475.

If, after a disclosure, the plaintiff submit the matter for decision on the disclosure, and the court decide it, it is too late for him to ask leave to file a supplemental complaint. The framing of issues in such proceedings, other than by supplemental complaint, is not a matter of right in the parties. If it can be done at all, it is in the discretion of the court. Mahoney v. McLean, 28 Minn. 63, 9 N. W. Rep. 76.

Where A., in an action against B., garnished C., and, upon C.'s denying his liability, made him a party to the suit by supplemental complaint, held, that the validity of a bill of sale to the garnishee of the property in his hands by the defendant, fraudulent as to creditors, could be determined in such action without alleging such fact by supplemental complaint, under this section. Davis v. Mendenhall, 19 Minn. 149, (Gil. 113.)

The fact that the principal defendant had deposited with the garnishee defendant money deposited by and credited on the latter's books to him, as "agent," is not conclusive that the money was his property. Ingersoll v. First Nat. Bank, 10 Minn. 396, (Gil. 315.)

An order refusing to set aside garnishee proceedings for insufficiency of the affidavit, and granting plaintiff leave to file a supplemental complaint under § 12 of the act of 1860, relating to garnishment, is not appealable. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

Upon application for judgment, the disclosure must be taken to be true. If not satisfied with it, the plaintiff must proceed by supplemental complaint. Vanderhoof v. Holloway, 41 Minn. 498, 43 N. W. Rep. 331.

Where the proceedings rest on disclosure alone, and there is no supplemental complaint, no findings of fact need be made. Wildner v. Ferguson, 42 Minn. 112, 43 N. W. Rep. 794.

As to the practice where the defendant is garnished by a creditor of the plaintiff. Blair v. Hilgedick, 45 Minn. 23, 47 N. W. Rep. 310; Barth v. Horejs, 45 Minn. 184, 47 N. W. Rep. 717; Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. Rep. 905.

Where the facts establish the garnishee's liability, his denial of indebtedness is immaterial. Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. Rep. 139.

See Oberteuffer v. Harwood, 6 Fed. Rep. 828.

§ 5320. Default of garnishee—Removing default.

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

(G. S. 1866, c. 66, § 159; G. S. 1878, c. 66, § 176.)

An order relieving a garnishee defendant from default will not be reviewed unless there is an abuse of discretion. Goodrich v. Hopkins, 10 Minn. 162, (Gil. 130.) Such an order ought to fix a time for the garnishee defendant to make his disclosure. Id.

"Costs" in this section include "disbursements." Woolsey v. O'Brien, 23 Minn. 72.

The garnishee's remedy for a judgment by default must be taken in the same proceeding. Segog v. Engle, 43 Minn. 191, 45 N. W. Rep. 427.

§ 5321. Judgment against garnishee—Transfer of action.

No judgment shall be rendered against any garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after examination and disclosure, if it appears that he ought not to be held; whenever a garnishee is not discharged as aforesaid, the cause shall be continued to abide the result of the original action. And in case such original action pending in any court not a court of record shall, under the provisions of law, be transferred to any other court, except by appeal, any garnishee action, the judgment in which is conditioned on the judgment in such original

action, shall be also transferred with such original action; and written notice of such transfer shall be served on the garnishee defendant or defendants, by the plaintiff in such action, specifying the court to which such transfer is made, and the time when such garnishee action will be heard, which shall be not less than two days from the service of such notice; and such garnishee action, so transferred, shall carry with it all proceedings already had, and any disclosure already made therein.

(G. S. 1866, c. 66, § 160, as amended 1875, c. 59, § 1; G. S. 1878, c. 66, § 177.)

If the facts disclosed by a garnishee leave a reasonable doubt of his liability, judgment should be rendered in his favor. Pioneer Printing Co. v. Sanborn, 3 Minn. 413, (Gil. 304.)

A garnishee does not become charged, in respect to the debtor's property in his hands at the time of the service of the garnishee summons, until judgment is rendered against him upon disclosure and an order of the court. Prior to that time an officer holding an execution against the debtor defendant in the original action has no authority to seize such property under the execution by virtue of any inchoate lien created under the garnishee proceedings. A mere order for judgment is insufficient to give such authority. Langdon v. Thompson, 25 Minn. 509.

See McConnell v. Rakness, 41 Minn. 34, 42 N. W. Rep. 539.

§ 5322. Same—Order of court necessary.

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

(G. S. 1866, c. 66, § 161; G. S. 1878, c. 66, § 178.)

See Langdon v. Thompson, 25 Minn. 509, 513.

§ 5323. Who may take disclosure, etc.

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

(G. S. 1866, c. 66, § 162, as amended 1871, c. 66, § 1; G. S. 1878, c. 66, § 179.)

Upon the examination of a garnishee, testimony other than that of the garnishee himself is receivable for the purpose of corroborating or explaining the testimony of the garnishee, or of developing facts additional to those disclosed by him. Leighton v. Heagerty, 21 Minn. 42.

See Langdon v. Thompson, 25 Minn. 513.

§ 5324. Fees of officers taking disclosure.

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

(G. S. 1866, c. 66, § 163, as amended 1871, c. 66, § 1; G. S. 1878, c. 66, § 180.)

§ 5325. Duty of person charged as garnishee of property, etc.

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

(G. S. 1866, c. 66, § 164; G. S. 1878, c. 66, § 181.)

See Crone v. Braun, 23 Minn. 240, 241; Langdon v. Thompson, 25 Minn. 513.

§ 5326. Court may determine value of property, make orders, etc.

Upon application and notice to the parties, the court may determine the value of any property or effects so in the hands of the garnishee for de-

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

(G. S. 1866, c. 66, § 165; G. S. 1878, c. 66, § 182.)

§ 5327. Proceedings when garnishee has lien on property.

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

(G. S. 1866, c. 66, § 166; G. S. 1878, c. 66, § 183.)

Under G. S. 1878, c. 39, § 8, (§ 4136,) and this section, where the mortgagee in a chattel mortgage has not sold the mortgaged goods or foreclosed the mortgage, the mortgagor has a subsisting right of redemption, which is subject to the claims of the mortgagor's creditors, and may be reached by garnishment. Whether it can properly be reached by a levy upon the mortgaged goods in the rightful possession of the mortgagee, *quære*. Becker v. Dunham, 27 Minn. 32, 6 N. W. Rep. 406. But where the goods are in fact seized upon writs of attachment against the mortgagor while in the rightful possession of the mortgagee, the latter, in an action against the levying officer, can recover only the value of his interest in the goods. Id.

§ 5328. Garnishee liable for contempt, when.

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

(G. S. 1866, c. 66, § 167; G. S. 1878, c. 66, § 184.)

§ 5329. Garnishee may sell property mortgaged.

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

(G. S. 1866, c. 66, § 168; G. S. 1878, c. 66, § 185.)

§ 5330. Garnishee not liable for destruction of property, when.

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

(G. S. 1866, c. 66, § 169; G. S. 1878, c. 66, § 186.)

§ 5331. Judgment, for what amount rendered.

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

(G. S. 1866, c. 66, § 170; G. S. 1878, c. 66, § 187.)

The word "costs," as used in this section, includes disbursements. Woolsey v. O'Brien, 23 Minn. 71.

See McConnell v. Rakness, 41 Minn. 3, 4, 42 N. W. Rep. 539.

§ 5332. Disclosure before return-day by consent of plaintiff.

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

(G. S. 1866, c. 66, § 171; G. S. 1878, c. 66, § 188.)

§ 5333. Same—When plaintiff does not consent.

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

(G. S. 1866, c. 66, § 172; G. S. 1878, c. 66, § 189.)

§ 5334. Fees and expenses of garnishees.

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

(G. S. 1866, c. 66, § 173; G. S. 1878, c. 66, § 190.)

Counsel fees and other necessary expenses, beyond costs of travel and attendance, may be allowed in a special case, in the discretion of the court, to garnishees, under this section; but such allowance must be made in the garnishee proceeding, and when not allowed a claim therefor cannot be set off by the garnishee in an action against him by his creditor. Schwerin v. De Graff, 19 Minn. 414, (Gil. 359.)

See McConnell v. Rakness, 41 Minn. 3, 42 N. W. Rep. 539.

§ 5335. Costs, etc., to be deducted from property garnished.

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

(G. S. 1866, c. 66, § 174; G. S. 1878, c. 66, § 191.)

§ 5336. Same—Specific articles—Judgment against plaintiff.

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

(G. S. 1866, c. 66, § 175; G. S. 1878, c. 66, § 192.)

§ 5337. Costs of plaintiff, how limited.

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

(G. S. 1866, c. 66, § 176; G. S. 1878, c. 66, § 193.)

§ 5338. Minimum judgment in justice's court—In district court.

No judgment shall be rendered against a garnishee in a justice's court, where the judgment against the defendant is less than ten dollars, exclusive

of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property, money or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than ten dollars. If the action is in a district court, no judgment shall be rendered against the garnishee, where the indebtedness proved against him, or the value of the money, property or effects of the defendant in his hands or under his control, shall be less than twenty-five dollars; but in all such cases the garnishee shall be discharged, and shall recover his costs, and have execution therefor against the plaintiff.

(G. S. 1866, c. 66, § 177; G. S. 1878, c. 66, § 194.)

See McConnell v. Rakness, 41 Minn. 3, 4, 42 N. W. Rep. 539.

§ 5339. Effect of judgment against garnishee.

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

(G. S. 1866, c. 66, § 178; G. S. 1878, c. 66, § 195.)

Payment by garnishees, without execution, of the judgment against them in an action before a justice of the peace, discharges them, though the judgment against the defendant was upon default, upon service of the summons by publication, and subsequent to the payment, within the year it was set aside, and the defendant was permitted to defend, and succeeded in his defense. Troyer v. Schweizer, 15 Minn. 241, (Gil. 187.)

The pendency of a prior action by attachment in another state, which binds the debt, may be set up in defense to a suit by the defendant in the attachment to recover the debt. Harvey v. Great Northern Ry. Co., 50 Minn. 405, 52 N. W. Rep. 905.

§ 5340. Discharge of garnishee not a bar, when.

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

(G. S. 1866, c. 66, § 179; G. S. 1878, c. 66, § 196.)

§ 5341. Appeals.

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

(G. S. 1866, c. 66, § 180; G. S. 1878, c. 66, § 197.)

An order of a district court for judgment against a garnishee is not appealable. Croft v. Miller, 26 Minn. 317, 4 N. W. Rep. 45.

An order of the district court which simply discharges a garnishee after examination is appealable. McConnell v. Rakness, 41 Minn. 3, 42 N. W. Rep. 539.

The garnishee may appeal to the municipal court of St. Paul from the judgment of a city justice, although the judgment in the principal case has not been appealed from. Albachten v. Chicago, St. P. & K. C. Ry. Co., 40 Minn. 378, 42 N. W. Rep. 86.

See McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, 392, (Gil. 269.)

§ 5342. Discharge of garnishment on defendant giving bond.

A defendant, when property, money or effects has been garnisheed, may, at any time, execute to the plaintiff a bond, in double the amount claimed in the complaint, with two or more sureties, who shall justify and be approved by the judge of the district court or court commissioner of the county in which garnishee proceedings were instituted, and if in justice court by such justice, and if in municipal court by a judge of said court, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereon equal to the value of the money, property or effects so garnisheed. And the officer approving such bond shall make an order discharging such garnishment, and releasing such money, property or effects therefrom, upon filing such bond with the court in which the garnishee proceedings were instituted, and serving upon the garnishee a copy of the order discharging such proceedings. The defendant shall have the same power to receive or collect the money, property and effects so garnisheed, in the same

manner as if such garnishee proceedings had never been instituted. All of the provisions of this title shall apply to all actions in which the defendant has or shall recover a judgment against the plaintiff, and all actions in which a counter-claim is interposed in the answer of the defendant, which counter-claim exceeds in amount the amount admitted to be due in said answer, and in all such cases the defendant may institute proceedings under this title, and conduct them to a determination with like force and effect and in like manner as if he was a plaintiff, and in such cases the word "plaintiff", wherever it is used in this title, shall be considered to mean "defendant", and the word "complaint", shall be considered to mean "answer".

(1871, c. 67, § 1; G. S. 1878, c. 66, § 198; as amended 1881, c. 55, §§ 1, 2; 1889, c. 203, § 1.)

Where no bond for the release of the attached property is given by the defendant, under this section, the statute authorizes no interference with such property or its possession prior to judgment against the garnishee, except upon application under § 5307, and order thereon, requiring it to be brought into court, or delivered to a receiver appointed by the court. Langdon v. Thompson, 25 Minn. 513.

See Maxfield v. Edwards, 38 Minn. 539, 542, 38 N. W. Rep. 701.

TITLE 11.

INJUNCTIONS.

§ 5343. Writs, how issued—Effect.

Writs of injunction, attested and sealed as other process of the courts, may issue, upon order of the court or a judge thereof as hereinafter set forth; but the period during which performance of an act is stayed by injunction forms no part of the time for performance of such act.

(G. S. 1866, c. 66, § 181; G. S. 1878, c. 66, § 199; as amended 1891, c. 78, § 1.)

The amendment of Laws 1891, c. 78, is not retroactive. McManus v. Duluth, C. & N. R. Co., 51 Minn. 30, 52 N. W. Rep. 981.

See Pettingill v. Moss, 3 Minn. 222, (Gil. 151.)

§ 5344. 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.

(G. S. 1866, c. 66, § 182; G. S. 1878, c. 66, § 200.)

The unlawful establishment of a rival ferry will be restrained by injunction. McRoberts v. Washburne, 10 Minn. 23, (Gil. 8.)

An injunction will not issue to restrain a mere trespass, where the threatened injury will not be irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation. Schurmeier v. St. Paul & P. R. Co., 8 Minn. 113, (Gil. 88.) A charge in a complaint that the threatened trespass will work irreparable injury, if the facts stated do not sustain the allegation, does not show a case for injunction. Id.

The unauthorized obstruction of a street or landing by a railroad track is such a special injury to the abutting owner as will entitle him to an injunction to restrain it. Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82, (Gil. 60.)

An execution issued more than 10 years after the entry of judgment is void, and no sale thereunder will create a cloud upon title to real estate so as to justify an injunction to restrain it. Hanson v. Johnson, 20 Minn. 194, (Gil. 172.)

A purchaser under an execution, pending an action to set aside the judgment on which it issued, will be bound by the result of the action, and therefore a sale on the execution would not work such irreparable injury to the plaintiff in the action as will justify

an injunction to restrain the sale pending the action. Hart v. Marshall, 4 Minn. 294, (Gil. 211.)

The fact that the mortgagee is proceeding to foreclose under the power will not justify an injunction, pending an action by the mortgagor to have it adjudged satisfied. Montgomery v. McEwen, 9 Minn. 103, (Gil. 93.)

A sale on foreclosure, by advertisement, of a mortgage satisfied in fact, pending a suit to procure the cancellation of the same, will constitute a cloud on the title, and is an act which may be restrained, as well on general principles of equity as by the terms of this section. Conkey v. Dike, 17 Minn. 457, (Gil. 434.)

See, also, Hamilton v. Wood, (Minn.) 57 N. W. Rep. 208.

That a mortgagee proceeding to foreclose under the power proposes to make an absolute sale without right of redemption is no ground to enjoin the sale. Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.)

A temporary injunction may issue on the complaint alone if it make out a sufficient cause for it, and if it is verified, and its allegations are positive. Stees v. Kranz, 33 Minn. 313, 20 N. W. Rep. 241.

As to when an injunction will be granted to restrain waste by a mortgagor. Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. Rep. 531.

An injunction may be granted, at the suit of a nonassenting stockholder, to restrain a transfer of its property to a foreign corporation. Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264, 47 N. W. Rep. 797.

See, also, Kolff v. St. Paul Fuel Exch., 48 Minn. 215, 50 N. W. Rep. 1036.

An injunction will not be granted to restrain a public official from performing the duties of his office pending proceedings in quo warranto. Norwood v. Holden, 45 Minn. 313, 47 N. W. Rep. 971.

An injunction will not lie to restrain assessment proceedings, when the property owners have an opportunity of objecting to the validity of the assessment upon the application for judgment. Albrecht v. City of St. Paul, 47 Minn. 531, 50 N. W. Rep. 608.

The court may, in a proper case, grant a temporary injunction, mandatory in character, and requiring some act to be done. Central Trust Co. v. Moran (Minn.) 57 N. W. Rep. 471.

A temporary injunction will be granted, though a permanent injunction be not prayed for. Hamilton v. Wood (Minn.) 57 N. W. Rep. 208.

See Lamb v. Shaw, 43 Minn. 507, 508, 45 N. W. Rep. 1134.

§ 5345. Affidavit—Service.

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.

(G. S. 1866, c. 66, § 183; G. S. 1878, c. 66, § 201.)

A complaint, the averments of which are positive, verified in the usual form, satisfies the requirements of the statute in regard to applications for injunctions. McRoberts v. Washburne, 10 Minn. 23, (Gil. 8.)

Under § 21, c. 57, Comp. St., an injunction could be allowed upon a complaint before service of the summons. If, in such case, the summons is not served, the parties' remedy is by motion to dissolve the injunction; but until dissolved it is obligatory. Lash v. McCormick, 14 Minn. 482, (Gil. 359.)

An injunction will not be granted on facts stated on "information and belief." Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.)

See Becker v. Dunham, 27 Minn. 32, 34, 6 N. W. Rep. 406.

§ 5346. Injunction after answer—Restraining order.

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.

(G. S. 1866, c. 66, § 184; G. S. 1878, c. 66, § 202.)

Where the answer denies all the equities set up in the complaint, and a petition for an injunction pending the action discloses no others, it is improper to grant the injunction. Montgomery v. McEwen, 9 Minn. 103, (Gil. 93.)

§ 5347. Bond to be given—Damages, how ascertained.

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 de-

tained 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.

(G. S. 1866, c. 66, § 185; G. S. 1878, c. 66, § 203.)

An action upon the bond is the sole remedy of a defendant for the recovery of his damages by reason of the issuance of the writ, if the court finally decides the plaintiff not entitled thereto, unless the writ was sued out maliciously, and without probable cause. Hayden v. Keith, 32 Minn. 277, 20 N. W. Rep. 195. If the sum named in the bond is insufficient as security, it is the duty of the court, upon defendant's motion, to set aside the writ unless additional security be given. Id.

The defendant's damages may be ascertained in the same action, by reference or otherwise, as the court may order, or in the suit upon the bond. Id.

When counsel fees can be recovered on the bond. Lamb v. Shaw, 43 Minn. 507, 45 N. W. Rep. 1134.

See, also, Curtis v. Hart, 34 Minn. 329, 25 N. W. Rep. 636.

§ 5348. 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.

(G. S. 1866, c. 66, § 186; G. S. 1878, c. 66, § 204.)

Delay of one month after notice held not prejudicial. O'Brien v. Oswald, 45 Minn. 59, 47 N. W. Rep. 316.

See Hamilton v. Wood, (Minn.) 57 N. W. Rep. 208.

§ 5349. 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.

(G. S. 1866, c. 66, § 187; G. S. 1878, c. 66, § 205.)

Upon an answer fully and positively denying the statements on which a preliminary injunction is granted, it will be dissolved. Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.) As a general rule, upon an answer fully denying and putting in issue the equities of the complaint, an injunction issued upon it will be dissolved. Moss v. Pettingill, 3 Minn. 217, (Gil. 145.) When the answer does not deny the complaint, but sets up new matter as a defense, the injunction will, unless the new matter is admitted, continue until a hearing. Id.

A motion to modify implies consent to the suit. Albrecht v. City of St. Paul, 47 Minn. 531, 50 N. W. Rep. 608.

§ 5350. Same—Affidavits to oppose motion.

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.

(G. S. 1866, c. 66, § 188; G. S. 1878, c. 66, § 206.)

TITLE 12.

RECEIVERS.

§ 5351. 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.

(G. S. 1866, c. 66, § 189; G. S. 1878, c. 66, § 207.)

SUBD. 1. A receiver may be appointed in an action to foreclose a mortgage. Lowell v Doe, 44 Minn. 144, 46 N. W. Rep. 297; Haugan v. Netland, 51 Minn. 552, 53 N. W. Rep. 873.

See St. Louis Car Co. v. Stillwater St. Ry. Co., cited in note to § 5897

SUBD. 5. See Rice v. St. Paul, etc., R. Co., 24 Minn. 464.

§ 5352. Court may order deposit of money, etc., 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.

(G. S. 1866, c. 66, § 190; G. S. 1878, c. 66, § 208.)

§ 5353. Same—Proceedings to compel deposit, etc.

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

(G. S. 1866, c. 66, § 191; G. S. 1878, c. 66, § 209.)

TITLE 13.

JUDGMENT UPON FAILURE TO ANSWER.

§ 5354. When summons personally served—Actions for money only.

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

First. When, in an 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. When the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counter-claim amounting to less than the plaintiff's claim, judgment may be entered by the clerk of court in favor of plaintiff for the excess of his said claim over the said counter-claim, with costs and disbursements, upon the plaintiff's filing with said clerk a statement signed by plaintiff, his attorney or agent, admitting such counter-claim, together with an affidavit of his costs and disbursements; which statement and affidavit shall be annexed to and be made a part of the judgment roll; all of which may be done without notice to the defendant. (As amended 1887, c. 90.)

Same—In other actions.

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.

Service by publication, etc.—Bond for restitution.

Third. 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 hereinafter 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 defense: 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: provided, further, that in all actions involving the title to, or brought to quiet the title to, real estate, judgment may be entered without filing the security above provided. (As amended 1868, c. 84, § 1; 1881, c. 13, § 1.)

(G. S. 1866, c. 66, § 192; G. S. 1878, c. 66, § 210; amended as supra.)

SUBD. 1. This section, as amended by Laws 1868, c. 84, authorizing the clerk, in an action on contract for the payment of money only upon proof of personal service, and no answer being filed with him, to enter judgment, is not in conflict with section 1, art. 6, of the constitution, and does not confer judicial power on the clerk. Skillman v. Greenwood, 15 Minn. 102, (Gil. 77.)

Where, in a complaint, a cause of action in tort is joined with others upon contract, it is error for the clerk, upon default, to enter judgment, including the amount claimed for the tort. Reynolds v. La Crosse & Minn. Packet Co., 10 Minn. 178, (Gil. 144.)

The supreme court will not review the assessment by the clerk of the district court of damages or costs where they have not been actually passed on by the court below, unless it is quite evident that substantial error has been committed, and adequate relief cannot be had from the court below. Babcock v. Sanborn, 3 Minn. 141, (Gil. 86.)

See Exley v. Berryhill, 37 Minn. 182, 33 N. W. Rep. 567.

In an action for conversion of a note, a judgment on default, entered by the clerk,

without order or assessment of damages, is merely irregular. Hersey v. Walsh, 38 Minn. 521, 38 N. W. Rep. 613.

SUBD. 2. A referee may be appointed under this subdivision to take and report the evidence in an action for divorce, as well when the defendant is in default as where issue is joined. Section 14, c. 62, G. S., (§ 4798,) does not pretend to regulate the manner in which such testimony should be taken. Young v. Young, 18 Minn. 90, (Gil. 72.)

SUBD. 3. Where judgment is entered without personal service of the summons, the roll need not show that security was filed. Shaubhut v. Hilton, 7 Minn. 506, (Gil. 413.)

In an action against a nonresident not personally served, the plaintiff is entitled to have his judgment entered and docketed, on complying with this subdivision. Cousins v. Alworth, 44 Minn. 505, 47 N. W. Rep. 169.

See Lane v. Innes, 43 Minn. 137, 140, 45 N. W. Rep. 4.

TITLE 14.

ISSUES.

§ 5355. 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.

(G. S. 1866, c. 66, § 193; G. S. 1878, c. 66, § 211.)

§ 5356. Issues of law.

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

(G. S. 1866, c. 66, § 194; G. S. 1878, c. 66, § 212.)

§ 5357. Issues 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.

(G. S. 1866, c. 66, § 195; G. S. 1878, c. 66, § 213.)

§ 5358. "Trial" defined.

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

(G. S. 1866, c. 66, § 196; G. S. 1878, c. 66, § 214.)

Quoted, Watson v. Ward, 27 Minn. 30, 6 N. W. Rep. 407.

"New trial." Dodge v. Bell, 37 Minn. 382, 34 N. W. Rep. 739.

§ 5359. Issues 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.

(G. S. 1866, c. 66, § 197; G. S. 1878, c. 66, § 215.)

§ 5360. What issues of fact to be tried by jury.

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.

(G. S. 1866, c. 66, § 198; G. S. 1878, c. 66, § 216.)

Under this section an action of replevin, though there be in it an issue as to a secret trust to the party executing a deed of assignment, is triable by a jury. Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

If no exception is taken in the court below to the manner in which the case is submitted to the jury, the objection cannot be raised here. Davis v. Smith, 7 Minn. 414, (Gil. 328.)

See Tancre v. Reynolds, 35 Minn. 476, 477, 29 N. W. Rep. 171; Marvin v. Dutcher, 26 Minn. 391, 407, 4 N. W. Rep. 685; Finch v. Green, 16 Minn. 355, (Gil. 315, 322;) Berkey

v. Judd, 14 Minn. 394, (Gil. 300, 302:) Schmidt v. Schmidt, 47 Minn. 451, 452, 50 N. W. Rep. 598.

§ 5361. Other issues of fact to be tried 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.

(G. S. 1866, c. 66, § 199; G. S. 1878, c. 66, § 217.)

In that class of cases which, by this section, are triable by the court, the authority of the court to try the issues itself, or send them to a jury, is the same as when law and equity were administered in separate courts. The court may, upon its own motion, or application of either party, send issues to the jury for trial. When done it should be by a formal order, made before the trial is entered upon, and stating the issues to be tried. Berkey v. Judd, 14 Minn. 394, (Gil. 300.) In cases coming within the operation of this section, the action is triable 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. Sumner v. Jones, 27 Minn. 312; 7 N. W. Rep. 265.

An action for specific performance is triable by the court except so far as it may be specially submitted to the jury. Piper v. Packer, 20 Minn. 276, (Gil. 247.)

In an action to reform a policy of insurance and enforce it as reformed, a jury was impaneled, and, without any order or consent as to the issues they should try, the plaintiff introduced evidence upon both branches of the case. Held, there was nothing for the jury to try till the court decided that plaintiff was entitled to a reformation of the policy. Guernsey v. American Ins. Co., 17 Minn. 104, (Gil. 83.)

In an action triable by the court a jury was impaneled, and specific questions of fact submitted for their determination. The whole case was presented at the trial. The questions submitted to the jury were not sufficient to determine all of the essential facts in the case. Upon the return by the jury of their verdict, the court made no order reserving the case for further consideration, but long afterwards made findings of fact upon essential matters not included in the findings of the jury, and, upon such findings, with those of the jury, directed judgment to be entered. Held no error. Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. Rep. 543.

An action for damages for overflow of lands, for the abatement as a nuisance of a dam causing such overflow, and an injunction against its continuance, is one of a mixed nature, and, under §§ 5360, 5361, the issues of fact are triable by the court, subject to the right of parties to consent, or the court to order the whole issue, or any specific question of fact, to be tried by a jury or referred. Where, in such a case, without formal consent or settlement of issues, the cause was tried by a jury, without objection, and instruction given to bring in a general verdict as to damages, held, there was substantial consent to submit to a jury the question of the existence of a nuisance, and quantum of damages, and to authorize judgment for the amount of such verdict. Finch v. Green, 16 Minn. 355, (Gil. 315.)

Where a cause is submitted generally to the jury, and the jury return a verdict which determines in favor of plaintiff only one of several material issues, the verdict will not sustain a judgment for the plaintiff. Meighen v. Strong, 6 Minn. 177, (Gil. 111.)

A question submitted to a jury, under this section, on appeal from the probate court, was whether respondent here and appellant in the district court was the legitimate child of the deceased. She was born out of wedlock, and her mother and deceased, after her birth, intermarried. Held, as the only real question was as to whether she was the child of the deceased, the fact that the question actually submitted was broader than this, and involved a question of law, could result in no actual prejudice to appellant, and was not ground for a new trial. McArthur v. Craigie, 22 Minn. 351.

The court may direct specific issues in an equitable action to be tried by a jury. Cobb v. Cole, 44 Minn. 278, 46 N. W. Rep. 364.

See Marvin v. Dutcher, cited in note to § 4674; Brown v. Lawler, 21 Minn. 327. Followed, Brown v. Nagel, 21 Minn. 415; Blackman v. Wheaton, 13 Minn, 326, (Gil. 299, 302;) Schmidt v. Schmidt, 47 Minn. 451, 452, 50 N. W. Rep. 598.

§ 5362. Notice of trial—Note of issue.

At any time after issue, and at least eight* days before the term, either party may give notice of trial; and the party giving notice shall furnish the clerk, at least seven days before the term, with a note of 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 notice was given, need not be noticed for a subsequent term, but shall remain upon the calendar from term

*In Ramsey county, "twelve" days. See § 4861.

to term, until finally disposed of or stricken off by the court. The party upon whom notice of trial is served may also file the note of issue, and cause the action to be placed upon the calendar, without further notice on his part.

(G. S. 1866, c. 66, § 200, as amended 1877, c. 28, § 1; G. S. 1878, c. 66, § 218.)

The phrase, "the term" for which notice of trial may be given, includes a special term, at which the action might, under § 15, c. 64, G. S., (§ 4850,) be properly tried, as well as a general term. Colt v. Vedder, 19 Minn. 539, (Gil. 469.)

Where a cause is at issue, noticed for trial, and placed upon the calendar, an amendment of the pleadings does not render another notice of trial necessary. Stevens v. Curry, 10 Minn. 316, (Gil. 249.)

Rule for computing time. State v. Weld, 39 Minn. 426, 40 N. W. Rep. 561.

A party is entitled as of right to notice of trial. When an order granting a new trial is appealed from and affirmed, and the cause remanded, it must be again noticed for trial. Mead v. Billings, 43 Minn. 239, 45 N. W. Rep. 228.

§ 5363. Issues on calendar—Order of disposition.

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

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

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

Third. Issues of law.

(G. S. 1866, c. 66, § 201; G. S. 1878, c. 66, § 219.)

The failure of a party demurring to appear at the hearing upon it in the court below does not prevent him being heard on it here on an appeal from an order overruling it. Hall v. Williams, 13 Minn. 260, (Gil. 242.)

Where the answer denies material allegations, it is error, without proof, to order judgment for the plaintiff upon the defendant's failure to appear when the case is called. Strong v. Comer, 48 Minn. 66, 50 N. W. Rep. 936.

§ 5364. 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.

(G. S. 1866, c. 66, § 202; G. S. 1878, c. 66, § 220.)

§ 5365. Separate trial in case of several defendants.

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.

(G. S. 1866, c. 66, § 203; G. S. 1878, c. 66, § 221.)

§ 5366. Continuance, how applied for—When refused.

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.

(G. S. 1866, c. 66, § 204, as amended 1868, c. 78, § 1; G. S. 1878, c. 66, § 222.)

Where the evidence of the absent witness would be immaterial if obtained, a continuance is properly denied. McLean v. Burbank, 12 Minn. 530, (Gil. 438.) See Wright v. Levy, 22 Minn. 466.

TITLE 15.

TRIAL BY JURY.

§ 5367. Jury, how impannelled.

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 com-

pleted, 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.

(G. S. 1866, c. 66, § 205; G. S. 1878, c. 66, § 223.)

§ 5368. 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.

(G. S. 1866, c. 66, § 206; G. S. 1878, c. 66, § 224.)

An act of the legislature requiring, as a condition to the right of trial in a civil action by jury, the payment in advance of a reasonable jury fee, is constitutional. Adams v. Corriston, 7 Minn. 456, (Gil. 365.)

§ 5369. Ballots, how kept.

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

(G. S. 1866, c. 66, § 207; G. S. 1878, c. 66, § 225.)

§ 5370. Challenge of jurors.

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, and the causes for challenges shall be the same as in criminal actions: provided, however, that there can be but three peremptory challenges on each side.

(G. S. 1866, c. 66, § 208, as amended 1878, c. 21, § 1; G. S. 1878, c. 66, § 226.)

That one of the jurors was a juror on a former trial of the case, which fact was unknown to the parties, is ground for a new trial. That the clerk's minutes contained a list of the jurors on the former trial does not charge the parties with negligence in not knowing the fact. Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

The order of challenges to individual jurors is in the discretion of the trial court. St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

Where a challenge to a juror for actual bias is admitted by the opposite party, there is nothing to try on the challenge, and the challenging party has no right to examine the juror. Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.) After a challenge for actual bias is admitted, it is discretionary with the court to allow, or refuse to allow, the challenge to be withdrawn. Id.

§ 5371. 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 defence, and offer his evidence in support thereof;

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

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

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

Sixth. The court may then charge the jury.

(G. S. 1866, c. 66, § 209; G. S. 1878, c. 66, § 227.)

SUBD. 3. Where the plaintiff, in rebuttal, offers evidence which he should have given in chief, the court may of its own motion limit the extent to which he shall give such evidence. Plummer v. Mold, 22 Minn. 15.

The admission of evidence not strictly rebutting, (after the other party had rested,)

from the one who opened the proofs, is no ground for a new trial, unless actual and manifest injustice were the result. Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

SUBD. 4. Upon an appeal to the district court from the award of the commissioners, the land-owner assumes the position of plaintiff, and is entitled to open and close. Minnesota Val. R. Co. v. Doran, 17 Minn. 188, (Gil. 162.)

If a court, under a mistake as to which party has the burden of proof, so directs the order of trial as to deprive the party having the affirmative of the issue of the privilege of opening and closing, this court will not reverse unless there appears probable ground for believing that the party was injured. If the court, under such a mistake, gives the appellant the advantage of opening and closing, he cannot complain, the error not being prejudicial to him. Paine v. Smith, 33 Minn. 495, 24 N. W. Rep. 305.

The discretion of the court in directing the defendant to have the opening and closing held properly exercised. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. Rep. 471.

§ 5372. Court may order view, when—Proceedings.

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.

(G. S. 1866, c. 66, § 210; G. S. 1878, c. 66, § 228.)

New trial granted on account of improper communications made to a jury while upon a view of the *locus in quo*. Hayward v. Knapp, 22 Minn. 5.

See Gurney v. Minneapolis & St. C. Ry Co., 41 Minn. 223, 43 N. W. Rep. 2.

§ 5373. Proceedings when juror falls sick.

If, after the impannelling 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 impannelled.

(G. S. 1866, c. 66, § 211; G. S. 1878, c. 66, § 229.)

§ 5374. 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.

(G. S. 1866, c. 66, § 212; G. S. 1878, c. 66, § 230.)

§ 5375. 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.

(G. S. 1866, c. 66, § 213; G. S. 1878, c. 66, § 231.)

§ 5376. Court always open to receive verdict—Adjournment.

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.

(G. S. 1866, c. 66, § 214; G. S. 1878, c. 66, § 232.)

§ 5377. Polling the jury—Insufficient verdict.

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 in-

sufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

(G. S. 1866, c. 66, § 215; G. S. 1878, c. 66, § 233.)

At any time before the jury are asked if the verdict recorded is their verdict, they may be sent out to complete an incomplete verdict, as where they had been instructed to return a general verdict, and find upon specific questions, and they came in with a general verdict without the special findings. Tarbox v. Gotzian, 20 Minn. 139, (Gil. 122.)

A jury having been out about twenty-four hours were brought in and asked by the court if there was any probability that they would agree upon a verdict, when the foreman answered that they stood eleven to one. The court thereupon stated that it was a very important matter that the jury should agree, and that he thought they had better make another effort, whereupon they retired, and in about twenty-five minutes returned a verdict for defendant. *Held* no ground for a new trial. McNulty v. Stewart, 12 Minn. 434, (Gil. 319.)

A jury who had leave to bring in a sealed verdict stated to the officer in charge that they had agreed, though they had not, and they were allowed to separate, and the next morning two of them protested against the verdict, stating that they had voted for it under protest; and, one of them still adhering to his views, they were sent out again, and finally agreed to a verdict. Held such misconduct as justified granting a new trial. Ætna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

Where the jury, in the absence of counsel, returned for further instructions, and were instructed by the court, held, that an exception taken afterward was unavailing. Reilly v. Bader, 46 Minn. 212, 48 N. W. Rep. 909.

A sealed verdict (the jury having separated after agreeing) may be submitted again to them for correction, when they bring it in, and declare that it is not as agreed upon. Loudy v. Clarke, 45 Minn. 477, 48 N. W. Rep. 25.

Degree of certainty required in a verdict. Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. Rep. 684.

§ 5378. Record of verdict—Duty of clerk—Disagreeing jury.

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.

(G. S. 1866, c. 66, § 216; G. S. 1878, c. 66, § 234.)

That a verdict is read to the jury, and they asked if it is their verdict, before instead of after it is recorded in the minutes, and upon their assenting they are discharged, and the verdict entered afterwards, does not vitiate the verdict. State v. Levy, 24 Minn. 362.

After a verdict has been recorded it cannot be corrected. No statement of the court below will be received to explain or show what was intended by it. Dana v. Farrington, 4 Minn. 433, (Gil. 335.)

See McNulty v. Stewart, 12 Minn. 434, (Gil. 319, 325.)

TITLE 16.

THE VERDICT.

§ 5379. 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 fact shall be so presented as that nothing remains to the court, but to draw from them conclusions of law.

(G. S. 1866, c. 66, § 217; G. S. 1878, c. 66, § 235.)

A verdict in these words, "The jury in the above case return a verdict for the plaintiff in the sum of one thousand dollars. N. B. O. F. Jenkins and Joseph Moody excepted in the above action,"—the two persons named having been originally made defendants, but as there was no service on one, and a dismissal as to the other, the plain-

tiff claimed no verdict against them,—is regular. Desnoyer v. McDonald, 4 Minn. 515, (Gil. 402.)

The verdict of the jury in this case held insufficient, as being neither a general nor special verdict, within the definition of this section. Cummings v. Taylor, 21 Minn. 366.

§ 5380. 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.

(G. S. 1866, c. 66, § 218; G. S. 1878, c. 66, § 236.)

If the defendant desires special findings upon any of the issues, he should ask the court to instruct the jury to find specially. Commissioners of Dakota Co. v. Parker, 7 Minn. 267, (Gil. 207.)

Under this section it is in the sound discretion of the trial court to instruct or not to instruct the jury to find upon particular questions of fact. McLean v. Burbank, 12 Minn. 530, (Gil. 438.)

It is error in the trial court to refuse to submit, on request of a party, a question on the facts for the jury to answer, on the sole ground that it has no authority to do so, provided the question be material; otherwise not. Jaspers v. Lang, 17 Minn. 296, (Gil. 273.)

Where a question is put to the jury for them to find upon, a failure to find fully, if the question be immaterial, is no ground for a new trial. Finch v. Green, 16 Minn. 355, (Gil. 315.)

When, on the trial below, an interrogatory is put to the jury, to be answered by their verdict, and their answer substantially covers the interrogatory, but is objectionable in form, the objection to its form is waived, if not made on the coming in of the verdict. Manny v. Griswold, 21 Minn. 506.

Where there is a general verdict and a special finding of fact, if the court desire to reserve the case for further consideration, it must, at the coming in of the verdict, enter an order reserving the case. Unless this is done, the party in whose favor the general verdict is may have judgment entered on it, and the other party can then raise the question how far the special finding shall prevail over or modify the general verdict only on appeal. Newell v. Houlton, 22 Minn. 19.

Where there is no general verdict, the special findings, in order to sustain a judgment, must pass upon all the material issues. Coleman v. St. Paul, M. & M. Ry. Co., 38 Minn. 260, 36 N. W. Rep. 638.

See Lane v. Lanfest, 40 Minn. 375, 42 N. W. Rep. 84; Reed v. Lammel, 40 Minn. 397, 42 N. W. Rep. 202; Crich v. Williamsburg City Fire Ins. Co., 45 Minn. 441, 444, 48 N. W. Rep. 198.

Where the jury bring in a general verdict without answering material questions specifically submitted, the final failure to answer is equivalent to an answer against the party having the burden of proof. Nichols, Shepard & Co. v. Wadsworth, 40 Minn. 547, 42 N. W. Rep. 541.

Where the jury finds a general verdict for the plaintiff, but fails to agree on a specific question submitted, the general verdict is properly received unless the finding for the defendant on the specific question would be conclusive against the plaintiff's right to recover. Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68, 43 N. W. Rep. 783.

In an action for the recovery of money, what questions shall be submitted for specific findings is in the discretion of the court. Stensgaard v. St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. Rep. 910.

See Riley v. Mitchell, 36 Minn. 3, 29 N. W. Rep. 588; Hallam v. Doyle, 35 Minn. 337, 29 N. W. Rep. 130; Jordan v. St. Paul, M. & M. Ry. Co., 42 Minn. 172, 43 N. W. Rep. 849.

§ 5381. Special finding 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.

(G. S. 1866, c. 66, § 219; G. S. 1878, c. 66, § 237.)

See Twist v. Winona & St. P. R. Co., 39 Minn. 164, 39 N. W. Rep. 402.

§ 5382. Jury to assess amount of recovery.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim 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.

(G. S. 1866, c. 66, § 220; G. S. 1878, c. 66, § 238.)

Where the question of value is not in issue, and the amount of plaintiff's recovery is fixed by the pleadings, and follows as a conclusion of law in case the jury find in his favor upon the issue of fact submitted to them, the omission of the jury to insert the amount of such recovery in their verdict is at most a harmless irregularity. Jones v. King, 30 Minn. 369, 15 N. W. Rep. 670.

It is irregular for a jury to make up their verdict by agreeing each to specify a sum, and divide the aggregate of such sum by twelve, and accept the quotient as the verdict. Not so if such sum is finally agreed to by subsequent discussion among the jurors as to its justness and correctness. McMartin v. Desnoyer, 1 Minn. 156, (Gil. 131.)

§ 5383. Verdict 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.

(G. S. 1866, c. 66, § 221; G. S. 1878, c. 66, § 239.)

Where, pending replevin, the plaintiff has become possessed of the property by the means given by the statute, and it is in his possession at the time of the trial, the value upon a verdict in his favor is not to be assessed, and when he comes into and is in possession by any other means, as by voluntary surrender by the defendant, or by his own act, it would seem that the same rule ought to apply, and that judgment in his favor should adjudge the title to be in him; that is, should be in terms for the possession of the property, and for damages for the detention. Leonard v. Maginnis, 34 Minn. 509, 26 N. W. Rep. 733.

See Drake v. Auerbach, 37 Minn. 505, 35 N. W. Rep. 367.

§ 5384. Entries on receiving verdict — Judgment—Reserving case—Stay.

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.

(G. S. 1866, c. 66, § 222; G. S. 1878, c. 66, § 240.)

This section would seem to require that, where a case has been tried by a jury, a motion for a new trial should be made before judgment. Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

Where it is apparent that of two items the jury has allowed one and disallowed one, and there is sufficient evidence to justify them in disallowing one of them, the presumption is that that is the one which they disallowed. Newell v. Houlton, 22 Minn. 19.

Where there is a verdict for defendants, and the answer does not show any defense, the plaintiff is, on motion, entitled to judgment, notwithstanding the verdict. Lough v. Bragg, 18 Minn. 121, (Gil. 106.)

Where the answer, though technically defective, shows a meritorious defense, and there is a general verdict for plaintiff for less than he claims, a judgment *non obstante veredicto* in his favor is not proper Lough v. Thornton, 17 Minn. 253, (Gil. 230.)

On application by defendant for a stay to settle a bill of exceptions and move for a new trial, the court may require him, as a condition, to renew security for final judgment given to discharge an attachment. Dennis v. Nelson (Minn.) 56 N. W. Rep. 589.

TITLE 17.

TRIAL BY THE COURT.

§ 5385. 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.

(G. S. 1866, c. 66, § 223; G. S. 1878, c. 66, § 241.)

§ 5386. Decision of court, when and how made.

Upon the trial of an issue of fact by the court, its decision shall be in writing; in giving the decision the facts found and the conclusions of law shall be separately stated; judgment upon the decision shall be entered accordingly. All questions of fact and law and all motions and matters heretofore or which shall hereafter be submitted to a judge for his decision or disposition shall be decided by him and his decision in writing filed with the clerk within ninety days after such submission, and if not so decided within that time he shall not, after the expiration of said ninety days, hear, try or determine any other action, motion or matter until he has so decided everything submitted to him more than ninety days previous thereto, except to award all writs and processes necessary to the perfect exercise of the powers with which he is vested and the due administration of justice, and to modify, vacate or dissolve all such writs and processes. If any judge shall fail for six months to decide any matter, cause or thing submitted to him in the future after such submission without good reason therefor, and pressure of business shall not be regarded as a good reason, it shall be just cause for complaint to the next legislature, which shall convene after such failure to decide. Provided, that nothing herein contained shall apply to any district wherein there is but one judge, and that sickness shall be a sufficient excuse.

(G. S. 1866, c. 66, § 224; G. S. 1878, c. 66, § 242; as amended 1889, c. 156, § 1.)

The provision requiring a decision in writing, stating the facts found and conclusions of law separately, is applicable to the municipal court of Minneapolis. Brackett v. Rich, 23 Minn. 485.

The provision requiring a court, where a case is submitted to it without a jury, to file its decision within twenty days, is not mandatory, but directory. Vogle v. Grace, 5 Minn. 294, (Gil. 232.)

In the decision of a demurrer the court need not state the facts. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

Where the court tries a cause without a jury it should state the facts found and conclusions of law separately. Baldwin v. Allison, 3 Minn. 83, (Gil. 41.)

In a case of trial by the court, the statement of "facts found," required by the statute, is a statement of such ultimate facts as are the legal effect of the evidence determinative of the material issues in the case, and necessary as the basis of a judgment. Butler v. Bohn, 31 Minn. 325, 17 N. W. Rep. 862.

In all actions judgment may be entered on the verdict, report, or decision, without special application to the court, or notice to the opposite party. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

After a trial by the court without a jury, a motion for a new trial for the causes mentioned in subsections 4, 5, § 59, p. 564, Comp. St., must be made at the earliest time at which it can be heard after notice that the decision has been rendered, and before judgment is perfected. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

An appeal will not lie from the statement filed (on trial by the court without a jury) of the court's findings of fact and law. The appeal should be from the judgment entered upon it. Von Glahn v. Sommer, 11 Minn. 203, (Gil. 132.)

Where a question as to the amount of damages upon a claim of excessive interest, after due, goes by default in the court below, and that court has not *actually* passed on the question, even though the judge signed the decree, the supreme court will not review such question. Hawke v. Banning, 3 Minn. 67, (Gil. 31.)

The supreme court may review a judgment upon the questions presented by the findings of fact and law of the judge or referee who tried the cause, though no case or bill of exceptions is made. Morrison v. March, 4 Minn. 422, (Gil. 325.)

When judgment is ordered on the conclusion of a trial by the court, findings of fact

may be made and filed after judgment. Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. Rep. 455.

Where, on trial, the court orders judgment on the merits without findings, the remedy is by application to the court to correct its omission. Williams v. Schembri, 44 Minn. 250, 46 N. W. Rep. 403.

§ 5387. Proceedings and 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.

(G. S. 1866, c. 66, § 225; G. S. 1878, c. 66, § 243.)

A demurrer to a complaint upon an equitable cause of action was overruled, and, the defendant having failed to answer within the time allowed, a reference was ordered to take proofs. Before the proofs were taken, the defendant, on an order to show cause, obtained an order "that judgment upon the issue of law be entered and perfected *in stanter* in favor of the plaintiff, upon the demurrer aforesaid, without the report of said referee, or any proofs taken on the part of said plaintiff." *Held*, that this is an appealable order under § 12, c. 9, Laws 1853. Deuel v. Hawke, 2 Minn. 50, (Gil. 37.) In such case no final judgment could properly be ordered without taking proofs in respect to the alleged fact. Id.

§ 5388. Court always open—Special terms—Decisions filed out of term.

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. And when any order or decision shall be filed in any cause the clerk of the court wherein it is filed shall immediately give notice, in writing, by mail or personally, thereof, to the attorneys of record in such cause, for which service such clerk shall receive a fee of fifteen cents for each notice given. Provided, that the notice so given shall not be construed as limiting the time of appeal or to take other proceedings on any such order or decision.

(G. S. 1866, c. 66, § 226, as amended 1868, c. 90, § 1; G. S. 1878, c. 66, § 244; 1889, c. 154, § 1.)

The powers of a district court in vacation comprehend a great many questions which require in their determination a full exercise of the judicial functions, and can only be entertained by the court, and not by a judge at chambers. The powers of a judge at chambers are confined to such preliminary and intermediate matters as the granting of orders to show cause, extending time to plead, letting to bail, granting injunctions; and many other matters of a similar nature, which are usually *ex parte*, go of course on a *prima facie* showing, and may be allowed by a judge of a court, when out of term, and when acting as judge merely, and not as the court. Gere v. Weed, 3 Minn. 352, (Gil. 249.)

An order setting aside a stipulation for dismissal of an action cannot be made by a judge at chambers. So, when signed by the judge, although the hearing was at chambers, it will be regarded ordinarily as an order of the court. Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

Upon a motion made in an adjoining district, under § 4, c. 67, Laws 1867, it is not necessary for the papers to show that it was proper to make it there, nor that it was made in time. The presumption is in favor of the jurisdiction exercised. Johnston v. Higgins, 15 Minn. 486, (Gil. 400.)

An application for an extension of the time to answer, though a motion be pending

to set aside the summons, is a recognition of the jurisdiction of the court over the person. Yale v. Edgerton, 11 Minn. 271, (Gil. 185.)

A "decision" under this section may mean an order or merely a direction for an order that may be entered by the clerk. Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

The court found as conclusions of law "that the plaintiff is not entitled to recover, and that the defendant is entitled to judgment against the plaintiff for his costs and disbursements," adding the words, "Let judgment be entered accordingly." Held, that these words are not an order involving the merits, or any part thereof, but a mere direction that an act be done which does involve the merits, to-wit, that judgment be entered. Such direction is not appealable. Ryan v. Kranz, 25 Minn. 362.

See Hoffman v. Parsons, 27 Minn. 236, 238, 6 N. W. Rep. 797.

An appeal from a justice of the peace on questions of law alone may be brought on for hearing before the court at any time. Rollins v. Nolting, 53 Minn. 232, 54 N. W. Rep. 1118.

§ 5389. Trial unfinished at end of term.

Whenever the trial of any civil action or proceeding, or of any indictment, which has been commenced at any term of the district court, is not concluded at the expiration of said term, the trial may nevertheless be proceeded with and concluded, and all proceedings may be had in said case in the same manner and with like effect as if the same had been concluded at the term at which the same was begun.

(1891, c. 38, § 1.[9])

§ 5390. Trials in vacation by consent of parties.

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.

(1872, c. 70, § 1; G. S. 1878, c. 66, § 245.)

TITLE 18.

TRIAL BY REFEREES.

§ 5391. Reference by consent.

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.

Third. That whenever, in the opinion of the presiding judge of a district court in this state, a press of business makes the same advisable and necessary, such judge, counsel consenting thereto, may make an order referring any civil action or proceeding of a civil nature (except an action for divorce) to a referee for trial and judgment, or for any one or more of the purposes named in this title; and the fees of such a referee, after being taxed by the judge making the order of reference, shall be paid on the order of said judge out of the state treasury as salaries of state officers are now paid. Said judge shall state as a part of said order of reference that in his opinion the press of business makes such reference advisable. (Last subd. added 1885, c. 55.)

(G. S. 1866, c. 66, § 228; G. S. 1878, c. 66, § 246.)

The statute authorizing the trial by referees is constitutional. Carson v. Smith, 5 Minn. 78, (Gil. 59.)

See Berkey v. Judd, 14 Minn. 394, (Gil. 300, 302.)

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[9] An act relating to trials in the district court which are unfinished at the expiration of terms. Approved April 1, 1891.

§ 5392. Compulsory reference, in what cases.

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.

(G. S. 1866, c. 66, § 229; G. S. 1878, c. 66, § 247.)

SUBD. 1. This subdivision, authorizing a compulsory reference in actions at law where the trial of an issue requires the examination of a long account on either side, is unconstitutional and void. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

The taking and stating the accounts of a partnership are not proper matters to be referred to a jury. To refer such matters to a jury for trial is error. Berkey v. Judd, 14 Minn. 394, (Gil. 300.)

Cause of action involving complicated accounts. See Fair v. Stickney Farm Co., 35 Minn. 380, 29 N. W. Rep. 49.

§ 5393. Number and qualifications 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.

(G. S. 1866, c. 66, § 230; G. S. 1878, c. 66, § 248.)

§ 5394. Trial by referees—Their powers—Effect of report—Proceedings when report is set aside.

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: provided, that whenever a finding has been made, or a decision or a judgment rendered upon the finding of the referee or referees, and the said finding or decision shall be set aside, or a new trial granted in the action, the cause referred shall be placed upon the calendar for trial by the court or a jury, as the case may be, the same as though no reference had ever been made, subject, nevertheless, to the same right of reference as in the first instance.

(G. S. 1866, c. 66, § 231, as amended 1877, c. 29, § 1; G. S. 1878, c. 66, § 249.)

Only material issues of fact need be passed on by a referee. He need not pass on facts admitted by the pleadings. Brainard v. Hastings, 3 Minn. 45, (Gil. 17.)

Where a proper foundation is laid for it, a referee may, in his discretion, reopen a case tried before him, and hear further proofs, at any time before his report is filed or delivered. Cooper v. Stinson, 5 Minn. 201, (Gil. 160.)

A referee should, in his report, find upon all the issues of fact made by the pleadings, and state his conclusions of fact and of law separately. Bazille v. Ullman, 2 Minn. 134, (Gil. 110.) To correct an omission of the referee to do this application should, in the first instance, be made in the court below for an order sending the report back to the referee, with instructions to supply the omissions. Id. When the report of a referee omits to state his findings of fact and conclusions of law separately, if the party wishes it corrected in this respect the proper practice is by motion for an order sending the report back to the referee for correction, and not for an order vacating the report and granting a new trial. Califf v. Hillhouse, 3 Minn. 311, (Gil. 217.)

When a referee files a report merely denying defendant's motion for judgment, but

reporting no judgment for either party, it is the duty of the district court to send the case back to him, with directions to report a judgment. Griffin v. Jorgenson, 22 Minn. 92.

On an appeal from an order setting aside a judgment entered on the report of a referee, this court will not consider whether the conclusions of law found by the referee are justified by his conclusions of fact. Id.

A judgment upon the report of a referee, if such as the facts found require, will not be reversed because inconsistent with some of the referee's conclusions of law. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

An appeal cannot be taken from an order denying a motion on a case made for judgment, notwithstanding the report of a referee. The appeal should be from the judgment after it is entered on the report. Ames v. Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

Where the evidence as to the facts is conflicting, this court will not disturb the findings of the referee. Kumler v. Ferguson, 7 Minn. 442, (Gil. 351.)

This court may, upon a statement of the case, review the findings of fact by a referee without any motion for a new trial in the court below. Cooper v. Brockenridge, 11 Minn. 341, (Gil. 241.)

A decision of a referee, dismissing an action for insufficiency of evidence, at the close of plaintiff's case, sustained. McCormick v. Miller, 19 Minn. 443, (Gil. 384.)

On the trial before a referee certain testimony was offered and objected to. The referee, without ruling upon the objection at the time, took the testimony with the understanding that before deciding the case he would rule upon the point, and admit or reject the testimony. He afterwards rejected it. No exception was taken to the course he took, and none reserved to such ruling as he might make upon the objection. *Held* that, there being no exception to his ruling, no point can be raised on it here. Kumler v. Ferguson, 22 Minn. 117.

§ 5395. Powers of majority at a meeting of all.

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.

(G. S. 1866, c. 66, § 232; G. S. 1878, c. 66, § 250.)

TITLE 19.

EXCEPTIONS.

§ 5396. "Exception" defined—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.

(G. S. 1866, c. 66, § 233; G. S. 1878, c. 66, § 251.)

An exception must be taken at the trial. One to an order of reference is nugatory. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

Upon the hearing of a case upon evidence taken and reported by a referee appointed for that purpose alone, a party desiring to avail himself of any objection interposed before the referee must renew it, and obtain a ruling thereon by the court, and, if adverse, take an exception. Gill v. Russell, 23 Minn. 362.

Where a cause is tried before a referee, and there are no exceptions nor statement of the case, the only question which this court can consider on writ of error is whether the facts found by the referee are sufficient to sustain the judgment. Teller v. Bishop, 8 Minn. 226, (Gil. 195.)

The rulings of a court in admitting or excluding evidence, or in its charge or refusal to charge, unless excepted to, cannot be alleged as ground of error. Roehl v. Baasen, 8 Minn. 26, (Gil. 9;) City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125;) Baldwin v. Blanchard, 15 Minn. 489, (Gil. 403.)

When a question is objected to, and the objection sustained, in taking an exception it must be made to appear that something material was proposed to be proved. State v. Staley, 14 Minn. 105, (Gil. 75.)

To subject questions arising upon the evidence to review by the supreme court upon writ of error, the evidence must be incorporated in a bill of exceptions. St. Anthony Mill Co. v. Vandall, 1 Minn. 246, (Gil. 195.)

To support a motion for a new trial on account of an alleged erroneous dismissal of an action, it is not necessary to except to the order of dismissal in a case in which the order was not granted upon the trial, but after the trial was concluded, and the case taken under advisement. Volmer v. Stagerman, 25 Minn. 235.

No question can be made in this court upon a charge of the court below not excepted to below. Commissioners of Dakota Co. v. Parker, 7 Minn. 267, (Gil. 207.)

Exceptions to instructions made after trial and verdict are ineffectual. Barker v. Todd, 37 Minn. 370, 34 N. W. Rep. 895.

Where different requests to charge the jury were refused, and the court also charged the jury at large, the exception, "defendant now excepts to each and every part of the charge, and also to the refusal of the court to give requests of defendant as requested," is not a good exception. Shull v. Raymond, 23 Minn. 66.

To the decision of the court upon five distinct propositions, separately numbered, the party requesting them to be given to the jury "excepted to said refusals and modifications of said instructions as given." Held sufficiently specific. Schurmeier v. Johnson, 10 Minn. 319, (Gil. 250.)

To a charge of the court covering all the main features of the case, and embracing several distinct propositions, and stating the application of the law to the facts as they might be found, an exception "to each and every part and portion of the instruction and charges," and "so far as relates to the consideration for said chattel mortgage, and to the transfer and possession of the three promissory notes put in evidence in this cause to show a consideration for such mortgage, all and singular and severally," is too general as to the first part of it, and to the second part sufficiently specific to present the question of the correctness of the propositions therein referred to. Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

When the court, without objection, postpones a decision as to the admissibility of evidence, and a subsequent ruling is not sought by motion in accordance with the conditions prescribed by the court, an assignment of error on the ground of the reception of the evidence will not be considered. Bitzer v. Bobo, 39 Minn. 18, 38 N. W. Rep. 609.

See Voak v. National Inv. Co., 51 Minn. 450, 53 N. W. Rep. 708.

Where evidence is admissible as to one defendant, a joint objection by all is properly overruled. Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. Rep. 791.

Where numerous requests for instructions are made, some of which are given and others refused, a general exception to the refusal is insufficient. Carroll v. Williston, 44 Minn. 287, 46 N. W. Rep. 352.

An exception to part of a charge embracing several propositions, some of which are correct, is insufficient. Main v. Oien, 47 Minn. 89, 49 N. W. Rep. 523.

An exception to "any qualification" of the requested instructions is not sufficient. Bishop v. St. Paul City Ry. Co., 48 Minn. 26, 50 N. W. Rep. 927.

The court said: "The exceptions will be made so broad that they will cover all requests of either plaintiff or defendant, either as refused or modified." Held, that this did not dispense with the necessity of taking exceptions, so as to be made of record, nor give leave to make the exceptions in the appellate court. Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. Rep. 1061.

A general exception to the giving of several instructions, "and to the giving of each and every one of the same," is not available. Steffenson v. Chicago, M. & St. P. Ry. Co., 51 Minn. 531, 53 N. W. Rep. 800.

§ 5397. 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.

(G. S. 1866, c. 66, § 234; G. S. 1878, c. 66, § 252.)

TITLE 20.

NEW TRIALS.

§ 5398. For what causes 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 or inadequate and insufficient 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.

(G. S. 1866, c. 66, § 235; G. S. 1878, c. 66, § 253; as amended 1891, c. 80, § 1.)

"New trial." See Dodge v. Bell, 37 Minn. 382, 34 N. W. Rep. 739.

The court may properly grant a new trial in a cause which it had dismissed upon motion before the introduction of evidence. Dunham v. Byrnes, 36 Minn. 106, 30 N. W. Rep. 402.

The district court has power to grant a new trial after a trial by a referee. Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

When an action is tried by a district court, without the intervention of a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an appeal lies to this court. Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. Rep. 773.

The district court may, in its discretion, before the time to appeal from the judgment expires, allow a motion for a new trial after the judgment is entered. Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

A new trial will not be granted, even where there is error, if from the whole case it is apparent that the result will not be changed. Dorr v. Mickley, 16 Minn. 20, (Gil. 8.)

A new trial will not be granted where it is evident that the result will be the same as on the first trial. Lewis v. St. Paul & S. C. R. Co., 20 Minn. 260, (Gil. 234.)

In civil actions the power of the trial courts to grant new trials is limited to the grounds specified and described in this section. For errors of law occurring upon the trial, but not excepted to, a new trial cannot be granted. Valerius v. Richard, (Minn.) 59 N. W. Rep. 534.

See, also, Ashton v. Thompson, 28 Minn. 330, 333, 9 N. W. Rep. 876; Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129; Deering v. Johnson, 33 Minn. 97, 22 N. W. Rep. 174, Dodge v. Bell, 37 Minn. 383, 34 N. W. Rep. 739.

SUBD. 1. It is discretionary with the trial court to allow a party who has rested his cause to reopen it. Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26.)

Where the motion for a new trial is on the ground that a jury trial was denied, and that the court improperly ordered a reference, an appeal from an order denying it brings up the record relating to the denial of a jury. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

See City of Winona v. Minnesota Ry. Const. Co., 27 Minn. 415, 423, 6 N. W. Rep. 795, 8 N. W. Rep. 148.

SUBD. 2. An attempt by a juror, while the jury is deliberating, to send a letter to his wife, by the hands of the successful party, such party knowing nothing of it, the letter not coming to his hands, is no ground for a new trial. Eich v. Taylor, 20 Minn. 378, (Gil. 330.)

An unauthorized communication made to a juror in a cause, pending the trial, is not ground for a new trial if it be apparent that it could not have influenced the mind of the juror in favor of the successful party. Chalmers v. Whittemore, 22 Minn. 305. If a juror in a cause, pending the trial, express to a stranger to the cause an opinion upon the case, it is not ground for a new trial if it be apparent that the opinion was formed upon the proceedings and evidence in the cause. Id.

New trial granted on account of improper communications made to a jury while upon a view of the *locus in quo*. Hayward v. Knapp, 22 Minn. 5.

A temporary separation of a juror from his fellows, after the withdrawal of the jury, under the charge of the court, for deliberation upon their verdict, is no ground for a new trial, when it clearly and affirmatively appears that no prejudice resulted, and that the facts and circumstances connected with the separation were such as to exclude all reasonable presumption or suspicion that the juror was tampered with, or that the verdict was or could have been in any way influenced or affected by the irregularity. State v. Conway, 23 Minn. 292.

In case of an application for a new trial for misconduct of the jury, if it does not appear that the misconduct was occasioned by the prevailing party, or any one in his behalf, and if it does not indicate any improper bias upon the jurors' minds, and the court cannot see that it had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside. If the moving party shows such misconduct that prejudice may have resulted to him from it, a new trial will be granted, unless the successful party shows that in fact such prejudice did not result. Koehler v. Cleary, 23 Minn. 325.

The granting of a new trial for misconduct of the jury is in the sound discretion of the trial court, and it requires a clear case against its action to justify this court in reversing the decision of such court. Hewitt v. Pioneer Press Co., 23 Minn. 178.

An application to set aside a verdict and grant a new trial upon the ground that the jury have been improperly and unfairly influenced by counsel, is largely addressed to the sound discretion of the trial court. Knowles v. Van Gorder, 23 Minn. 197. An ot-

jection made by the court, of its own motion, to the improper conduct complained of, is sufficient to enable the opposite party to take advantage of such conduct. Id.

Affidavits of jurors cannot be received to show misconduct on the part of the jury. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131.) Misconduct of counsel in addressing the jury is not ground of error unless excepted to at the time, and included in the bill of exceptions or case. Id.

Improper conduct of a juror, as ground for a new trial, must be clearly proved. State v. Dumphey, 4 Minn. 438, (Gil. 340.)

An order granting or refusing a new trial because of improper remarks of counsel will not be disturbed except in case of clear abuse of discretion. Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. Rep. 904; Olson v. Gjertsen, 42 Minn. 407, 44 N. W. Rep. 306.

A new trial may be granted on the ground of independent investigations made by a juror. Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. Rep. 1072.

SUBD. 3. That a material witness, who was not subpœnaed, but, at the party's request, promised to attend and testify, was physically unable to attend, and the trial was had without him, is no ground for a new trial. Eich v. Taylor, 17 Minn. 172, (Gil. 145.)

See Huntress & B. L. Co. v. Wyman (Minn.) 56 N. W Rep. 896.

SUBD. 4. A verdict will not be set aside for excessive damages, unless it is such as to warrant the inference, that the jury were swayed by prejudice, preference, partiality, passion, or corruption. St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 132.) Followed, Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26.)

To warrant a trial court to set aside a verdict for excessive damages, the damages must be not merely *more* than the court would have awarded had it tried the case, but they must (especially in an action for defamation) so greatly and grossly exceed what would be adequate in the judgment of the court that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion,—that is to say, of excited feeling, rather than of sober judgment; or of prejudice,—that is to say, of state of mind partial to the successful party, or unfair to the other. Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. Rep. 836, 20 N. W. Rep. 87.

See, also, Dennis v. Johnson, 42 Minn. 301, 44 N. W. Rep. 68.

A motion for a new trial on the ground of excessive damages appeals in a measure to the discretion of the trial court; that is to say, to its sound practical judgment, in view of all the relevant facts of the particular case. Id.

When the propriety of an order granting a new trial for excessive damages comes before an appellate court for review, the question is not precisely that presented to the trial court on the motion for the new trial, but rather whether it clearly appears that the trial court, in granting the order, abused its sound discretion in failing to exercise a sound, practical judgment upon all the relevant facts before it. Id.

The rule allowing exemplary or punitive damages in certain cases obtains in a case where an innkeeper, after a guest had engaged and paid for a night's lodging, refused to let him have it, and turned him out of the house, with abusive and insulting language. McCarthy v. Niskern, 22 Minn. 90.

Power of the court, in actions for personal injuries or for causing death, to grant a new trial, unless the plaintiff consents to reduce the verdict. Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. Rep. 79.

In an action of tort, the objection that the damages are excessive or inadequate comes under this, and not the next, subdivision. Nelson v. Village of West Duluth (Minn.) 57 N. W. Rep. 149. Otherwise, where plaintiff is entitled to actual damages only. Lane v. Dayton, Id. 328.

SUBD. 5. Variance between the pleadings and proofs is not among the enumerated causes for which a new trial may be granted. Every such objection may be relieved against without driving the parties out of court. It is only when the allegation to which the proof is directed is not proved, not only in some particulars, but in its general scope and meaning, that the objection becomes fatal. Short v. McRea, 4 Minn. 119, (Gil. 83.)

The rule for determining the sufficiency of evidence to support the findings of a jury upon controverted questions of fact, applied to verdicts in civil actions of a purely legal nature, applies also to all verdicts upon specific questions of fact tried by a jury under the direction of the court, pursuant to § 5361, whether in actions of equitable cognizance only, or in cases transferred to and tried in a district court on appeal from a probate court. Marvin v. Dutcher, 26 Minn. 392, 4 N. W. Rep. 685.

Where the only evidence of the defendant's guilt in a prosecution for larceny was possession of the stolen property about a month after it was stolen, and the defendant, by three witnesses, proved that he purchased it, showing time and place and amount paid, held, that the evidence was insufficient to sustain a conviction. State v. Miller, 10 Minn. 313, (Gil. 246.)

A motion for a new trial for the causes mentioned in subdivisions 4 and 5, in an action tried by a court without a jury, must be made at the earliest time at which it can be heard after notice that the decision has been rendered, and before judgment is perfected. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

See, also, Tozer v. Hershey, 15 Minn. 257, (Gil. 197.)

Whether motion on the ground of excessive or inadequate damages should be made under this or the preceding subdivision, see Nelson v. Village of West Duluth and Lane v. Dayton, supra.

The sufficiency of evidence to sustain a verdict will not be considered on appeal without a motion for a new trial. Byrne v. Minneapolis & St. L. Ry. Co., 29 Minn. 200, 12 N. W. Rep. 698; Barringer v. Stoltz, 39 Minn. 63, 38 N. W. Rep. 808.

An order refusing a new trial cannot be sustained in the absence of sufficient findings of fact, though the evidence returned would have justified such findings. Benjamin v. Levy, 39 Minn. 11, 38 N. W. Rep. 702.

If there is not a manifest and palpable preponderance of evidence in favor of the verdict, an order granting a new trial for insufficiency of the evidence will not be reversed. Hicks v. Stone, 13 Minn. 434 (Gil. 398); Crosby v. St. Paul City Ry. Co., 34 Minn. 413, 26 N. W. Rep. 225; Werner v. Schroeder, 38 Minn. 321, 37 N. W Rep. 449; Cable v. Byrne, 38 Minn. 534, 38 N. W. Rep. 620; Congdon v. Bailey, 39 Minn. 22, 38 N. W. Rep. 629; Smith v. St. Paul & D. R. Co., 44 Minn. 17, 46 N. W. Rep. 149; Powell v. Heisler, 45 Minn. 549, 48 N. W. Rep. 411; Emerson v. Hennessy, 47 Minn. 461, 50 N. W. Rep. 603; Breen v. Railway Transfer Co., 51 Minn. 4, 52 N. W. Rep. 975; Linne v. Forrestal, 51 Minn. 249, 53 N. W. Rep. 547.

The court may grant a new trial on the evidence, after a trial by referee. The action of the court will not be disturbed unless the evidence manifestly preponderates in favor of the decision vacated. Koktan v. Knight, 44 Minn. 304, 46 N. W. Rep. 354. See Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. Rep. 236.

SUBD. 6. Newly-discovered evidence, if merely impeaching or cumulative, is no ground for a new trial. State v. Dumphey, 4 Minn. 438, (Gil. 340.)

A new trial will not be granted for newly-discovered evidence where such evidence only discredits the evidence of the opposite party given on the trial, or is merely cumulative or corroborative of evidence introduced. Mead v. Constans, 5 Minn. 171, (Gil. 134.) A new trial will not be granted for newly-discovered evidence where such evidence will not be at all likely to change the result. Id. Same point, Fenner v. Caldwell, 7 Minn. 225, (Gil. 166.)

See, also, Peck v. Small, 35 Minn. 465, 29 N. W. Rep. 69; Gilmore v. Brost, 39 Minn. 190, 39 N. W. Rep. 139; State v. Barrett, 40 Minn. 65, 41 N. W. Rep. 459; Schacherl v. St. Paul City Ry. Co., 42 Minn. 42, 43 N. W. Rep. 837; Jones v. Chicago, M. & St. P. Ry. Co., 42 Minn. 183, 43 N. W. Rep. 1114; Brazil v. Peterson, 44 Minn. 212, 46 N. W. Rep. 331.

A motion for a new trial upon either of the grounds included in subdivisions 1, 2, 3, and 6, may be made after, as well as before, judgment is entered. Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

When plaintiff shows sufficient diligence to entitle him to a new trial for the newly-discovered evidence, see Humphrey v. Havens, 9 Minn. 318, (Gil. 301.) See, also, Wintermute v. Stinson, 19 Minn. 394, (Gil. 340.)

Where the newly-discovered evidence is the testimony of a witness, an affidavit stating that the party making it had learned what the witness would swear to, by a conversation with one who had seen or heard taken a deposition of said witness, is not sufficient. Eddy v. Caldwell, 7 Minn. 225, (Gil. 167.)

The decision of a trial court upon an application for a new trial upon the ground of newly-discovered evidence can only be reviewed in an appellate court upon a record showing both the after-discovered evidence and that introduced upon the former trial. State v. Conway, 23 Minn. 291.

The party must have been ignorant of the newly-discovered evidence at the time of the trial. His counsel's ignorance is not enough. Broat v. Moor, 44 Minn. 468, 47 N. W. Rep. 55.

See Hosford v. Rowe, 41 Minn. 245, 42 N. W. Rep. 1018; Cairns v. Keith, 50 Minn. 32, 52 N. W. Rep. 267; Elmborg v. St. Paul City Ry. Co., 51 Minn. 70, 52 N. W. Rep. 969.

SUBD. 7. A motion to vacate the report of a referee, and for a new trial for errors of law committed during the trial, and for insufficiency of evidence, may be made on a case settled after the entry of judgment when the report has been made and filed, and judgment has been entered without notice, and when the party making the motion has been guilty of no laches or unreasonable delay in settling the case, and making the motion. When in such a case, a report is vacated, and a new trial is granted, the court may also set aside the judgment to give effectiveness to its decision. Cochrane v. Halsey, 25 Minn. 52.

The admission of immaterial evidence is no ground for a new trial if the court can see there is no reasonable ground to apprehend that it prejudiced the objecting party. Cole v. Maxfield, 13 Minn. 235, (Gil. 220.)

That a question is not strictly cross-examination is no ground for a new trial if no injury resulted. St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 250.)

In what cases the court may grant a new trial for insufficient instructions, though not excepted to. Demueles v. St. Paul & N. P. Ry. Co., 44 Minn. 436, 46 N. W. Rep. 912. See Roehl v Baasen, cited in note to § 5396; Dartnell v. Davidson, 16 Minn. 530, (Gil. 477.)

§ 5399. Motion, how made — Case — Bill of exceptions— Judge's or stenographer's minutes.

When the application is made for a cause mentioned in the fourth, fifth and seventh subdivisions of the last section, it is made either upon a bill of exceptions or a statement of the case, prepared as described in the next section; for any other cause, it is made upon affidavit: provided, however, that the judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes, or upon the minutes of the stenographic reporter where there is such a reporter, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or court at which the trial is heard. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had: and provided, if, during the trial, any exception is taken to the ruling of the court, such exception may be forthwith taken and reduced to writing, and allowed and signed by the judge, together with so much of the testimony or charge as to make the ruling and exception intelligible, which shall be made a part of the record, so as to obviate a case or other bill of exception; and on appeal the court shall not infer that any other evidence was introduced to obviate the exceptions.
(G. S. 1866, c. 66, § 236, as amended 1875, c. 60, § 1; G. S. 1878, c. 66, § 254.)

A motion for a new trial, whether the trial was by the judge, a referee, or a jury, must, if the party have a reasonable opportunity, be made before judgment; but if he have no reasonable opportunity before judgment, he may make it afterwards, within the time for bringing an appeal from the judgment. In such case, however, he must use due diligence in making it, and will lose his right to make it by neglect of such diligence. The determination of the question whether he has used due diligence is in the sound discretion of the trial court. Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129.

See, also, Collins v. Bowen, 45 Minn. 186, 47 N. W. Rep. 719.

An order denying leave to make and serve a statement of the case, after the time given by statute has expired, is not, in the absence of abuse of discretion, appealable. Irvine v. Myers, 6 Minn. 558, (Gil. 394.)

Upon the trial of a cause by the court without a jury, or by a referee, the time within which to make a case commences upon the filing of the decision. Id.

A fact occurring at a trial, and not matter of record, will not be reviewed when not presented by a case or bill of exceptions, although it is stated in the findings of fact made by the court. Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. Rep. 472.

The supreme court may review a judgment upon the questions presented by the findings of fact and law of the judge or referee who tried the cause, though no case or bill of exceptions is made. Morrison v. March, 4 Minn. 422. (Gil. 325.)

See Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129; Dodge v. Bell, 37 Minn. 332, 34 N. W. Rep. 739.

When a motion is made to set aside a verdict and for a new trial upon the minutes, the case or bill of exceptions, in the event of an appeal, must be proposed and settled within the time, and in the manner, proposed in § 5400. Van Brunt & Wilkins Manuf'g Co. v. Kinney, 51 Minn. 337, 53 N. W. Rep. 643.

An objection to a motion on the minutes at a second term after the trial is waived when not made till after argument on the merits. Larson v. Ross (Minn.) 57 N. W. Rep. 323.

§ 5400. Bill of exceptions or case, how prepared 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 from 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 ad-

joining 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.

(G. S. 1866, c. 66, § 237, as amended 1870, c. 74, § 1; G. S. 1878, c. 66, § 255.)

A party is not entitled to have a case or bill of exceptions settled and allowed as a basis of a motion for a new trial, after the expiration of the time to appeal from the final judgment. Richardson v. Rogers, 37 Minn. 461, 35 N. W. Rep. 270.

A statement of the case on which to move for a new trial or to appeal must be allowed and signed by the judge or referee. The stipulation of the parties will not dispense with such allowance and signature. Abrahams v. Sheehan, 27 Minn. 401, 7 N. W. Rep. 822.

After the lapse of fifteen days from the service of amendments to a proposed case, within which time the same is required by this section to be presented for settlement, an order to show cause why the case should not be settled was granted, and on the hearing the same was settled and signed. Held, that the effect of such order and settlement was to grant further time for presenting the case, as permitted by said chapter, and § 105, c. 66, G. S. See § 5267. Cook v. Finch, 19 Minn. 407, (Gil. 350.)

Where, after the expiration of the time limited by this section, no judgment having been entered, leave to make a case is granted by the court, such leave operates as an extension, as authorized by § 5267. Volmer v. Stagerman, 25 Minn. 234. Where an order signed by the judge provided that a proposed case as amended stand as the settled case in the action, held, sufficient as a settlement and allowance of such case, though the case itself was not signed. Id.

Failure to make and serve a proposed case, within the time limited by the court on granting an extension of time, is cured by its subsequent allowance and settlement. Id.

Where a statement of the case, to which amendments had been proposed and allowed, had not been duly approved and certified by the district judge, but a motion for a new trial thereon had been heard and determined by him without objection, held, that it was thereby adopted and approved by him, and he might properly certify it at any time; and that, as the defect is merely formal, and the objection might have been obviated if it had been seasonably taken, it should be disregarded in this court. Sherman v. St. Paul, Minneapolis & Manitoba Ry. Co., 30 Minn. 228, 15 N. W. Rep. 239.

By admitting "due service" of a proposed case, a party waives the objection that it was not served in time, and in such case *mandamus* will issue to compel its settlement and allowance. State v. Baxter, 38 Minn. 137, 36 N. W. Rep. 108.

After a bill of exceptions has been settled by the judge, he cannot correct mistakes in it without calling in the parties and allowing them to be heard. State v. Laliyer, 4 Minn. 379, (Gil. 286.) The district court cannot correct a "case" settled and signed by a referee without proof that it was subsequently altered. Taylor v. Parker, 18 Minn. 79, (Gil. 63.) The "case," not being allowed and signed, sent back for correction. Phœnix v. Gardner, 13 Minn. 294, (Gil. 272;) Chesley v. Mississippi & Rum River B. Co., 39 Minn. 83, 38 N. W. Rep. 769.

Contents of documents, how to be made part of case. Blake v. Lee, 38 Minn. 478, 38 N. W. Rep. 487.

A case once settled cannot be disregarded by the court on motion for new trial made thereon, even though the judge thinks it incorrect. Steinkraus v. Minneapolis, L. & M. Ry. Co., 39 Minn. 135, 39 N. W. Rep. 70.

The case must show affirmatively that it contains all the evidence pertaining to the issue to be reviewed; otherwise an order granting a new trial on the evidence will not be reversed. (Overruling Henry v. Hinman, 21 Minn. 378.) Chesley v. Mississippi & Rum River B. Co., supra; Mead v. Billings, 40 Minn. 505, 42 N. W. Rep. 472; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. Rep. 157; Kohn v. Tedford, 46 Minn. 146, 48 N. W. Rep. 686.

Immaterial exhibits need not be included. In re Lyons, 42 Minn. 19, 43 N. W. Rep. 568.

See Abbott v. Nash, 35 Minn. 452, 29 N. W. Rep. 65.

TITLE 21.

GENERAL PROVISIONS.

§ 5401. Trials of scandalous nature—Exclusion of minors.

That when, in any court, a cause of a scandalous or obscene nature is on trial, the presiding judge or justice may, in his discretion, exclude therefrom all minors not necessarily present as parties or witnesses.

(1887, c. 164; G. S. 1878, v. 2, c. 66, § 255a.)

See, as to examination of adverse party, § 5659.

§ 5402. 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.

(G. S. 1866, c. 66, § 238; G. S. 1878, c. 66, § 256.)

As to treble damages in certain cases, see §§ 5415, 5884.

§ 5403. Requests for instructions to jury, etc.

Upon the trial of any civil action before a jury in any district or municipal court of this state, any party thereto having an interest in the result of such trial may, before the commencement of the argument to the jury, tender to the court instructions in writing, properly numbered, to be given to the jury, and require the court to indicate before the argument such as will be given, by writing opposite each the words "given," "given as modified by the court" or "refused." And if the court desires, it may hear argument thereon by the respective counsel before acting on the instructions tendered. And thereupon, during the argument to the jury, any instructions so indicated to be given, may be read to the jury as the law of the case; and the court shall give the same to the jury as the law when such jury is instructed by the court. And the court may of its own motion and shall upon application of either party, also before the commencement of the argument, lay before the parties any instructions properly numbered which it will give to the jury; and thereupon the same may be read by any one as the law while making an argument to the jury; provided, however, the court may give to the jury such other instructions, with those already approved, at the close of the argument, as may be necessary to fully present the law to the jury and secure the ends of justice.

(G. S. 1866, c. 66, § 239; G. S. 1878, c. 66, § 257; as amended 1883, c. 57, § 1; 1889, c. 77, § 1.)

See Smith v. St. Paul & D. R. Co., 51 Minn. 86, 52 N. W. Rep. 1068.

§ 5404. Trials by court or referees.

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.

(G. S. 1866, c. 66, § 240; G. S. 1878, c. 66, § 258.)

§ 5405. Offer of judgment—Proceedings—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.

(G. S. 1866, c. 66, § 241; G. S. 1878, c. 66, § 259.)

In an action to recover possession of personal property, if, pending the action, the defendant deliver the property to plaintiff, the latter has still a right to have the title determined by the judgment. In such case an offer for judgment, unless it offer to allow judgment determining the title, is of no avail. Oleson v. Newell, 12 Minn. 186, (Gil. 114.)

When an offer of judgment is made and served, the plaintiff has 10 full days thereafter, excluding the day of service, in which to accept or reject the offer, and to give notice thereof in case of acceptance. In case the trial is begun before the expiration of this period, without any action by the plaintiff upon the offer, it thereby becomes ineffectual for any purpose. Mansfield v. Fleck, 23 Minn. 61.

The word "costs," as used in this section, providing that, after refusing offer of judgment, if plaintiff shall fail to recover more than offered, defendant shall be allowed costs, includes disbursements. Woolsey v. O'Brien, 23 Minn. 71.

An offer for judgment for a specified sum and "accrued costs" is good. Petrosky v. Flanagan, 38 Minn. 26, 35 N. W. Rep. 665.

See Flaherty v. Rafferty, 51 Minn. 341, 53 N. W. Rep. 644, 645.

§ 5406. Tender in actions for torts.

When, in an action to recover damages for the commission of a tort, the defendant shall, at any time before the trial of such action, tender to the plaintiff a sum of money as damages or compensation for such tort, and, if such tender be made after the commencement of the action, in addition to such tender for damages or compensation, he shall also tender the costs and disbursements of the plaintiff then accrued, and the plaintiff in such action shall not recover a greater sum than the amount so tendered, the plaintiff shall recover no costs or disbursements, but shall pay the defendant's costs and disbursements. The fact of such tender having been made shall not be pleaded, nor given in evidence to the court or jury.

(1877, c. 119, § 1; G. S. 1878, c. 66, § 260.)

§ 5407. Same—Award of costs.

In all such actions, when such tender shall be made, and the plaintiff fails to recover a greater sum than the amount of such tender, if the amount of such recovery, and the costs and disbursements accrued and tendered, exceed the amount of the defendant's costs and disbursements, the court shall enter judgment against the defendant for such excess. If the amount of the defendant's costs and disbursements exceed the amount recovered by the plaintiff, and his costs and disbursements accrued and tendered, the court shall enter judgment against the plaintiff for such excess.

(1877, c. 119, § 2; G. S. 1878, c. 66, § 261.)

§ 5408. Dismissal of action.

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

First. By the plaintiff, at any time before trial, if a provisional remedy has not been allowed, or counter-claim made, or affirmative relief demanded in the answer: *provided*, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant, or an order of the court on notice and cause shown. (*As amended* 1881, *Ex Sess.* c. 26, § 1.)

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 subdivisions is made by an entry in the clerk's register, and a notice served on the adverse party; judgment may thereupon be entered accordingly.

(G. S. 1866, c. 66, § 242, as amended 1878, c. 22, § 1; G. S. 1878, c. 66, § 262, amended as supra.)

The entry of dismissal may be made by the plaintiff's attorney. Blandy v. Raguet, 14 Minn. 491, (Gil. 368.)

See Craver v. Christian, 34 Minn. 397, 398, 26 N. W. Rep. 8; Hooper v. Balch, 31 Minn. 276, 17 N. W. Rep. 617; Schleuder v. Corey, 30 Minn. 501, 502, 16 N. W. Rep. 401.

SUBD. 1. In an action of replevin, where the property has not been taken, there has been no provisional remedy allowed within this section. Blandy v. Raguet, 14 Minn. 491, (Gil. 368.)

In an action in replevin, where the property is taken by the plaintiff, and returned to the defendant on the proper bond, the plaintiff cannot dismiss by a notice served on the defendant's attorneys, even though they retain the notice. Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

On an appeal from a justice to the district court, the plaintiff may dismiss his action. Fallman v. Gilman, 1 Minn. 179, (Gil. 153.)

The plaintiff is not entitled to dismiss, as a matter of right under subdivision 1, after the trial has actually commenced. Bettis v. Schreiber, 31 Minn. 329, 17 N. W. Rep. 863.

Where a trial has been had, and a verdict thereon has been set aside and a new trial granted, a subsequent dismissal or discontinuance upon the application of the party obtaining such verdict is a dismissal "before trial," and is no bar to another action. Phelps v. Railroad Co., 37 Minn. 485, 35 N. W. Rep. 273.

An appeal will not lie from an order dismissing an action before trial. Jones v. Rahilly, 16 Minn. 177, (Gil. 155.)

See Curtiss v. Livingstone, 36 Minn. 312, 30 N. W. Rep. 814.

Relief prayed in answer, being conditioned on plaintiff's recovery, held not such affirmative relief as to bar plaintiff's right to dismiss. Koerper v. St. Paul & N. P. Ry. Co., 40 Minn. 132, 41 N. W. Rep. 656.

The amendment of Laws 1881 (Ex. S.) c. 26, § 1, is simply prohibitory, and a dismissal forbidden thereby does not in itself operate as a determination of the action on its merits. Walker v. St. Paul City Ry. Co., 52 Minn. 127, 53 N. W. Rep. 1068.

SUBD. 2. A mere submission to arbitration, although followed by an award, is not a discontinuance of an action under this section. Hunsden v. Churchill, 20 Minn. 408, (Gil. 360.)

Upon a settlement and compromise of a cause of action, and the filing of a stipulation discontinuing the action, the cause is out of court, so that no further step can be taken in it. Eastman v. St. Anthony Falls, etc., Co., 17 Minn. 48, (Gil. 31.)

If a plaintiff neglect unreasonably to perfect judgment to which he is entitled, the defendant may have an order of dismissal. Deuel v. Hawke, 2 Minn. 50, (Gil. 37.)

The court cannot require a party to enter judgment to which he is entitled, and, upon his default, cause it to be entered for him. Sherrerd v. Frazer, 6 Minn. 572, (Gil. 407.)

See Rogers v. Greenwood, cited in note to § 5388; Jones v. Rahilly, 16 Minn. 177, (Gil. 155, 156.)

Stipulation before trial for dismissal without costs does not authorize a judgment for defendant upon the merits. Rolfe v. Burlington, C. R. & N. Ry. Co., 39 Minn. 398, 40 N. W. Rep. 267.

The court may dismiss before trial, on the plaintiff's application, though the defendant has pleaded a counterclaim or demanded affirmative relief. Mathews v. Taaffe, 44 Minn. 400, 46 N. W. Rep. 850.

See Cameron v. Chicago, M. & St. P. R. Co., 51 Minn. 153, 53 N. W. Rep. 199.

SUBD. 3. Under this subdivision an action to remove a cloud may be dismissed upon failure to comply with a conditional order requiring defendant's grantee to be made a party to the suit, although the proofs of the respective parties have been submitted to the court. Johnson v. Robinson, 20 Minn. 170, (Gil. 153.)

Where, upon a stipulation for a judgment of dismissal without costs or notice, a judgment was entered with costs, an order vacating the allowance of costs, but refusing to set aside the judgment, will not be reversed in this court because made with leave to defendant to proceed upon notice to retax such costs. Plaintiff's remedy in such case is by the proper appeal after such retaxation and allowance of costs in the judgment. Herrick v. Butler, 30 Minn. 156, 14 N. W. Rep. 794.

Upon the trial of an action of replevin involving an issue of title in the defendant, the cause was submitted to the court for decision without a jury. The court made its decision, holding that the defendant was entitled to a "judgment of dismissal," which, by order of the court, was entered. It appearing from the conclusions of the court, stated as required by statute, that the judgment of dismissal was based upon a determination of the issue of title in favor of the defendant, held, that such judgment is conclusive as to the fact so decided. Boom v. St. Paul Foundry & Manuf'g Co., 33 Minn. 253, 22 N. W. Rep. 538.

As to costs when the action is dismissed on trial for the plaintiff's failure to prove his case. Conrad v. Bauldwin, 44 Minn. 406, 46 N. W. Rep. 850.

Dismissal of action on the plaintiff's motion is within the court's discretion. Althen v. Tarbox, 48 Minn. 1, 50 N. W. Rep. 828.

Where the plaintiff makes a case for nominal damages, which would carry costs, it is error to order a dismissal. Farmer v. Crosby, 43 Minn. 459, 45 N. W. Rep. 866.

See Sloan v. Becker, 31 Minn. 414, 417, 18 N. W. Rep. 143; Andrews v. School Dist., 35 Minn. 70, 27 N. W. Rep. 303; Woods v. Lindvall, 1 C. C. A. 37, 48 Fed. Rep. 62, affirming 47 Fed. Rep. 195.

SUBD. 4. When the plaintiff fails to appear at the trial, and the answer pleads no

counterclaim, the defendant may have the action dismissed, but cannot have a trial and judgment on the merits. Keator v. Glaspie, 44 Minn. 448, 47 N. W. Rep. 52.

§ 5409. Judgment on the merits.

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

(G. S. 1866, c. 66, § 243; G. S. 1878, c. 66, § 263.)

Dismissal by the court of an action at law (while the same is on trial and before its final submission) upon the ground that the plaintiff has failed to establish his cause of action, is not a final determination on the merits, and therefore not pleadable against another action for the same cause. Craver v. Christian, 34 Minn. 397, 26 N. W. Rep. 8. See Schleuder v. Corey, 30 Minn. 501, 502, 16 N. W. Rep. 401.

Where the issues have been made in an action in ejectment, and judgment has been entered on a stipulation that the action shall be dismissed "on its merits," such judgment is upon the merits. Cameron v. Chicago, M. & St. P. Ry. Co., 51 Minn. 153, 53 N. W. Rep. 199.

§ 5410. Judgment as between several parties.

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.

(G. S. 1866, c. 66, § 244; G. S. 1878, c. 66, § 264.)

All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance. But in such action they cannot have judgment for the damage done to the property of each. Grant v. Schmidt, 22 Minn. 1.

The plaintiff may be allowed judgment in a suit for partition allotting him his share, without waiting for a determination of the conflicting claims of the owners of other undivided interests. Howe v. Spalding, 50 Minn. 157, 52 N. W. Rep. 527.

See Goldschmidt v. County of Nobles, 37 Minn. 49, 33 N. W. Rep. 544; Crump v. Ingersoll, 44 Minn. 84, 86, 46 N. W. Rep. 141.

§ 5411. Judgment as 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.

(G. S. 1866, c. 66, § 245; G. S. 1878, c. 66, § 265.)

In an action commenced prior to the Revised Statutes, against several defendants upon their joint promise, judgment could not be rendered against one alone upon his several promise. Carlton v. Chouteau, 1 Minn. 102, (Gil. 81.)

§ 5412. Judgment against defendants sued jointly with others.

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.

(1873, c. 67, § 1; G. S. 1878, c. 66, § 266.)

In an action against several defendants upon a joint contract, not joint and several, plaintiff must recover against all or none, and the rule is not changed by statute. Fetz v. Clark, 7 Minn. 217, (Gil. 159;) Fetz v. Clark, 8 Minn. 86, (Gil. 61;) Whitney v. Reese, 11 Minn. 138, (Gil. 87.)

In an action upon an account stated, by two jointly, the stating of the account being in issue, it is competent for either defendant to show that it was not stated by him, and in such case plaintiff may have judgment against the one by whom such account was stated. Reed v. Pixley, 22 Minn. 540.

Where an action is brought upon a partnership liability, against a firm alleged to consist of three persons, and upon the trial it appears that one of them is not a member of the firm, but that the other two are members of it, upon proof of the alleged partnership liability judgment may properly be entered against the firm of two members. Miles v. Wann, 27 Minn. 56, 6 N. W. Rep. 417. Criticising Fetz v. Clark, *supra*.

See, also, Keigher v. Dowlan, 47 Minn. 574, 50 N. W. Rep. 823; Bunce v. Newell (Minn.) 57 N. W. Rep. 160.

Where the payee of a joint and several note brought suit against, and obtained personal services on, all the makers, and after they were all in default for want of an answer, he entered judgment by default against two, and 17 months afterwards, by leave of court given ex parte, he entered up another judgment against another defendant,

and the court afterwards denied the motion of this defendant to set aside the second judgment, held that, if the plaintiff did not have an absolute right, under § 5207, to enter such separate judgments against different defendants, he had a right to do so by obtaining leave of the court, as provided in this section, and his failure to obtain such leave before entering the first judgment was cured by the subsequent orders of the court. Wolford v. Bowen (Minn.) 59 N. W. Rep. 195.

§ 5413. Measure of relief to be granted plaintiff.

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.

(G. S. 1866, c. 66, § 246; G. S. 1878, c. 66, § 267.)

A plaintiff cannot, if there be no answer, have more than the specific relief prayed for in the complaint. Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. Rep. 85.

As to what relief is "consistent with the case made by the complaint, and embraced within the issue," see Farmer v. Crosby, 43 Minn. 459, 45 N. W. Rep. 866; Triggs v. Jones, 46 Minn. 277, 48 N. W. Rep. 1113.

See, also, Thompson v. Bickford, 19 Minn. 25, (Gil. 1;) Washburn v. Mendenhall, 21 Minn. 333; Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 466, 50 N. W. Rep. 601.

§ 5414. Clerk to enter judgment on 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.

(G. S. 1866, c. 66, § 247; G. S. 1878, c. 66, § 268.)

A motion may be made in arrest of judgment after verdict. Wentworth v. Wentworth, 2 Minn. 277, (Gil. 238.)

§ 5415. Damages trebled for trespass to personal property.

Whoever shall carry off, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages which may be assessed therefor in a civil action in any court having jurisdiction, except as provided in the next section.

(1868, c. 75, § 1; G. S. 1878, c. 66, § 269.)

The term, "or other personal property," is to be confined to things *ejusdem generis* with those previously enumerated, to-wit, "wood, timber, lumber, hay, and grass;" that is, to things which are the product of the soil. Berg v. Baldwin, 31 Minn. 541, 18 N. W. Rep. 821.

See State v. M'Crum, 38 Minn. 154, 156, 36 N. W. Rep. 102.

As to liability of the master for treble damages in case of trespass by the servant, see Potulni v. Saunders, 37 Minn. 517, 35 N. W. Rep. 379.

§ 5416. Same—Judgment for single damages only.

If, upon the trial of such action, it appears that the defendant had probable cause to believe that the property so taken or carried off was his own, or that of another person under whose direction the act was done, judgment shall be given for single damages only, and costs of the action.

(1868, c. 75, § 2; G. S. 1878, c. 66, § 270.)

§ 5417. Action for libel published in newspaper—Prerequisite—Retraction.

Before any suit shall be brought for the publication of a libel in any newspaper in this state, the aggrieved party shall, at least three days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper at their principal office of publication, specifying the statements in the said articles which he or they allege to be false and defamatory. If it shall appear, on the trial of said action, that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or in case of daily papers within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was

the article complained of as libellous, then the plaintiff in such case shall recover only actual damages. Provided, however, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state, unless the retraction of the charge is made editorially in a conspicuous manner at least three days before the election, in case such libellous article was published in a daily paper; and in case such libellous article was published in a weekly paper at least ten days before the election. Provided, that nothing in the provisions of this act shall be held to apply to any libel published of or concerning any female.

(1887, c. 191, § 1; G. S. 1878, v. 2, c. 66, § 270a; as amended 1889, c. 131, § 1.)

The subject of Laws 1887, c. 191, is sufficiently expressed in its title. Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. Rep. 936.

The act is not invalid as unequal or partial legislation. Id.

In an action for the publication of a libel in a newspaper it is not necessary in order to recover "actual" damages, to allege service of the notice provided for in Laws 1889, c. 131. Clementson v. Minnesota Tribune Co., 45 Minn. 303, 47 N. W. Rep. 781.

The notice may be served elsewhere than at the office of publication. Holston v. Boyle, 46 Minn. 432, 49 N. W. Rep. 203.

§ 5418. Same—"Actual damages" defined.

The words "actual damages" in the foregoing section shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever.

(1887, c. 191, § 2; G. S. 1878, v. 2, c. 66, § 270b.)

As to the damages recoverable under this section. Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. Rep. 936; Clementson v. Minnesota Tribune Co., cited in note to § 5417; Holston v. Boyle, 46 Minn. 432, 49 N. W. Rep. 203.

§ 5419. Judgment on counterclaim.

If a counterclaim, 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.

(G. S. 1866, c. 66, § 248; G. S. 1878, c. 66, § 271.)

§ 5420. 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.

(G. S. 1866, c. 66, § 249; G. S. 1878, c. 66, § 272.)

Where only part of the property is taken on the writ, the value of the part not taken is immaterial, and judgment cannot be rendered for such part not taken, nor for its value. Hecklin v. Ess, 16 Minn. 51, (Gil. 38.)

One who has a special property in goods, as a sheriff under a levy, can recover as against the general owner only the value of his special interest. La Crosse & Minnesota Steam Packet Co. v. Robertson, 13 Minn. 291, (Gil. 269.)

In an action in replevin for different articles of personal property, if a part only of the property can be obtained, the plaintiff should be allowed to elect to take that part, and judgment for the value of the remainder, and, if he demand it, that the jury shall assess the value of the articles separately; but the defendant has no right to object that the jury assessed the value of the property in gross. Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 191.)

In an action of replevin, upon appeal from the judgment to this court, the plaintiff and defendant stipulated that judgment might be entered for the value of the property,

and it was so entered. Held, that the surety in the undertaking, when sued upon it, cannot object that the judgment in replevin should have been in the alternative. Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

The judgment in replevin before a justice must be in the alternative, but on appeal upon questions of law alone the district court may correct the judgment in that particular. Kates v. Thomas, 14 Minn. 460, (Gil. 343.)

The plaintiff may waive his right to an alternative judgment. Thompson v. Scheid, 39 Minn. 102, 38 N. W. Rep. 801.

When the plaintiff's title or right to possession is divested after suit, and before trial, he can recover only damages for the detention. Deal v. D. M. Osborne & Co., 42 Minn. 102, 43 N. W. Rep. 835.

Where the plaintiff is entitled to a recovery, and the property has not been delivered, its value must be assessed as of the time the right of action accrued. McLeod v. Capehart, 50 Minn. 101, 52 N. W. Rep. 381.

In an action against a sheriff by the general owner of property held on process, to recover the possession, a verdict in form for the defendant, and assessing the value of his special interest to the amount of the execution and costs, is sufficient. Hanson v. Bean, 51 Minn. 546, 53 N. W. Rep. 871.

See Oleson v. Newell, cited in note to § 5405; Berthold v. Fox, cited in note to § 5267; Stevens v. McMillin, 37 Minn. 509, 35 N. W Rep. 372; Leonard v. Maginnis, 34 Minn. 506, 509, 26 N. W. Rep. 733; Adamson v. Sundby, 51 Minn. 460, 53 N. W Rep. 761; Barber v. Amundson, 52 Minn. 358, 54 N. W. Rep. 733, 734.

§ 5421. Entry and contents of judgment.

The judgment shall be entered in the judgment-book, and specify clearly the relief granted, or other determination of the action.

(G. S. 1866, c. 66, § 250; G. S. 1878, c. 66, § 273.)

The omission of the clerk to sign a judgment does not affect its validity. Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

When the clerk of the district court keeps but one book for the registry of actions and entry of judgments, a judgment entered therein is valid. Jorgensen v. Griffin, 14 Minn. 464, (Gil. 346.)

Where the clerk kept two books for the entry of judgments, one styled "Judgment Book," and the other "Decree Book," the entry of a judgment for foreclosure in the latter is at most a mere irregularity which does not affect its validity. Thompson v. Bickford, 19 Minn. 17, (Gil. 2.)

In a book kept by the clerk of the district court, which on the outside was indorsed "Judgment Book," "Records," and "Register of Actions and Judgment Book," there were entries of the various proceedings in a cause, from time to time, commencing with the filing of the summons and complaint; and the last entry was as follows, without any date: "Judgment entered against defendants, and in favor of plaintiff, for $328.50." Held, that this was not an entry of judgment, and that the entry was not admissible to prove a judgment. Brown v. Hathaway, 10 Minn. 303, (Gil. 238.)

A transcript of the entry of judgment is sufficient evidence of the judgment without producing the roll. Williams v. McGrade, 13 Minn. 46, (Gil. 39.) A transcript of the docket of a judgment is prima facie evidence of the judgment and docketing. Id.

The judgment, before docketing, must be entered in the judgment book. It is not enough that a judgment roll is filed, with what purports to be a copy of the judgment in it. In such case the clerk cannot, without an order of the court, enter a judgment nunc pro tunc. Rockwood v. Davenport, 37 Minn. 533, 35 N. W. Rep. 377.

See, also, Barton v. Drake, 21 Minn. 299, 306.

§ 5422. 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.

(G. S. 1866, c. 66, § 251; G. S. 1878, c. 66, § 274.)

This means that the judgment may be entered in such case without making the executor or administrator a party. When entered, it fixes the liability of the estate to pay it "in the course of administration." To make it "payable," no other court need pass upon it. The whole jurisdiction to determine the liability is retained in the court which has the action. Berkey v. Judd, 27 Minn. 477, 8 N. W. Rep. 383.

Where a court of general jurisdiction has jurisdiction of the subject-matter and parties in an action, and the plaintiff dies, and after his death the court renders judgment in his favor, the judgment is not void. Hayes v. Shaw, 20 Minn. 405, (Gil. 355.)

See Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

§ 5423. 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.

(G. S. 1866, c. 66, § 252; G. S. 1878, c. 66, § 275.)

If from the petition, the case settled, and the verdict, a judgment may be entered specifying clearly the relief granted, the verdict is sufficient. St. Paul & S. C. R. Co. v. Matthews, 16 Minn. 341, (Gil. 303.)

On an appeal from a judgment, this court can review only such questions as appear upon the judgment roll. Keegan v. Peterson, 24 Minn. 1.

See Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

It will not be presumed that there was other proof of service than that shown by the record. Godfrey v. Valentine, 39 Minn. 336, 40 N. W Rep. 163.

See Rockwood v. Davenport, note to § 5421.

§ 5424. 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.

(G. S. 1866, c. 66, § 253; G. S. 1878, c. 66, § 276.)

§ 5425. Docketing judgments—Transcrips—Lien on real estate.

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.

(G. S. 1866, c. 66, § 254, as amended 1870, c. 67, § 1; G. S. 1878, c. 66, § 277.)

To constitute a judgment for the purpose of docketing, it must be entered in the judgment book. A docketing without such entry is of no avail, even though a "judgment roll" be filed with what purports to be a copy of the judgment in it. Rockwood v. Davenport, 37 Minn. 533, 35 N. W. Rep. 377. In such case the clerk cannot, without an order of the court, enter judgment nunc pro nunc Id.

A judgment duly rendered and docketed is a lien, as against a fraudulent grantee, notwithstanding the misspelling of the name of the judgment debtor. Fuller v. Nelson, 35 Minn. 213, 28 N. W. Rep. 511.

As to the lien of the judgment, the omission to include costs, or the insertion of costs taxed without notice, is merely an irregularity; but, for the purpose of limiting the time to appeal, the judgment is not deemed perfected until costs have been duly taxed and inserted in the judgment. Richardson v. Rogers, 37 Minn. 461, 35 N. W. Rep. 270.

A judgment becomes a lien on a homestead as on other real estate, and although, while it remains a homestead, it is exempt from sale on execution, it may be sold on execution as soon as it ceases to be a homestead, as where the owner sells it. Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

The homestead provided by the act of 1858, though exempt from sale while it continued a homestead, was subject to the lien of a judgment against the owner, and might be sold when it ceased to be a homestead. Tillotson v. Millard, 7 Minn. 513, (Gil. 419.) The right of the judgment creditor to sell in that contingency was a vested and valuable right, of which he could not be divested by act of the legislature. So far as it assumes to do so, the act of March 10, 1860, p. 286, Sess. Laws, is invalid. Id.

The limitation of the lien of a judgment to ten years does not apply to judgments entered and docketed at the time the provision took effect, the lien of which had been preserved under the act of 1862. Following Davidson v. Gaston, 16 Minn. 230, (Gil. 202;) and Davidson v. Barnes, 17 Minn. 69, (Gil. 47.) Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.) Same point, Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

Where, in the case of a judgment coming within the provisions of c. 27, Laws 1862, execution was issued and levied on real estate belonging to one or more of the defendants, the property advertised for sale, sale postponed from time to time for want of bid-

ders, and for want of bidders no sale was had, and the execution was returned unsatisfied, all within five years from entry of judgment, held, that the provisions of c. 27, Laws 1862, were complied with, and the lien of the judgment preserved. Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.)

The death of a judgment debtor does not operate to extend the five-years limitation contained in c. 27, Laws 1862, within which, in order to preserve the lien of a judgment, an execution must be issued. Erickson v. Johnson, 22 Minn. 380.

A judgment was docketed August 22, 1862, and the lien thereof was in full force at the adoption of the General Statutes of 1866. Held, that the effect of § 7518, and §§ 5399, 5408, was to preserve the lien, and extend the right to issue execution for a period of ten years from the original docketing. Id.

Execution returned within five years, unsatisfied in part, will preserve the lien of the judgment under the act of 1862. Following Davidson v. Gaston, 16 Minn. 230, (Gil. 202,) and Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.) Id.

A judgment survives, and the lien thereof continues, for the period of ten years, and no longer. The commencement within this statutory period, and the pendency of an action on the part of the judgment creditor in the nature of a creditor's bill to reach property of his judgment debtor not subject to execution, will not operate to continue the life of his judgment beyond this statutory period of ten years. Hence, if this period expires during the pendency of such action, his judgment will have ceased to exist, and his right to the relief sought will be gone. Newell v. Dart, 28 Minn. 248, 9 N. W. Rep. 732.

When a judgment which was docketed in the district court is affirmed in this court, it remains, without redocketing, a lien upon real estate, by virtue of the original docketing, for the amount of the original judgment, with accumulative interest; but to make it a lien for the damages and costs in this court it must be redocketed. Daniels v. Winslow, 4 Minn. 318, (Gil. 235.)

A formal levy of an execution upon real estate is not necessary. Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

A sale of real estate on execution passes at once to the purchaser all the title of the execution debtor, subject to be defeated by redemption. The title so acquired will pass by quitclaim deed of the purchaser. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

Where trees standing upon land at the time of the sale thereof upon execution are cut and removed from the same before the expiration of the period of redemption, the purchaser at the execution sale, after his title becomes absolute by the expiration of the period of redemption, without redemption, may maintain an action for the conversion of the logs into which such trees have been cut, against a person in possession of such logs, who refuses to deliver them to him on proper demand. Whitney v. Huntington, 34 Minn. 458, 26 N. W. Rep. 631.

Where, pending an action against the owner of real estate to compel specific performance of a contract to convey it, judgments are rendered against him, execution issued, and the real estate sold, the purchasers at the execution sale are bound by the judgment in the action pending. Steele v. Taylor, 1 Minn. 274, (Gil. 210.) Such purchasers are voluntary purchasers, and, not receiving title by operation of law, they may or may not be brought in as parties at the election of the plaintiff. They cannot become such without his consent. Id.

The docketing of a judgment in favor of Sumner W Farnham is proved by a transcript of the docket in which the name is given Samuel W. Farnham, the description corresponding in every other respect with the judgment rendered. Thompson v. Bickford, 19 Minn. 17, (Gil. 2.)

Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

See Rockwood v. Davenport, cited in note to § 5421; Spencer v. Haug, 45 Minn. 231, 47 N. W. Rep. 794; Atwater v. Manchester Savings Bank, 45 Minn. 341, 345, 48 N. W. Rep. 187; Dayton v. Corser, 51 Minn. 406, 53 N. W. Rep. 717, 718.

§ 5426. Security on appeal—Discharge of lien.

That whenever judgment has been entered in any suit or action, and a motion has been made and is pending for a new trial, or an appeal has been taken to the supreme court, the judgment shall cease to be a lien on the real estate of the defendant, upon payment into court, as security of such judgment, the amount thereof, and such further sum as the court may by order direct and determine to be sufficient to secure all interest and costs that will probably accrue pending such appeal.

(1876, c. 75, § 1; G. S. 1878, c. 66, § 278.)

§ 5427. Lien of judgments in United States courts.

Judgments for the payment of money that have been heretofore or shall be hereafter duly docketed, either in the district or circuit court of the United States in and for the state of Minnesota, from the time of docketing the same become a lien on all the real property of the debtor in the county wherein said judgment was rendered, and in any other county in the state, upon fil-

ing, in the office of the clerk of the district court of such county, a duly certified transcript of such docket.

(1877, c. 141, § 1; G. S. 1878, c. 66, § 279.)

§ 5428. Same—Docketing transcripts.

Whenever any such transcript shall be delivered to the clerk of the district court in and for any county in the state of Minnesota, the same shall be docketed in like manner, and have like effect, as if such judgment had been rendered in one of the district courts in and for the state of Minnesota.

(1877, c. 141, § 2; G. S. 1878, c. 66, § 280.)

§ 5429. Same—Authority to attorney general.

The attorney general of this state is hereby authorized to procure and publish a transcript of the docket of all judgments in the United States district and circuit courts for this state now in force, and furnish a copy thereof to the several clerks of the district courts of this state: provided, the expense of the same shall not exceed the sum of two hundred and fifty dollars.

(1877, c. 141, § 3; G. S. 1878, c. 66, § 281.)

§ 5430. Assignment of judgments, how made.

Whenever a judgment is assigned, the assignment thereof shall be in writing, under the hand and seal of the assignor, and shall by him be acknowledged before a justice of the peace, or any other officer authorized to take the acknowledgment of deeds.

(1877, c. 99, § 1; G. S. 1878, c. 66, § 282.)

§ 5431. Filing of assignment—Entry on docket.

The instrument of assignment of any such judgment shall be filed in the court rendering the judgment, with the files in the action, and an entry thereof shall be made upon the docket; and until so filed, any such assignment shall be void as against creditors levying upon or attaching the same, and as against subsequent purchasers in good faith for value.

(1877, c. 99, § 2; G. S. 1878, c. 66, § 283.)

An unrecorded assignment of a judgment in part is not valid as against creditors levying thereon. Wheaton v. Spooner, 52 Minn. 417, 54 N. W Rep. 372.

See Graham v. Evans, 39 Minn. 382, 40 N. W. Rep. 368; Henry v. Traynor, 42 Minn. 234, 44 N. W. Rep. 11.

§ 5432. Rights of assignee—Attorney's lien saved.

After a judgment has been assigned, and the assignment filed, as in this act provided, none but the assignee, his agent or attorney, shall have authority to receive or collect the amount due on such judgment, or to take out execution to enforce the collection of such judgment: provided, that no assignment shall be construed or allowed to deprive attorneys of their lien or interest in any judgment, for their fees, costs and disbursements.

(1877, c. 99, § 3; G. S. 1878, c. 66, § 284.)

An assignee of a judgment on which the original attorneys issued execution, having acquiesced in their acts, is bound by the sheriff's payment to such attorneys. Gill v. Truelsen, 39 Minn. 373, 40 N. W. Rep. 254.

Attorneys having a lien on a judgment which has been collected by the sheriff may require him to retain the amount of the lien. Id.

§ 5433. Satisfaction of judgments in behalf of the state.

The auditor of state may make and execute satisfactions of judgments and assignments thereof in behalf of the state of Minnesota.

(1889, c. 44, § 1.[10])

§ 5434. Actions to set aside judgment for fraud, etc.

That in all cases where judgment heretofore has been or hereafter may be obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment,

[10] An act entitled an act to authorize the auditor of state to execute satisfactions and assignments of judgments in behalf of the state of Minnesota. Approved March 22, 1889.

at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or representation. Such action shall be commenced in the judicial district where such judgment was rendered, and in such action the court shall have and possess the same powers heretofore exercised by courts of equity in like proceedings, and may perpetually enjoin the enforcement of such judgment, or command the satisfaction thereof, and may also compel the prevailing party to make restitution of any money or other property received by virtue thereof, and may also make such other or further order or judgment as may be just or equitable: provided, that no rights or interests under any judgment obtained by means of such wrongful or fraudulent acts or practice of the prevailing party, acquired by third parties in good faith and without actual knowledge of such wrongful or fraudulent acts or practice, shall be affected by any such order or judgment made in the action herein provided for: and provided further, that when in any such action, pending the final determination thereof, the statute of limitation shall become a bar to the enforcement of such judgment, or to the commencement of an action thereon, and, in the action herein provided for, the validity of such judgment shall be established, such judgment may be enforced, or an action commenced thereon, at any time within one year after the final determination of the action herein provided for.

(1877, c. 131, § 1; G. S. 1878, c. 66, § 285.)

This section, authorizing the opening of judgment procured by fraud or perjury at any time within three years after its discovery, is, in so far as it is applicable to a judgment absolute at the time of its passage, unconstitutional and void. Wieland v. Shillock, 24 Minn. 345.

That part of this section anterior to the proviso is constitutional as respects judgments recovered after its passage. It does not impair vested rights, nor does it deprive a party of the certain remedy in the law guarantied by § 8, art. 1, of the constitution of this state. It affords a remedy in all cases where, after its passage, judgment has been obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the party recovering the judgment, by an action to be brought as provided. The provision that the court in which the action is brought shall "possess the same powers heretofore exercised by courts of equity in like proceedings," is not a limitation or qualification of the right of the party aggrieved to bring and maintain an action to set aside the judgment, and for other relief, upon the grounds expressly mentioned in the act. This provision gives to the court in which the action is brought, the same powers, in order to make such action effectual for the purposes contemplated by the statute, which a court of equity possessed in similar proceedings. Spooner v. Spooner, 26 Minn. 138, 1 N. W. Rep. 838.

Notwithstanding the plaintiff in a divorce proceeding has again married, an aggrieved party may, under this section, maintain an action to set aside and annul a decree a vinculo procured by fraudulent acts or practices. Said action may also be commenced and prosecuted after the death of the party obtaining such fraudulent decree. Bomsta v. Johnson, 38 Minn. 230, 36 N. W. Rep. 341.

It is the duty of a sheriff, to whom an execution fair upon its face is delivered, to levy it. The fact that the judgment upon which it is issued was fraudulently obtained is no concern of his, so long as it is not reversed, stayed, or enjoined. Baker v. Sheehan, 29 Minn. 235, 12 N. W. Rep. 704.

This section is in derogation of the common law, and should be strictly construed. Stewart v. Duncan, 40 Minn. 410, 42 N. W. Rep. 89.

One not a party to the action in which the judgment was recovered, though directly interested in the result, cannot maintain an action under this section. Id.

An action cannot be maintained upon the bare allegation that on an issue of fact squarely made there was false or perjured testimony. Hass v. Billings, 42 Minn. 63, 43 N. W. Rep. 797. Followed in Wilkins v Sherwood (Minn.) 56 N. W. Rep. 591.

A party against whom a judgment has been obtained cannot, by commencing an action, under this section, to set aside such judgment, make a defense against the judgment which should have been made in the original action, when there is no excuse for having failed to make such defense. Clark v. Lee (Minn.) 59 N. W. Rep. 970.

See Holcomb v. C. N. Nelson Lumber Co., 39 Minn. 342, 40 N. W. Rep. 354.

§ 5435. 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 au-

thority 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. Unless such revocation of authority has been so previously entered upon the register, the attorney of record may, at any time within two years after the judgment, satisfy and discharge the same and the lien thereof, by a brief entry to that effect made on the register, subscribed by such attorney, and witnessed and dated by the clerk of the court or his deputy. Any satisfaction made and acknowledged in the name of a partnership by a member of the partnership, shall be as valid and binding as if executed and acknowledged by each individual member of the partnership; Provided, That nothing herein shall be construed to apply to any case where such partnership has been dissolved prior to the making of such satisfaction. Provided, that whenever any person, against whom there exists a judgment for the payment of money, or on whose property such a judgment is a lien, files, in the office of the clerk of the court in which such judgment was rendered, an affidavit setting forth the existence of such judgment and that he desires to pay the same and has made diligent effort, but has been unable to find any person having power or authority to satisfy the same, such person may pay the amount due on said judgment to the clerk of the court in which such judgment was entered, and such clerk shall receive such money when tendered in payment of any such judgment, and shall thereupon note satisfaction of such judgment on the judgment docket and on the register of the action in which such judgment was entered, and shall execute under his hand and official seal and deliver to the person paying such judgment a certificate reciting the receipt by him, said clerk, of such money in satisfaction of such judgment, and that the same is fully paid and satisfied of record. Such clerk shall immediately notify all persons appearing of record to have any interest in or lien on such judgment, including the attorney of record of the original judgment creditor, that he has received the amount due on such judgment and has satisfied the same of record. Such clerk shall, on demand therefor, pay over such money to the person entitled thereto and take his duplicate receipts therefor, one of which said clerk shall retain, and the other he shall file in the action in which such judgment was rendered. Any clerk satisfying a judgment according to the provisions of this act shall be entitled to receive from the person paying the same double the amount of fees now allowed him for entering a satisfaction of judgment.

(G. S. 1866, c. 66, § 255; G. S. 1878, c. 66, § 286; as amended 1881, Ex. S. c. 33, § 1; 1889, c. 95, § 1; 1893, c. 87, § 1.)

See § 5433 as to satisfaction of state judgments.

An order dismissing a motion made under this section to compel entry of satisfaction of a judgment, satisfied in fact otherwise than on execution, is an order of court, and appealable under subd. 6, § 6140. Ives v. Phelps, 16 Minn. 451, (Gil. 407.)

To enable a judgment debtor to move to compel the satisfaction of a judgment satisfied in fact, it is not necessary that the consideration for the agreement constituting such satisfaction should move from him. If satisfied in fact, no matter by whom, he is entitled to have the same appear of record. Id.

See Woodford v. Reynolds, 36 Minn. 155, 30 N. W. Rep. 757.

TITLE 22.

PROCEEDINGS SUPPLEMENTARY TO THE JUDGMENT.

§ 5436. Summoning of parties after judgment.

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.

(G. S. 1866, c. 66, § 256; G. S. 1878, c. 66, § 287.)

See Johnson v. Lough, cited in note to § 5207, subd. 1.

A nonresident party attending as a witness is privileged from service of a summons under this section. First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. Rep. 308.

§ 5437. Heirs, devisees, etc., may be summoned, when—Proceedings.

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.

(G. S. 1866, c. 66, § 257; G. S. 1878, c. 66, § 288.)

§ 5438. Summons, what to contain—Service.

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 the service of the summons, and shall be served in the same manner as an ordinary summons.

(G. S. 1866, c. 66, § 258; G. S. 1878, c. 66, § 289.)

§ 5439. 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.

(G. S. 1866, c. 66, § 259; G. S. 1878, c. 66, § 290.)

§ 5440. Party summoned may answer—Defences allowed.

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

(G. S. 1866, c. 66, § 260; G. S. 1878, c. 66, § 291.)

§ 5441. Pleadings—Trial—Judgment.

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.

(G. S. 1866, c. 66, § 261; G. S. 1878, c. 66, § 292.)

TITLE 23.

THE EXECUTION.

§ 5442. Judgment may be enforced within ten years.

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.

(G. S. 1866, c. 66, § 262; G. S. 1878, c. 66, § 293.)

This section requires only that execution upon a judgment should be issued within ten years. Davidson v. Gaston, 16 Minn. 230, (Gil. 202;) Lamprey v. Davidson, 16 Minn. 480, (Gil. 435;) Davidson v. Barnes, 17 Minn. 69, (Gil. 47.) Followed, Erickson v. Johnson, 22 Minn. 380.

An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired. Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

The time during which a judgment creditor was, on motion of the judgment debtor, enjoined from issuing execution, is to be excluded from the statutory period allowed for the issuance of execution, under Rev. St. 1851, c. 71, § 80, as amended by Laws 1862, c. 27. Wakefield v. Brown, 38 Minn. 361, 37 N. W. Rep. 788.

The rule relating to computation of time, established by § 5222, applies to this section. Spencer v. Haug, 45 Minn. 231, 47 N. W. Rep. 294.

§ 5443. 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.

(G. S. 1866, c. 66, § 263; G. S. 1878, c. 66, § 294.)

§ 5444. Form and contents of writ.

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. **Execution against property—Taxes on real estate.**

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. And in case real property has been levied upon by virtue of a writ of attachment, in favor of the judgment creditor, in the same action in which the judgment was rendered, and the judgment creditor has, subsequently to such levy, paid the taxes upon the real property so attached, and filed in the office of the clerk of the court the receipt of the proper officer for such taxes, the said receipt shall be attached to and become a part of the judgment-roll, and the execution shall also specify the filing of such receipt, with the date of filing, date of receipt, and amount thereof; and in case of the sale under execution of any such real estate, the proceeds of such sale, after deducting the costs and expenses thereof, shall be first applied to the payment of the amount so paid for taxes, with the interest accrued thereon;

Second. **Against property held by heirs, etc.**

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. **Against joint defendants.**

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. **For delivery of property.**

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.

(G. S. 1866, c. 66, § 264, as amended 1877, c. 17, § 1; G. S. 1878, c. 66, § 295.)

An execution should be dated as of the day when it issued from the clerk's office, and not as of the day of its delivery to the sheriff. Mollison v. Eaton, 16 Minn. 426, (Gil. 383.)

See Butler v. White, 25 Minn. 432, 441; Gowan v Fountain, cited in note to § 5448.

§ 5445. When returnable—Renewals.

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; (but the judgment creditor or his attorney may, at any time within said sixty days, demand the money received and collected by said sheriff upon execution in his hands, and the sheriff shall immediately pay the same over to said judgment creditor, or his said attorney, after deducting his proper fees thereon.) 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 sixty days from the date hereof, at the 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.

(G. S. 1866, c. 66, § 265, as amended 1871, c. 61, § 1; G. S. 1878, c. 66, § 296; 1881, Ex. S. c. 4, § 1.)

Where a levy has been made before the return-day of the execution, it may be completed by a sale after such day. This section does not change the rule. Barrett v. McKenzie, 24 Minn. 20; Knox v. Randall, 24 Minn 479; Spencer v. Haug, 45 Minn. 231, 233, 47 N. W. Rep. 294.

An *alias* execution may properly be issued notwithstanding this provision. Walter v. Greenwood, 29 Minn. 87, 12 N. W. Rep. 145.

§ 5446. Judgments, how enforced in different cases.

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.

(G. S. 1866, c. 66, § 266; G. S. 1878, c. 66, § 297.)

§ 5447. Execution 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.

(G. S. 1866, c. 66, § 267; G. S. 1878, c. 66, § 298.)

The judgment debtor having died after the judgment had been docketed, the creditor may enforce the judgment by a sale of real estate on execution after the year, although he had presented his judgment for payment in the probate court, and it had been allowed. Fowler v. Mickley, 39 Minn. 28, 38 N. W. Rep. 634.

§ 5448. To what officer issued—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.

(G. S. 1866, c. 66, § 268; G. S. 1878, c. 66, § 299.)

Where the county in which a judgment debtor resides is attached to another for judicial purposes, under section 33, c. 64, Gen. St., the execution may, for the purpose of supplementary proceedings, be issued to the latter county. See § 4943. Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)

An execution issued to a county other than that in which the judgment was rendered is valid, though taken from the clerk's office before the judgment is docketed in the county to which it runs, when not delivered to the sheriff for service until afterwards. Gowan v. Fountain, 50 Minn. 264, 52 N. W. Rep. 862.

§ 5449. What may be levied on and sold—Lien of execution.

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 judgment debtor, 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.

(G. S. 1866, c. 66, § 269, as amended 1875, c. 62, § 1; G. S. 1878, c. 66, § 300.)

It is the duty of the sheriff to execute writs of execution against the same debtor, in the order in which they come into his hands. But the liens of the respective creditors upon property not subject to the lien of the judgments take precedence according to the order in which the executions are actually levied upon it, and not in the order in which they are delivered to the sheriff. Albrecht v. Long, 25 Minn. 163.

If, under this section, a judgment can be levied upon and sold, upon execution, the sale can only be made "if the court so order," as provided in section 284. Thompson v. Sutten, 23 Minn. 50.

A mortgage, never recorded, and not accompanied by any evidence of personal liability, and which has been lost, cannot be levied upon. Gale v. Battin, 16 Minn. 148, (Gil. 133.) Nor can such a mortgage be enforced by an action in the nature of a creditors' bill. Id.

Where the purchaser of personal property gave to the seller his note for the price, the seller indorsed it to another, and he recovered judgment upon it against the maker and indorser, (the purchaser and seller,) the debt for the purchase money is merged in the judgment; and, the seller having paid the judgment, an action by him against the purchaser to recover the money so paid is not an action for the purchase money of the property within the meaning of the exemption laws. Harley v. Davis, 16 Minn. 487, (Gil. 441.)

See Hutchins v. Carver County, 16 Minn. 13, (Gil. 1, 6.)

A judgment for the recovery of money is subject to levy, and the sheriff may enforce payment, though the debtor has voluntarily paid the judgment creditor subsequent to notice and levy; and, if the judgment has been satisfied on such payment, the sheriff may, on motion, have the satisfaction canceled, and may have execution issued. Henry v. Traynor, 42 Minn. 234, 44 N. W. Rep. 11.

The fact that the property of a judgment debtor is in the hands of a receiver does not prevent a levy on the judgment. Wheaton v. Spooner, 52 Minn. 417, 54 N. W. Rep. 372.

The interest of a vendee under a contract for the sale of land, under which he has entered and made improvements, and paid part of the purchase money, is subject to levy. Reynolds v. Fleming, 43 Minn. 513, 45 N. W. Rep. 1099.

Equitable, as well as legal, estates are subject to execution. Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. Rep. 187.

§ 5450. Levy on property subject to lien of judgment—Release.

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.

(G. S. 1866, c. 66, § 270, as amended 1871, c. 62, § 1; G. S. 1878, c. 66, § 301.)

A formal levy on real estate is not essential to its valid sale on execution. The statute gives the minuting by an officer, upon the execution, of the time when delivered to him, and that he then levied upon the real estate subject to the lien of the judgment, the effect of a formal levy, but does not make such minuting essential to the validity of an execution sale of such property. Hutchins v. Commissioners Carver County, 16 Minn. 13, (Gil. 1.)

See State v. Penner, 27 Minn. 269, 276, 6 N. W. Rep. 790; Duford v. Lewis, 43 Minn. 26, 27, 44 N. W. Rep. 522; Spencer v. Haug, 45 Minn. 231, 234, 47 N. W. Rep. 794.

§ 5451. Levy on personal property.

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

(G. S. 1866, c. 66, § 271; G. S. 1878, c. 66, § 302.)

The interest of a pledgeor of a promissory note, in the note, is subject to levy and sale under execution, if the pledgee consent to surrender possession to the sheriff. The maker cannot object that the pledgee need not have parted with the note. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

It is not enough to take merely. He must take into his custody,—that is to say, into his keeping; or, in other words, he must keep as well as take. This requires at least such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn or taken by another without his knowing it. Wilson v. Powers, 21 Minn. 193.

Book-accounts cannot be levied upon by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence, and must be levied on in the same way. Swart v. Thomas, 26 Minn. 141, 1 N. W. Rep. 830.

§ 5452. Levy on bulky articles.

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 or recorder of the city, village, 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.

(G. S. 1866, c. 66, § 272; G. S. 1878, c. 66, § 303; as amended 1881, c. 63, § 2.)

Where property of a bulky character, incapable of immediate manual delivery, is assumed to be sold by an officer, pursuant to levy thereon under legal process, against the protest of the owner, as the property of another, to a purchaser who is left to take possession for himself, the owner is not remitted to contest the title with the purchaser, but may acquiesce in the sale for the sake of the remedy against the officer, and hold him for a conversion. Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. Rep. 781.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

§ 5453. Same—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.

(G. S. 1866, c. 66, § 273; G. S. 1878, c. 66, § 304.)

§ 5454. 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.

(G. S. 1866, c. 66, § 274; G. S. 1878, c. 66, § 305.)

If the maker of a pledged note pay it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

A judgment may be levied on without the service of a copy of the execution on the clerk. Wheaton v. Spooner, 52 Minn. 417, 54 N. W. Rep. 372.

See Ide v. Harwood, 30 Minn. 191, 14 N. W. Rep. 884.

§ 5455. Service on judgment debtor.

The officer shall, at or before the time of posting of notices of sale, serve a copy of the execution and inventory, certified by him, upon the judgment debtor, 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 judgment debtor, with some person of suitable age and discretion then resident therein.

(G. S. 1866, c. 66, § 275, as amended 1875, c. 63, § 1; G. S. 1878, c. 66, § 306; 1879, c. 22, § 1.)

Where a sheriff collected, upon execution, money due upon an exempt judgment, and applied it on an execution against the judgment creditor in his hands, without any notice to such creditor, held, that no demand on the sheriff was necessary before suit to recover the money. Wylie v Grundysen, 51 Minn. 360, 53 N. W. Rep. 805.

See Duford v. Lewis, 43 Minn. 26, 44 N. W. Rep. 522.

§ 5456. Inventory and return.

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

(G. S. 1866, c. 66, § 276; G. S. 1878, c. 66, § 307.)

A return of the sheriff upon an execution, that he "levied upon" property, without stating the particular facts constituting a levy, is sufficient. Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

§ 5457. Levy on coin or other money.

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.

(G. S. 1866, c. 66, § 277; G. S. 1878, c. 66, § 308.)

§ 5458. Levy on pledged or mortgaged chattels.

When goods or chattels are pledged or mortgaged 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 or mortgage may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant or judgment debtor, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge or mortgage.

(G. S. 1866, c. 66, § 278; G. S. 1878, c. 66, § 309; as amended 1883, c. 60, § 1.)

An officer levying for the purposes of a sale under this section, after default, but before possession by the mortgagee, may take the chattels into his custody. Barber v. Amundson, 52 Minn. 358, 54 N. W. Rep. 733.

§ 5459. 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; also all moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire. (*As amended* 1878, *c.* 12, § 1.)

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, including articles or goods manufactured in whole or in part by him, 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. In addition to the articles enumerated in this section, all the presses, stones, type, cases, and other tools and implements used by any copartnership, or by any printer, publisher, or editor of any newspaper, and in the printing or publication of the same, whether used personally by said copartnership, or by any such printer, publisher, or editor, or by any persons hired by him to use them, not to exceed in value the sum of two thousand dollars, together with stock in trade not exceeding four hundred dollars in value, shall be exempt from attachment or sale on any final process, issued from any court in this state. (*As amended* 1876, *c.* 43, § 1; 1881, *c.* 25, § 1.)

Ninth. One sewing-machine. (1868, *c.* 72, § 1.)

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, and binding material sufficient for use in harvesting the crop raised from the seed grain above specified. (1871, *c.* 65, § 1, *as amended* 1885, *c.* 34.)

*Eleventh.** The wages of any laboring man or woman, or of his or her minor children, in any sum not exceeding twenty 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. (*As amended* 1879, *c.* 5, § 1.)

Provided, however, that the exemptions provided for and embraced in sub-

*See § 5314.

divisions six, seven, eight, nine, ten, and eleven of section two hundred and seventy-nine, shall extend only to debtors having an actual residence in this state. (1872, c. 71, § 1, as amended 1873, c. 69, § 1; 1875, c. 64, § 1.)

(G. S. 1866, c. 66, § 279; G. S. 1878, c. 66, § 310; amended as supra.)

See, as to exemptions from garnishment, § 5313; exemption of ladders and fire buckets, § 1224, subd. 10. See, also, § 1416.

An absconding debtor who has departed the state without any intention of returning, and becomes a resident of another jurisdiction, cannot avail himself of the benefits of our exemption laws in respect to personal property left behind him, and subsequently seized and sold upon execution. Orr v. Box, 22 Minn. 485.

As to a married woman's right of exemption, see Curtis v. McHugh, (Mich.) 12 N. W. Rep. 163.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63; Lynd v. Picket, 7 Minn. 184, (Gil. 128, 132.)

SUBD. 5. A silver watch and chain, though worn by a debtor, are not exempt from execution under this section, as an article of wearing apparel, nor "as household furniture," though he may have no other time-piece, and such watch is used to keep the time at his house. Rothschild v. Boelter, 18 Minn. 361, (Gil. 331.) Defendant, a cigar-maker, used a watch worn by him to keep the time of his workmen employed in the business. Held, that it was not exempt as an instrument used and kept for the purpose of carrying on his trade. Id.

A judgment recovered for the value of personal property, exempt from execution, converted by the judgment debtor, by a levy upon and sale of it, is not itself exempt, and may be set off against a judgment held by the judgment debtor against the judgment creditor in it. Temple v. Scott, 3 Minn. 419, (Gil. 306.)

A chattel mortgage upon exempt personal property, executed by a married man, a housekeeper, to secure the purchase money, given pursuant to the agreement upon which the property was purchased, is valid without the wife's signature. Barker v. Kelderhouse, 8 Minn. 207, (Gil. 178.)

SUBD. 6. A pair of two-year-old steers, "fit to be used for light work," held exempt as "a yoke of oxen," although not yet broken. Berg v. Baldwin, 31 Minn. 541, 18 N. W. Rep. 821.

A buggy may be exempt. Allen v. Coates, 29 Minn. 46, 11 N. W. Rep. 132.

A light, two-seated vehicle used by the debtor may be exempt. Kimball v. Jones, 41 Minn. 318, 43 N. W. Rep. 74.

Whether a race horse is exempt. Anderson v. Ege, 44 Minn. 216, 46 N. W. Rep. 362.

SUBD. 8. This provision was intended to include only persons, to the exercise of whose trade or business tools or implements are necessary. The stock in trade of a merchant is not exempt under the second clause. Grimes v. Bryne, 2 Minn. 89, (Gil. 72.)

There is no exemption as to partnership goods: Prosser v. Hartley, 35 Minn. 340, 29 N. W. Rep. 156. Tools, to be exempt, must be held for the purpose of carrying on trade. Id. And the owner of a "stock in trade," in order that it may be exempt, must be engaged or about to engage in business in which such stock is or is to be used. Id.

Unfinished burial cases and caskets, upon which additional labor, expense, and material must be put before they can be deemed finished, or fit for sale and use, when owned and held by a manufacturer for the purpose of being so finished and made fit for use by him, constitute, in part, his "stock in trade," within the meaning of this subdivision, and they are exempt from sale on execution within the limits prescribed as to value. McAbe v. Thompson, 27 Minn. 134, 6 N. W. Rep. 479.

Articles composing the stock of a milliner, and kept indiscriminately for sale or for manufacture, are not exempt; but articles manufactured, in whole or in part, not exceeding $400 in value, though placed on sale with unexempt property, are exempt. Hillyer v. Remore, 42 Minn. 254, 44 N. W. Rep. 116.

A tailor may be entitled to the exemption of two sewing machines, if kept and personally used, and reasonably necessary, for the purposes of his trade. Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. Rep. 857.

SUBD. 9. See Cronfeldt v. Arrol, supra.

SUBD. 11. Whether one is "a laboring man or woman" is a question of law. Wildner v. Ferguson, 42 Minn. 112, 43 N. W. Rep. 794.

Only those whose work is manual are within this subdivision. Id.

As to the exemption of wages under Laws 1889, c. 204 (§ 5314). Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. Rep. 396.

§ 5460. 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.

(G. S. 1866, c. 66, § 280; G. S. 1878, c. 66, § 311.)

This section is constitutional. Rogers v. Brackett, 34 Minn. 279, 25 N. W. Rep. 601.

An action by the vendor of personal property upon the vendee's note, received in full payment and satisfaction of the price of the property, is an action for the "purchase money" of the property, within the meaning of this section. Rogers v. Brackett, 34 Minn. 279, 25 N. W. Rep. 601.

The fact that the action is for purchase money is enough to make this section applicable, without any statement thereof in the complaint, judgment, or execution. Id.

This section is not unconstitutional as class legislation, or as discriminating between different kinds of liabilities as respects the exemption of property from legal process. Id.

D. sold H. a cook-stove and fixtures, taking H.'s note therefor, which he sold to F., who recovered judgment against the maker and indorser. D., having paid the judgment, brought suit against H. for the amount, attaching the property originally sold, which was the only cook-stove and fixtures H. had. *Held*, that H.'s original indebtedness for purchase money, as well as his contract as maker of the note given therefor, was merged in F.'s judgment, and the action brought by D. against H. could not be regarded as for purchase money, so as to render the stove and fixtures liable to attachment under this section. Harley v. Davis, 16 Minn. 487, (Gil. 441.)

Any property authorized to be acquired and held as a homestead, under Gen. St. c. 68, § 1, (see § 5521,) and held and occupied as such, is protected against any mortgage, except for the purchase money, given by the owner, if a married man, without the signature of his wife. Smith v. Lacor, 23 Minn. 454. A debt incurred for lumber to build a dwelling-house on a lot held under a contract of purchase, and claimed and occupied as a homestead, represents no part of the purchase money of such homestead. Id. One who furnishes materials for erecting or repairing a house on homestead property is not entitled to a lien. Cogel v. Mickow, 11 Minn. 475, (Gil. 354.) Followed, Coleman v. Ballandi, 22 Minn. 144.

A judgment recovered for the value of exempt property wrongfully taken and sold on execution is not itself exempt, and may be set off against a judgment held by the judgment debtor therein against the judgment creditor. Temple v. Scott, 3 Minn. 419, (Gil. 306.)

§ 5461. Earnings of minor children exempt, when.

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 contracted for the especial benefit of such minor child.

(1867, c. 80, § 1; G. S. 1878, c. 66, § 312.)

See § 5314.

§ 5462. Judgment for taking exempt property, exempt.

Whenever any personal property, exempt as aforesaid, is levied upon, seized or sold by virtue of any execution, or wrongfully and unlawfully taken or detained by any person, the damages sustained by the owner thereof, by reason of such levy, seizure or sale, or such unlawful detention or taking, and any judgment recovered therefor, shall be exempt from attachment, execution, or other proceeding whereby any creditor of such owner seeks to apply the same to the payment of his debts.

(G. S. 1866, c. 66, § 281, as amended 1877, c. 30, § 1; G. S. 1878, c. 66, § 313.)

Where a building appurtenant to exempt realty is wrongfully severed therefrom, a judgment recovered for the value thereof is exempt. Wylie v. Grundysen, 51 Minn. 360, 53 N. W. Rep. 805.

See Henry v. Traynor, 42 Minn. 234, 236, 44 N. W. Rep. 11.

§ 5463. Levy on property in excess of exemption allowed —Proceedings.

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.

(G. S. 1866, c. 66, § 282; G. S. 1878, c. 66, § 314.)

This section has no application where all the property of the debtor of a kind which is exempted, with a limit as to quantity, but without a limit as to value, does not exceed the quantity which the statute exempts. Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

The owner of a horse levied on may select it as exempt without bringing his other horses from another county for the sheriff to levy on. Anderson v. Ege, 44 Minn. 216, 46 N. W. Rep. 362.

§ 5464. Levy on growing crops—Sale, when to be made.

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.

(G. S. 1866, c. 66, § 283, as amended 1871, c. 63, § 1; G. S. 1878, c. 66, § 315.)

Growing grain may be levied on at any period of its growth, whether the growth is going on below or above the surface of the soil. Gillitt v. Truax, 27 Minn. 528, 8 N. W. Rep. 767.

Blackberries, while growing on the bushes, are not subject to levy as personal property. Sparrow v. Pond, 49 Minn. 412, 52 N. W. Rep. 36.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

§ 5465. Sale of property levied on—Collection of debts—Payment to plaintiff.

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.

(G. S. 1866, c. 66, § 284; G. S. 1878, c. 66, § 316.)

A judgment is a thing in action, and, if it can be levied upon at all, can, under this section, be sold only when the court so orders. Thompson v. Sutton, 23 Minn. 50.

As to the rights of a sheriff levying on the unpaid subscriptions of a stockholder in a corporation, see Robertson v. Sibley, 10 Minn. 323, (Gil. 253.)

§ 5466. Notice of sale.

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

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

Second.—When real property is sold upon judgment, decree or execution, a similar notice describing the property with sufficient certainty to enable a person of common understanding to identify it, shall be posted for six weeks successively in three public places of the county where the property or some part thereof is situated, and a copy thereof shall be published once a week for the same period in a newspaper 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 capital of the state.

(G. S. 1866, c. 66, § 285, as amended 1867, c. 68, § 2; G. S. 1878, c. 66, § 317.)

Upon a sale of real estate upon execution the description of the premises contained in the notice of sale and certificate of sale was "lot 5, block 39," without stating in what village or city. Held, that it was too imperfect and incomplete to identify the property which was the subject of the sale. Herrick v. Ammerman, 32 Minn. 545, 21 N. W. Rep. 836.

See Dartnell v. Davidson, 16 Minn. 530 (Gil. 477, 480); Duford v. Lewis, 43 Minn. 26, 27, 44 N. W. Rep. 522.

§ 5467. 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.

(G. S. 1866, c. 66, § 286; G. S. 1878, c. 66, § 318.)

The provision that certain irregularities of the officer shall not affect the validity of an execution sale do not extend to judgment creditors who purchase under their own judgments. Pettingill v. Moss, 3 Minn. 222, (Gil. 151.)

Under this section, failure to post notices of sale on execution will not affect the validity of the sale. McNair v. Toler, 21 Minn. 175; Bigelow v. Chatterton, 2 C. C. A. 402, 51 Fed. Rep. 614.

§ 5468. 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.

(G. S. 1866, c. 66, § 287; G. S. 1878, c. 66, § 319.)

A sale on execution, in gross, as one parcel, of several distinct, separate, known tracts or parcels of land, not lying in one body, is not void, but it may be vacated for cause shown, as that it was the result of actual fraud, or if the owner or party interested in the land has been prejudiced by it, and there is no just ground for making the sale in that way. Lamberton v. Merchants' Nat. Bank Winona, 24 Minn. 281.

See Duford v. Lewis, 43 Minn. 26, 44 N. W. Rep. 522.

§ 5469. Sale of real estate, when absolute.

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.

(G. S. 1866, c. 66, § 288; G. S. 1878, c. 66, § 320.)

See Thompson v. First Div. St. P. & P. R. Co., 26 Minn. 353, 356, 4 N. W. Rep. 603.

§ 5470. Sale of real property—Certificate and its contents.

Whenever any sale of real property is made upon any execution, or pursuant to any judgment, decree or order of a court, (except when 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 the 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, and shall be prima facie evidence of the facts therein stated:

Certificates on sales heretofore made.

And in case of any such sale heretofore made, upon which no certificate has been made or delivered by the officer, such officer or his successor in office may make and deliver to the purchaser such certificate, at any time within six months after the passage of this act; and any certificate upon any such sale heretofore made, whether such certificate has heretofore been or shall hereafter be made and delivered by such officer, may hereafter be recorded with

like force and effect as if recorded within the time originally provided therefor.

(G. S. 1866, c. 66, § 289, as amended 1876, c. 45, § 1; 1877, c. 31, § 1; Id. c. 32, § 1; G. S. 1878, c. 66, § 321.)

When a sale on execution is regularly made, its validity is not affected by the omission of the sheriff to make or file a certificate of sale. Barnes v. Kerlinger, 7 Minn. 82, (Gil. 55.)

A description in a certificate of sale of the execution upon which the sale is made, which fairly identifies the execution, is sufficient. A false particular in such description may be disregarded, as in case of deeds and other instruments. Bartleson v. Thompson, 30 Minn. 161, 14 N. W. Rep. 795.

As to the purchaser, the certificate of sale is the highest evidence of what was done, and he cannot be prejudiced by an erroneous return, or by a failure to make any return. Spencer v. Haug, 45 Minn. 231, 47 N. W. Rep. 794.

See Whitney v. Huntington, 34 Minn. 458, 460, 26 N. W. Rep. 631; Duford v. Spencer, 43 Minn. 26, 27, 44 N. W. Rep. 522.

§ 5471. 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

(G. S. 1866, c. 66, § 290; G. S. 1878, c. 66, § 322.)

A sale of real estate on execution passes at once to the purchaser all the title of the execution debtor, subject to be defeated by redemption. The title so acquired will pass by quitclaim deed of the purchaser. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.) Followed in Curriden v. St. Paul & N. P. Ry. Co., 50 Minn. 454, 52 N. W. Rep. 966.

The right, during the time for redemption, acquired by the purchaser at an execution sale, will pass by his deed whereby he "grants, bargains, sells, releases, and quitclaims all right, title, interest, claim, or demand" in or to the land; and when the time to redeem expires without redemption, the title under the execution sale will vest in the grantee in the deed. Lindley v. Crombie, 31 Minn. 232, 17 N. W. Rep. 372.

The sale is not void because the specific interest of the judgment debtor in the land is not designated. Reynolds v. Fleming, 43 Minn. 513, 45 N. W. Rep. 1099.

See Whitney v. Huntington, 34 Minn. 458, 460, 26 N. W. Rep. 636; Abraham v. Holloway, 41 Minn. 156, 159, 42 N. W. Rep. 867; Dayton v. Corser, 51 Minn. 406, 53 N. W. Rep. 717.

§ 5472. Redemption of real estate sold—By whom.

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.

(G. S. 1866, c. 66, § 291; G. S. 1878, c. 66, § 323.)

One redeeming from an execution sale is a purchaser for value. Ahern v. Freeman, 46 Minn. 156, 48 N. W. Rep. 677.

SUBD. 1. The owner of real estate sold on execution may redeem, without paying other liens that may be held by the purchaser. Warren v. Fish, 7 Minn. 432, (Gil. 347.)

A redemption by the owner terminates the sale, and restores the estate to its condition before the sale, except as to the judgment under which the sale was made. Id.

SUBD. 2. A creditor of an estate gets no lien upon the real estate of the deceased, so as to be entitled to redeem from foreclosure of a mortgage executed by him in his life-time, merely by the allowance of such creditor's claim against the estate. Whitney v. Burd, 29 Minn. 203, 12 N. W. Rep. 530.

When, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. Tinkcom v. Lewis, 21 Minn. 132. The rule is the same when such junior mortgagee has foreclosed his mortgage by advertisement, and has purchased, at the foreclosure sale, the parcel embraced in his mortgage. Id.

Rule in Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. Rep. 868, that a creditor redeeming need not pay liens held by the purchaser at an execution or mortgage sale subsequent to that on which the sale was had, and prior to that under which he redeems, if such purchaser has not, with respect to such subsequent liens, placed himself in the line of redemption by complying with the statute, followed and applied. Parke v. Hush, 29 Minn. 434, 13 N. W. Rep. 668.

A judgment recovered against a corporation under §§ 5897, 5898, does not entitle the

judgment creditor to redeem real estate sold by the receiver under order of the court. Watkins v. Minnesota Thresher Manuf'g Co., 41 Minn. 150, 42 N. W. Rep. 862.

One who has brought suit on a contract for the payment of money only, and who has attached the real estate of the defendant, is "a creditor having a lien." Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. Rep. 187.

A sale under a second lien, whether before or after a sale under a first lien, unless it is cut off by the first sale, or is redeemed from, cuts off all subsequent liens. Lowry v. Akers, 50 Minn. 508, 52 N. W. Rep. 922.

While there are rights of redemption outstanding, the lien upon which a redemption is made is not merged in the title of the purchaser at the sale redeemed from, but it passes, by subrogation, to any subsequent redemptioner. Id.

§ 5473. Same—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.

(G. S. 1866, c. 66, § 292; G. S. 1878, c. 66, § 324.)

The purchaser may waive his rights in respect to the time. Tice v. Russell, 43 Minn. 66, 44 N. W. Rep. 886.

Where a judgment creditor redeemed a day earlier than he was entitled to, and the holder of a prior judgment did not attempt to redeem, and the person for whom the redemption was made acquiesced, the redemption was valid. Sprandel v. Houde, 54 Minn. 308, 56 N. W. Rep. 34.

See Parke v. Hush, 29 Minn. 434, 436, 13 N. W. Rep. 668.

§ 5474. 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.

(G. S. 1866, c. 66, § 293; G. S. 1878, c. 66, § 325.)

When a lien-holding creditor seeking to redeem from a foreclosure sale produces to the sheriff the original instrument evidencing his lien, with the certificate of record indorsed thereon, this is a sufficient compliance with the statute which requires the production of a certified copy of such instrument. Tinkcom v. Lewis, 21 Minn. 132.

A party who redeems and files with the sheriff the papers required by the statute need not give any other notice of his redemption. Warren v. Fish, 7 Minn. 432, (Gil. 347.)

See Whitney v. Burd, 29 Minn. 203, 204, 12 N. W. Rep. 530; Atwater v. Manchester Savings Bank, 45 Minn. 341, 348, 48 N. W. Rep. 187.

§ 5475. Certificate of redemption—Its contents.

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 approved 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.

(G. S. 1866, c. 66, § 294; G. S. 1878, c. 66, § 326.)

See Abraham v. Holloway, 41 Minn. 156, 160, 42 N. W. Rep. 867.

§ 5476. 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.

(G. S. 1866, c. 66, § 295; G. S. 1878, c. 66, § 327.)

§ 5477. 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.

(G. S. 1866, c. 66, § 296; G. S. 1878, c. 66, § 328.)

See Whitney v. Huntington, cited in note to § 5425.

§ 5478. Proceedings where sale is irregular or judgment reversed.

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 as an incumbrancer where title or incumbrance has accrued before a levy on such new execution.

(G. S. 1866, c. 66, § 297, as amended 1868, c. 82, § 1; G. S. 1878, c. 66, § 329.)

§ 5479. Joint debtors and sureties—Contribution and subrogation.

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.

(G. S. 1866, c. 66, § 298; G. S. 1878, c. 66, § 330.)

One debtor in a joint judgment, who pays more than his share, and files the notice required by this section, is at once subrogated to the right of the judgment creditor, and may have execution to enforce contribution. He need not wait till a levy on his property before paying the judgment. Aukeny v. Moffett, 37 Minn. 109, 33 N. W. Rep. 320.

§ 5480. Stay, for how long—Bond to be filed.

Execution upon any judgment, rendered for the recovery of money only, in any district court of this state, may be stayed for the period of six months: provided, that, in order to obtain such stay, the party applying therefor shall, within ten days after judgment is rendered and docketed, file a bond, with two or more responsible freeholders of this state as sureties, with the clerk of the court in which said judgment was rendered, in double the amount of the judgment and costs, which bond shall first be approved by the judge of said court, or the court commissioner of such county, conditioned that the judgment debtor will pay the amount of such judgment, interest and costs, within the time for which said stay is granted, and for the authorizing and empowering the issuing of an execution for such amount against the judgment debtor and sureties, upon default of such payment: provided, that the interest to be allowed shall be at the rate of twelve per cent. per annum on the amount of the judgment, including the costs.

(1877, c. 76, § 1;[11] G. S. 1878, c. 66, § 331.)

§ 5481. Execution against debtor and sureties.

If the judgment, interest and costs be not paid at the expiration of the time for which the same may have been stayed, the judgment creditor may have execution issued against the judgment debtor and his sureties, for the amount of such judgment, costs and interest as aforesaid.

(1877, c. 76, § 2; G. S. 1878, c. 66, § 332.)

§ 5482. Justification of sureties.

Each surety must justify, by affidavit, that he is a resident and freeholder of this state, and worth the amount specified in the undertaking, above his debts and liabilities, and exclusive of his property exempt from execution.

(1877, c. 76, § 3; G. S. 1878, c. 66, § 333.)

§ 5483. Obligee in bond—Service on creditor—Exceptions to bond—Proceedings.

The bond herein prescribed shall run to the judgment creditor, his executors, administrators or assigns, a copy of which shall be served on the judgment creditor, his agent or attorney, if resident of the county wherein the judgment was rendered, within ten days from such rendition; and the judgment creditor may except to the bond or the sufficiency of the sureties, and upon notice, or by order to show cause, the court may, in its discretion, order the execution to issue at once, notwithstanding such bond, unless the judgment debtor give such further bond and sureties as shall be deemed sufficient by the court; and the court may require the proposed sureties to justify orally, if required by the judgment creditor; and for cause shown, the court may require a still further bond and sureties at any time, and, in default thereof, may order execution to issue.

(1877, c. 76, § 4; G. S. 1878, c. 66, § 334.)

§ 5484. Duty of officer returning execution against sureties.

Every officer to whom an execution shall issue against sureties, as provided in the preceding sections, shall certify, in his return thereon, whether the same,

[11] An act providing for a stay of execution on judgments rendered in the district courts of this state, for the recovery of money only. Approved February 24, 1877 (Laws 1877, c. 76).

and what amount, if any, was collected from the sureties, and the true date of such collection.

(1877, c. 76, § 5; G. S. 1878, c. 66, § 335.)

§ 5485. Stay granted after levy made.

If the stay herein provided shall be granted after an execution shall have issued, or after levy made, then and in that case the levy shall be released, and the execution returned, with the cause of such return thereon noted by the officer.

(1877, c. 76, § 6; G. S. 1878, c. 66, § 336.)

TITLE 24.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 5486. Order for examination of judgment debtor.

When an execution against property of the judgment debtor or of any of several judgment debtors in the same judgment is issued to the sheriff of the county where said judgment debtor 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 the judge of the district court of the judicial district where the debtor resides, or, if the debtor is not a resident of the state, then from the judge of the judicial district where the judgment roll or a transcript of a justice's judgment is filed, requiring said judgment debtor, or, if a corporation, any officer thereof, to appear and answer concerning his or its property before the judge of the district in which such judgment debtor resides, or where such corporation has an officer, or, if the judgment debtor is a non-resident of the state, then before the judge of the district in which said judgment roll or transcript of a justice's judgment is filed or before a referee appointed by such judge at a time and place specified in said order; Provided, That if the judgment debtor or other person required to attend and be examined, as prescribed in this title, or officer of a corporation required to attend in its behalf, is at the time of the service of the order upon him a resident of the state or then has an office within the state for the regular transaction of business in person, he cannot be compelled to attend pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

(G. S. 1866, c. 66, § 299; G. S. 1878, c. 66, § 337; as amended 1889, c. 106, § 1; 1891, c. 120, § 1.)

A judgment creditor, upon the return unsatisfied in whole or in part of an execution issued to the proper county, is, without any other fact, entitled to an order requiring the debtor to appear and answer concerning his property. Kay v. Vischers, 9 Minn. 270, (Gil. 254.)

Where the county in which a judgment debtor resides is attached to another for judicial purposes, under § 33, c. 64, G. S., (§ 4943), the execution may, for the purpose of supplementary proceedings, be issued to the latter company. Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)

See Knight v. Nash, 22 Minn. 452, 453.

§ 5487. 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.

(G. S. 1866, c. 66, § 300; G. S. 1878, c. 66, § 338.)

§ 5488. Persons indebted to judgment debtor may pay sheriff.

After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, 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.

(G. S. 1866, c. 66, § 301; G. S. 1878, c. 66, § 339.)

§ 5489. Witnesses—Appeals.

Witnesses may be required to appear and testify on any proceedings under this title in the same manner and subject to the rules governing the trial of actions, and such debtors may be represented by counsel. An appeal may be taken to the supreme court by any aggrieved party in such proceedings from any order or judgment made or rendered in the proceedings under said title and chapter.

(G. S. 1866, c. 66, § 302; G. S. 1878, c. 66, § 340; as amended 1889, c. 106, § 2.)

§ 5490. Reference—Examination to be under 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.

(G. S. 1866, c. 66, § 303; G. S. 1878, c. 66, § 341.)

§ 5491. Order for application of property to pay judgment —Exemption.

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, cannot 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.

(G. S. 1866, c. 66, § 304; G. S. 1878, c. 66, § 342.)

The scope and purpose of the proceedings is the discovery of the debtor's property, both that which is liable to execution, and equitable interests belonging to him not so liable; and to compel the application of both, if not exempt, to the satisfaction of the judgment. Flint v. Webb, 25 Minn. 263.

An order, upon disclosure, directing the payment of money, is appealable. Christensen v. Tostevin, 51 Minn. 230, 53 N. W. Rep. 461.

See Towne v. Campbell, 35 Minn. 231, 28 N. W. Rep. 254; Knight v. Nash, 22 Minn. 452, 455.

§ 5492. Appointment of receiver—Transfers.

The judge may in accordance with and subject to the rules of courts of equity, 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 until his further order therein.

(G. S. 1866, c. 66, § 305; G. S. 1878, c. 66, § 343; as amended 1889, c. 106, § 3.)

The appointment of a receiver in such proceedings is a matter resting in the sound discretion of the court before whom they are instituted. Flint v. Webb, 25 Minn. 263.

A receiver may be appointed though the only property disclosed is an interest in real estate situate in another state, and the debtor may be required to convey such interest to the receiver. Towne v. Campbell, 35 Minn. 231, 28 N. W. Rep. 254.

An order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor, and appointing a receiver to collect the same, is an appealable order under G. S. c. 86, § 8. See § 6149. Knight v. Nash, 22 Minn. 453.

The receiver may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor, although there has been no transfer of the property in question to the receiver. Dunham v. Byrnes, 36 Minn. 106, 30 N. W. Rep. 402.

An assignment under the insolvent law by the debtor, subsequent to supplemen-

tary proceedings, is no bar to the appointment of a receiver. Tomlinson & Webster Manuf'g Co. v. Shatto, 34 Fed. Rep. 380.

See Benbow v. Kellom, 52 Minn. 433, 54 N. W. Rep. 482.

§ 5493. Proceedings in case of adverse claimants of property, etc.

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.

(G. S. 1866, c. 66, § 306; G. S. 1878, c. 66, § 344.)

A debt due from a municipal corporation to a judgment debtor, even though denied by the corporation, may be reached by a final order upon disclosure, directing the transfer of the claim, and appointing a receiver to collect it for the benefit of the creditor. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to an order of this character. Knight v. Nash, 22 Minn. 453.

§ 5494. Disobedience of order 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.

(G. S. 1866, c. 66, § 307; G. S. 1878, c. 66, § 345.)

See State v. Becht, 23 Minn. 411; Towne v. Campbell, 35 Minn. 231, 232, 28 N. W. Rep. 254.

§ 5495. Questions to be answered—Criminating answers.

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.

(G. S. 1866, c. 66, § 308; G. S. 1878, c. 66, § 346.)

§ 5496. Debtor of judgment debtor may be examined.

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 an 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.

(1867, c. 61, § 1; G. S. 1878, c. 66, § 347.)

See Menage v. Lustfield, 30 Minn. 487, 16 N. W. Rep. 398.