THE

PUBLIC STATUTES

OF THE

STATE OF MINNESOTA.

(1849—1858.)

COMPILED BY
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COMMISSIONERS.

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Form of commitment where justice on the trial shall find that he has not jurisdiction of the case

Form of commitment where justice on the trial shall find that he has not jurisdiction of the case.

Territory of Minnesota, } ss.
County of }

To the sheriff or any constable of said county:

Whereas, of, &c., has been brought this day before the undersigned, one of the justices of the peace of said county, charged on the oath of , with having, on the day of , A. D. 18 , in said county, committed the offense of (here state the offense charged in the warrant,) and in the progress of the trial on said charge, it appearing to the said justice that the said had been guilty of the offense of (here state the new offense found on the trial,) committed at the time and place aforesaid, of which offense, the said justice has not final jurisdiction; and whereas, after examination, had in due form of law, touching the said charge and offense last aforesaid, the said justice did adjudge that the said offense had been committed, and that there was probable cause to believe the said to be guilty thereof; and whereas, the said has not offered sufficient bail for his appearance to answer for said offense, you are therefore commanded, forthwith to take the said and him convey to the common jail of said county, the keeper whereof is hereby required to detain him in custody, in said jail, until he shall be thence discharged according to law.

Given under my hand this day of , A. D. 18 .

J. P., justice of the peace.

CHAPTER 60.

CIVIL ACTIONS.

THE FORMS OF ACTIONS AT LAW.

[*Chapter* 70, *Revised Statutes.*]

Distinctions between the forms of actions at law abolished.

To be but one form to be called civil actions.

(1.) SEC. I. The distinction between the forms of actions at law, heretofore existing, are abolished; and there shall be in this territory hereafter, but one form of action at law, to be called a civil action, for the enforcement or protection of private rights, and the redress of private wrongs; except as otherwise expressly provided by statute.

Parties to actions how designated.

(2.) SEC. II. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

THE TIME OF COMMENCING ACTIONS.

Actions when to be commenced.

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

Action to recover real property within twenty years.

(4.) SEC. IV. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the suit. The periods prescribed in the preceding section for the commencement of actions, are as follows:

Actions to be brought within ten years.

(5.) SEC. V. Within ten years:

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

Actions to be brought within six years.

(6.) SEC. VI. Within six years:

1. An action upon a contract or other obligation, expressed or implied, excepting those mentioned in the last preceding section;

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

3. An action for trespass upon real property;

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

5. 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.

6. 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.

(7.) SEC. VII. Within three years:

Actions to be commenced within three years.

1 An action against a sheriff, coroner, or constable, upon the liability by the doing of an act in his official capacity, and in virtue of his office, or by omission of an official duty, including the failure to pay money collected upon an execution; but this section does not apply to an action for an escape.

2. An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, except as otherwise provided by law.

(8.) SEC. VIII. Within two years:

Actions to be commenced within two years.

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

2. An action upon a statute for a forfeiture or penalty to the territory.

(9.) SEC. IX. Within one year:

Actions to be commenced within one year.

1. An action against a sheriff, or other officer, for the escape of a person arrested or imprisoned by a civil process.

(10.) SEC. X. 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, claimed or proved to be chargeable on the adverse side.

On current accounts when cause of action accrues.

(11.) SEC. XI. All action upon a statute for a penalty given in the whole or in part, to the person who prosecutes for the same, must be commenced within one year after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years thereafter in behalf of the United States, by the attorney general, or the district attorney of the county where the offense was committed.

Actions for penalty within one year after the commission of the offense.

(12.) SEC. XII. An action for relief not being before provided for, must be commenced within ten years after the cause of action shall have accrued.

Actions for relief to be brought within ten years.

(13.) SEC. XIII. The limitations prescribed in this chapter, apply to actions brought in the name of the United States, in the same manner as to actions by private parties.

Limitations to apply to actions brought by United States.

(14.) SEC. XIV. An action is commenced as to each defendant, when the summons is served on him, or on a defendant who is a joint contractor, or otherwise united in interest with him.

When action is commenced.

(15.) SEC. XV. 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 be 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 must be followed by the first publication of the summons, or the service thereof, within sixty days.

Attempt to commence action equivalent when, &c.

(16.) SEC. XVI. If, when the cause of action accrue against a person, he be out of the territory, the action may be commenced within the term herein limited after his return to the territory; and if, after the cause of action accrues, he depart from the territory, the time of his absence is not part of the limited time for the commencement of the action.

When cause of action accrue, defendant is out of the territory, time of absence not to be included.

(17.) SEC. XVII. If a person, entitled to bring an action mentioned in this chapter, except for a penalty, or forfeiture, or against a sheriff or

Certain disability not a part of limitation.

other officer for an escape, be, at the time the cause of action accrued, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal, for a time less than his natural life; or
4. A married woman.

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

When personal representatives may commence actions in certain cases.

(18.) SEC. XVIII. If a person entitled to bring an action, die 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, die 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, and within one year after the issuing of letters testamentary or of administration.

With alien time of war not to be part of limitation.

(19.) SEC. XIX. 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 part of the period limited for the commencement of the action.

In case of injunction, &c., continuance thereof not part of limitation.

(20.) SEC. XX. When the commencement of an action is stayed by injunction, or a 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.

When party cannot avail himself of disability.

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

Limitation does not attach until all disabilities are removed.

(22.) SEC. XXII. 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.

Promise not evidence of new contract unless in writing.

(23.) SEC. XXIII. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby.

When payment is made on contract, limitation to commence from the time payment was made.

(24.) SEC. XXIV. Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, bond, promissory note, or other evidence of indebtedness, if such payment be made after the same becomes due, the limitation shall commence from the time the last payment was made.

When judgment is arrested or reversed plaintiff may commence anew within one year.

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

This chapter not to extend to actions commenced.

(26.) SEC. XXVI. This chapter does not extend to actions already commenced, but the statutes now in force are applicable to such cases according to the subject of the action, and without regard to the form.

THE PARTIES TO CIVIL ACTIONS.

Action to be prosecuted in name of party in interest.

(27.) SEC. XXVII.[8] [*As amended on page* 8 *of the amendments of* 1852 *to the revised statutes.*] Every action must be prosecuted in the name of the real party in interest, except as hereinafter provided; but this sec-

tion shall not be construed to authorize the assignment of a thing in action not arising out of contract.

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

(29.) SEC. XXIX. An executor or administrator, a trustee of an expressed trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section. Executor, &c., may sue alone.

(30.) SEC. XXX. [*As amended on page* 8 *of the amendments of* 1852 *to the revised statutes.*] When a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property, she may sue alone; and when the action is between herself and her husband, she may sue or be sued alone. But when her husband shall not be joined with her, she shall prosecute or defend by her next friend or guardian except in actions between herself and husband. Husband to be joined with married woman in actions.

(31.) SEC. XXXI. When an infant is a party, he must appear by his guardian, who may be appointed by the court in which the action is brought, or by a judge thereof. When an infant is party, must sue by guardian.

(32.) SEC. XXXII. The guardian must be appointed as follows: Guardian how appointed.

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen; or if under that age, upon the application of a relation or friend of the infant;

2. When the infant is defendant, upon an application of the infant, if he be the age of fourteen years, and apply within twenty days after the service of the summons, if he be under the age of fourteen, or neglect so to apply, then, upon the application of any other party to the action, or of a relation or friend of the infant.

(33.) SEC. XXXIII. 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 be not living with, or in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service. Father may sue for seduction of daughter.

(34.) SEC. XXXIV. 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 a ward. Father may sue for injury to child.

(35.) SEC. XXXV. When a husband and father has deserted his family, the wife and mother 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. When husband has deserted family, wife may prosecute or defend.

(36.) SEC. XXXVI. 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. How parties severally liable may be sued.

(37.) SEC. XXXVII. [*As amended on page* 8 *of the amendments of* 1852 *to the revised statutes.*] 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 survive or continue. In case of the death, marriage or other disability of a party, the court on motion may allow the action to be continued by his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the Action not to abate by death, &c. In case of transfer, action how continued.

original party, or the court may allow the person to whom the transfer is made, to be added or substituted as a party to the action.

Partners may be sued by their common name.

Process how served in such case.

(38.) SEC. XXXVIII. 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, and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants, and had been sued upon their joint liability. Any one of the joint associates may also be sued for the obligations of all.

THE PLACE OF TRIAL OF CIVIL ACTIONS.

What actions to be tried in county where the subject of action is situated.

(39.) SEC. XXXIX. Actions for the following causes must 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:

1. 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;

2. For the partition of real property;

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

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

Actions to be tried in county where cause thereof arose.

(40.) SEC. XL. Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial, as in section forty-three:

1. For the recovery of a penalty or forfeiture imposed by statute, except that where it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream;

2. Against a public officer or person especially 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 aid does anything touching the duties of such officer.

What actions to be tried in county where parties reside.

(41.) SEC. XLI. In all other cases except as provided in the next section, the action must be tried in the county in which the parties or one of them, reside at the commencement of the action, or if none of the parties reside in this territory, the same may be tried in any county which the plaintiff may designate in his complaint, subject however to the power of the court to change the place of trial as provided in section forty-three.

Action against non-resident by attachment may be brought in county where defendant has property.

(42.) SEC. XLII. If the defendant is a non-resident of this territory, 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.

In what cases court may change place of trial.

(43.) SEC. XLIII. The court may change the place of trial on the application of all the defendants who answer in the following cases:

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

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

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

A Bill for an Act allowing a change of venue in certain cases.

[*Passed March* 3, 1855.] c. 17

Application necessary to warrant the granting of a change of venue.

(44.) SEC. I. *Be it enacted by the legislative assembly of the territory of Minnesota:* That if either party in any civil cause at law, or in equity, after issue joined therein, which is or may be depending in any district court within the territory, shall fear that he will not receive a fair trial or hearing, in the court in which the cause is pending, on account that the judge of such court is interested, or prejudiced therein, or is related to, or shall have been counsel for either party; or that the inhabitants of such county are prejudiced against the applicant, or for any other good reason he fears he will not receive a fair and impartial trial or hearing, such party may apply to the court in term, or to the judge thereof, in vacation, by petition, setting forth the cause of the application, and praying a change of venue, accompanied by an affidavit verifying the facts stated in the petition.

When judges shall grant a change of venue.

(45.) SEC. II. In all cases, as is specified in the foregoing section, reasonable notice of the application having been given to the opposite party or his attorney, the court or judge shall award a change of venue, to some county in another judicial district, where the causes complained of do not exist: *provided*, that neither party shall have more than one change of venue.

Change of venue may be made by consent of parties.

(46.) SEC. III. A change of venue may, in all civil cases, be made, upon the consent in writing of the parties or their attorneys.

SEC. IV. [*Amends chapter* 66, *section* 7, *of the revised statutes.*]

When act to take effect.

(47.) SEC. V. This act shall take effect and be in force from and after its passage.

MANNER OF COMMENCING CIVIL ACTIONS.

[*Chapter* 70, *Revised Statutes.*]

Civil actions how commenced.

(48.) SEC. XLIV. Civil actions in the several district courts of this territory, must be commenced by the service of a summons, as hereinafter provided.

Summons by whom signed and what to contain.

(49.) SEC. XLV. 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 territory therein specified, in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service.

Summons to contain notice.

(50.) SEC. XLVI. The summons must also contain a notice in substance as follows:

Notice to be contained in summons.

1. [*As amended on page* 8 *of the amendments of* 1852 *to the revised statutes.*] In an action arising on obligation for the payment of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint; in other actions for the recovery of money only, that he will, upon such failure, have his damages assessed by a jury, or the amount he is entitled to recover, ascertained by the court, or under its direction, and take judgment for the amount so assessed or ascertained.

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

Copy of complaint to be served or filed.

(51.) SEC. XLVII. [*As amended on page* 8 *of the amendments of* 1852 *to the revised statutes.*] 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 court, in which case the service of the copy may be

omitted; but the summons in such case, must notify the defendant that the complaint has been filed with the clerk of the 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 three 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 that time.

After appearance, defendant may demand copy of complaint.

Summons by whom served.

(52.) SEC. XLVIII. 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; the service must be made and the summons returned to the person whose name is subscribed thereto, with all reasonable diligence.

Summons how served.

(53.) SEC. XLIX. The summons must be served by delivering a copy thereof, as follows:

1. If the suit be against a corporation, to the president, or other head of the corporation, secretary, or managing agent thereof;

2. 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 be none within this territory, then to any person having the care or control of such minor, or with whom he resides, or by whom he is employed;

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

4. In all other cases to the defendant personally, or by leaving a copy of the summons at his usual last place of abode.

When court may grant order that service be made by publication.

(54.) SEC. L. When the defendant after due diligence, cannot be found within the territory, and when that fact appears by affidavit, to the satisfaction of the court, or judge, and it in like manner appears that a cause of action exists against the defendant, or that he is a proper party to the action relating to real property in this territory, such court, or judge, may grant an order that the service be made by the publication of a summons in either of the following cases:

1. When the defendant is a foreign corporation;

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

3. When the defendant is not a resident of the territory, but has property therein, and the action arises on obligation, and the court has jurisdiction of the subject of the action;

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

Liens.

5. [*Added by laws of* 1856, *page* 11.] When the subject of the action is real or personal property in this territory, and the defendant has or claims a lien, actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

Order what to contain.

(55.) SEC. LI. (*a*) The order must direct the publication to be made in a newspaper published in the county where the action is brought, and if there is no newspaper published in the county, then in a newspaper published at the seat of government of the territory, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication the court or judge must also direct a copy

(*a*) Clerks of the district courts are authorized to grant orders of publication by chapter 11 of laws of 1858, on page 25, published in this collection under "Clerks of the District Courts," in the chapter on "*County officers*"

of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is not known to the party making the application, when the publication is ordered, personal service of a copy of the summons and complaint out of the territory, is equivalent to publication and deposit in the post-office; in either case, the service of the summons is to be deemed complete at the expiration of the time prescribed in the order for publication.

Copy of summon and complaint to be deposited in post-office, directed to defendant.

(56.) SEC. LII. If the summons be not personally served on the defendant, nor received by him through the post-office, in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, must 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 defense be successful, and the judgment, or any part thereof, has been collected, or otherwise enforced, such restitution may therefore be compelled as the court directs.

Defendant not served with summons may come in at any time and defend.

(57.) SEC. LIII. 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:

When one of several defendants are served with summons, plaintiff how to proceed.

1. If the action be against the defendants jointly indebted upon an obligation, he may proceed against the defendants served, unless the court otherwise direct; and if he recover 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, and if they are subject to arrest, against their persons; or,

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

(58.) SEC. LIV. Proof of the service of the summons, and of the complaint or notice, if any accompanying the same, must be as follows:

Proof of service of summons how made.

1. If served by the sheriff, his certificate thereof; or,

2. If by another person, his affidavit thereof; or,

3. 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 shall be deposited; or,

4. The written admission of the defendant.

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

(59.) SEC. LV. 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.

Court acquires jurisdiction from service of summons.

PLEADINGS IN CIVIL ACTIONS.

(60.) SEC. LVI. The pleadings are the formal allegations by the parties, of their respective claims and defenses, for the judgment of the court.

Pleadings defined.

(61.) SEC. LVII. All the forms of pleadings in actions at law, heretofore existing, are abolished, and hereafter the forms of pleadings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be regulated by the statute.

Forms of pleadings abolished, sufficiency thereof to be determined by statute.

Pleadings on the part of plaintiff.

(62.) SEC. LVIII. [*As amended on page 9 of the amendments of 1852 to the revised statutes.*] The only pleadings allowed on the part of the plaintiff are:

1. The complaint;
2. The reply or demurrer.

Pleadings on the part of defendant.

And on the part of the defendant:

1. Demurrer;
2. The answer.

THE COMPLAINT.

Complaint first pleading of plaintiff.

(63.) SEC. LIX. The first pleading on the part of the plaintiff, is the complaint.

Complaint what must contain.

(64.) SEC. LX. The complaint must contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county where the action is brought, and the names of the parties to the action, plaintiff and defendant;
2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;
3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated.

THE DEMURRER.

When defendant may demur.

(65.) SEC. LXI. The defendant may demur to the complaint within twenty days after the service of a copy thereof, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant on the subject of the action;
2. That the plaintiff has no legal capacity to sue;
3. That there is another action pending between the same parties for the same cause;
4. That there is a defect of parties, plaintiff or defendant;
5. That several causes of action have been improperly united;
6. That the complaint does not state facts sufficient to constitute a cause of action.

Demurrer what to contain.

(66.) SEC. LXII. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken; unless it do so, it may be disregarded, and treated as a nullity. It may be taken to the whole complaint, or to any of the causes of action mentioned therein.

Answer must be served in twenty days.

(67.) SEC. LXIII. If the complaint be amended, a copy thereof must be served upon the defendant, who must answer it within twenty days after service, or the plaintiff, upon filing with the clerk proof of the service, and of the defendant's omission, may proceed to obtain judgment, as in other cases of failure to answer; but where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

When objection may be taken advantage of by answer.

(68.) SEC. LXIV. When any of the matters enumerated in section sixty-one, do not appear in the face of the complaint, the objection may be taken by answer.

When defendant waives objections to complaint.

(69.) SEC. LXV. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection

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

THE ANSWER.

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(70.) SEC. LXVI. The answer of the defendant must contain: Answer what must contain.

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

2. A statement of any new matter constituting a defense or counter claim, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

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(71.) SEC. LXVII. The counter claim, mentioned in the last section, must be an existing one in favor of the defendant, and against the plaintiff, between whom a separate judgment might be had in the action, and arising out of the following causes of action: When counter claim allowed.

1. 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;

2. In an action arising on obligation, any other cause of action arising also on obligation, and existing at the commencement of the suit.

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(72.) SEC. LXVIII. If the defendant omit to set up a counter claim in the case mentioned in the first subdivision of the last section, he cannot afterwards maintain an action against the plaintiff thereon. If defendant omit to set up counter claim it cannot afterwards be allowed.

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(73.) SEC. LXIX. The defendant may set forth by answer as many defenses as he shall have; they shall each be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished; the defendant may also answer one or more of the several allegations in the complaint, and demur to the residue. Separate defenses how set up in answer.

70

(74.) SEC. LXX. [*As amended on page* 9 *of the amendments of* 1852 *to the revised statutes.*] Sham answers and defenses and frivolous demurrers may be stricken out, or judgment rendered notwithstanding the same, on motion, as for want of an answer. Sham answers, &c., to be stricken out.

71

(75.) SEC. LXXI. [*As amended on page* 9 *of the amendments of* 1852 *to the revised statutes:*] When the answer contains new matter set up as a defense, or counter claim, or both, the plaintiff may, 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, and in such a manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint, constituting a defense to the counter claim, or other new matter in the answer; or he may demur to the same, stating in his demurrer the grounds thereof; and the plaintiff may demur to one or more of several defenses or counter claims, and reply to the residue. Reply to counter claim, &c., what to contain. Plaintiff may demur.

If the answer contains a statement of new matter constituting a defense or counter claim, and the plaintiff fail to reply or demur thereto within the time allowed by law, the defendant may move on a notice of not less than eight days, for such judgment as he may be entitled to upon such statement, and the court may thereupon order a reference or assessment of damages by a jury in its discretion. Plaintiff failing to reply or demur, cause may be referred or damages assessed.

If a reply of the plaintiff to any defense or counter claim set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof. Defendant may demur for insufficiency.

GENERAL RULES OF PLEADING.

What pleadings allowed.

(76.) SEC. LXXII.[73] No other pleading shall be allowed than the complaint, answer, reply, and demurrer.

Pleadings in any court of record.

(77.) SEC. LXXIII.[74] [*As amended by laws of* 1856, *page* 6 *and* 7.] Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also, and in all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true, and when a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney or any other person except the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party. But when the action or defense is founded upon a written instrument for the payment of money only, and such instrument is in possession of the agent or attorney, the affidavit of the agent or attorney to the fact of such a possession shall be a sufficient verification. When a corporation is a party, the verification may be made by any officer thereof; and when the United States, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney general in behalf of the territory, for the recovery of real property, the pleadings need not be verified.

Pleadings how verified.

Account how set up in pleading.

(78.) SEC. LXXIV.[74] It shall not be 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, to the fact 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.

Allegations of pleadings to be liberally construed.

(79.) SEC. LXXV.[75] In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties.

Irrelevant or redundant matter may be stricken out.

(80.) SEC. LXXVI.[76] [*As amended on page* 9 *of the amendments of* 1852 *to the revised statutes.*] If irrelevant or redundant matter be 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 defense, is not apparent, the court may strike it out on motion, or require it to be amended.

Judgment how pleaded.

(81.) SEC. LXXVII.[77] In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial, the facts conferring the jurisdiction.

Performance of conditions precedent how pleaded.

(82.) SEC. LXXVIII.[78] 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 be controverted,

the party pleading shall be bound to establish on the trial, the facts showing such performance.

Private statute how pleaded.

(83.) SEC. LXXIX. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its approval, and the court shall thereon take judicial notice thereof.

Pleadings in actions for libel or slander, what necessary.

(84.) SEC. LXXX. 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 be controverted, the plaintiff shall be bound to establish on trial, that it was so published or spoken.

In actions last mentioned, defendant how to answer.

(85.) SEC. LXXXI. 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 prove the justification or not, he may give in evidence the mitigating circumstances.

Actions to recover property distrained, defendant may answer that he [illegible] the land.

(86.) SEC. LXXXII. 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.

Several causes of action may be united.

(87.) SEC. LXXXIII. [*As amended on page 23 of the laws of 1853.*] 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:

What.

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

2. Contracts expressed or implied;

3. Injuries with or without force to person and property, or either;

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

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

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

Material allegation in pleadings not denied to be taken as true.

(88.) SEC. LXXXIV. 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 specifically controverted by the reply as prescribed, shall, for the purposes of the action, be taken as true; but the allegation of new matter in a reply, shall not in any respect conclude the defendant, who may, on the trial, countervail it by proofs, either in direct denial, or by way of avoidance.

Material allegation defined.

(89.) SEC. LXXXV. A material allegation is one essential to the claim or defense, and which could not be stricken from the pleading, without leaving it insufficient.

MISTAKES IN PLEADINGS, AND AMENDMENTS.

Variance between proof and allegation when material.

(90.) SEC. LXXXVI. No variance between the allegation in a pleading and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense

upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must 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.

When variance not material facts to be found upon the evidence.

(91.) SEC. LXXXVII. 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.

What to be deemed a failure of proof

(92.) SEC. LXXXVIII. When, however, the allegation of the claim, or defense to which the proof is directed is unproved, not in some particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Pleadings may be amended.

(93.) SEC. LXXXIX. [*As amended on page* 9 *of the amendments of* 1852 *to the revised statutes.*] 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 do not delay the trial, it may be so amended at any time within twenty days after service of the answer or demurrer to such pleading; in such case a copy of the amended pleading must be served on the adverse party, who shall have twenty days to answer the same. After the decision of a demurrer, either at a term or in vacation, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party demurring, to withdraw the same, and plead over, or if the demurrer is sustained, may allow the pleading demurred to, to be amended or withdrawn, and a new pleading substituted, on such terms as may be just.

Party demurring may be allowed to withdraw the same.

In what cases court may allow party to amend.

(94.) SEC. XC. The court may, at any time in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved; the court may likewise, in its discretion, allow an answer or reply to be made after the time limited by this chapter, or by an order enlarging such time; and may also, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. And whenever any proceeding taken by a party, fails to conform in any respect to the provisions of the statutes, the court may permit an amendment of such proceedings, so as to make it conformable thereto.

When the name of defendant not known, plaintiff may sue in any other name.

(95.) SEC. XCI. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceedings may be amended accordingly.

Court to disregard error not affecting rights of parties.

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

Supplemental pleadings when allowed.

(97.) SEC. XCIII. 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.

ARREST AND BAIL. (a)

(98.) SEC. XCIV.[94] No person can be arrested in a civil action, except as prescribed by this chapter; but this provision does not apply to proceedings for contempt. Arrests on civil process.

(99.) SEC. XCV.[95] The defendant may be arrested as hereinafter prescribed in the following cases: When defendant may be arrested in civil action.

1. In an action for the recovery of damages, or a cause of action arising on an obligation where the defendant is not a resident of the territory, or is about to remove therefrom, or where the action is for a willful injury to person or to property, knowing the property to belong to another;

2. In an action for a fine or penalty, or on a promise to marry, or for money or property embezzled or fraudulently misapplied, or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment;

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff;

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought;

5. When the defendant has removed, concealed, or disposed of his property, or is about to do so with intent to defraud his creditors;

6. When the arrest of the defendant is expressly authorized by special statutes in an action for a fine or penalty, or for a willful violation of duty. But no female can be arrested in any action, except for a willful injury to person, character or property.

(100.) SEC. XCVI.[96] An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought. Judge to order arrest.

(101.) SEC. XCVII.[97] The order may be made whenever it appears to the judge by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section ninety-five. When such order may be made.

(102.) SEC. XCVIII.[98] Before making the order, the judge must require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least one hundred dollars. If the undertaking be executed by the plaintiff without sureties, he must annex thereto an affidavit that he is a resident and householder or freeholder, within the territory, and worth double the sum specified in the undertaking over all his debts and liabilities. Undertaking of plaintiff, requisitions of.

(103.) SEC. XCIX.[99] The order may be made to accompany the summons, or at any time afterwards before payment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order Order when and how served and returned.

(a) It is very doubtful whether since the act of March 3, 1855, (page 125, laws of 1855,) a defendant can be arrested in a civil action in any case, but the law is published in consequence of the doubt.

at a time and place therein mentioned to the plaintiff or attorney by whom it is subscribed or indorsed.

Affidavit and order to be served on defendant.

(104.) SEC. C. The affidavit and order of arrest must be delivered to the sheriff, who upon arresting the defendant must deliver to him a copy thereof.

Order how to be executed.

(105.) SEC. CI. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

Defendant when and how discharged.

(106.) SEC. CII. The defendant at any time before execution may be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Defendant how may give bail.

(107.) SEC. CIII. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or if he be arrested for the cause mentioned in the third subdivision of section ninety-five, an undertaking to the same effect as that provided by section one hundred and twenty-seven.

When bail may surrender defendant in their exoneration.

(108.) SEC. CIV. At any time before a failure to comply with their undertaking, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail must be delivered to the sheriff, who shall detain the defendant in his custody, thereon, as upon an order of arrest, and by a certificate in writing acknowledge the surrender;

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the district court may upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on such application they shall be exonerated accordingly; but this section does not apply to an arrest for the cause mentioned in the third subdivision of section ninety-five.

Bail may arrest defendant to surrender him.

(109.) SEC. CV. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally discharged, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

How bail may be proceeded gainst.

(110.) SEC. CVI. In case of failure to comply with the undertaking, the bail can be proceeded against by action only.

Bail how exonerated.

(111.) SEC. CVII. The bail may be exonerated, either by the death of the defendant or his imprisonment in a penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrendering to the sheriff of the county where he was arrested in execution thereof within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

Sheriff to deliver order of arrest to attorney for plaintiff with his return thereon.

(112.) SEC. CVIII. Within the time limited for that purpose the sheriff must deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return indorsed, and the undertaking of the bail, or a copy thereof; the plaintiff within ten days thereof may serve upon the sheriff a notice that he does not accept the bail, or he must be deemed to have accepted it, and the sheriff shall be exonerated from liability.

Sheriff how exonerated.

Sheriff or defendant may give plaintiff notice of justification of bail.

(113.) SEC. CIX. On the receipt of the undertaking, or copy and notice, the sheriff or defendant may within ten days thereafter give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of

the justification of the same or other bail, (specifying the places of residence and occupations of the latter) before a judge of the court, or justice of the peace at a specified time and place, the time to be not less than five, nor more than ten days thereafter; in case other bail be given there must be a new undertaking in the form prescribed in section one hundred and three.

Qualification of bail, what to be.

(114.) SEC. CX. The qualification of bail must be as follows:

1. Each of them must be a resident of the territory;

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge or justice of the peace on justification, may allow more than two bail, to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Bail to attend before judge or justice to justify.

(115.) SEC. CXI. For the purpose of justification, each of the bail must attend before the judge or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff touching his sufficiency in such manner as the judge or justice of the peace in his discretion may think proper; the examination must be reduced to writing, and subscribed by the bail if required by the plaintiff.

If judge or justice shall find bail sufficient must indorse allowance on undertaking.

(116.) SEC. CXII. If the judge or justice find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

Defendant may deposit amount of claim with sheriff.

(117.) SEC. CXIII. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order; the sheriff must thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

Sheriff must deposit same in court and take certificate thereof.

(118.) SEC. CXIV. The sheriff must within four days after the deposit, pay the same into court, and take from the officer receiving the same two certificates of such payment, the one of which he must deliver to the plaintiff, and the other to the defendant; for any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

When money to be refunded to defendant.

(119.) SEC. CXV. If money be deposited as provided in the last two sections, bail may be given and justified upon notice, as provided in section one hundred and ten, at any time before judgment, and thereupon the judge before whom the justification is had, must direct in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it must be refunded accordingly.

Money deposited to be applied in satisfaction of judgment.

(120.) SEC. CXVI. When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk must, under the direction of the court apply the same in satisfaction thereof, and after satisfying the judgment, refund the surplus, if any, to the defendant; if the judgment be in favor of the defendant, the clerk must refund to him the whole sum deposited and remaining unapplied.

Sheriff when liable as bail, how may discharge himself.

(121.) SEC. CXVII. If after being arrested the defendant escape, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof the sheriff shall himself be liable as bail, but he may discharge himself from such liability, by the giving and justification of bail as provided in section one hundred and nine, one hundred and ten, and one hundred and eleven, and one hundred and twelve, at any time before process against the person of the defendant to enforce an order or judgment in the action.

Proceedings against sheriff,

(122.) SEC. CXVIII. If a judgment be recovered against the sheriff

and proceedings on official bond. upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the proceedings may be had on the official bond of the sheriff to collect the deficiency as in other cases of delinqency.

Bail when liable to sheriff. (123.) SEC. CXIX. The bail taken on the arrest, shall unless they justify, or other bail be given, or justified, be liable to the sheriff by action for the damages which he may sustain by reason of such omission.

Defendant may move to vacate the order of arrest. (124.) SEC. CXX. A defendant arrested may at any time before the justification of bail, apply on motion to vacate the order of arrest, or to reduce the amount of bail.

If motion made on affidavit, plaintiff may oppose by affidavit. (125.) SEC. CXXI. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.

An Act to abolish Imprisonment for Debt and for other purposes.

[*Passed March* 3, 1855.] c. 47

Of imprisonment for debt. (126.) SEC. I. *Be it enacted by the legislative assembly of the territory of Minnesota:* That from and after the passage of this act, no person in this territory shall be subject to imprisonment for debt or arrest, under or by virtue of any process issuing from any court, tribunal, or functionary therein, on account of any debt, judgment, pecuniary liability, or demand, due or claimed to be due by any citizen or citizens of this territory, or to any citizen or citizens of any state or territory of the United States; or of any citizen or citizens, subject or subjects of any foreign state, principality, kingdom, or empire, unless the same shall be for a fine imposed by a court or jury having jurisdiction, of the offense or offender for the commission of a specified crime or misdemeanor, whereof the delinquent shall have been previously convicted after a trial before some competent tribunal: *provided,* that nothing contained in this act shall be construed so as to deprive any court or judge thereof, of the right to punish summarily for contempt, without the intervention of a jury, by fine or imprisonment, or both, in the discretion of said court or judge.

Proceedings in case of fraud. (127.) SEC. II. *Be it further enacted,* that in all cases where the plaintiff or complainant shall seek to charge the defendant with fraud, the concealment of goods, property, or money, or with bad faith, touching any pecuniary or business transaction, such plaintiff or complainant shall in all such cases, be left to his suit against the defendant in and by which, in his pleadings, he shall charge the defendant with such fraud, concealment, &c., &c., in as clear and distinct a manner as the case shall permit, to which the defendant shall answer or plead, and the facts arising or elicited upon such pleadings, and the accompanying evidence shall be submitted to the jury as in criminal cases.

Laws repealed. (128.) SEC. III. *And be it further enacted,* that all laws now in force in this territory, passed by the legislative assembly thereof, authorizing the imprisonment or arrest of any debtor, or the issuance of any writ of *capias ad satisfaciendum,* or execution against the body, together with all laws in conflict with this act, be and the same are hereby repealed.

Act take effect. (129.) SEC. IV. *And be it further enacted,* that this act shall take effect from and after its passage.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

[*Chapter* 70, *Revised Statutes.*]

Action to recover (130.) SEC. CXXII. The plaintiff in an action to recover the posses-

sion of personal property, may at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter. possession of personal property.

(131.) SEC. CXXIII. When a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing: Plaintiff must make an affidavit.

1. 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 must be set forth; Requisites of affidavit.

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

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. 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,

5. The actual value of the property.

(132.) SEC. CXXIV. The plaintiff may thereupon by indorsement 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. Plaintiff may require sheriff to take the property.

(133.) SEC. CXXV. Upon the receipt of the affidavit and notice with a written undertaking, executed by one or more securities approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action for the return of the property to the defendant, if return be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff must 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: he must also without delay serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. Sheriff when to take the property.

(134.) SEC. CXXVI. The defendant may within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fail to do so, he must be deemed to have waived all objections to them; when the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties, until the objections to them are either waived as above provided, or until they justify; if the defendant except to the sureties, he cannot reclaim the property as provided in the next section. Defendant may except to security.

(135.) SEC. CXXVII. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant; if a return of the property be not so required within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section one hundred and thirty-two. When defendant may retain possession of the property.

(136.) SEC. CXXVIII. The defendant's sureties upon notice to the When defend-

ant's sureties must justify.

plaintiff of not less than two nor more than six days, must justify before a judge or justice of the peace in the same manner as upon bail on arrest; and upon such justification, the sheriff must deliver the property to the defendant; the sheriff shall be responsible for the defendant's sureties, until they justify, or until the justification is completed, or expressly waived, and may retain the property until that time, but if they or others in their places fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

Qualification of sureties.

(137.) SEC. CXXIX. The qualifications of sureties, and their justification, must be such as are prescribed by sections one hundred and ten and one hundred and eleven, in respect to bail upon an order of arrest.

When sheriff may break open building to take property.

(138.) SEC. CXXX. If the property or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession, and if necessary he may call to his aid the power of his county.

Sheriff to keep property in secure place; to whom to deliver it.

(139.) SEC. CXXXI. When the sheriff shall have taken property, as in this chapter provided, he must 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.

When plaintiff to indemnify sheriff.

(140.) SEC. CXXXII. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and are freeholders and householders 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 the property a reasonable time to demand such indemnity.

Notice and affidavit to be filed with clerk in twenty days.

(141.) SEC. CXXXIII. The sheriff must file the notice and affidavit with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

ATTACHMENT.

When plaintiff may have property attached.

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

Warrant of attachment must be obtained from judge.

(143.) SEC. CXXXV. A warrant of attachment must be obtained from a judge of the court, or from the clerk thereof, in which the action is brought.

Warrant may issue against the defendant, when.

(144.) SEC. CXXXVI. [*As amended on page* 10 *of the amendments of* 1852 *to the revised statutes.*] The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim, and the ground thereof; and that the defendant is either a foreign corporation, or not a resident of this territory, or has departed therefrom with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed

therein with the like intent, or that he has assigned, secreted, or disposed, or is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors, or that the plaintiff's debt was fraudulently contracted, or for any other good and sufficient reason, he will be in danger of losing the same unless an attachment issue.

Attachment not affected by this chapter.

Nothing in this act contained shall in any wise affect or invalidate any attachment already issued, or any proceedings had, or to be had thereupon or thereunder or in relation thereto.

Written undertaking to be made by plaintiff.

(145.) SEC. CXXXVII. Before issuing the warrant, the judge or clerk shall require a written undertaking on the part of the plaintiff, with sufficient surety to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

Warrant to whom directed and what to contain.

(146.) SEC. CXXXVIII. The warrant must 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, the amount of which must be stated in conformity with the complaint. Several warrants may be issued at the same time to the sheriffs of different counties.

What property may be attached.

(147.) SEC. CXXXIX. The rights or shares which the defendants may have in the stock of any corporation, together with the interests and profits thereon, and all other property in this territory, of such defendants, may be attached and sold to satisfy the judgment and execution.

Warrant how to be executed.

(148.) SEC. CXL. The sheriff to whom the warrant is directed and delivered, must execute the same without delay, as follows:

1. Real property must be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the warrant certified by the sheriff;

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

3. Other personal property must be attached by leaving a certified copy of the warrant and a notice specifying the property attached, with a person holding the same, or as to a debt, with the debtor, or as to 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; the sheriff must make a full inventory of the property attached, and return the same with the order of attachment.

Sheriffs to serve warrants.

4. [*Added by laws of* 1856, *page* 11.] The sheriff shall serve a copy of the warrants of attachments and inventory certified by him upon the defendant, if he can be found within the county, and he is a resident thereof, the said sheriff shall leave such copy at the usual place of abode of the said defendant.

Proceedings where real estate is attached.

(149.) SEC. CXLI. If real estate is attached by virtue of any warrant of attachment, the officer, on service thereof, shall make a certified copy of said warrant and of his return thereon, which shall be filed and recorded in the book of mortgages in the register's office of the county in which such real estate is situated, and from the time of filing as aforesaid, the same shall be and continue a lien on all real estate mentioned or described in the return of the officer in such county, until the same shall be discharged, and when said lien shall be discharged by the order of said court, or by satisfaction of the judgment rendered in the suit, it shall be the duty of the said register, when requested, to record the satisfaction piece or transcript of the record of such order, in the book of mortgages,

and to enter on the margin of the page or pages where the said warrant and return are so recorded, a minute of such discharge or satisfaction.

When defendant must designate number of shares in corporation to sheriff.

(150.) SEC. CXLII. Whenever the sheriff, with a warrant of attachment or an execution against the defendant, applies to any person mentioned in the third subdivision of section one hundred and forty, for the purpose of attaching or levying, upon the property mentioned therein, such person must 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 refuse 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.

Perishable property must be sold by sheriff.

(151.) SEC. CXLIII. If any of the property attached be perishable, the sheriff must sell the same in the manner in which property is sold on execution, and immediately deposit the proceeds with the clerk of the court. He must also collect, and if necessary, in his name of office sue for the debts and credits attached, and deposit the amount collected with the clerk. Other property attached by him, must be retained by him, to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment.

Other property must be retained to answer judgment.

When sheriff may deliver property to defendant.

(152.) SEC. CXLIV. The sheriff may deliver any of the property attached to the defendant, or to any other person claiming it, upon his giving a written undertaking therefor, executed by one or more sufficient sureties engaging to redeliver it, or pay the value thereof to the sheriff to whom execution upon a judgment obtained by the plaintiff in that action, may be issued.

Action upon undertaking, what a defense.

(153.) SEC. CXLV. If an action be brought upon such undertaking, against the principal or his sureties, it shall be a defense that the property for which the undertaking was given, did not at the execution of the warrant of attachment, belong to the defendant against whom it was issued.

When property claimed by third person, sheriff to summon jury to try right of property.

(154.) SEC. CXLVI. If the property attached be claimed by a third person as his property, the sheriff may summon a jury to try the validity of such claim, and proceedings must be had thereon, with the like effect as in case of seizure upon execution.

When defendant must give evidence of the property attached.

(155.) SEC. CXLVII. The defendant or claimant may be required to attend before the court or judge for the purpose of giving any necessary information respecting the property attached, and may be thereupon examined on oath concerning the same.

If judgment be recovered by plaintiff how sheriff must satisfy same.

(156.) SEC. CXLVIII. If judgment be recovered by the plaintiff in such action, the sheriff must satisfy the same out of the property attached by him, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest therein, sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation, the sheriff must 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;

3. If any of the attached property belonging to the defendant shall

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

4. Until the judgment against the defendant be paid, the sheriff may collect the notes, other evidences of debt, and debts that may have been attached, and prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment, or upon the order of the court, he may sell such notes, evidences and debts, and apply the proceeds in like manner; when the judgment and costs shall have been paid, the sheriff upon reasonable demand, must deliver over to the defendant the residue of the attached property or the proceeds thereof.

Action brought by sheriff may be prosecuted by plaintiff.

(157.) SEC. CXLIX. The actions authorized by this chapter to be brought by the sheriff, may be prosecuted by the plaintiff or under his direction, upon the delivery by him to the sheriff, of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages or costs on account thereof, not exceeding two hundred and fifty dollars in any one action; such sureties shall in all cases, when required by the sheriff, justify by making an affidavit that each is worth double the amount of the penalty of the bond, over and above all debts and liabilities, and property exempt from execution.

Proceedings when defendant recovers against plaintiff.

(158.) SEC. CL. If the defendant recover judgment against the plaintiff in such action, any undertaking received by the sheriff, except such as is mentioned in the last section, all the proceeds of sales, and money collected by him, and all the property attached, remaining in his hands, must be delivered by him to the defendant or his agent on request; the warrant of attachment must be discharged and the property released therefrom.

When attachment may be discharged.

(159.) SEC. CLI. Whenever the defendant shall have appeared in the action, he may apply to the judge, or to the court, for an order to discharge the same, upon the execution of the undertaking mentioned in the next section, and if the application be granted, all the proceeds of sales and moneys collected by the sheriff, and all the property attached remaining in his hands, must be released from the attachment, and delivered to the defendant.

Defendant to enter into undertaking.

(160.) SEC. CLII. Upon such application the defendant must deliver to the court or judge, an undertaking executed by at least two sureties, approved by such court or judge, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which must be at least double the amount claimed by the plaintiff in his complaint.

Defendant may move to vacate the warrant.

(161.) SEC. CLIII. The defendant may also at any time before the time for answering expires, apply, on motion, to vacate the warrant of attachment.

When plaintiff may oppose motion by affidavit.

(162.) SEC. CLIV. If the motion be 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 warrant of attachment was made.

Sheriff when to retain warrant of attachment.

(163.) SEC. CLV. When the warrant of attachment is fully executed or discharged, the sheriff must return the same, with his proceedings thereon, to the court in which the action was brought.

When party has money in hands belonging to

(164.) SEC. CLVI. When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any

another, court may order same to be paid into court.

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.

Proceedings when party disobeys order of court.

(165.) SEC. CLVII. Whenever in the exercise of its authority, a court shall have ordered the deposit, or delivery, of money or other thing, and the order is disobeyed, the court besides punishing the disobedience, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it in conformity with the direction of the court.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Judgment defined.

(166.) SEC. CLVIII. A judgment is the final determination of the rights of the parties in the action.

Judgment for and against whom may be given.

(167.) SEC. CLIX. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Judgment where there are several defendants.

(168.) SEC. CLX. 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.

Relief granted not to exceed that demanded.

(169.) SEC. CLXI. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have 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.

When action may be dismissed without final determination.

(170.) SEC. CLXII. [*Subdivisions* 2 *and* 3 *are as amended on page* 10 *of the amendments of* 1852 *to the revised statutes.*] The action may be dismissed without a final determination of its merits, in the following cases:

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

Suit may be withdrawn after notice.

2. 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;

Plaintiff failing to establish his claim, its effect.

3. 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;

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

5. 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.

In all other cases judgment to be rendered on merits.

(171.) SEC. CLXIII. In every case, other than those mentioned in the last section, the judgment must be rendered on the merits.

When judgment may be taken against defendants severally.

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

JUDGMENT UPON FAILURE TO ANSWER.

Judgment upon failure to answer, when and what cause made.

(173.) SEC. CLXV. Judgment may be had if the defendant fail to answer the complaint as follows:

Plaintiff may file proof of service of summons.

1. [*As amended on page* 10 *of the amendments of* 1852 *to the revised statutes.*] In an action arising on obligation for the payment of money only, the plaintiff may file with the clerk proof of the personal service of the summons, and that no answer has been received within twenty days after the service of the summons, or if further time is allowed, then that none has been received within such further time; the clerk must, 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 have an order entered of course by the clerk, that a writ of inquiry of damages issue, and on the return of the sheriff's inquest, judgment may be entered for the amount assessed without further application to the court; or he may apply to the court to have his damages assessed, or the amount he is entitled to recover, ascertained in any other manner and for judgment.

Clerk to enter judgment.

Plaintiff may have an order entered by the clerk and a writ of inquiry to issue.

2. In other actions, the plaintiff may upon the like 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 be 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; and where the action is for the recovery of money only, or of specified real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference as above provided.

When plaintiffs are entitled to judgment.

3. [*As amended by laws of* 1856, *page* 11.] When the service of the summons was by publication, or by leaving a copy of the same at the last usual place of abode of the defendant, in actions arising upon contract for the payment of money only, the plaintiff on filing with the clerk, proof of such service, and that no answer has been received within twenty days after such service, together with the security hereinafter mentioned, to be approved by clerk, shall be entitled to judgment in the same manner as if the summons had been served upon the defendant personally; in actions other than those arising upon contract for the payment of money only, upon filing the like proof, the plaintiff may apply to the court, shall thereupon require proof to be made of the fact stated in the complaint, and may thereupon render judgment for the plaintiff for such sum, or other relief, as he is entitled to recover or receive in the action. "In all cases where the summons has not been served upon the defendant 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 property or money collected or received under or by virtue of the judgment; in case the defendant or his representatives shall thereafter apply and be admitted to defend the action and shall succeed in the defense.