REVISED LAWS OF MINNESOTA 94

SUPPLEMENT 1909

CONTAINING

THE AMENDMENTS TO THE REVISED LAWS, AND OTHER LAWS OF A GENERAL AND PERMANENT NATURE, ENACTED BY THE LEGISLATURE IN 1905, 1907, AND 1909

WITH HISTORICAL AND EXPLANATORY NOTES TO PRIOR STATUTES AND FULL AND COMPLETE NOTES OF ALL APPLICABLE DECISIONS

COMPILED AND ANNOTATED BY
FRANCIS B. TIFFANY

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or refuse to make immediate payment for all the expenses of such removal from said premises and plaintiff shall have the right to enforce such lien by detaining the same until paid, and in case of nonpayment for sixty days after the execution of the writ, shall have the right to enforce his lien and foreclose the same by public sale as provided for in case of sales under chapter 328 of the general laws of 1905. (R. L. c. 76, as amended by Laws 1909, c. 496, § 5.)

Historical.—R. L. 1905, c. 76, was amended, by adding thereto a new section, by "An act to amend sections 4041, 4046, 4047 and 4048 of the Revised Laws of Minnesota, 1905, relating to forcible entry and unlawful detainer, and to add thereto a new section to be known as section 4051½." Approved April 24, 1909.

CHAPTER 77.

CIVIL ACTIONS.

PARTIES.

4053. Real party in interest to sue—When one may sue or defend for all.

Common interest.—Mandamus, brought by a legal voter, on behalf of himself and all other legal voters in the county, was authorized by this section. Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

4057. Infants and insane persons—Guardians ad litem.

Pleading appointment.—The complaint sufficiently alleged that the guardian had been duly appointed by the proper court. Patterson v. Melchior, 102 Minn. 363, 113 N. W. 902.

See note under section 3838.

4059. Parent or guardian may sue for seduction.

Action by female.—Except where there are confidential relations or peculiar circumstances, no right of action exists by a woman for seduction against the offender. Welsund v. Schueller, 98 Minn. 475, 108 N. W. 483.

4060. Parent or guardian may sue for injury to child or ward—Bond—Settlement.—A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of a minor child, and a general guardian may maintain an action for the injury of his ward. Provided, that if no such action is brought by the father or mother, an action for such injury may be maintained by a guardian ad litem, either before or after the death of such parent. Before any such parent shall receive any money or other property in settlement or compromise of any action so brought, or in satisfaction of any judgment obtained therein, such parent shall file a bond as security therefor, in such form and with such sureties as the court shall prescribe and approve; and no settlement or compromise of any such action shall be valid unless the same shall be approved by a judge of the court in which such action is pending. (R. L. § 4060, as amended by Laws 1907, c. 58.)

Cited in Patterson v. Melchior, 102 Minn. 363, 113 N. W. 902.

See note under section 3838.

Settlement prior to amendment of 1907.—It seems that a father might settle the claim of his child. Where a father, mother, and minor son were injured, and suits for damages were commenced by the father and mother, and before trial a settlement was made, it did not conclusively appear that the son's claim was included. Johnson v. Minneapolis & St. L. R. Co., 101 Minn. 396, 112 N. W. 534.

Conceding that under sections 4060 and 4503 settlement without the approval of the court is not void, settlement of an action by the parent, without advice of counsel and without direction of the court, is subject to review. The court does not lose jurisdiction by mere entry of a formal order directing entry of judgment of dismissal. The court was justified in setting aside such order and the stipulation for settlement, and in reinstating the case. The order setting

aside the former order was appealable. Picciano v. Duluth, M. & N. R. Co., 102 Minn. 21, 112 N. W. 885.

4062. Joinder of parties to instrument.

Actions in tort.—Joinder of parties defendant in actions of tort is governed by the common law. Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675.

4064. Action not to abate by death, etc.—Torts.

Application in general.—Where after verdict, plaintiff died, and his mother, as administratrix, was substituted as plaintiff, this section controlled, and section 4503 did not apply. Clay v. Chicago, M. & St. P. R. Co., 104 Minn. 1, 115 N. W. 949.

Motion to dismiss on the ground that the right to maintain the proceedings had passed from plaintiff to a receiver held properly denied; the remedy being by motion for substitution under this section. American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428.

The right of substitution, and the consequent complete elimination of a party to the record, arises only where the whole beneficial interest in the cause of action is assigned pendente lite. Walker v. Sanders, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276.

Assignment—Substitution or intervention.—If by an assignment plaintiff retains any substantial interest, or may become liable to the assignee, intervention, and not substitution, is the proper remedy. Walker v. Sanders, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276.

See note under section 4140.

4068. Actions against partnership, etc.

Service of summons.—Allegations of complaint held to show that defendant trustees were carrying on business as associates under a common name, within this section, providing for service of summons on one or more of such associates. Venner v. Great Northern R. Co., 121 N. W. 212.

[4070—]1. Joinder of connecting carriers.—That whenever any personal property shall be transported by two or more connecting common carriers into or through this state and shall become injured or damaged during transportation, the consignor, consignee or owner thereof, or his assignee, in an action to recover damages for such injury, may join as parties defendant one or more of such connecting common carriers with the last or delivering common carrier. ('07 c. 466 § 1)

Historical.—"An act to regulate procedure and practice in actions against connecting common carriers for loss or damage to shipments of personal property." Approved April 26, 1907.

[4070—]2. Same—Pleading and proof.—In any such action brought in any court of this state against the last or delivering carrier and any one or more connecting common carriers, it shall be sufficient for the plaintiff to allege in his complaint and prove upon the trial of such action, that such personal property was in good order and condition when delivered to the initial carrier, that the same was transported from the initial point of shipment to its destination by two or more connecting common carriers, including the defendants, that it was in whole or in part injured or damaged on arrival at destination, and the general nature and amount of such injury or damage thereto, and such proof shall be prima facie evidence that such injury or damage was caused by the negligence of all the defendants and the amount of loss or damage caused to such property by the negligence of each and every one of the defendants shall be determined by the jury upon the trial of said action from all the evidence in the case, and a verdict rendered accordingly. ('07 c. 466 § 2)

LIMITATION OF ACTIONS.

4071. General rule—Exceptions.

When action accrues.—In determining whether a cause of action is barred, the day on which it accrued is excluded. Nebola v. Minnesota Iron Co., 102 Minn. 89, 112 N. W. 880.

The statute does not begin to run against a breach of covenant of seisin from

the deed's delivery, but from the time the covenantee is compelled to yield to a superior outstanding title. Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 17 L. R. A. (N. S.) 1195, 124 Am. St. Rep. 629.

Cited in Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450.

See note under section 4075.

Waiver.—Where notes more than six years overdue were received in evidence without objection, and the court's attention was not called to the plea of limitation until conclusion of the trial, the defense was waived.—Savage v. Madelia Farmers' Warehouse Co., 98 Minn. 343, 108 N. W. 296.

Laches.—Where one who may proceed in equity for rescission of a contract, or sue at law for damages, adopts the latter course, the equitable doctrine of laches has no application. Such action may be brought at any time within the period fixed by the statute. Neibuhr v. Gage, 99 Minn. 149, 108 N. W. 884, 109 N. W. 1.

4072. Bar applies to state, etc.—Exception.

School and swamp lands.—Title to lands granted to the state for the use of its schools by the United States cannot be acquired by adverse possession, as against the state. Murtaugh v. Chicago, M. & St. P. R. Co., 102 Minn. 52, 112 N. W. 860, 120 Am. St. Rep. 609; Kinney v. Munch, 120 N. W. 374.

Nor can title to the state swamp lands be so acquired. Scofield v. Scheaffer, 104 Minn. 123, 116 N. W. 210.

4073. Recovery of real estate, fifteen years.

Title without possession.—The legal "title" carries with it the right of possession, which is sufficient under this section to authorize an action to recover from one in possession without title. Norton v. Frederick, 119 N. W. 492.

Adverse possession in general.—To constitute title by adverse possession, the possession must be accompanied and characterized by intention to claim title adversely to the true owner. But such intention need not be declared affirmatively, and may be established by circumstantial evidence. Sawbridge v. City of Fergus Falls, 101 Minn. 378, 112 N. W. 385.

Adverse user, which is in its inception permissive and subservient to the title of the true owner, and not hostile or under claim or color of right, is presumed so to continue until the contrary is affirmatively shown, and does not ripen into title, however long it may continue. Omodt v. Chicago, M. & St. P. R. Co., 106 Minn. 205, 118 N. W. 798.

—— **Mistake as to boundary lines.**—Title by adverse possession may be acquired under a claim of title, although the interested parties were mistaken as to the true boundary line. Weeks v. Upton, 99 Minn. 410, 109 N. W. 828.

—— **Between tenants in common.**—Where one tenant in common attempts to convey by warranty deed the whole estate in fee and his grantee records his deed and enters upon the land and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and possession of the co-tenant. Sanford v. Safford, 99 Minn. 380, 109 N. W. 819, 116 Am. St. Rep. 432.

—— **Submerged lands.**—Title by adverse possession may be acquired by the maintenance of a dam across a stream, thereby causing the lands to be submerged for the statutory period. Simons v. Munch, 120 N. W. 373.

—— **Continuity of possession.**—The pendency of a former action by defendant against plaintiff to determine adverse claims to the land, in which she affirmatively alleged in her answer that she was the owner, which action was afterwards dismissed on her motion, plaintiff therein consenting, did not interrupt the continuity of adverse possession of the land by defendant. Holmgren v. Isaackson, 104 Minn. 84, 116 N. W. 205.

Tax sales—Short statutes of limitation.—Short statutes of limitation as to actions to test the validity of tax sales do not apply to actions for the possession of real estate, nor to actions where the party invoking the statute alleges title in himself by virtue of the tax sale and asks the court to determine the question of title upon the merits and adjudge it to be in him, for such a judgment would carry with it as a necessary incident the unquestionable right to the possession of the land. Willard v. Hodapp, 98 Minn. 269, 107 N. W. 954.

4074. Foreclosure of real estate mortgage.

See sections [4074—]1 to [4074—]3, and note under section [4074—]1.

Maturity of debt—Extension of time of payment.—Under Laws 1901, c. 11, where a mortgage was extended, the statute commenced to run from the maturity of the debt, and not from the date of maturity as originally stated in the mortgage. Trudeau v. Germann, 101 Minn. 387, 112 N. W. 281.

[4074—]1. Same.—No action or proceeding to foreclose a real estate mortgage, whether by action or advertisement, or otherwise,

shall be maintained unless commenced within fifteen years from the maturity of the whole of the debt secured by said mortgage, and this limitation shall not be extended by the non-residence of any plaintiff or defendant or any party interested in the land upon which said mortgage is a lien in any action commenced to foreclose such mortgage, nor by reason of any payment made after such maturity, nor by reason of any extension of the time of payment of said mortgage or the debt or obligation thereby secured or any portion thereof, unless such extension shall be in writing and shall have been recorded in the same office in which the original mortgage is recorded, within the limitation period herein provided, or prior to the expiration of any previously recorded extension of such mortgage or debt, nor by reason of any disability of any party interested in said mortgage. ('09 c. 181 § 1)

Historical.—"An act limiting the time within which real estate mortgages may be foreclosed." Approved April 13, 1909.

Section 4 repeals inconsistent acts.

See sections 4074, [4074—] 2, 4457.

Section 5 provides that the act shall take effect November 1, 1909.

[4074—]2. Same—When time begins to run—Commencement of proceedings.—The time within which any such action or proceeding may be commenced shall begin to run from the date of such mortgage, unless the time of the maturity of the debt or obligation secured by such mortgage shall be clearly stated in such mortgage. Any action or proceeding to foreclose a real estate mortgage whether by action, by advertisement or otherwise, commenced within the period of limitation herein provided, may be prosecuted to completion notwithstanding the expiration of said period of limitation, and proceedings to foreclose a real estate mortgage by advertisement shall be deemed commenced on the date of the first publication of the notice of sale. ('09 c. 181 § 2.)

Historical.—The first sentence of this section is substantially the same as Laws 1907, c. 197, § 1, which took effect July 1, 1908, and which is superseded by this act.

Laws 1907, c. 197, cited in Trudeau v. Germann, 101 Minn. 387, 112 N. W. 281.

[4074—]3. Same—Pending actions, etc.—Nothing herein contained shall apply to any action or proceeding now pending. ('09 c. 181 § 3)

4075. Judgments, ten years.

Judgment—Effect of nonresidence.—An action upon a judgment, domestic or foreign, must be brought within 10 years from rendition thereof, without reference to the residence of the judgment debtor during the 10 years. Section 4082 does not modify this section. Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450.

—— **New promise.**—The operation of the statute is not suspended by a new promise. Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435.

See note under section 4086.

4076. Various cases, six years.

Subd. 1.—Cited and applied in E. S. Woodworth & Co. v. Carroll, 104 Minn. 65, 112 N. W. 1054.

Cited in Brooks v. Mohl, 104 Minn. 404, 116 N. W. 931, 17 L. R. A. (N. S.) 1195, 124 Am. St. Rep. 629.

See Thornton v. City of East Grand Forks, 106 Minn. 233, 118 N. W. 834.

Subd. 2.—Cited in State v. Bonness, 99 Minn. 392, 109 N. W. 703.

Subd. 6.—The statute does not begin to run in an action to set aside a partnership accounting for fraud until discovery of the fraud. Johnston v. Johnston, 119 N. W. 652.

Subd. 7.—The statute commences to run against an action to recover trust funds on the performance of the trust, or when the trustee repudiates it, and the cestui is notified thereof. The mere lapse of time, without inquiry into the

trusteeship, does not constitute such laches as to preclude recovery. Johnston v. Johnston, 119 N. W. 652.

Subd. 8.—Cited and applied in Adams v. Overboe, 105 Minn. 295, 117 N. W. 496.

Laws 1895, c. 126, prescribing that no action against the surety on a bond given by a public officer, etc., should be maintained unless "recommended" within four years from date of filing a new bond or expiration of term of office, *held* inoperative, because incapable of a rational construction. Board of Com'rs of Itasca County v. Miller, 101 Minn. 294, 112 N. W. 276.

4077. Against sheriffs and others—Forfeitures, three years.

Subd. 1.—This section does not apply to an action for money had and received against a sheriff on account of money obtained from the county upon verified bills, alleged to be untrue, for official services. Megaarden v. Hennepin County, 102 Minn. 134, 112 N. W. 899.

Where property was converted by the sheriff when the sale was made under execution, and the action against the sheriff was commenced within three years thereafter, it was not barred. Adams v. Overboe, 105 Minn. 295, 117 N. W. 496.

Subd. 2.—In an action under Laws 1895, c. 163, § 7, to recover treble damages for willful trespass to pine timber of the state, the limitation is three, not two, years. State v. Bonness, 99 Minn. 392, 109 N. W. 703.

An action in conversion, brought by the state to recover the value of the timber not removed within the time prescribed by the permit, was not barred by this subdivision or by section 4078, subd. 2. State v. Rat Portage Lumber Co., 106 Minn. 1, 115 N. W. 162.

4078. Various actions, two years.

Subd. 1.—Under G. S. 1894, § 2369, no action for damages for overflowing lands by the erection and maintenance of a milldam, which is a permanent structure, can be maintained unless it is brought within two years after damages are first sustained by reason of the dam. Priebe v. Ames, 104 Minn. 419, 116 N. W. 829, 17 L. R. A. (N. S.) 206.

Cited and applied in Langer v. Newmann, 100 Minn. 27, 110 N. W. 68.

See note under section 4084.

Subd. 2.—Cited and applied in State v. Bonness, 99 Minn. 392, 109 N. W. 703; State v. Rat Portage Lumber Co., 106 Minn. 1, 115 N. W. 162.

See note under section 4077.

[4078—]1. Local improvement certificate of certain cities—Two years—Lien superseded.—That no action for the refundment or recovery of moneys paid on account of the purchase of any valid or invalid certificate of sale for a local improvement assessment, heretofore or hereafter issued by any city in this state now or hereafter having a population of over fifty thousand inhabitants, shall be maintained after the expiration of two years from the date when notice of expiration of the period of redemption of the property described in such certificate from the sale evidenced thereby could have lawfully been given; nor shall such action be maintained in any case where the person claiming under such certificate of sale has permitted the lien evidenced by such certificate to be superseded, avoided or cut out by a subsequent or superior lien arising either from the levy of taxes for general purposes or from the levy of a duly authorized local improvement assessment. ('07 c. 183 § 1)

Historical.—"An act relating to local improvement assessment certificates issued by cities in this state now or hereafter having a population of over fifty thousand inhabitants, and limiting the right to maintain an action thereon for the refundment or recovery of moneys paid therefor, and limiting the time within which such action may be commenced." Approved April 13, 1907.

By section 2 the act took effect January 1, 1908.

Constitutionality.—Laws 1907, c. 183, held unconstitutional as applied to certificates purchased prior to the passage of the act, under the provision of the St. Paul charter that, if in any action within 15 years the certificates be declared invalid, the city should reimburse the purchaser.—Gray v. City of St. Paul, 105 Minn. 19, 116 N. W. 1111.

4081. When action deemed begun—Pendency.

G. S. 1894, § 5143, cited in Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154.

Garnishment.—A garnishee summons is issued when delivered to the proper officer for service upon the garnishee, and, when the writ is sent to the officer

by mail, delivery is not completed until received by him. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 N. W. 257.

4082. Effect of absence from state.

Cited and applied in Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450.
See note under section 4075.

4084. Periods of disability not counted.

Subd. 2.—In an action within the limitation of section 4078, subd. 1, where complaint alleged that as a result of conspiracy between defendants plaintiff was falsely adjudged insane and committed on July 24, 1902, and was restored to capacity April 6, 1903, the action being commenced February 21, 1905, the action was barred. Langer v. Newmann, 100 Minn. 27, 110 N. W. 68.

Where a personal injury caused by negligence of another and resulting insanity occur on the same day, the two events are legally simultaneous, and the disability of insanity exists at the time the cause of action accrued. Nebola v. Minnesota Iron Co., 102 Minn. 89, 112 N. W. 880.

Subd. 5.—Statutory provisions suspending the running of the period of limitation while an action is stayed by an injunction applies only between parties to the suit. Lagerman v. Casserly, 120 N. W. 1086.

4086. New promise must be in writing.

Operation in general.—A judgment does not come within the rule made the foundation of this section, by which a new promise or part payment suspends the operation of the statute. Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435.

Part payment.—A partial payment on a partnership debt, after dissolution, suspends the operation of the statute as to other partners, in favor of a creditor receiving such payment, who has had dealings with the partnership and has no notice of its dissolution. Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972.

A part payment on a note by one of two joint makers will not prevent the running of the statute as to the other. Where a note was executed by R. and L., and R. made a part payment, an indorsement thereof on the note was not, by virtue of section 4731, evidence of the correctness of a recital that it was paid at the request of L. Atwood v. Lammers, 97 Minn. 214, 106 N. W. 310.

Partial payments by the principal debtor will not prevent the running of the statute as to the guarantor of a promissory note, unless the contract of guaranty expressly so provides. Northwest Thresher Co. v. Dahltorp, 104 Minn. 130, 116 N. W. 106.

To prevent the running of the statute, the payment must be made voluntarily by the debtor in person, or by his authority, or must be duly ratified by him. Woodcock v. Putnam, 101 Minn. 1, 111 N. W. 639.

To infer a new promise from the fact of part payment, the debt or obligation must be definitely pointed out by the debtor and an intention to discharge it in part made manifest. Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320.

—— **Sale of collateral.**—The indorsement on a note of the proceeds of sale of collateral deposited with the note at the time it was given is not a part payment which will interrupt the running of the statute. Atwood v. Lammers, 97 Minn. 214, 106 N. W. 310.

—— **Application of payment.**—Where the creditor holds separate claims, and the debtor makes a general payment on his indebtedness, without directing or authorizing application upon any one, all of which are then barred, the bar is not removed as to any of them. Smith v. Moulton, 12 Minn. 352 (Gil. 229), applied. Anderson v. Nystrom, 103 Minn. 168, 114 N. W. 742, 13 L. R. A. (N. S.) 1141, 123 Am. St. Rep. 320.

VENUE.

4089. Actions relating to land, situs to govern.

Application in general.—An action to set aside a mortgage foreclosure and sale and to redeem must be brought in the county in which the land is situated. Casserly v. Morrow, 101 Minn. 16, 111 N. W. 654.

4092. Replevin.

In general.—Replevin cannot be maintained in a state court against an officer of a federal court to recover property in his possession as such officer. Druhe Hardwood Lumber Co. v. Fischbein, 101 Minn. 81, 111 N. W. 950.

4095. Other cases, residence of defendant to govern.

Domestic corporation.—Where defendant fraternal beneficial society, when action was commenced, had in Hennepin county several subordinate lodges and

deputy grand master workmen, and on affidavit and demand filed with the clerk the papers were transferred to Ramsey county, where defendant had its general office, denial of a motion to remand to Hennepin county was error. Taylor v. Grand Lodge A. O. U. W. of Minnesota, 98 Minn. 36, 107 N. W. 545.

CHANGE OF VENUE.

4096. As of right—Demand.

Application in general.—Where the venue is properly laid, a third person substituted as defendant is not entitled, as a matter of right, to a change by complying with this section. Healy v. Mathews, 121 N. W. 428.

4097. By order of court—Grounds.

Cited and applied in Healy v. Mathews, 121 N. W. 428.

Subd. 4.—A motion for change for the convenience of witnesses is addressed to the discretion of the court. Murray Cure Institute Co. v. Ward, 121 N. W. 878.

SUMMONS—APPEARANCE—NOTICES, ETC.

4106. Service of summons—On natural persons.

House of usual abode.—In the case of a married man, the "house of his usual abode" is prima facie the house wherein his wife and family reside. Berryhill v. Sepp, 106 Minn. 458, 119 N. W. 404.

4109. Same—On private corporations.

Subd. 1.—Where a corporation is tenant under a lease, service of notice to quit upon its treasurer is a good service upon the corporation, both at common law and under G. S. 1894, § 5199. Lindeke v. Associates Realty Co., 146 Fed. 630, 77 C. C. A. 56.

Subd. 3.—The question whether a foreign corporation is doing business in the state, so that service of summons may be made upon its agent within the state, is one of due process of law under the Constitution of the United States. The agent must be an agent in fact, not merely by construction of law. He must be one having in fact representative capacity and derivative authority. Wold v. J. B. Colt Co., 102 Minn. 386, 114 N. W. 243.

The agent, upon whom service is made must be such in fact, and the corporation must be doing business in the state. Where summons in this case was served on an agent of defendants, who was soliciting, within the state, passenger and freight traffic to be routed over their lines, none of which was in this state, the corporations were not "doing business in the state," within the meaning of the statute, and the service of the summons was rightly set aside. North Wisconsin Cattle Co. v. Oregon Short Line R. Co., 105 Minn. 198, 117 N. W. 391.

4110. Same—On railway companies.

Foreign company.—A foreign railway company, whose cars are brought into the state by another company under a joint traffic arrangement, held not transacting business within the state. A ticket agent of such local railway company, who sells through joint tickets over the local line within the state and also over the foreign line beyond the state, is not a "ticket agent" of the foreign company on whom service of process may be made. Slaughter v. Canadian Pac. R. Co., 106 Minn. 263, 119 N. W. 398.

4111. Service by publication—Personal service out of state.

Summons—Error in name.—Publication of a summons to "George H. Leslie" confers no jurisdiction over "George W. Leslie." D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615.

Affidavit.—Neither the making nor the filing of a sheriff's return that defendant could not be found was, under G. S. 1894, § 5204, a jurisdictional prerequisite to publication of summons. Easton v. Childs, 67 Minn. 242, 69 N. W. 903, followed. Perkins v. Gibbs, 121 N. W. 605.

Divorce.—Sections 3579, 4111, 4112, made no substantial change in the law as to service by publication of summons in divorce. An affidavit in such a case, showing that personal service cannot well be made and containing the statements required by this section, with the return of the sheriff that the defendant cannot be found, is sufficient to justify an order directing service by publication and to authorize publication of the summons, without further affidavit after the order has been made. Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.

4112. Same—In what cases.

Cited and applied in Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.
See note under section 4111.

4113. When defendant may defend—Restitution.

G. S. 1894, § 5206, cited in Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

MOTIONS AND ORDERS.

4124. Motions, etc., where noticed and heard.—Demurrers and motions for judgment on the pleadings may be heard and determined at the regular or special term of the court held in any county of the district, or at any time and place within the district which a judge thereof shall fix. All motions of which notice is required to be given shall be made within the judicial district, or at some place in an adjoining district which is nearer, by railway, to the county seat of the county in which the action is pending than is the residence of the nearest qualified judge of the district of which such county is a part. Orders so made by the judge of another district shall be filed in the county of the venue, with like effect as though made by a judge of the local district. Provided, that in any county having two special terms of court each month, all motions in actions pending therein shall be made in such county. (R. L. § 4124, as amended by Laws 1909, c. 433, § 1.)

PLEADINGS.

4127. Contents of complaint.

Subd. 3.—A complaint, whether framed as a bill in equity or otherwise, regardless of the prayer for relief, is good as against a general demurrer, if the facts alleged show that the plaintiff is entitled to any substantial relief. Lovering v. Webb Pub. Co., 106 Minn. 62, 118 N. W. 61.

4128. Demurrer to complaint—Grounds.

Failure to state cause of action.—Where the complaint alleges in the alternative two statements of fact, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other, and demurrer will lie. Anderson v. Minneapolis, St. P. & S. S. M. R. Co., 103 Minn. 224, 114 N. W. 1123.

As against a general demurrer, the question is whether, assuming every fact alleged, enough has been stated to constitute a cause of action. Vukelis v. Virginia Lumber Co., 119 N. W. 509.

A demurrer to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action does not reach discrepancies between the relief to which the complaint may entitle and the prayer in the summons. Freeman v. Paulson, 119 N. W. 651.

—— **Effect as admission.**—An allegation in a complaint in ejectment that plaintiff is the owner in fee of the property carries with it by inference an immediate right of possession, and the latter fact need not be expressly averred. The demurrer admits it as a conclusion necessarily resulting from the ownership. Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947.

4129. Same—Requisites—Waiver.

Waiver.—An objection to a complaint in equity that plaintiff has an adequate remedy at law must be taken by demurrer or it is waived. Lloyd v. Simons, 97 Minn. 315, 105 N. W. 902.

A defect of parties plaintiff or defendant can only be raised by demurrer or answer. If not so raised, it is waived. Budds v. Frey, 104 Minn. 481, 117 N. W. 158.

4130. Contents of answer.

General denial.—In an action for money loaned, under a general denial evidence was admissible that the money was paid as a gift.—Jennings v. Rhode, 99 Minn. 335, 109 N. W. 597.

New matter.—Where defendant relies upon fraud in procuring the execution of an instrument set out in the complaint, he must allege the facts constituting fraud. Trainor v. Schutz, 98 Minn. 213, 107 N. W. 812.

All facts which tend only to contradict the allegations of the complaint may be shown under a general denial. Matters in "excuse, justification, or avoidance" in forcible entry are new matter. Sodini v. Gaber, 101 Minn. 155, 111 N. W. 962.

4131. Requisites of a counterclaim—Pleading does not admit.

Cause of action connected with subject-matter.—In an action to enjoin a trespass defendant may plead as a counterclaim that the alleged trespass rests upon a disputed boundary line, and have the true line determined by the judgment. Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131.

Cause of action existing when action was begun.—A cause of action for damages for breach of contract, arising simultaneously and concurrently with the commencement of an action, may be interposed as a counterclaim therein. Hall v. Parsons, 105 Minn. 96, 117 N. W. 240.

Action by state.—In an action by the state claims arising out of independent transactions cannot, without its consent, be asserted as a set-off or counterclaim. State ex rel. Young v. Holgate, 119 N. W. 792.

4132. Several defenses, etc., how pleaded—Answer and demurrer.

Several defenses.—In an action to recover rent under a lease, a defense by way of confession and avoidance, based on a subsequent oral agreement inconsistent with plaintiff's right to recover, is not inconsistent with a general denial. Rees v. Storms, 101 Minn. 381, 112 N. W. 419.

4134. Demurrer or reply to answer—Insufficient reply.

Reply—Departure.—In an action for the price of goods sold and delivered, where defendant set up a contract whereby he was to convey land in payment, and pleaded tender of a proper conveyance, and that plaintiff had refused to accept the same, plaintiff might reply by admitting the contract, and allege that it was procured by fraud and for that reason was not performed; such reply being by confession and avoidance of the new matter, and not a departure. Niebels v. Howland, 97 Minn. 209, 106 N. W. 337.

4136. Sham and frivolous pleadings.

Sham pleadings.—A sham answer may be stricken out, where its falsity is clearly shown, though interposed in belief of its truth and in good faith. State ex rel. Engelhard v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630.

Answer rightly stricken out as sham. Brown-Forman Co. v. Peterson, 101 Minn. 53, 111 N. W. 733.

Where, in an action for goods sold, the answer alleged that plaintiff was a foreign corporation, had not complied with the statute, and that the sale took place within this state, it was error to strike out the answer as false. Beckwith v. Golden Rule Co., 121 N. W. 427.

4140. Intervention.

Interest entitling to intervene.—Where, pending an action to set aside a deed on the ground that it was procured by fraud, plaintiff by warranty deed conveyed the premises, her grantee had a right to intervene. Walker v. Sanders, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276.

See note under section 4064.

4143. Pleadings liberally construed.

In general.—Upon a motion for judgment on the pleadings, made at trial, the allegations of the answer will be liberally construed. Roebuck v. Wick, 98 Minn. 130, 107 N. W. 1054.

4144. Irrelevant, redundant, and indefinite pleadings.

Indefinite pleading.—In the absence of a statute or a rule of court, the trial court may, after a pleading has been sustained on demurrer and before answer, entertain a motion to make the same more definite. Lovering v. Webb Pub. Co., 121 N. W. 911.

4154. Joinder of causes of action.

Joinder.—All persons whose property is affected by a nuisance, though they own property in severalty, may unite in an action to abate it; but they cannot join with a cause of action for that relief their several claims for damages. Nahte v. Hansen, 106 Minn. 365, 119 N. W. 55.

Misjoinder.—When one of two causes of action attempted to be stated in a complaint is bad for want of facts constituting a cause of action, there is no misjoinder. Minneapolis, Red Lake & M. R. Co. v. Brown, 99 Minn. 384, 109 N. W. 817.

Subd. 1.—When several acts of negligence concur in giving rise to a single right of action, they may be united in the same complaint. Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N. S.) 675.

A cause of action for unpaid rent under a lease and a cause of action for damages occasioned by the wrongful act of the tenant in setting fire to the building in violation of the covenants of the lease may be united in the same complaint. Reed v. Bernstein, 103 Minn. 66, 114 N. W. 261.

4157. Amendment by order.

Cited in D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 17 L. R. A. (N. S.) 236, 124 Am. St. Rep. 615.

Amendment—At trial.—When, in the course of trial, the court grants plaintiff's motion to amend the complaint, by tendering new issues, defendant cannot be required to disclose by affidavit the names of witnesses, nor what particular evidence he desires to produce, as a condition to a continuance. Despatch Laundry Co. v. Employers' Liability Assur. Corp., 105 Minn. 384, 117 N. W. 506.

Refusal to permit plaintiff at the conclusion of the trial to amend his complaint by inserting additional grounds of negligence and to make it conform to the evidence held not an abuse of discretion. Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116.

—— **After trial.**—The discretion of court, which had during trial twice allowed defendant to amend its answer and plaintiffs thrice to amend their reply, was not abused by refusal to allow, on motion for a new trial, an amendment to the answer involving a complete change of theory of defense, based on the falsity of the verified admissions of the answer and inconsistent with much of the testimony, because a stockholder of defendant corporation at the time of the transaction was ignorant of the proceedings. Wasser v. Western Land Securities Co., 97 Minn. 460, 107 N. W. 160.

Allowing amendment of the complaint after the first trial and more than a year before the second trial was within the discretion of the court, whether or not the amendment changed the nature and substance of the action. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995.

The court did not abuse its discretion in denying, at the conclusion of the trial, defendants' motion to amend their answer, setting up a new defense. Hall v. Skahen, 101 Minn. 460, 112 N. W. 865.

—— **After affirmance on appeal.**—Where an order for judgment is affirmed on appeal, an amendment involving a new trial should not be allowed, unless possibly in extraordinary cases, and then only when the proposed amendment sets forth a basis for relief not before presented. Todd v. Bettingen, 102 Minn. 260, 113 N. W. 906, 18 L. R. A. (N. S.) 263.

4158. Variance—Amendment—Exceptions.

Proof must follow pleadings.—Plaintiff, who has declared on an express agreement, cannot recover on proof of an implied contract. Ecker v. Isaacs, 98 Minn. 146, 107 N. W. 1053.

Immaterial variance.—A variance is fatal only when the adverse party might reasonably have been and was misled. Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738.

4160. Extensions of time—Relief against mistakes, etc.

Judgment—Amendment.—Where a cause is submitted on a stipulation of facts covering certain of the issues, and eliminating the issues not covered, and by mistake the court determines the issues so excluded, the findings and judgment may be amended to express the intention of the parties. Wright v. Krabbenhoft, 104 Minn. 460, 116 N. W. 940.

—— **Opening default—Relief granted liberally.**—Where an answer discloses a defense, and there was reasonable excuse for the delay, and no substantial prejudice appears to have arisen thereby, the court should open the default and permit the defense to be maintained. Barrie v. Northern Assur. Co., 99 Minn. 272, 109 N. W. 248.

The proposed answer contained, in part at least, a meritorious defense, and the court did not abuse its discretion in permitting defendant to defend; the judgment to stand as security. W. R. Lynn Shoe Co. v. Schunk, 101 Minn. 22, 111 N. W. 729.

Where there had never been a trial on the merits, and a proposed answer set up a meritorious defense, the order opening a default judgment will not be reversed. Hendricks v. Conner, 104 Minn. 399, 116 N. W. 751.

—— **Discretionary.**—Opening a default is in the discretion of the court, and its action will not be reversed, unless it appears that the discretion was abused. Fishstrom v. Bankers' Mut. Casualty Ins. Co., 102 Minn. 228, 113 N. W. 267; Waller v. Waller, 102 Minn. 405, 113 N. W. 1013; Perkins v. Gibbs, 121 N. W. 605.

—— **Time of application—Diligence.**—It must affirmatively appear, to justify granting such a motion, when addressed to the discretion of the court, that it was made with due diligence and within one year from actual notice of the judgment. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108; Hoffman v. Freimuth, 101 Minn. 48, 111 N. W. 732.

A party who applies, within one year after the entry of a default judgment against him on service of the summons by publication only, must be permitted to defend as a matter of right, provided his motion is accompanied by an answer setting up a defense on the merits, and he has not been guilty of laches

in making his motion after notice of the pendency of the action or entry of the judgment. Fink v. Woods, 102 Minn. 374, 113 N. W. 909.

— **Affidavit of merits.**—The rule excluding hearsay evidence applies to the affidavit. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

— **Who may apply.**—The grantee of a defendant in an action to determine adverse claims may move the court to vacate a default judgment and for leave to defend; but his right depends upon whether defendant would, on the facts disclosed, be entitled to it. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

Vacation of judgments and orders—Divorce.—In an action for divorce, defendant, inter alia, sought to be restored to possession of her personal property. Plaintiff served notice of dismissal; but by stipulation the case was put on the trial calendar, and a decree of absolute divorce was entered. Defendant afterward moved that the order for judgment be vacated, and the dismissal be made effective. Held, that the dismissal did not avail, because the answer sought affirmative relief and the dismissal was abandoned, and that the court had no discretion to open the final order for judgment. La Fond v. La Fond, 102 Minn. 344, 113 N. W. 896.

An action to annul a marriage upon the ground that it was procured by fraud and duress is not an action for a divorce, within the proviso. Waller v. Waller, 102 Minn. 405, 113 N. W. 1013.

As to vacating real estate judgments, see sections [4160—] 1, [4160—] 2.

[4160—]1. Vacating real estate judgment—Within what time.—No judgment or decree quieting title to land or determining the title thereto or adverse claims therein heretofore entered or hereafter to be entered shall be adjudged invalid or set aside, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced, or application for leave to defend be made, within five years from the time of filing a certified copy of such judgment or decree in the office of the register of deeds of the county in which the lands affected by such judgment or decree are situated. ('09 c. 451 § 1)

Historical.—"An act limiting the time within which judgments or decrees entered in actions to quiet title to real estate or determining adverse claims therein may be vacated or set aside or leave to defend permitted." Approved April 23, 1909.

Section 3 repeals inconsistent acts.

See section 4160.

Section 4 provides that the act shall take effect November 1, 1909.

[4160—]2. Same—Pending proceedings—Registration of title.—Nothing herein contained shall apply to any action or proceeding now pending to have any such judgment or decree vacated or set aside or to any application now pending for leave to defend in any such action, nor shall this act apply to any proceeding under the provisions of chapter 65, Revised Laws 1905. ('09 c. 451 § 2)

ISSUES AND TRIAL.

4164. Issues, how tried—Right to jury trial.

Equitable actions.—In an action to set aside a deed and mortgage as fraudulent and to subject the land to the payment of a judgment for alimony, the court properly exercised its discretion in refusing to submit the issues to a jury. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183.

4165. Of fact, how brought to trial.—Issues of fact may be brought to trial by either party, upon notice served eight or more days before the beginning of a general term. At least seven days before the term one of the parties shall file a note of issue, containing the title of the action and the names of the respective attorneys, and stating the time when the last pleading was served and whether the issue is triable by the court or a jury. The clerk shall thereupon enter the cause on the calendar according to the date of issue, and it shall remain thereon, from term to term, until tried or stricken off by the court. Provided, that in all districts consisting of one county only, wherein but one term of court is held annually, no notice of trial need be served; but the party desiring to place a cause upon the calendar thereof for trial, shall,

after issue is joined therein, prepare a note of issue containing the title of the cause, a statement as to whether the issue is an issue of law or an issue of fact, and if an issue of fact, whether triable by court or jury, and the names and addresses of the respective counsel, and shall serve the same on opposing counsel, and file such note of issue, with proof of service, with the clerk of court within ten days after such service; and, thereupon, the clerk shall set such cause for trial, in accordance with such rules as the judges of said court may make, but in no event earlier than thirty days after the filing of such note of issue, and shall notify all counsel in said cause by mail of the date of such setting. The judges of said court may, by order or rule of court, provide for the assigning and setting of cases for trial upon such calendar, and the order in which they shall be heard, and the resetting thereof. All appeals from inferior tribunals, including probate court, justice court, county commissioners, and all boards from the decision of which an appeal lies to such court, shall in like manner be placed upon the calendar for trial. For all purposes, other than those specifically herein provided for, the first Monday in each month of the year, except in the months of July, August and September, shall be deemed the first day of a regular or general term of such district court, held in such county, and all persons committed for trial, or held to appear before such court, shall, unless otherwise provided, appear on such dates. Provided, that when the first Monday of any such month shall be a legal holiday the following day shall be deemed to be the first day of such general term of such district court. (R. L. § 4165, as amended by Laws 1909, c. 221, § 1.)

4167. Order of trial—Absence of parties.

Cited in Blandin v. Brennin, 106 Minn. 353, 119 N. W. 57.

4168. Continuance.

Continuance.—Held, on the facts as they appear from the record, it was error to deny defendant's motion for continuance; the court having granted plaintiff's motion to amend the complaint, substituting new issues. Despatch Laundry Co. v. Employers' Liability Assur. Corp., 105 Minn. 384, 117 N. W. 506, 118 N. W. 152.

JURY TRIALS.

4169. Jury, how impaneled—Ballots—Rules of court—Examination—Challenges.—When an action is called for trial by jury, the clerk shall draw from the jury box ballots containing the names of jurors, until the jury is completed or the ballots are exhausted. If exhausted, the sheriff, under 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. The ballots containing the names of jurors sworn to try the case shall not be returned to the box until the jury is discharged. All others so drawn shall be returned as soon as the jury is completed. Provided, it shall be lawful for the judge or judges of any district court in the state to provide by rule that in selecting a jury the clerk shall draw eighteen names from the jury box in the first instance and that the said eighteen shall then be examined as to their qualifications to sit as jurors in the action and if any of said eighteen be excused for any reason whatever, another shall be called in his place until there shall be eighteen jurors in the box qualified to sit in the action; and the parties shall have the right to exercise their peremptory challenges as to these eighteen. When the peremptory challenges have been exhausted, of the remaining men the twelve first called into the jury box shall constitute the jury. (R. L. § 4169, as amended by Laws 1909, c. 417, § 1.)

Historical.—"An act to amend the Revised Laws of 1905, section 4169, concerning jury trials in civil actions." Approved April 22, 1909.

4170. Challenges—Jury fee.

See section 4169.

Peremptory challenge.—Where a party, who has not exhausted his peremptory challenges, passes them and accepts the jury as then constituted, without expressly reserving his right to use them if other jurors are called, he does not thereby waive his right to peremptorily challenge a juror thereafter called in place of one challenged by his adversary. Lerum v. Geving, 97 Minn. 269, 105 N. W. 967.

Implied bias—Personal injury action—Indemnity insurance company.—In an action to recover damages for personal injury, plaintiff's counsel has a right to ascertain whether such relation existed between persons called as jurors and any company insuring defendant against such accidents as would disqualify them, because by implication they would be biased or prejudiced. Antletz v. Smith, 97 Minn. 217, 106 N. W. 517; Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891.

4171. Order of trial.

Right to close.—Where defendants admitted the allegations of the complaint in an action for rent, and the burden was on them to establish their defense of constructive eviction, the court did not err in permitting their attorney to close the argument. Viehman v. Boelter, 105 Minn. 60, 116 N. W. 1023.

4174. Requested instructions.

Time for request.—Requests for instructions held rightly rejected for the reason that they were not seasonably handed to the court. Gracz v. Anderson, 104 Minn. 476, 116 N. W. 1116.

Expression of opinion as to facts.—The court may express to the jury in its instructions its opinion of facts in issue, provided the ultimate determination thereof be left to the jury. If a party be apprehensive that the jury may be unduly influenced thereby, he should specially request the court to instruct that they, not the court, are the exclusive judges of all questions of fact. Bonness v. Felsing, 97 Minn. 227, 106 N. W. 909, 114 Am. St. Rep. 707.

Punitive damages.—It is the duty of the court to explain the meaning of punitive or exemplary damages and to state the circumstances and conditions under which such damages may be awarded. It is error to direct the jury to award punitive damages in any particular case. Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99.

4175. What papers jurors may take.

Pleadings.—The court may, in its discretion, permit the jury to take the pleadings; but the practice is of doubtful propriety, and they should not be given to the jury unless there is special reason for so doing. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517.

4176. Verdict, when received—Correcting same—Polling jury.

Informal verdict—Sufficiency.—Although a verdict be informal, it is sufficient if by reference to the pleadings and record it can be made certain. Cohues v. Finholt, 101 Minn. 180, 112 N. W. 12.

4177. Verdict, general and special.

Special verdict.—Where a jury finds by special verdict for one party on all issues, and also finds a general verdict for the other party, judgment may be rendered on the special verdict; but where the pleadings and proof tend to sustain liability on a number of grounds, all of which have been properly submitted, and the jury finds a general verdict for the party seeking recovery, that verdict will not be avoided because, by special findings addressed to less than all such grounds of liability, the jury has found for the party sought to be charged. Awde v. Cole, 99 Minn. 357, 109 N. W. 812.

4182. Receiving verdict.

Improper verdict.—When the verdict is not justified by the law or the evidence, the court may require the jury to return a proper verdict. Craven v. Skobba, 121 N. W. 625.

TRIAL BY THE COURT.

4185. Decision, how and when made.

Memorandum.—A memorandum attached to, but not expressly made part of, the order or decision, may be referred to when it furnishes a "controlling reason for the court's decision," but not for the purpose of impeaching or contradicting express findings of fact, or conclusions necessarily following from the decision made. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

Refusal to make finding.—Where the court expressly declines to pass upon a question of fact involved, it is unnecessary after its decision has been filed, to

apply for amended findings covering the question. State ex rel. Pope v. Germania Bank of St. Paul, 103 Minn. 129, 114 N. W. 651.

GENERAL PROVISIONS.

4195. Dismissal of action.

Cited in Holmgren v. Isaacson, 104 Minn. 84, 116 N. W. 205.

See Blandin v. Brennin, 106 Minn. 353, 119 N. W. 57, cited in note under section 3879.

Right to dismiss.—Where defendant has obtained a decision or verdict on the merits, plaintiff cannot, as a matter of right, after obtaining an order granting a new trial, dismiss the action to the prejudice of defendant's right to review the order on appeal. Floody v. Great Northern R. Co., 104 Minn. 517, 116 N. W. 107.

Findings on dismissal.—An action cannot be dismissed by the trial court without a verdict or findings of fact, unless the evidence would not sustain a verdict or findings for plaintiff. Du Breuille v. Town of Ripley, 106 Minn. 510, 119 N. W. 244.

Effect of dismissal.—A dismissal of the action, though a previous judgment has been rendered therein, extinguishes action, judgment, and all. Sammons v. Pike, 105 Minn. 106, 117 N. W. 244.

NEW TRIALS.

4198. Grounds—Presumption on appeal.

In general—Error without prejudice.—A new trial should not be granted where the record affirmatively shows that the error did not result in prejudice. Kelly v. Tyra, 103 Minn. 176, 114 N. W. 750; 115 N. W. 636, 17 L. R. A. (N. S.) 334.

Waiver of error.—Plaintiff waived error, if any, in an order granting a new trial, by consenting to an amended answer, thus agreeing to litigate a new issue. Church v. Odell, 100 Minn. 98, 110 N. W. 346.

Misconduct of jury.—Where there is in fact misconduct in interfering with the jury in the performance of their duty, it is sufficient to require the granting of a new trial if the misconduct may reasonably have had an effect unfavorable to the moving party. Where a prevailing party attempts to corrupt or improperly influence the action of a juror, a new trial, as matter of sound public policy, should be granted, without reference to the question whether or not the attempt was successful. Akin v. Lake Superior Consol. Iron Mines, 103 Minn. 204, 114 N. W. 654, 837.

New trial granted upon ground that instructions were misleading and for misconduct of a juror. Floody v. Great Northern Ry. Co., 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. (N. S.) 1196.

The court did not err in refusing to grant a new trial on the alleged ground of misconduct of a juror. Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

Misconduct of counsel.—The motion is addressed to the discretion of the court. Balder v. Zenith Furnace Co., 103 Minn. 345, 114 N. W. 948; Parmelee v. Tri-State Telephone & Telegraph Co., 103 Minn. 530, 115 N. W. 1135.

Assignments of error as to misconduct of counsel are not well taken, where no exceptions were taken at the trial, nor the attention of the trial court called thereto, nor a ruling invoked. Ludwig v. Spicer, 99 Minn. 400, 109 N. W. 832.

In a personal injury action, where plaintiff's counsel used improper language in addressing the jury, damages awarded were held excessive, and a new trial granted unless plaintiff consent to a reduction. Bremer v. Minneapolis, St. P. & S. S. M. R. Co., 96 Minn. 469, 105 N. W. 494.

In a personal injury action, an order denying a motion for a new trial was reversed, and a new trial granted, because of improper and prejudicial language used by plaintiff's attorney in addressing the jury. Bjoraker v. Chicago, M. & St. P. R. Co., 103 Minn. 400, 115 N. W. 202.

—— **Review on appeal.**—An application for new trial upon the ground of prejudicial remarks of counsel cannot be reviewed upon appeal, unless incorporated in a settled case or bill of exceptions. It is not sufficient that the matter appear by affidavits. Youngquist v. Minneapolis St. R. Co., 102 Minn. 501, 114 N. W. 259.

Accident or surprise.—The court did not abuse its discretion in denying a new trial on the ground of plaintiff's surprise by the testimony of a witness called by defendant. Village of Pillager v. Hewett, 98 Minn. 265, 107 N. W. 815.

The court did not err in refusing to grant a new trial upon the ground that defendant was taken by surprise by testimony of witnesses whose depositions

might have been taken in connection with other witnesses. Strand v. Great Northern R. Co., 101 Minn. 85, 111 N. W. 958.

Where a cause was tried and a verdict directed against defendant in his absence, it was not an abuse of discretion to grant a new trial on the ground that he was prevented from being present by excusable neglect and surprise. Where the answer was verified by defendant the court could dispense with an affidavit of merits. Trainor v. Maturen, 100 Minn. 127, 110 N. W. 370.

Cited in Rogers v. Clark Iron Co., 104 Minn. 198, 116 N. W. 739.

A motion on the ground of surprise or excusable neglect is addressed to the discretion of the court. Holland v. Sheehan, 106 Minn. 545, 119 N. W. 217.

Failure to obtain transcript.—Failure or inability of a reporter to furnish the defeated party with a transcript of the evidence is no ground for a new trial. Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50.

Newly discovered evidence.—The motion is addressed to the discretion of the court. Village of Hewitt v. Board of Com'rs of Hubbard County, 103 Minn. 41, 114 N. W. 261.

The motion is addressed to the discretion of the judge, upon consideration of the evidence given and the effect of the new evidence in connection therewith. Bunker v. United Order of Foresters, 97 Minn. 361, 107 N. W. 392; Tew v. Webster, 103 Minn. 110, 114 N. W. 647.

See, also, Gragg v. Empey, 105 Minn. 229, 117 N. W. 421; Shaw v. Chicago, M. & St. P. R. Co., 105 Minn. 393, 117 N. W. 465.

A new trial will not ordinarily be granted to enable a party to avail himself of impeaching evidence. Northrup v. Hayward, 99 Minn. 299, 109 N. W. 241.

Denial of motion for new trial on the ground of newly discovered evidence held error. McDonald v. Smith, 101 Minn. 476, 112 N. W. 627.

Excessive or insufficient damages.—It was within the discretion of the court to grant a new trial upon the ground that a verdict of $1 was inadequate. Defendant was not prejudiced by the condition that it might avoid a new trial by payment of $150. Ford v. Minneapolis St. R. Co., 98 Minn. 96, 107 N. W. 817.

That damages are excessive does not justify the inference that they were given under the influence of passion or prejudice, unless they are so large that the court must conclude they were not given upon fair consideration of the evidence. Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

Evidence held to justify a new trial on the ground that the damages were insufficient. Alton v. Chicago, M. & St. P. R. Co., 120 N. W. 749.

—— **Remitting excess.**—When the damages are excessive, and the circumstances such as to indicate that the jury were also influenced by passion or prejudice in determining the other issues, a new trial should be granted. Whether a new trial should be granted absolutely or only conditionally is a question resting largely in the discretion of the court. Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

See McKnight v. Minneapolis, St. P. & S. S. M. R. Co., 96 Minn. 480, 105 N. W. 673.

Errors of law—Incompetent evidence.—The rule that admission of incompetent evidence on a jury trial is not ground for a new trial, where the fact which such evidence tends to prove is shown by other competent evidence, applies only where the other evidence, fairly construed, conclusively establishes the fact. Bergenthal Co. v. Security State Bank, 98 Minn. 414, 108 N. W. 301.

Where incompetent evidence is received over the objections, a new trial will not be granted, if it appears from the record that the evidence did not prejudice the party objecting. Crowley v. Burns Boiler & Mfg. Co., 100 Minn. 178, 110 N. W. 969.

—— **Instructions.**—In an action to recover damages caused by alleged negligence, defendant moved for a directed verdict, which was denied. The jury returned a verdict in favor of defendant. A motion for a new trial, made by plaintiff on alleged errors in rulings upon questions of evidence and erroneous instructions, was denied. Held, that the motion to direct a verdict should have been granted, and that the correctness of the instructions was therefore immaterial. Donahue v. Northwestern Telephone Exch. Co., 103 Minn. 432, 115 N. W. 279.

—— **Erroneous submission of issues.**—Where two or more distinct issues have been submitted to a jury, one erroneously, and a general verdict returned, a new trial must be granted, for the reason that it is impossible to determine upon what issue the verdict was based. Barrett v. Magner, 105 Minn. 118, 117 N. W. 245.

Insufficiency of evidence.—Motion properly granted. Lang v. Menbach, 96 Minn. 431, 105 N. W. 415.

The fact that one new trial has been granted on the merits is an important factor in the determination of a motion to set aside a second verdict based on

the same evidence, and the discretion should be exercised with caution. Fischer v. Sperl, 100 Minn. 198, 110 N. W. 853.

— **Order granting new trial—When reversed.**—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, following the rule of Hicks v. Stone, 13 Minn. 434 (Gil. 398); Farmer v. Stillwater Water Co., 99 Minn. 119, 108 N. W. 824; Nelson v. Mississippi & Rum River Boom Co., 99 Minn. 484, 109 N. W. 1118; Kramer v. Perkins, 102 Minn. 455, 113 N. W. 1062, 15 L. R. A. (N. S.) 1141; Burgraf v. Byrnes, 102 Minn. 511, 113 N. W. 1133; Skajewski v. Zantarski, 103 Minn. 27, 114 N. W. 247; Avery v. Holliston, 104 Minn. 178, 116 N. W. 354; Hansen v. Lee, 104 Minn. 232, 116 N. W. 482; Flakne v. Minnesota Farmers' Mut. Ins. Co., 105 Minn. 479, 117 N. W. 785.

An order granting a new trial will not be sustained, as one based upon the ground that the verdict or findings were not sustained by the evidence, and therefore a discretionary order, within the rule of Hicks v. Stone, 13 Minn. 434 (Gil. 398), unless it affirmatively appears from the record to have been so granted. Bradley v. Bradley Estate Co., 97 Minn. 130, 106 N. W. 338.

A probability that plaintiff can in any view of the evidence recover no more than nominal damages will not justify a reversal of an order setting aside a verdict for defendant and granting plaintiff's motion for a new trial on the ground that the verdict for defendant was not sustained by the evidence. Kramer v. Perkins, 102 Minn. 455, 113 N. W. 1062, 15 L. R. A. (N. S.) 1141.

— **Presumption on appeal.**—Where an order granting a new trial was silent as to the grounds, an assignment of error that the verdict was not justified by the evidence could not be considered. Sather v. Sexton, 101 Minn. 544, 112 N. W. 1142.

4199. Basis of motion.—If the motion be made for a cause mentioned in section 4198, subdivision 1–4, pertinent facts not appearing of record shall be shown by affidavit; if for any other cause, a case or bill of exceptions shall first be settled and included in the record, unless the moving party within fifteen days of the rendition of verdict or notice of the filing of the decision or report, notices the motion to be heard on the minutes of the court, in which case the judge shall hear the motion on the minutes of the judge or of the stenographer, but it shall not be necessary for the moving party to furnish the court or the opposing party a transcript of the stenographers' minutes, nor of any part thereof, as a condition to have the motion heard. If the motion is to be heard on the minutes of the court, it shall be heard within thirty days after the coming in of the verdict or notice of the filing of the decision or report, unless the time be extended by written stipulation of the parties or by the court for cause, such extension to be granted without costs to either party. If the motion be on the minutes, and the order be appealed from, a case or bill of exceptions shall be proposed by the appellant, and be settled and returned with the record to the supreme court. The records and files of the court pertaining to the case may be referred to without being mentioned in the notice of motion. (R. L. § 4199, as amended by Laws 1907, c. 450.)

4200. Exceptions—Notice of motion for new trial.

Rulings on evidence.—To be the basis of review, the ruling of the court or its refusal to rule on an objection to admission of evidence must be excepted to, or the point must be assigned as error on a motion for new trial. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

When an improper question is asked a witness by the judge, failure to interpose objection is a waiver of the right to take advantage of the error. Merrill v. Coates, 101 Minn. 43, 111 N. W. 836.

Instructions.—Omission of material instructions, or indefiniteness, insufficiency, or obscurity, in the charge, is not ground for error unless the court's attention is called to the defect and further instructions asked for. Kramer v. Northwestern Elevator Co., 97 Minn. 44, 106 N. W. 86.

Technical or verbal error or unintentional misstatements of law or fact in the charge, which could have been corrected, are not ground for reversal in case of failure of objecting counsel to direct the attention of the court to such error or misstatements. Kolbe v. Boyle, 99 Minn. 110, 108 N. W. 847.

Assignment of error.—Assignments of errors, not noted below, will not be considered on appeal. On motion on new trial, an assignment that the deci-

sion is not justified by the evidence and is contrary to law, is insufficient to call in question any of the findings of fact. Nye v. Kahlow, 98 Minn. 81, 107 N. W. 733.

The definite and specific assignment in a motion for a new trial of a ruling or decision of the court constitutes a sufficient exception. Prizer-Painter Stove & Heater Co. v. Peaslee, 99 Minn. 275, 109 N. W. 232.

Assignments of error in the Supreme Court challenging rulings of the trial court do not answer the purpose of exceptions authorized to be taken on a motion for a new trial by this section, and, when not based upon exceptions taken either at the trial or by motion for a new trial, will not be considered. American Engine Co. v. Crowley, 105 Minn. 233, 117 N. W. 428.

Assignments of error cannot be predicated upon a ruling which is neither excepted to at the trial nor assigned as error upon the motion for a new trial. Moneyweight Scale Co. v. Hjerpe, 106 Minn. 47, 118 N. W. 62.

4201. "Bill of exceptions" and "case" defined.

In general.—The examination of jurors, or that a party had exhausted his peremptory challenges, cannot be shown by affidavit, but only by a settled case. Jeremy v. Matsch, 106 Minn. 543, 118 N. W. 1008.

4202. Bill of exceptions or case, how and when settled.

Adverse party.—In an action to recover possession of personal property, where a claimant intervened, and the court ordered judgment for plaintiff, intervener was not an adverse party required to be served. State ex rel. Gergen v. Flaherty, 98 Minn. 526, 106 N. W. 1133.

Extension of time.—After expiration of the time stipulated, a motion for extension of the time within which to settle a case was addressed to the discretion of the court. Johnson v. Groth, 102 Minn. 243, 113 N. W. 452.

REPLEVIN.

4213. Claim of property by third person.

Failure to serve affidavit.—Failure to serve an affidavit of title under this section did not avoid the verdict, where the only issue tried related to other matters. Gilbert v. Gonyea, 103 Minn. 459, 115 N. W. 640.

The object of the affidavit is the protection of the officer and to enable him to obtain indemnity before proceeding with the sale; and it applies only where the possession of the execution debtor is such as to create a presumption of ownership. Kiewel v. Tanner, 105 Minn. 50, 117 N. W. 231.

ATTACHMENT.

4215. When and in what cases allowed.

Cited and applied in Breckke v. Duluth Log Co., 101 Minn. 110, 111 N. W. 949.

See note under section 3527.

4216. Contents of affidavit.

Cited in Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L. R. A. (N. S.) 990.

4223. Motion to vacate.

Vacation of writ—Appeal.—Where the affidavits are such as might reasonably lead different minds to opposite conclusions, and there is no clear preponderance of proof opposed to the decision of the court, the appellate court has recognized a presumption in favor of such decision. Schoeneman v. Sowle, 102 Minn. 466, 113 N. W. 1061.

GARNISHMENT.

4229. Affidavit—Garnishee summons—Title of action.

Cited and applied in Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 N. W. 257.

See note under section 4231.

In what actions—Tort.—Under G. S. 1894, § 5306, garnishment proceedings are authorized in actions in tort. Cummings v. Edwards, Wood & Co., 95 Minn. 118, 106 N. W. 304.

—— **On appeal from justice court.**—Where, after a judgment in a justice court against defendant, the case was appealed on questions of law and fact, garnishment proceedings in the district court could not properly be dismissed on the ground that they were commenced for the purpose of annoying and harassing defendant, because after the appeal garnishment proceedings were com-

menced in the justice court by inadvertence and subsequently abandoned. Hopkins v. McCusker, 103 Minn. 79, 114 N. W. 468.

See note under section 4257.

4231. In district court.

Summons—When issued.—A garnishee summons is issued when delivered by plaintiff, or his attorney, to the proper officer for service upon the garnishee, and, when the writ is sent to the officer by mail, delivery is not completed until received by him. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 N. W. 257.

Service on defendant.—Failure to serve upon defendant a proper copy of the summons and notice is not a jurisdictional defect, such as to render void a judgment entered against the garnishee upon the disclosure. But the proceedings may be dismissed, and the garnishee discharged, on motion of defendant, specially appearing for that purpose. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 N. W. 257.

See note under section 4245.

4232. Effect of service on garnishee—Fees.

Effect of service.—The service of a summons in garnishment does not change the rights of the parties, further than to transfer the right of defendant to proceed against the garnishee for the collection of the debt. The attaching creditor occupies no better position with respect to the garnishee than would defendant in a suit by him against the garnishee. Bacon v. Felthous, 103 Minn. 387, 115 N. W. 205.

Pendency of garnishee action—Action by creditor.—Pendency of a garnishee action is a defense by way of a plea in abatement in an action by the garnishee's creditor to recover the debt sought to be reached by the garnishment proceedings. The proper practice is to order a stay of proceedings in the action to recover the debt, pending determination of the liability of the garnishee in the garnishee action. American Hardwood Lumber Co. v. Joannin-Hansen Co., 99 Minn. 305, 109 N. W. 403.

4233. Property subject to garnishment.

Property subject to garnishment—In general.—The courts of this state have jurisdiction to entertain garnishment proceedings against nonresidents in all cases where defendant and garnishee are both personally served with process while within the state. Swedish-American Bank v. Bleecher, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492, and McKinney v. Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278, distinguished. In such case the situs of the property, as determined by the residence of the parties, is immaterial. Nor is the place of payment material where the garnishee interposes no claim that he cannot be compelled to make payment at a place other than agreed upon. McShane v. Knox, 103 Minn. 268, 114 N. W. 955, 20 L. R. A. (N. S.) 271.

—— **Debt of foreign corporation.**—A debt due from one foreign corporation to another, arising out of a contract entered into in this state at an agency of the debtor, maintained therein for the transaction of its business, is subject to garnishment in an action by a resident plaintiff against the creditor corporation, although the latter maintains no agency therein. Krafve v. Roy & Roy, 98 Minn. 141, 107 N. W. 966, 116 Am. St. Rep. 346.

—— **Debt payable upon condition.**—Where a contract provides for payment of money in installments, and that it shall by the debtor be deposited in a bank in name of the creditor, but not subject to be withdrawn by him except by check payable to a third party, from whom the creditor is to receive a deed, which shall be delivered when all installments are paid, the debt created by the contract is not subject to garnishment by a general creditor of the debtor. Bacon v. Felthous, 103 Minn. 387, 115 N. W. 205.

4234. In what cases garnishment not allowed.

Cited in American Hardwood Lumber Co. v. Joannin-Hansen Co., 99 Minn. 305, 109 N. W. 403.

4235. Examination of garnishee.

Cited in Webster Mfg. Co. v. Penrod, 103 Minn. 169, 114 N. W. 257.

4240. Proceedings when debt or title is disputed.

G. S. 1894, § 5319, cited in Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L. R. A. (N. S.) 1009.

4241. Judgment against garnishee—Default.

Default of garnishee—Admission—Estoppel.—A garnishee who defaults admits that he has property of defendant in his possession, and is estopped to assert that the judgment in the original action is void for want of jurisdiction, because defendant had no property in the state and therefore service could not be made by publication. Such admission establishes the fact that defendant has

property within the state. Minneapolis, St. P. & S. S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 649.

—— **Judgment.**—When the garnishee defaults, and the amount of property in his possession is thus undetermined, and the summons in the original action is thereafter published, the court acquires jurisdiction to enter judgment against defendant, and the garnishee cannot object if judgment is entered, upon the default of defendant, for the full amount claimed. Such judgment having thus been entered, a judgment may be entered for the full amount thereof against the garnishee upon his default. The court having jurisdiction to enter a judgment, the garnishee cannot question the correctness of the amount thereof. Minneapolis, St. P. & S. S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 649.

—— **Disclosure.**—A garnishee who has defaulted cannot make disclosure until after the default has been removed by the court upon application duly made and good cause shown. Minneapolis, St. P. & S. S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 649.

4242. Same, when rendered—Discharge—Transfer of action.

Charging garnishee.—The proper tribunal to determine whether a garnishee may be charged as such on the facts of his disclosure is the court in which the garnishee action is pending. American Hardwood Lumber Co. v. Joannin-Hansen Co., 99 Minn. 305, 109 N. W. 403.

4244. Who may take disclosure.

Other testimony.—Upon disclosure, an executor garnishee might introduce testimony and evidence other than his own, for the purpose of corroboration and explanation by developing facts additional to those disclosed by him, and to show that money and effects under his control as executor did not in fact belong to the judgment debtor. Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L. R. A. (N. S.) 1009.

4245. Disclosure before return day.

Application in general.—This section must be construed with section 4231. It is intended for the convenience of the garnishee, but not to do away with service of the summons on defendant, nor to prevent defendant from appearing at the time specified in the summons and insisting on his rights as provided in section 4231. Webster Mfg. Co. v. Penrod, 103 Minn. 69, 114 N. W. 257.

4247. Duty and rights of garnishee.

Rights of garnishee.—The garnishee can be required to pay only in the manner provided by the contract which creates his liability. Bacon v. Felthous, 103 Minn. 387, 115 N. W. 205.

4256. Discharge of attachment or garnishment.

Cited in Hopkins v. McCusker, 103 Minn. 79, 114 N. W. 468.
See note under section 4257.

4257. Appeals.

Appeal from justice court—Garnishment in district court.—After a case has been removed by appeal from a justice court to the district court, garnishment proceedings may be commenced in the district court, notwithstanding the fact that a proper appeal bond was given and is in force. Hopkins v. McCusker, 103 Minn. 79, 114 N. W. 468.

JUDGMENT.

4264. Measure of relief granted.

On default—Excessive relief.—In an action to determine adverse claims, plaintiff is entitled, on defendant's default, to such relief only as he demands in his complaint, or as comes within its allegations, where the demand is imperfectly framed. A judgment awarding excessive relief, so appearing from the face of the record, is void for want of jurisdiction, and is open to attack before or after the time of appeal, even by one not a party, affected thereby in his property rights. Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612.

4269. Damages for libel.

Notice.—Notice is sufficient if it declares the entire publication to be false and defamatory, without specifying those particular parts which constitute libelous matter per se. Craig v. Warren, 99 Minn. 246, 109 N. W. 231.

4271. Judgment roll, how made up.

Cited in Cohues v. Finholt, 101 Minn. 180, 112 N. W. 12.

4272. Docketing judgments—Transcripts—Lien on land.

Cited in Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450.

See note under section 4075.

Cited in Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435.

See note under section 4086.

Lien—Upon what estates and interests.—A creditor of a person selected as the medium through whom a conveyance is made by husband to wife acquires no interest in the land by virtue of a judgment existing against such person, although such conveyance was made in fraud of creditors. Sokolowski v. Ward, 98 Minn. 177, 107 N. W. 961.

The reversionary interest of the assignor for benefit of creditors is subject to the lien of a judgment entered and docketed against him pending the insolvency proceedings, subject to be defeated by a sale of the land by the assignee before the proceedings are terminated. Northwestern Mut. Life Ins. Co. v. Murphy, 103 Minn. 104, 114 N. W. 360.

See note under section 4611.

On sale by order of the probate court to pay debts or expenses, any surplus belonging to an heir must be applied to the payment of a judgment obtained against him, docketed after the death of the ancestor and before sale. Kolars v. Brown, 121 N. W. 229.

4273. New county—Docketing old judgments—Real estate tax judgments.—When a new county is created, the clerk of the district court thereof shall transcribe into his records all the docket entries relative to judgments for the payment of money, including real estate tax judgments, against lands situated in such new county, rendered within the ten years next preceding such creation and docketed in the counties from which such new county was set off, and such transcribed entries shall have the same effect as transcripts of dockets of judgments made by the clerk of court of the county where the originals were docketed and filed in another county. For such transcription the clerk shall receive from the new county fifteen cents for each judgment. (R. L. § 4273, as amended by Laws 1907, c. 159, § 1.)

4277. Judgments, procured by fraud, set aside by action.

See sections [4160—] 1, [4160—] 2.

When action lies—Perjury.—When the issues were defined by the pleadings and no deceit was practiced as to the proofs to be offered, an action will not lie under G. S. 1894, c. 5434, to vacate a judgment on the ground that it was obtained by fraud and perjury. Bisseberg v. Ree, 99 Minn. 481, 109 N. W. 1115.

An action cannot be maintained upon the bare allegation that on an issue of fact, so squarely made that each party knows what the other will attempt to prove, and where neither has a right, or is under any necessity, to depend on the other to prove the fact to be as he himself claims it, there was false or perjured testimony by the successful party or his witnesses. Hayward v. Larrabee, 106 Minn. 210, 118 N. W. 795.

[4280—]1. Discharge of judgments against bankrupts.—Any person discharged from his debts pursuant to the act of Congress known as "An act to establish a uniform system of bankruptcy throughout the United States, approved July first, eighteen hundred and ninety-eight," and all amendments thereto, may, after the expiration of one year from the date of such discharge, apply to any court of record in which a judgment shall have been rendered or a transcript thereof filed against him, for the discharge thereof from record, and if it shall appear to the court that he has thus been discharged from the payment of such judgment, the court may order and direct that such judgment be discharged and satisfied of record, and thereupon the clerk of such court shall enter a satisfaction thereof; provided, however, that no such application shall be made or order granted except upon ten days' notice of such application to the judgment creditor whose judgment is sought thereby to be satisfied of record, his executors, administrators or assigns, served in the manner provided for the service of notices in civil actions, or in case such creditor, or his executors, administrators or assigns,

shall not reside within the state of Minnesota, in such manner as the court shall provide by order; provided, further, that nothing in this act shall be construed to apply to judgments not listed among the liabilities of the bankrupt in his petition to be adjudged a bankrupt under the act of July first, eighteen hundred ninety-eight and all amendments thereto. ('09 c. 230 § 1)

Historical.—"An act to provide for the discharge of judgments against persons discharged under the United States bankrupt law." Approved April 17, 1909.

4281. Joint debtors—Contribution and subrogation.

Subrogation—Failure to file notice.—Where defendant, as clerk, was negligent in not entering and docketing a judgment by confession, and the judgment creditor was damaged thereby, plaintiff, who was obliged to pay the judgment as surety, was thereby substituted to the rights of the creditor, and could maintain action for damages, although he did not file the notice provided for in this section. Whelan v. Reynolds, 101 Minn. 290, 112 N. W. 223.

Cited in Akin v. Lake Superior Consol. Iron Mines, 103 Minn. 204, 114 N. W. 654, 837.

See note under section 4284.

4282. Several judgments against joint debtors.

Application in general.—Action may be maintained upon contract or for a tort, against one of several persons jointly liable. Fryklund v. Great Northern R. Co., 101 Minn. 39, 111 N. W. 727.

Where an action is brought against one of the parties to a joint contract, and the complaint alleges a contract made by him and the evidence shows a joint contract, there is, in the absence of showing that defendant was misled, no fatal variance. Morgan v. Brach, 104 Minn. 247, 116 N. W. 490.

Cited in Town of Kettle River v. Town of Bruno, 106 Minn. 58, 118 N. W. 63.

Bringing in joint obligor—Waiver.—Where one of joint lessees, sued independently, pleaded a general denial and made no objection to being proceeded against alone, he was not, after a decision, entitled to amend and set up that such contract was joint. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

What law governs.—Under this section the rule that the lex fori governs in matters of procedure applies. Fryklund v. Great Northern R. Co., 101 Minn. 37, 111 N. W. 727.

4284. By confession—On statement.

Sufficiency of statement.—A judgment by confession, based upon a statement regular except that it does not sufficiently state the facts out of which the debt arose, is valid as between the parties. Neither the judgment debtor nor subsequent purchasers claiming under him can avoid such a judgment. Whelan v. Reynolds, 101 Minn. 290, 112 N. W. 223.

Duty of clerk.—When such statement is presented to the clerk, with a request to enter and docket a judgment thereon, if he fails so to do promptly he is liable to the judgment creditor for damages sustained thereby. Whelan v. Reynolds, 101 Minn. 290, 112 N. W. 223.

See note under section 4281.

4286. Submission without action.

Cited in Lager v. Sibley County, 100 Minn. 85, 110 N. W. 355; Manley v. Scott, 121 N. W. 628.

EXECUTIONS.

4306. Sale, when and how.

Application of proceeds.—Where the amount bid is in excess of that required to satisfy the execution and costs of sale, it is the duty of the sheriff to apply the balance to satisfaction of a junior judgment which is a lien on the land. Carlson v. Headline, 100 Minn. 327, 111 N. W. 259.

4308. Certificate of sale of realty.

Certificate—Issue without payment.—A sheriff cannot be required to issue certificate until the amount bid has been paid in cash; but, if the certificate is issued without such payment, the sale is valid and the remedy of the execution debtor is an action against the sheriff for the unpaid purchase money. Carlson v. Headline, 100 Minn. 327, 111 N. W. 259.

4312. Redemption, how made.

Cited in Thompson v. E. I. Dupont Co., 100 Minn. 367, 111 N. W. 302.

See note under section 4315.

4315. Redemption pending action to set aside execution sale.

Operation in general.—Where plaintiffs complied with Laws 1895, c. 326, it was not necessary also to produce to the sheriff or clerk the deed under which they claimed to redeem, as required by G. S. 1894, § 5474. Whether this would be so under the Revised Laws was not determined. Thompson v. E. I. Dupont Co., 100 Minn. 367, 111 N. W. 302.

4317. Property exempt.— * * *

11. Necessary seed for the actual personal use of the debtor for one season, not to exceed in any case the following amounts: one hundred bushels of wheat, one hundred bushels of barley, one hundred bushels of potatoes, one hundred bushels of oats, one hundred bushels of flax, ten bushels of corn; and binding material sufficient for use in harvesting the crop raised from such seed. (R. L. § 4317, subd. 11, as amended by Laws 1909, c. 12, § 1.)

Subd. 8.—The exemption of tools and instruments granted by G. S. 1894, § 5459, was lost by an abandonment of the trade or occupation. Cable v. Hoolihan, 98 Minn. 143, 107 N. W. 967, 116 Am. St. Rep. 348.

Resident.—Where a debtor sold all his nonexempt property and started for another state, with the intention of establishing a residence there, and while within this state an attachment was levied on his horse, held, that he was still a resident, and entitled to claim his exemptions. Grimestad v. Lofgren, 105 Minn. 286, 117 N. W. 515, 17 L. R. A. (N. S.) 990.

SUPPLEMENTARY PROCEEDINGS.

4323. Property applied to judgment—Receiver, etc.

Receiver.—A judgment in favor of defendant in an action by a receiver is binding upon the creditor at whose instance he was appointed. Dohs v. Holbert, 103 Minn. 283, 114 N. W. 961.

CHAPTER 78.

JURIES.

[4329—]1. How drawn and summoned in counties having more than 200,000 inhabitants.—The judge or judges of any judicial district may, by order filed with the clerk of court of any county having a population of more than two hundred thousand, where a term of court is to be held, at least fifteen days before the sitting of such court, direct that the petit jurors for such or any subsequent term or terms be summoned for any day of the term fixed by such order other than the day now fixed by law. Such order may be at any time modified or vacated by the court by an order in like manner made and filed with the clerk at any time. When such order has been made, the clerk of the district court in such county shall in the presence of the judge thereof, at least ten days before the general term of said district court, under the direction of the judge or judges of said court, draw from the names in the list of persons selected to serve as petit jurors, made, certified and prepared for drawing, the names of as many persons as the court or judge shall direct to serve as petit jurors for a period of two weeks in such terms, commencing with the day of such term named in said order; and shall then continue in like manner to draw the names of other persons for each panel for as many successive panels of petit jurors as the court or judge may direct for successive periods of two weeks, covering the time that petit jurors are expected to be needed during such general term. Such clerk shall forthwith issue to the proper officer venires for such panels of petit jurors, returnable on the proper days as to each, respectively, at ten o'clock in the forenoon, and the officer shall forthwith thereafter, as soon as may be,