

CODE OF

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PLEADINGS AND PRACTICE

IN CIVIL ACTIONS

IN THE

COURTS OF THIS STATE.

REPORTED TO THE

LEGISLATURE OF MINNESOTA,

BY AARON GOODRICH,

ONE OF THE COMMISSIONERS APPOINTED TO REVISE THE LAWS.



SAINT PAUL:
EARLE S. GOODRICH, STATE PRINTER,
PIONEER AND DEMOCRAT OFFICE.

1858. A

House - Senate
23 - 24

JOINT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES, OF THE STATE OF MINNESOTA, RELATIVE TO THE DUTIES OF THE CODE COMMISSIONERS, AND THE PUBLICATION OF THEIR REPORT; PASSED MARCH 18, 1858.

Resolved, By the House of Representatives of the State of Minnesota, (the Senate concurring,) that Aaron Goodrich, Moses Sherburne, and William Hollinshead, heretofore appointed Commissioners to revise the laws of this State, be and are hereby instructed to enter upon their duties and compile the laws of this State, arranging them under suitable and appropriate Chapters, and to prepare a system of pleadings and practice for the several Courts of this State, such system to conform as near as practicable to the present New York Code, and having reference to the brevity and legal intent of the pleadings; and that they cause the result of their labors to be printed and laid before the Legislature at the earliest day practicable.

HF 375
Bill read in Senate for
want of a Constitutional majority
Senate Journal, 1858, August 10, 1858, p. 725
Motion to read of HF 375 lost
Aug 12, 1858
S. J. p. 725

CODE OF PLEADINGS AND PRACTICE.

AN ACT

To simplify and abridge the Pleadings and Practice in the Courts of this State.

Whereas, it is deemed expedient that many of the present forms of actions and pleadings in the Courts of this State be abolished; that others less expensive and complicated—and better calculated to promote the ends of justice, be instituted in their stead. Therefore,

Be it enacted by the Legislature of the State of Minnesota, as follows:

GENERAL DEFINITIONS AND DIVISIONS.

- SECTION 1. Divisions of Remedies.
2. Definition of an Action.
 3. Definition of a Special Proceeding.
 4. Division of Actions.
 5. Definition of a Criminal Action.
 6. Definition of a Civil Action.
 7. Civil and Criminal Remedies.
 8. Division of Act.
 9. The Courts of Justice in this State.

SECTION 1. *Remedies.*—Remedies in the Courts of Justice ^{Divisions of Remedies} are divided into—

1. Actions.
2. Special Proceedings.

SEC. 2. *Action.*—An Action is an ordinary proceeding in a Court of Justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. ^{Definition of an action}

SEC. 3. *Special Proceeding.*—Every other remedy is a Special Proceeding. ^{Definition of a special proceeding}

SEC. 4. *Division of Actions.*—Actions are of two kinds, ^{Division of actions}

1. Civil.

2. Criminal.

Definition of a criminal action SEC. 5. *Criminal Action*.—A Criminal Action is prosecuted by the State as a party against a person charged with a public offence, for the punishment thereof.

Definition of a civil action SEC. 6. *Civil Action*.—Every other is a Civil Action.

Civil & criminal remedies SEC. 7. *Remedies not merged*.—Where the violation of a right admits of both a Civil and Criminal remedy, the right to prosecute the one is not merged in the other.

Division of act SEC. 8. *Division of this Act*.—This Act is divided into titles and sections.

The first relates to the Courts of Justice and their jurisdiction. The residue relate to Civil Actions commenced in the Courts of this State, on and after the 10th day of December, 1858, except as otherwise provided therein, and are divided into titles and sections.

TITLE I.

OF THE COURTS OF JUSTICE AND THEIR JURISDICTION.

1. Of the Courts in General.
2. Of the Supreme Court.
3. Of the District Courts.
4. Of the Courts of Probate.
5. Of Justices of the Peace.

OF THE COURTS IN GENERAL.

The Courts of Justice in the State SEC. 9. The following are the Courts of Justice in this State :

1. The Court for the trial of Impeachments. (1)
2. The Supreme Court.
3. The District Courts.
4. The Courts of Probate.
5. The Courts of Justices of the Peace.

THE SUPREME COURT.

- SECTION 10. When and where Court to be held.
11. Session continued from day to day, and adjournment authorized.
 12. Appellate jurisdiction of Supreme Court.
 13. The Supreme Court may issue Writs of Error, Certiorari, Mandamus, Prohibition, &c.
 14. Powers of Supreme Court.

(1) See Constitution, Sec. 14, Art. 4.

15. Court to give its opinions in writing, when—appointment of Reporter authorized—reports to be published.
16. Power of Judges in vacation.
17. Provisions in cases of absence of Judges on first day of term.
18. Clerk to adjourn if no Judge appears.
19. Special terms authorized.

SEC. 10. The several Judges of the Supreme Court of this State are hereby required to meet at the Supreme Court room, at the Capitol, and hold a session of the Supreme Court once in each year,—that is to say : On the second Monday of January.

When and where court to be held

SEC. 11. Any session of the Supreme Court shall be continued from day to day until the business of the Court shall be disposed of, unless otherwise ordered by the Court ; but the Court may be adjourned from time to time, for the hearing or decision of any matters or questions, or transaction of other business, as convenience or necessity may require.

Session continued from day to day &c

SEC. 12. The Supreme Court of this State shall have and exercise appellate jurisdiction only, except as otherwise provided by law, which shall extend to all matters of appeal, from the decisions, judgments, or decrees, of any of the District Courts, in all matters of law or equity, and may also extend to all questions of law arising in any of the said District Courts :

Appellate jurisdiction of supreme court

1. Upon a motion for a new trial in arrest of judgment, or in cases reserved by said Court :

2. In a final judgment in the District Courts, in any action commenced therein or brought there from another Court, and upon appeal from that judgment to review any interlocutory order, involving the merits, and necessarily affecting the judgment :

3. In a judgment or decision of any District Court in a criminal action.

SEC. 13. The Supreme Court shall have power to issue Writs of Error, Certiorari, Mandamus, Prohibition, and all other writs and process, not especially provided for by law, to all Courts of inferior jurisdiction, to corporations and to individuals, that shall be necessary to the furtherance of justice and the execution of the laws ; but no Writ of Error shall operate as a stay of proceedings or execution, unless so ordered by the Court, upon motion, or by one of the Judges thereof in vacation, except in cases otherwise provided by law.

Powers of supreme court

Powers of supreme court SEC. 14. The Supreme Court shall be vested with full power and authority necessary for carrying into complete execution all the judgments, decrees and determinations in the matter aforesaid, and for the exercise of its jurisdiction as the supreme judicial tribunal of the State; and may by order, from time to time, make and prescribe such general rules of practice and regulations for the said Supreme Court, not inconsistent with the provisions of this act, as it may deem proper.

Court to give opinion in writing &c SEC. 15. The said Court shall in all cases decided by it, give its opinion in writing, at the term when such cases are argued, which shall be filed with the Clerk of said Court, with the other papers in the case, and the said Court shall appoint some proper person to report its doings in all causes decided; which reports shall be published from time to time according to law.

Powers of judges in vacation SEC. 16. Any one of the Judges of the Supreme Court shall have power in vacation to issue any of the writs or process, which the said Court is allowed by law to issue.

Provision in case of absence of judge first day of the term SEC. 17. If any two Judges of the Supreme Court shall not attend on the first or any other day of the term, the Clerk shall enter such fact on record, and the Judge present shall adjourn the Court to the next day, and so on from day to day for six days, if neither of the absent Judges appear; at the end of which period, all matters pending in said Court shall stand continued until the next regular or special term of said Court.

Clerk to adjourn in case no judge appears SEC. 18. If neither of the Judges appear, the Clerk of said Court may adjourn from day to day, as provided in the preceding section.

Special terms authorized SEC. 19. Whenever, from any cause, it shall appear to the Judges of the said Court, or any two of them, that the public interest requires that a special term of the said Court be held, the said Judges, or any two of them, shall have authority to appoint a special term of said Court, giving thirty days previous notice thereof, by advertisement published in a newspaper, at the seat of government of the State.

OF THE DISTRICT COURTS.

- SECTION 20. The State divided into Judicial Districts.
 21. Times and places of holding the District Courts.
 22. Jurisdiction of District Courts.
 23. Equitable jurisdiction of the District Courts.

SEC. 20. The State shall be divided into Judicial Districts as follows:

1. The counties of Washington, Chisago, Manomin, Anoka, Isanti, Pine, Buchanan, Carlton, St. Louis and Lake shall constitute the First Judicial District.

The state divided into judicial districts.

2. The county of Ramsey shall constitute the Second Judicial District.

3. The counties of Houston, Winona, Fillmore, Olmsted and Wabashaw shall constitute the Third Judicial District.

4. The counties of Hennepin, Carver, Wright, Meeker, Sherburne, Benton, Stearns, Morrison, Crow-Wing, Mille Lac, Itaska, Pembina, Tod and Cass shall constitute the Fourth Judicial District.

5. The counties of Dakota, Goodhue, Scott, Rice, Steele, Waseca, Dodge, Mower and Freeborn shall constitute the Fifth Judicial District.

6. The counties of Le Seuer, Sibley, Nicollet, Blue-Earth, Faribault, McLeod, Renville, Brown, and all other counties in the State not included within the other districts, shall constitute the Sixth Judicial District.

SEC. 21. The general terms of the District Courts of the State shall be held at the times and places following:

Time & place of holding district court

1. In the First Judicial District,

2. In the Second Judicial District,

3. In the Third Judicial District,

4. In the Fourth Judicial District,

5. In the Fifth Judicial District,

6. In the Sixth Judicial District,

Jurisdiction of district court

SEC. 22. The District Courts of this State shall have original jurisdiction in all civil actions within their respective districts, when the sum in controversy shall exceed one hundred dollars: and in civil actions of which a Justice of the Peace has not jurisdiction, whatever may be the amount in controversy: and appellate jurisdiction from Courts of Probate and Justices of the Peace, as hereinafter provided; and shall also have original jurisdiction of all criminal actions where the punishment shall exceed three months' imprisonment or a fine of more than one hundred dollars (1): and appellate jurisdiction of criminal actions, as hereinafter provided; and the judges of said court shall be conservators of the peace.

Equitable jurisdiction of holding district court

SEC. 23. The District Courts shall also have original jurisdiction of all matters in equity: and shall have power to appoint receivers, make interlocutory orders, grant injunctions as herinafter provided, and to issue writs of *ne exeat*, attachment, and sequestration: and to grant and enforce equitable relief in all cases where a complete and adequate remedy cannot be had at law.

OF THE COURTS OF PROBATE.—(2).

SECTION 24. Court of Probate established.

25. Jurisdiction of Courts of Probate.

(1) See Constitution, Article 6, Sections 5 and 8.

(2.) See Section 274, Title 11. Also, Sec. 601, Title 1.

26. Jurisdiction of Courts of Probate.
27. Jurisdiction exercised by one Judge exclusive.
28. Court of Probate must be held by the Judge thereof, or in his absence by the District Attorney.
29. Probate Court shall be always open.
30. Proceedings in Probate Court.
31. Office open, when; Court may be held, where; Judge must provide books, &c.
32. Books to be kept by Judge—what to contain.
33. Register—what to contain.
34. Index to each book.
35. Successor may complete unfinished business.
36. Judge cannot be Attorney in certain cases.
37. Costs may be awarded.
38. Judge may issue executions.
39. Process—by whom executed.
40. Judge has care of certain persons.
41. Guardians may be appointed, and their duties.
42. The Board of Supervisors or a Justice of the Peace may apply for appointment of guardians for certain persons.
43. Application, how made, and what to contain.
44. The Judge must appoint time and place to investigate.
45. Judge must issue citation—how served.
46. Jury must be empanelled—their duties.
47. How trial must be conducted.
48. Party complained of may appear by self or Counsel.
49. Inquisition of the Jury—how made, and what to contain.
50. When the Judge must appoint Guardians.
51. Appointment—how made and what to contain, and how notice must be given.
52. The Guardian must be sworn, and give security.
53. Judge must appoint Appraisers—inventory must be made, and how made.
54. The power of such Guardians.
55. How Guardians must pay the debts.
56. When real property may be sold to pay debts.
57. When disability is not permanent—how to proceed.
58. How sale or mortgage must be conducted, and the disposal of the proceeds.
59. Guardian may be required to give new security, and is subject to the direction of the Judge.
60. When Guardian may execute conveyance of real property.
61. When the authority of the Guardian ceases.
62. How Guardian must be removed.
63. Judge how to proceed upon application for the removal of a Guardian.
64. Fees of a Judge on the appointment of Guardian, and when he may order costs.
65. Persons under Guardian cannot contract.

Court of probate established SEC. 24. There shall be established in each organized county of this State, a Probate Court, with the jurisdiction conferred by this act, but nothing contained in this act shall affect the proceedings now in said Courts.

Jurisdiction of courts of probate SEC. 25. The said Probate Courts shall have exclusive jurisdiction in the first instance, in the county to take the proof of Wills.

1. When the testator, at or immediately before his death, was an inhabitant of the county, in whatever place he may have died:

2. When the testator not being an inhabitant of this State, shall have died in the county, leaving assets therein:

3. When the testator not being an inhabitant of this State, shall have died out of the State, leaving assets in the county:

4. When the testator not being a resident of this State, shall have died out of the State, not leaving assets therein, but when assets thereafter come into the county.

5. When real property devised by the testator is situated in the county, and no other Probate Court has gained jurisdiction under either of the preceding subdivisions of this section.

SEC. 26. The Probate Court has jurisdiction also,

Jurisdiction of courts of probate 1. To take proof of a Will relating to real property situated in the county, when the testator shall have died out of this State, not being an inhabitant thereof, and not leaving assets therein:

2. To grant and revoke letters testamentary and of administration:

3. To direct and control the conduct, and settle the accounts of Executors and Administrators:

4. To enforce the payment of debts and legacies and the distribution of the estates of intestates:

5. To order the sale and dispose of the property of deceased persons:

6. To appoint and remove Guardians, to direct and control their conduct and settle their accounts:

7. To take the care and custody of the person and estate of a lunatic or habitual drunkard residing in the county:

8. To direct the admeasurement and allotment of Dower:

9. To exercise the powers and duties conferred upon it by law.

SEC. 27. The jurisdiction acquired by any Probate Court over a matter or proceeding is exclusive of that of any other Probate Court, except when otherwise provided by law, and when a Guardian is appointed or any other proceeding is commenced in the Probate Court of a particular county, all further proceedings in respect to the same, must be continued in that Court.

Jurisdiction exercised by one judge exclusively

SEC. 28. The Probate Court of each county must be held by the Judge of the Probate Court; and in case the Judge of Probate is unable to act, or if the office be vacant, then the said court must be held by the District Attorney of the county.

Courts of probate must be held by judge thereof &c

SEC. 29. The Probate Court shall be always open for the transaction of business within its jurisdiction; but it shall be the especial duty of the Judge of Probate to attend at his office on the first Monday of each month, and then hold a Probate Court.

Probate court must be always open

SEC. 30. There are no pleadings in the Probate Courts of this State. The proceedings are those prescribed by statute. The granting of letters of administration and testamentary may be known as the appointment of administrators or executors; the proceedings in these courts are upon the application of a party, verbal or written, and when verbal, entered in the minutes of the court, and when written, they are to be filed. The powers of a Judge of Probate are exercised by means of:

Proceeding in probate court

1. A citation to a party.
2. An affidavit, deposition, examination, or statement under oath of a party or witness, or other legal and competent evidence.
3. A subpoena to a witness, or attachment to compel his attendance, or commitment for refusal to testify.
4. Orders, judgments and decrees.
5. An execution, warrant, or other process to enforce them.

SEC. 31. The Judge of Probate must keep an office open at reasonable hours, suitable and convenient for the transaction of business and for the deposit and safe keeping of the public books and papers under his charge. He may hold his court at any other place in his county, which he may from time to time appoint, reference being had to public convenience. (1). He must also provide suitable cases for the

Office open, court held &c

(1.) See Sec. 31, majority Report.

books and papers of his office, the expense of which is a county charge; they belong to the county, and must be delivered by the Judge of Probate to his successor in office.

SEC. 32. The following books must be kept by the Judge of Probate:

Books to be kept by judge — what to contain

1. A register in which shall be entered a memorandum of all official business transacted by him, or in his office, appertaining to the estate of each person deceased, under the name of such person; that pertaining to the general guardian of an infant, under the name of such infant; that pertaining to an insane person or drunkard, under his or her name.

2. A record of Wills, in which he must record all Wills proven before him, with the certificate of probate thereof; and of all Wills proven elsewhere, upon which letters testamentary or of administration are issued by him.

3. A record of appointment of Administrators and Executors, of general Guardians of infants, of Guardians of insane persons and drunkards, of the appointment of Admeasurers of Dower, with all orders relating to the same and the admeasurers' report.

Register what to contain

SEC. 33. The Judges of Probate must cause to be entered and kept in the register, mentioned in the first subdivision of the preceding section, a balance sheet of the accounts of Administrators, and Guardians, and Trustees before him, with his orders and judgments relating to the same, a memorandum of execution issued thereon, with a note of satisfaction when satisfied; also, all orders relating to the sale of real estate, and to the distribution of the proceeds thereof, and all orders made by him in the discharge of his official duties.

Index to each book

SEC. 34. To each of such books there must be attached an Index referring to the entries in alphabetical order, under the name of the person to whose estate or business they relate, and indicating the page of the book where the entry is made.

Successor may complete unfinished business

SEC. 35. The successor in office of any Judge of Probate, has power to complete any unfinished business commenced by his predecessor.

Judge cannot be attorney in certain cases

SEC. 36. A Judge of Probate cannot be Counsel or Attorney in any civil action for or against any Executor, Administrator, Guardian, or minor, Trustees, or other person over whom or whose accounts he would by law have jurisdiction, whether such action relates to the business of the estate or not.

SEC. 37. Costs may be awarded in favor of one party against another, to be paid personally or out of the estate or fund in any proceeding contested adversely before the Judge of Probate; but such costs shall not exceed those allowed in the District Court for a trial in an action of law; witnesses fees and other disbursements equal to those allowed in the District Court, may also be allowed.

Costs must be awarded

SEC. 38. Orders for the payment of money, may be enforced by execution, or otherwise, in the same manner as judgments for the payment of money in the District Court; except in the Probate Court, all process is issued by the Judge of Probate.

Judge may issue execution

SEC. 39. Executions, Warrants and other process issued by a Judge of Probate, must be executed by the sheriff or coroner of the county to which they are sent to be executed, in the same manner and with the same powers and responsibilities and fees, as process issued from the District Court.

Process by whom executed

SEC. 40. The Judge of Probate of the county, has the care and custody of the person and property of idiots, lunatics, and other persons of unsound mind; and of persons who, in consequence of habitual drunkenness, or for any other cause, are incapable of the proper care and management of their own property, all of whom are known in the statute, as insane persons or habitual drunkards.

Judge has care of certain persons

SEC. 41. For the purpose of exercising these powers, the Court may appoint one, two, or three Guardians in each case, whose duty it is—

Guardians may be appointed and their duties

1. To take possession of the property of the person, and manage the same in a manner proper to produce income, and to prevent its being wasted or destroyed:

2. To take the care and custody of such person, and so far hold him in restraint as may be necessary to prevent injury to the person or property of himself or others:

3. To provide out of his property for the maintenance of such person and his family, and the education of his children:

4. To make an inventory of his property, real and personal, and to file the same in the office of the Judge of Probate, immediately after the appointment of such Guardian, and to keep, and annually file in the office of the Judge of Probate, an account of all sums received and expended for the year, verified by his oath.

SEC. 42. The Board of Supervisors of the county, or any

Justice of the Peace therein, where the insane person or habitual drunkard resides, or any member of the family of such insane person or drunkard, or any person related to him by blood or marriage, may apply to the Judge of Probate for the appointment of such Guardian.

Application for appointment of guardian

SEC. 43. Such application must be in writing, stating the facts upon which it is founded, and verified by the affidavit of the applicant, to the effect that he believes it to be true.

Application how made — what to contain

SEC. 44. Upon receiving the application, the Judge of Probate must immediately appoint a time and place in the county where the insane person or drunkard resides, to investigate the truth of the allegations made in the application, which time must not be less than eight, nor more than twenty days thereafter.

The judge must appoint time and place to investigate

SEC. 45. The Judge of Probate must also issue a citation to the insane person or drunkard, to appear at the time and place specified, and show cause, if any he have, against the application; such citation, with a copy of the application, must be served by the sheriff or coroner, at least six days before the time of appearance, on the insane person or drunkard, and on some member of the family of such person, or of the family in which he resides, of suitable age and discretion other than the applicant.

Judge must issue citation, how served

SEC. 46. At the time and place appointed, or at such other time as the hearing may be adjourned to, for cause shown, the Judge of Probate must attend, and draw and impanel a jury of six persons in the same manner as a jury is drawn and impaneled by a Justice of the Peace, for the trial of civil actions. When a jury is duly impaneled, it must be sworn by the Judge of Probate, to investigate the truth of the matters stated in the application, and to find a true inquisition thereon, according to the evidence.

Jury must be empaneled their duties

SEC. 47. The Judge of Probate must preside at the trial, and decide all questions of law arising therein; and the trial must be conducted in all respects like a trial in a civil action, except as otherwise provided in this Act.

How the trial must be conducted

SEC. 48. Upon such trial, the alleged insane person or drunkard may appear by counsel, and may produce witnesses on his part; but whether he appear or not, the applicant must prove the truth of the allegations made in his application.

Party complained of may appear by self or council

SEC. 49. The inquisition of the jury must be in writing,

and subscribed by the jury, or the foreman thereof, and must declare that there exists no sufficient reason for the appointment of Guardians, or that the person is in one of the conditions mentioned in section forty, specifying which of them; the Judge of Probate must instruct the jury as to the form of the inquisition, and it may be formed and subscribed in his presence; but he can take no part in the deliberation of the jury, nor advise them in respect to their decision, except on questions of law.

Inquisition of
the jury &c

Sec. 50. If the jury find that the person is in one of the conditions mentioned in section forty, the Judge of Probate must immediately appoint one or more Guardians (not exceeding three in number) for him. When the application sets forth a cause other than habitual drunkenness, they must state in the inquisition whether or not in their opinion the disability is likely to be permanent. If the jury find that there exists no sufficient reason for the appointment of Guardians, the application must be dismissed.

When judge
must appoint
guardians

Sec. 51. The appointment must be in writing, and must define the general duties of the Guardians as prescribed in section forty-one. It must be recorded in the office of the Judge of Probate in the book kept by him for that purpose. The guardian must also give public notice of his appointment, by advertisement in a newspaper printed and published in the county; if there is no newspaper printed and published in the county, then such notice must be inserted in a newspaper printed and published at the seat of government of the State.

Appointment
&c

Sec. 52. The Guardian must be sworn to execute faithfully the duties of his trust according to the best of his ability; he must also give security in the same manner and to the same effect as the general guardian of an infant. The oath and undertaking must be filed in the office of the Judge of Probate.

The guardian
must be sworn
and give secu-
rity

Sec. 53. The Judge of Probate must also appoint Appraisers; and an inventory and appraisal of the personal property of the insane person or drunkard must be taken, verified and returned in the same manner and with the same effect as in case of administration of the estate of a deceased person, except that it must contain a description of the real property and a valuation by the appraisers of the annual income thereof.

Judge must
appoint appra-
isers &c

SEC. 54. The powers and responsibilities of Guardians in the execution of the trusts reposed in them by this Act are in all respects like those of a general Guardian in respect to an infant and his estate, except as in this act otherwise provided.

The powers of such guardians

SEC. 55. In the payment of debts, the Guardian must be governed by the same rule as those which regulate the conduct of Administrators.

How guardians must pay debts

SEC. 56. When there is not personal property sufficient, with the income of real property, for the payment of the debts, or for the proper maintenance of the insane person or drunkard and his family, the Judge of Probate may, upon a proper accounting by the Guardian of the personal and of the income of the real property, order the real property, or such part thereof as he may deem necessary, to be sold or mortgaged to procure the necessary funds therefor.

When real property may be sold to pay debts

SEC. 57. When the inquisition does not state that the disability is likely to be permanent, the Judge of Probate must, before ordering a sale, ascertain the probable necessary expenditure over the annual income for a period not exceeding three years in advance, and must limit the sale or mortgage to so much of the real property as can be sold or mortgaged separately without material injury to the residue of the property, and as may be sufficient to raise such sum; and in all cases he must ascertain by evidence the present condition of the person. Further sale or mortgage may be ordered from time to time as may be necessary.

When disability is not permanent — how to proceed

SEC. 58. The proceedings of a sale or mortgage must be conducted in all respects in the same manner as for a sale by Administrators, except as herein otherwise provided: but the proceeds of the sale, instead of being paid to the Judge of Probate, are to be placed in the hands of the Guardian.

How sale or mortgage must be conducted &c

SEC. 59. The Guardian may be required to give new or additional security or to render an account, and may be removed by the Judge of Probate; he is also subject in all other respects to the control and direction of the Judge of Probate, in the same manner as a general Guardian of an infant.

Guardian may be required to give new security &c

SEC. 60. The Guardian has power, under the direction of a court of competent jurisdiction, to execute a conveyance of real property, or to do any other act in the specific performance of a contract made by the insane person or drunkard when he was capable to contract.

When guardian may execute conveyance of real property

SEC. 61. The power of the Guardian ceases upon the death of the insane person or drunkard, and also when the disability in respect to which he was appointed has been adjudged by the Judge of Probate to have ceased: or when he has been removed for any cause as provided in the next two sections.

When the authority of the guardian ceases

SEC. 62. Upon application to the Judge of Probate to remove a Guardian, or revoke his appointment, made upon the affidavit of some respectable person, showing misconduct of the Guardian, or that the disability in respect to which the Guardian was appointed, has ceased, a citation must be issued to the Guardian to the person upon whose application such Guardian was appointed, if living within the county, and to the next of kin, if any within the county who are of full age, to show cause, if any they have, why the Guardian should not be removed, or his appointment revoked.

Guardian removed

SEC. 63. The citation must be served at least ten days before the time appointed for the hearing; upon its return duly served, or upon another day to which the hearing may be adjourned, the Judge of Probate must hear the evidence offered for and against the application; if sufficient cause for the continuance of the Guardian be not shown, the Judge of Probate must by an order declare that the disability in regard to which the Guardian was appointed has ceased, that the powers of the Guardian are therefore revoked, and that the party for whom he was appointed is restored to his original rights. If misconduct of the Guardian be established, he must be removed, and another appointed in his place.

How proceed for removal of guardian

SEC. 64. The fees of a Judge of Probate for appointing a Guardian are the same as in the proof of a Will, and for his removal and the proceedings in relation thereto, the same as for similar services in case of Administrators. Upon a trial before him, the Judge of Probate may order costs to be paid, either by a party, or out of the funds of the estate, to any other party, not exceeding the costs allowed for the trial of a civil action. (1)

Fees of judge &c

SEC. 65. Every insane person or habitual drunkard, for whom a Guardian shall be appointed in accordance with the provisions of this Title, is, during the continuance of such appointment, incapable in law to make any civil contract by which the estate of such insane person or drunkard will be bound.

Persons under guardian cannot contract

(1) For fees see sec. 601.

JURISDICTION OF JUSTICES OF THE PEACE.

- SECTION 66. Jurisdiction of Justices of the Peace.
 67. Justice—where keep office and issue process.
 68. Justice shall not hold office with practicing attorney.
 69. Powers and jurisdiction of Justices of the Peace.
 70. Jurisdiction of Justices of the Peace.
 71. Jurisdiction does not extend to certain cases.

Jurisdiction of justice of the peace
 SEC. 66. The jurisdiction of all Justices of the Peace save such as shall be elected in virtue of the charter of some incorporated city, (1.) shall be co-extensive with the limits of the county in which they are elected, and no other or greater.

Justice where keep office and issue process
 SEC. 67. Every Justice of the Peace shall keep his office in the town for which he may be elected, and not elsewhere; but he may issue process in any place in the county.

Justice shall not hold office with practicing attorney
 SEC. 68. No Justice of the Peace shall hold his office in the same room with a practicing attorney, unless such attorney be his law partner; and in such case such partner shall not be permitted to appear or practice as an attorney, in any case tried before such Justice.

Powers and jurisdiction of justices of the peace
 SEC. 69. Every Justice of the Peace elected in any town in this State, is hereby authorized to hold a Court for the trial of all actions in the next section enumerated, and to hear, try and determine the same according to law; and for that purpose, where no special provision is otherwise made by law, such Courts shall be vested with all the necessary powers which are possessed by Courts of Record in this State; and all laws of a general nature are to apply to such Justice's Court, so far as the same may be applicable, and not inconsistent with the provisions of this Title.

SEC. 70. Every such Justice shall have jurisdiction over, and cognizance of the following actions and proceedings:

- Jurisdiction of justices of peace
 1. Of an action arising on contract for the recovery of money, if the sum claimed does not exceed one hundred dollars.
 2. Of an action for damages for an injury to the person or to the real property, or for taking, detaining or injuring personal property, if the damages claimed do not exceed one hundred dollars.
 3. Of an action for a penalty not exceeding one hundred dollars, given by statute.

(1) See sec. 66—Majority report.

4. Of an action upon a bond, conditioned for the payment of money not exceeding one hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. When the payments are to be made by installments, an action may be brought for each installment as it becomes due.

5. Of an action upon a surety bond or undertaking taken by them, if the penalty do not exceed one hundred dollars.

6. To take and enter judgment on confession of a defendant, when the amount does not exceed one hundred dollars; and in an action for damages for fraud in the sale, purchase or exchange of personal property, if the damages claimed do not exceed one hundred dollars.

SEC. 71. The jurisdiction conferred by the last section does not extend, however, to a civil action—

1. In which the title to real property shall necessarily come in question:

Jurisdiction
does not extend
to certain
cases

2. Nor for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, nor upon a promise to marry.

3. Nor of an action against an Executor or Administrator as such.

COMMENCEMENT OF SUITS: SERVICE AND RETURN OF PROCESS.

- SECTION 72. Justice to keep Docket, and what to contain.
73. How suits commenced.
74. Justice may require security of plaintiff for costs.
75. Process shall be in name of State.
76. Summons—first process: what to contain and how served.
77. Process how returned.
78. Justice when to issue Warrant.
79. Warrant what to contain.
80. Warrant how served.
81. Proceedings before Justice on warrant.
82. Justice empower person to serve process.
83. Officer's failing to execute process, how liable.
84. Parties how may appear.
85. Infant how to institute suit.
86. Who may not appear in person or by attorney.
87. Suit not to be prosecuted against infant until Guardian appointed: Guardian how appointed.
88. Parties entitled to an hour for appearance.

SEC. 72. Every Justice of the Peace shall keep a Docket in which he shall enter—

1. The title of all causes commenced before him.

Justice to
keep docket,
what to con-
tain

2. The time when the process was issued against the defendant, and the particular nature thereof.

3. The time when the parties appeared before him, either without or upon the return of the process.

4. A brief statement of the nature of the plaintiff's demand, and the amount claimed: and if any set-off was pleaded, a similar statement of the set-off, and the amount estimated.

5. Every adjournment, stating at whose request and for what time.

6. The time when the trial was had, stating whether the same was by Jury or by the Justice.

7. The verdict of the Jury, and when rendered.

8. The time of issuing execution, and the name of the officer to whom delivered: and an account of the debt, damages and costs, and the fees due to each person separately.

9. The fact of an appeal having been taken and allowed, and when.

10. Satisfaction of judgment when entered.

11. And such entries as may be material.

How suits
commenced

SEC. 73. Suits may be instituted before a Justice of the Peace either by the voluntary appearance and agreement of the parties, or by the usual process; also, when the name of the defendant is not known to the plaintiff, a suit may be commenced by a fictitious name: and it shall not be abated for that cause, but may be amended on such terms as the Justice shall think reasonable.

Justice may
require security

SEC. 74. Any Justice of the Peace in this State may, in all actions hereafter instituted, either before or after the process shall issue, at his discretion, require of the plaintiff in such action to give security for the costs; and the person giving such security shall sign a memorandum in writing to that effect, which such Justice shall keep as a part of the record in the case: and if the plaintiff refuse to give such security the Justice shall dismiss the suit.

Process shall
be in name of
the State

SEC. 75. All process issued by Justices of the Peace shall run in the name of the State of Minnesota, be dated on the day it issued, and shall be signed by the Justice granting the same, and be directed to the sheriff or any constable of the proper county.

Summons
first process
&c

SEC. 76. In all cases not otherwise especially provided for, the first process shall be by summons—commanding the officer to summon the defendant to appear before such Jus-

tice, at the time and place to be expressed in such summons, not less than eight nor more than twenty days from the date thereof, to answer to the plaintiff in a civil action:—which summons shall be served at least six days before the time of appearance therein mentioned, by reading the same to the defendant, and delivering a copy thereof to him if requested by such defendant, if such defendant shall be found, and, if not found, by leaving a copy thereof at his or her last usual place of abode.

SEC. 77. Every constable or sheriff serving any process authorized by this Title shall return thereon in writing the time and manner of service, and shall sign his name to such return. Process how returned _____

SEC. 78. A Justice of the Peace shall issue a warrant in every case where he is satisfied from the affidavit of the person desiring the same, or from any other person, that the plaintiff has a subsisting and unsatisfied cause of action against the defendant, and that such cause of action is one for which imprisonment is permitted by section twelve (12) of article one (1) of the Constitution of this State, and by the provisions of an Act, entitled "An Act to abolish imprisonment for debt, and for other purposes," approved March 3d, 1855. (1) Justice when to issue warrant

SEC. 79. A warrant shall command the sheriff or constable to take the body of the defendant, and bring him forthwith before such Justice, to answer the plaintiff in a civil action, and shall further require the sheriff or constable after he shall have arrested the defendant, to notify the plaintiff of such arrest. Warrant what to contain

SEC. 80. A warrant shall be served by arresting the defendant and taking him before the Justice who issued the same; but if such Justice be, on the return thereof, absent or unable to try the cause; or if it be made to appear to the Justice, by the affidavit of the defendant, that said Justice is a material witness for the defendant in the case, or is near of kin to the plaintiff in the suit, stating therein the degree, the officer shall forthwith take the defendant to the nearest Justice of the same county, who shall take cognizance of the cause, and proceed therein as if the warrant had been issued by himself. Warrant how served

SEC. 81. When a defendant is brought before a Justice

(1) See Sec. 78 of majority report. Shall we imprison our neighbors of West St. Paul for crossing the river and paying us a visit?—they reside in another county.

Proceedings before justice on warrant on a warrant, he shall be detained in the custody of the officer until the Justice shall direct his release; but in no case shall the defendant be detained longer than twelve hours from the time he shall be brought before the Justice, unless within that time the trial of the cause has commenced, or unless it has been delayed at the instance of the defendant.

Justice empowered to serve process Sec. 82. Every Justice issuing any process, authorized by this act, upon being satisfied that such process will not be executed for want of an officer to be had in time to execute the same, may empower any suitable person, not being a party to the suit, to execute the same, by an indorsement on the process to the following effect: "At the request and risk of the plaintiff, I authorize A. B. to execute and return this writ. E. F., Justice of the Peace;" and the person so empowered shall thereupon possess all the authority of a constable in relation to the execution of such process, and shall be subject to the same obligations, and shall receive the same fees for his services.

Officers failing to execute process &c Sec. 83. If any officer, without showing good cause therefor, fail to execute any process to him delivered, and make due return thereof, or make false return, such officer for every such offence shall pay to the party injured ten dollars, and all damages such party may have sustained by reason thereof, to be recovered in a civil action founded upon this statute.

Parties how they may appear Sec. 84. Parties in Justices' Courts may prosecute or defend in person or by attorney, and any person may act as attorney in Justices' Courts, except that the constable by whom the summons or jury process was served, cannot appear or act on the trial, in behalf of either party. The authority of a person to act as attorney for another, may be oral or written; but unless admitted by the adverse party, must be proved by the oath of the attorney or otherwise.

Infant how to institute suit Sec. 85. No suit shall be instituted by an infant plaintiff, until a next friend for such infant shall have been appointed. Whenever requested, the Justice shall appoint some suitable person, who shall consent thereto in writing, to be named by such plaintiff, to act as his next friend in such suit, who shall be responsible for the costs therein.

Not appear by person, or attorney Sec. 86. Every defendant in a suit may appear and defend the same, either in person or by agent, except persons under twenty-one years of age.

Sec. 87. After the service and return of process against

an infant defendant, the suit shall not be further prosecuted until a Guardian for such defendant shall have been appointed. Upon the request of such defendant, the Justice shall appoint some person who shall consent thereto in writing, to be Guardian of the defendant in defence of the suit; and if the defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such Guardian, the Justice may, at the request of the plaintiff, appoint any discreet person as such Guardian; and the consent of such Guardian or next friend shall be filed with the Justice, and the Guardian for the defendant shall not be liable for any cost in the suit.

Suit not to be prosecuted against infant—guardian appointed

SEC. 88. The parties are entitled to one hour in which to make their appearance, after the time mentioned in the summons for appearance; but are not bound to remain longer than that time, unless both parties appear, and the Justice being present, is actually engaged in the trial of another action or of a special proceeding; in such case he may postpone the time of appearance until the close of the trial.

Parties entitled to an hour for appearance

PLEADINGS AND TRIAL.

- SECTION 89. Pleadings when to take place.
90. Pleadings in Justice's Court defined.
 91. Pleadings how prepared, &c.
 92. Complaint must state facts.
 93. Answer, what to contain.
 94. Plaintiff, when to reply.
 95. Written instrument, how pleaded.
 96. When cause of action on set-off, is account or instrument, what to plead.
 97. Pleadings must be verified.
 98. Statement in pleading not denied to be taken as true.
 99. Party may object to pleading, when.
 100. Variance between proof and pleading to be disregarded.
 101. Pleadings, when may be amended.
 102. When and upon what conditions adjournments allowed.
 103. If title to lands in question, Justice how to proceed.
 104. Adjournment, how long.
 105. Adjournment of cause commenced by warrant.
 106. When adjournment upon application of defendant, he shall remain in custody.
 107. When recognizance shall have been given upon prior adjournment.
 108. When plaintiff may recover upon recognizance.

SEC. 89. The pleadings in Justices' Courts must take place at the time mentioned in the summons for the appearance of the parties, or within one hour thereafter, or at such

Pleadings when to take place

time thereafter, not exceeding one week, as the Justice may appoint for the convenience of the parties, and by their consent, or otherwise.

SEC. 90. The pleadings in Justices' Courts are :

Pleadings in
justice's court
defined

1. The complaint by the plaintiff, stating the cause of action :

2. The answer by defendant, stating the grounds of defence :

3. When the answer contains a notice or plea of "set-off," or new matter constituting a defence, the reply by the plaintiff.

Pleadings how
prepared

SEC. 91. The pleadings may be oral or written. If written, they shall be filed; if oral the substance thereof shall be by the justice entered in his "docket," and in either case a memorandum thereof shall be entered by the Justice in his docket in connection with the entry of the cause; such pleadings are not required to be drawn in a formal or technical manner—but must be such as to enable the court or jury to apply the relief or remedy, in accordance with the known rules of law.

Complaint
to state facts

SEC. 92. The complaint must state in a plain and direct manner the facts constituting the cause of action.

Answer what
to contain

SEC. 93. The answer must contain a denial of all the material allegations contained in the complaint which the defendant believes to be untrue, and also a statement in a plain and direct manner of any other facts constituting a defence or set-off, upon which an action might be brought by the defendant against the plaintiff in a Justice's Court. (1)

Plaintiff when
to reply

SEC. 94. When the answer contains a set-off, or new matter constituting a defence, the plaintiff may reply, denying any of the material allegations relating thereto, which he shall believe untrue.

What answer
equivalent to
denial

SEC. 95. A statement in an answer or reply that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleading of the adverse party, to form a belief, is equivalent to a denial.

Written-instru-
ment how
pleaded

SEC. 96. When the cause of action or set-off, arises upon an account or instrument for the payment of money, it is sufficient for the party to deliver the account or instrument to the Court; and to state in writing that there is due to him thereon from the adverse party, a specified sum which he claims to recover or set-off; the Court may at any time of

(1) See Sections 91, 92 and 93 Majority Report.



the pleading, require that such writing or account be exhibited to the inspection of the adverse party, with liberty to copy the same; or if not so exhibited, may prohibit its being afterwards given in evidence.

SEC. 97. Every complaint, answer, or reply, must be verified by the oath of the party pleading; or if he be not present, by the oath of his agent or attorney. 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 upon the subject, and the reason why it is not made by the party; the verification must be in writing, in conformity with the pleadings verified.

SEC. 98. Every material allegation in a complaint, or relating to a set-off, or new matter in an answer, not denied by the pleading of the adverse party must, on the trial, be taken to be true, except that when a defendant who has not been served with a copy of the complaint with the summons fails to appear and answer, the plaintiff cannot recover without proving his case.

SEC. 99. Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit, or that it contains no cause of action or defence, although it be taken as true. If the Court deem the objection well founded, it must order the pleading to be amended, and if the party refuse to amend, the defective pleading must be disregarded, or treated as pleadings were treated at common law.

SEC. 100. A variance between the proof on the trial and the allegations in the pleadings, must be disregarded as immaterial, unless the Court be satisfied that the adverse party has been prejudiced thereby.

SEC. 101. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omission in the allegations or denial, necessary to support the action or defence, when, by such amendment, substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the Court, that an adjournment is necessary to the adverse party, in consequence of such an amendment, an adjournment may be granted. The Court may also, in its discretion, require as a condition for an amendment, the payment of costs to the adverse party, to

Pleadings verified

Statement in pleading not denied to be taken as true

When party may object to pleading

Variance between proof & pleading to be disregarded

Pleadings amended

be fixed by the Court, not more than three dollars; but such payment cannot be required, unless an adjournment is made necessary by the amendment; nor can an amendment be allowed after a witness is sworn on a trial, when an adjournment will be made necessary thereby—save upon such terms as shall be imposed by the Court.

Adjournment
allowed

SEC. 102. When the pleadings of the parties shall have been completed, the Justice shall, upon the application of either party, if sufficient cause be shown upon oath, adjourn the case for any time not exceeding thirty days; and upon an adjournment, all costs for travel, attendance of witnesses, serving subpoenas, &c., shall be taxed and shall abide the event of the suit or be paid by the party asking said adjournment, as the Court shall direct.

Title to lands

SEC. 103. If it appear, on the trial of any cause before a Justice, from the evidence of either party, that the title to land is necessarily drawn in question, which title shall be disputed by the other party, the Justice shall immediately make an entry thereof, in his docket, and cease all further proceedings in the cause, and shall certify to the District Court of the county, a transcript of all the entries made in his docket relating to the case, together with all process and other papers relating to the suit, in the same manner and within the same time as upon an appeal; and thereupon the District Court shall proceed in the cause to final judgment and execution, the same as if the said suit had been originally commenced therein, and the costs shall abide the event of the suit.

Adjournment
how long

SEC. 104. Every adjournment after the first, shall be for such reasonable time as will enable the party to procure such absent testimony or witness as may be material, which the party applying for the adjournment shall not have been able to procure by the use of proper diligence; and shall be at the cost of the party applying therefor, unless otherwise ordered by the Justice.

Adjournment
of cause com-
menced by
warrant

SEC. 105. If a cause commenced by a warrant be adjourned by the consent of both parties, or on the application of the plaintiff, the defendant shall be discharged from custody.

When adjourn-
ment upon
application
&c

SEC. 106. But if such cause be adjourned upon the application of the defendant, he shall continue during the time of the adjournment in custody of the officer, unless he shall enter into recognizance before the Justice, with such security as the Justice approves, in a penalty sufficient to secure the

plaintiff's demand and costs, conditioned that if said judgment be given against him in the suit and execution be issued against his person, he will render himself up on such execution before the return day thereof; or that he or his security will pay the judgment so recovered.

SEC. 107. If any such recognizance shall have been given upon any prior adjournment, it shall not be necessary to enter into any recognizance upon a subsequent adjournment, unless such recognizance be required by the Justice, or the bail of the defendant, in such prior recognizance. When recognizance given prior adjournment

SEC. 108. In any suit brought upon such recognizance, the plaintiff shall not be entitled to recover, unless he shows an execution or a duly certified copy thereof upon the judgment, obtained in the suit in which said adjournment was had, duly issued within six days after the time, when the same could have been issued against the person of the defendant and a return thereon that such defendant could not be found. When plaintiff recover upon recognizance

SET-OFFS. (1)

SECTION 109. What claims may be set off.

110. When claims against assignor of promisory notes may be set off.
111. Set-off in suit by trustee—when allowed.
112. Defendant how entitled to set off.
113. Judgment when set off proved.
114. Judgment when balance due defendant.

SEC. 109. Set-offs which the defendant may have against the plaintiff, may be set off in the following cases, and under the following circumstances: What claims may be set off

1. It must be a demand arising upon a judgment, or upon a contract, express, or implied, whether such contract be written or unwritten, sealed or without a seal, and if it be founded upon a bond or other contract having a penalty, the sum equitably due by virtue of its condition, only shall be set off.

2. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee and owner of the demand.

3. It must be for real estate sold, or for money paid, or

(1) I have embraced all the rights and remedies included under the "Counter claim" and "Set-off" combined, under the plea or notice of "Set Off." I thought it best to dispense with the use of expressions which are unknown to the law, or even the English language, especially when nothing is gained by their use. The word "Set-Off," has a well defined meaning in the language, and has received judicial construction for centuries. See Sec. 109 Majority Report.

service done; or if it be not such a demand, the amount must be capable of liquidation by calculation.

4. It must have existed at the time of the commencement of the suit, and must then have belonged to the defendant.

5. It can only be allowed in actions founded upon demands which could be themselves the subject of set-off according to law.

6. If there be several defendants, the demands set off must be due to all of them jointly.

7. It must be a demand against the plaintiff in the action, or the party of whom he is the legal representative.

8. If the action be founded upon a contract (other than a negotiable promissory note, or bill of exchange,) which has been assigned to the plaintiff, a demand against such plaintiff, or any assignee of such contract at the time of assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, may be set off, to the amount of the plaintiff's debt, if the demands be such as might have been set off against such plaintiff or assignee, while the contract belonged to him.

When claims against assignor of promissory notes setoff
 SEC. 110. If the action be upon a negotiable promissory note, or bill of exchange which has been assigned to the plaintiff, after it becomes due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons, who shall have assigned or transferred such note or bill after it became due if the demand be such as might have been set off against the assignor, while the note or bill belonged to him.

Setoff in suits by trustee — when allowed
 SEC. 111. If the plaintiff be a trustee for an other, or if the suit be in the name of the plaintiff who has no real interest in the contract upon which the case is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

Defendant entitled to setoff
 SEC. 112. To entitle a defendant to a set-off of any claim he may have against the plaintiff, he must specifically and clearly allege the same in his answer, stating the particular items of such claim; but no set-off shall be allowed by a Justice's Court, unless the same shall be alleged in the defendant's answer as required in this act.

SEC. 113. If the amount of the set-off duly established be

equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action, if it be less than the plaintiff's debt or demand, the plaintiff may, if entitled, have judgment for the residue. Judgment when set-off approved

SEC. 114. If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered for the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff where the contract which is the subject of the suit shall have been assigned before the commencement of such suit, nor for any balance due from any person other than the plaintiff in the action. Judgment when balance due defendant.

EVIDENCE, WITNESSES AND DEPOSITIONS.

SECTION 115. How and by whom subpoena may be served.

116. Attachment—when to issue against witness.

117. Attachment—how executed.

118. Witnesses neglecting to appear—how liable.

119. Deposition may be taken.

120. Deposition—how taken.

121. Deposition—when to be read in evidence.

122. Parties failing to appear—Justice how to act.

SEC. 115. A subpoena may be served by any person duly authorized; by reading it to the witness or by delivering a copy thereof to him. Subpoena may be served

SEC. 116. Whenever it shall appear to the satisfaction of the Justice by proof made before him that any person duly subpoenaed to appear before him in a suit, shall have failed without a just cause to attend as a witness in conformity to such subpoena, and the party in whose behalf such subpoena was issued or his agent, shall make oath that the testimony of such witness is material, the justice shall have power to issue an attachment to compel the attendance of such witness: *Provided however*, That no attachment shall issue against a witness unless his mileage and one day's attendance has been tendered or paid in advance. Attachment when to issue against witness

SEC. 117. Every such attachment shall be executed in the same manner as a warrant, and the fees of the officer for issuing and serving the same, shall be paid by the person against whom the same was issued, unless he show reasonable cause to the satisfaction of the Justice, for his omission to attend, in which case the party requiring such attachment, shall pay all costs of such attachment. Attachment how executed

SEC. 118. Every person subpoenaed as aforesaid, and neg-

Witnesses neglecting to appear -- how liable

lecting to appear, shall also be liable to the party in whose behalf he may have been subpoenaed, for damages which such party may have sustained by his non-appearance : *Provided*, That such witness had one day's attendance and his mileage tendered or paid him in advance.

Depositions may be taken

SEC. 119. Either party in any civil suit depending before a Justice, may, upon notice, cause the deposition of any witness therein, to be taken by any Judge or Justice of the Peace of any county in this State where the said witness may be.

Depositions how taken

SEC. 120. The deposition shall be taken, certified, and returned according to the law of the State concerning depositions.

Depositions when to be read in evidence

SEC. 121. The Justice shall allow every deposition taken, certified and returned according to the provisions of this act, to be read on the trial of the cause in which it is taken, in all cases where the same testimony, if given verbally in Court, could have been received ; but no such deposition shall be read on the trial, unless it appears to the Justice that the witness whose deposition is offered :

1. Is dead, or resides out of the county; or,
2. Is unable, or cannot easily attend before the Justice, on account of sickness, age, or other bodily infirmity:
3. Has gone out of the county, without the consent or collusion of the party offering the deposition.

Parties failing to appear—justice how to act

SEC. 122. If either party shall fail to appear within one hour after the time specified for the return of the process, or after the hour of adjournment, the Justice may dismiss the suit, or proceed to hear the proof of the party present, and render judgment thereon accordingly, as the case may require.

TRIAL BY JURY.

SECTION 123. Entitled to Jury trial; Jury how selected; oath of officer; oath of Jurors; oath of officer having charge of jurors: and Jury of 12 men.

124. Jury not agreeing, Justice may discharge;
125. Jurors summoned, not appearing to be fined.

Trial by jury, how selected, oaths, &c

SEC. 123. In every action to be brought by virtue of this Act, it shall be lawful for either of the parties to the suit, or for the attorney of either of them, after issue joined, before the Court shall proceed to inquire into the merits of the cause, to demand of said Court that the said action be tried by a

jury of six persons, on first paying to the Justice the jury fees in advance, which shall be taxed against the party losing, and upon such demand, the Justice shall direct the sheriff or any constable of the county who may be present, or if no officer be present, the Justice may appoint a suitable person to perform the duties required by this section, to whom he shall administer the following oath or affirmation: "You do solemnly swear (or affirm, as the case may be,) that you will perform the duties required of you, according to the best of your abilities, without partiality to either party;" and if in the opinion of the Justice the jurors above required cannot appear forthwith, for the trial of the cause, the Justice shall adjourn the cause, for such reasonable time as he may think proper to enable the officer to summon the said Jurors, and for them to appear, which time shall be specified in the *venire facias*; the person so sworn shall write down the names of eighteen persons, being inhabitants of the county, and possessing the qualifications necessary to constitute jurors in a court of record, from which list each party may strike out alternately six names, and in case of the absence of either party, or of his refusal to strike out, the Justice shall strike out of the said list six names, and shall thereupon issue a *venire facias*, requiring the officer to summon the six persons whose names remain upon the above mentioned list, to appear at the time and place therein mentioned, to serve as Jurors for the trial of the cause, named in said *venire facias*; *Provided*, That if any of said Jurors shall not attend at the time so summoned to appear, or in case there should be legal objections raised to any of those who shall appear, it shall be the duty of the officer to summon a sufficient number of talesmen to supply the deficiency. The Jury so selected shall take the following oath or affirmation: "You and each of you do solemnly swear, (or affirm) that you will well and truly try the matter of difference between _____, plaintiff, and _____, defendant, and a true verdict give according to law and the evidence given to you in Court; so help you God;" and after having been sworn, they shall sit together and hear the several proofs and allegations of the parties, which shall be delivered in public in their presence. And to each witness on any trial, the Justice shall administer the following oath (or affirmation,) to wit: "You do swear in the presence of Almighty God, (or affirm,) that the evidence you shall give in this matter of difference between _____, plaintiff, and _____, defendant, shall be true and correct according to the best of your knowledge and belief; so help you God;" and after having been sworn, they shall sit together and hear the several proofs and allegations of the parties, which shall be delivered in public in their presence.

Trial by jury
how conducted

Trial by jury
continued

defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God;" and after hearing the allegations and proofs, the jury shall be kept together in some convenient place, until they all agree upon a verdict, or be discharged by the Justice; and for which purpose a proper officer shall be sworn or affirmed, to whom the said Justice shall administer the following oath, to wit: "You do swear in the presence of Almighty God, that you will, to the utmost of your ability, keep every person sworn on this inquest together, in some private convenient place, without drink, except water; you will not suffer any person to speak to them, nor speak to them yourself unless by order of the Justice, except it be to ask them whether they have agreed on their verdict, or are discharged by the Court, so help you God." And when the Jurors have agreed on their verdict, they shall deliver the same to the Justice, in the same Court, who is hereby required to give judgment thereupon, and to award execution in manner hereinafter directed.

That in all trials for criminal offences before a Justice of the Peace, wherein the accused shall demand a trial by jury of twelve men, and in all civil suits before a Justice of the Peace where the value in controversy shall exceed twenty dollars, in which either party shall demand a trial by jury of twelve men, such jury shall be impaneled by said Justice in the way and manner following, to wit:

Jury of twelve
men

When such jury shall be so demanded, the Court shall direct the Sheriff, or any Constable of the county, to make a list in writing of the names of twenty-four inhabitants of the county, qualified to serve as jurors in the Courts of Record in this State, from which the complainant and accused, in case of a trial for a criminal offence, and the parties in the case of a civil suit, may each strike out six names: in the case of the refusal or neglect of either person above named so to strike out such names, the Justice shall strike out the names for either or both of said parties; and upon such names being stricken out as herein provided, the Justice shall issue a venire directed to the Sheriff or any Constable of the county, directing him to summon the twelve persons, whose names shall remain upon such list to appear before such Court at the time and place to be named therein, to serve as jurors for the trial of such offence or civil suit. All further and other proceedings in relation to said jury and

the trial before it shall be held as provided by law in case of a jury trial in Justice's Court. (1)

SEC. 124. Whenever a Justice shall be satisfied that a jury sworn in any civil case before him, after having been out any reasonable time, cannot agree on a verdict, he may discharge them and issue a new venire, unless the parties consent that the Justice may render judgment.

Jury not agreeing — Justice may discharge

SEC. 125. Every person who shall be duly summoned as a juror, and shall not appear, nor render a reasonable excuse for his default, shall be subject to a fine not exceeding ten dollars.

Jurors summoned not appearing to be fined

JUDGMENTS, AND THE FILING TRANSCRIPTS THEREOF, AND THE STAY OF EXECUTIONS.

- SECTION 126. Confession of judgment, how taken.
127. Mutual judgments, when offset each other.
128. When Justice do set off Judgment rendered by other Justice.
129. Judgment set off—Entry to be made.
130. Justice, when transfer cause to another Justice.
131. Justice, when to render judgment forthwith.
132. Execution, when stayed.
133. Party staying, enter into Recognizance.
134. Form of Recognizance.
135. Execution, when to issue against Principal and Bail.
136. Surety to have judgment.
137. Judgment stayed after Execution, same as an Appeal.
138. Justice to give Transcript; when same shall be filed.
139. Transcript, when filed, Lien on Real Estate.

SEC. 126. No confession shall be taken or judgment rendered thereon, unless the following requisites be complied with.

Confession of judgment how taken

1. The defendant must personally appear before the Justice; or

2. The confession must be in writing, signed by the defendant, attested by two witnesses, and filed with the Justice.

SEC. 127. If there be mutual Justice's judgments between the same parties, upon which the time for appealing has elapsed, on which there is no existing execution, one judgment on the application of either party, and a reasonable notice given to the adverse party, may be set off against the

Mutual judgments — when offset each other

(1) See Chapter 10, approved May 23, 1857. I have changed the amount from \$12 to \$20, that it might conform to Article 4 of the Amendments to the Constitution of the U. S. See also, Majority Report, Sec. 123.

other, by the Justice before whom the judgment against which the set-off is proposed may be.

Justice to set-off judgment rendered by other justice

SEC. 128. If the judgment proposed as a set-off, was rendered before another Justice, the party proposing such set-off must produce before the Justice a transcript of such judgment upon which there is a certificate of the Justice rendering the judgment, that it is unsatisfied in whole or in part, and that there is no appeal or existing execution thereon, and such transcript was obtained for the purpose of being a set-off against the judgment to which it was offered as a set off. The Justice granting such transcript shall make an entry thereof in his docket, and all further proceedings on such judgment shall be stayed, unless such transcript shall be returned with the proper Justice's certificate thereon, that it has not been allowed in set-off.

Judgment set off—entry to be made

SEC. 129. If any Justice shall set-off one judgment against another, he shall make an entry thereof in his docket, and execution shall issue only for the balance, which may be due after such set-off. If a Justice shall allow a transcript of a judgment rendered by another Justice to be set off, he shall file such transcript among the papers relating to the judgment in which it is allowed in set-off; if he shall refuse such transcript as a set-off, he shall so certify on the transcript, and return the same to the party who offered it.

Justice when transfer cause to another justice

SEC. 130. If, previous to joining issue in any cause, the defendant, his agent, or attorney, shall make affidavit that the Justice before whom the same is pending, is a material witness for such defendant, without whose testimony he cannot safely proceed to trial thereof; or if it shall appear that the Justice is of near kin to the plaintiff, then and in such case the said Justice shall transfer said suit, and all other papers appertaining to the same, to some other Justice of the same county, who may thereupon proceed to hear, try and determine the same, in the same manner as it would have been lawful for the Justice before whom the said suit was commenced, to have done; *Provided*, That no cause or trial shall be removed from a Justice more than once; and no cause or proceeding shall be so removed, unless the application therefor be made on the return day of the process, and before any proceedings had on the part of the defendant.

SEC. 131. In cases where the plaintiff shall be non-suited, or withdraw his action, or where judgment shall have been confessed, and in all cases where a verdict shall be rendered,

or the defendant shall be in custody at the time of hearing the cause, the Justice shall forthwith render judgment, and enter the same in his docket, within three days after the cause shall have been submitted to him for his decision. Justice when to render judgment forthwith

SEC. 132. The execution upon a judgment by a Justice of the Peace, may be stayed in the manner hereinafter provided, upon reasonable notice to the opposite party, and for the following periods of time, to be calculated from the date of the judgment: Execution when stayed

1. If the judgment be for any sum not exceeding ten dollars, exclusive of costs, one month.
2. If it be for any sum above ten dollars, and not exceeding thirty dollars, two months.
3. If it be for any sum above thirty dollars, and not exceeding fifty dollars, three months.
4. If it be for any sum above fifty dollars, and not exceeding seventy-five dollars, four months.
5. If it be for a sum above seventy-five dollars, exclusive of costs, six months; but if all the parties to the judgment agree upon any other time, the stay shall be for the time so agreed upon.

SEC. 133. To entitle any person to such stay of execution, some responsible person, to be approved by the Justice, and not being a party to the judgment, must, within five days after rendering the judgment, enter into a recognizance before the Justice, to the adverse party, in a sum sufficient to secure the payment of the judgment and costs, conditioned to be void upon such payment at the expiration of the stay. Party staying enter into recognizance

SEC. 134. Such recognizance must be signed by the person entering the same, and may be in the following form:—

“I, _____, acknowledge my indebtedness to _____, in the sum of _____ dollars, to be void on this condition: Whereas, _____ obtained a judgment before _____, a Justice of the Peace of _____, on the _____ day of _____, 18____, against _____,—
Now, if such judgment shall be paid at the expiration of _____ months from the time it was rendered, this recognizance shall be void.” Form of recognizance

SEC. 135. If, at the expiration of such stay, the judgment be not paid, the execution shall issue against the principal and bail; if the principal do not satisfy the execution, and the officer cannot find sufficient property belonging to him upon which to levy, he shall levy upon the property of the When to issue execution

bail, and in his return shall state what amount of the money collected by him on the execution was collected by him from the bail, and the time when the same was received.

Surety to have judgment SEC. 137. After the return of such execution, the bail shall be entitled, on motion, to a judgment before a Justice for the amount collected from him in satisfaction of such execution, with interest thereon at twelve per cent. per annum; and such return of the officer, upon motion, shall be evidence of the facts therein stated. No motion shall be made after three months from the return of the execution.

Judgment stayed SEC. 137. If a judgment be stayed in the manner above prescribed, after an execution has been issued thereon, the Justice shall revoke such execution, in the same manner and with the like effect as he is hereinafter directed to revoke an execution after an appeal has been allowed.

Justice to give transcript SEC. 138. Every Justice, on demand of any person in whose favor he shall have rendered judgment for more than ten dollars exclusive of costs, shall give to such person a certified transcript of such judgment; and the Clerk of the District Court of the said county in which the judgment was rendered shall, upon the production of any such transcript, file the same in his office, and forthwith enter such judgment in the docket of the District Court, in which are entered judgments and decrees, and shall note therein the time of filing such transcript.

Transcript SEC. 139. Every such judgment, from the time of such filing of the transcripts thereof, shall have the same lien on the real estate of the defendant in the county as a judgment of the District Court of the same county—shall be equally under the control of the District Court, and shall be carried into execution in the same manner and with like effect as the judgment of such District Courts: but no execution shall be issued thereon out of the District Court until an execution shall have been issued by a Justice and returned, that the defendant has no goods or chattels whereon to levy the same.

EXECUTIONS AND PROCEEDINGS THEREON.

- SECTION 140. Execution issued on demand.
 141. Execution when to issue against person.
 142. Execution what to contain.
 143. Duty of Justice before issuing execution.
 144. Execution when and how renewed.
 145. Notice of sale, how given and what to contain.
 146. Sale and return how made.

147. Officer not to purchase at sale.
 148. Garnishees when may be summoned.
 149. Officer to receive money and receipt therefor.

SEC. 140. Upon every judgment rendered by a Justice, execution shall be issued by such Justice, in the manner hereinafter prescribed, at any time on demand. Execution issued on demand

SEC. 141. In the following cases execution may be issued by the Justice against the person of the debtor, and in no other:— Execution when to issue against person

1. When the debt has been fraudulently contracted.
2. When the action in which judgment is rendered is founded on the tortious act of the defendant: which fact or tort shall be alleged in the pleading. (1)

SEC. 142. The execution shall command the officer to levy the debt or damages, together with the interest thereon and the costs, upon the goods and chattels of the person against whom the execution shall be granted—his arms and accoutrements excepted, and also such other articles as are exempt by law from execution—and to pay the money, within thirty days from date, to the Justice who issued the execution, to render to the party who recovered the same; and if the execution be issued against a male person, in case where imprisonment is authorized by law, it shall command the sheriff or constable that if no goods or chattels can be found, or not sufficient to satisfy such execution, then to take the body of the person against whom the execution shall be issued and convey him to the common jail of the county, there to remain until such execution shall be satisfied and paid or he be otherwise discharged according to law. Execution what to contain

SEC. 143. Before any execution shall be delivered, the Justice shall state in his docket, and also on the back of the execution, the amount of the debt or damages and costs separately, and the officer receiving such execution, shall indorse thereon the time of the reception of the same. Duty of justice before issuing execution

SEC. 144. If any execution be not satisfied, it may, at the request of the plaintiff, be renewed from time to time by the Justice issuing the same, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made; if any part of such execution has been satisfied, the indorsement or renewal shall express the sum due on the execution; every such indorsement shall renew the execution in full force, in all respects, for thirty days, and no Execution renewed

(1) See Sec. 141 Majority Report.

longer. An entry of such renewal shall be made in the docket of the justice.

Notice of sale how given
 SEC. 145. The officer after taking goods or chattels into his custody by virtue of an execution, shall without delay give public notice, by at least three advertisements put up at three public places in the township and immediate vicinity where the property is to be sold, of the time and place, when and where the same shall be exposed for sale. Such notice shall describe the goods or chattels taken, and shall be put up at least ten days before the day of sale.

Sale and return how made
 SEC. 146. At the time so appointed, the officer shall expose the goods or chattels to sale at public vendue to the highest bidder. The officer shall in all cases return the execution, and have the money before the justice at the time of making such return.

Officer not to purchase at a sale
 SEC. 147. No officer shall directly or indirectly, purchase any goods or chattels at any sale made by him upon execution; every such sale shall be absolutely void.

Garnishees summoned
 SEC. 148. If there be no property found, or if the goods or chattels levied on are not sufficient to satisfy such execution, the officer shall, upon the demand of the plaintiff, summon in writing, as garnishees, such persons as may be named to him by the plaintiff or his agent, to appear before the Justice on the return day of the execution, to answer such interrogatories as may be put to them, touching their liabilities as garnishees; and like proceedings shall be had thereon before the Justice to final judgment and execution, as in suits instituted by attachment in Justice's Court.

Officer to receive money
 SEC. 149. The officer who shall hold any execution, shall receive all money tendered to him in payment thereof, and shall indorse the same on the execution, and give the person paying the same a receipt therefor, in which shall be specified on what account the same was paid, if demanded.

REPLEVIN.

SECTION 150. Object of action—affidavit required.

151. What the affidavit shall state.

152. Plaintiff to execute bond with sureties.

153. Writ to be issued by Justice.

154. Duty of officers in executing writ.

155. Third person claiming property to be co-defendant.

156. If property be not obtained, what plaintiff shall recover.

157. Plaintiff failing to establish his right—what defendant shall recover.

SEC. 150. When the object of the action is to recover the possession of personal property, the plaintiff or some other person, shall in all cases, before any writ shall be issued, take and subscribe an affidavit and file the same with the Justice.

Object of action—affidavit required

SEC. 151. Such affidavit must state that the property (describing it) is wrongfully detained by the defendant, that the plaintiff is entitled to the immediate possession thereof, that it was not taken from him by any process legally and properly issued against him, or if so taken, that it was exempt from seizure in such process; it must also state the value of the property, according to the best knowledge and belief of the affiant.

What the affidavit shall state

SEC. 152. The plaintiff shall also execute a bond to the defendant with sureties, to be approved by the Justice, in a penalty at least double the value of the property sought, conditioned that he will appear at the return day thereof and prosecute his action to judgment, and return the property to the defendant, if a return thereof be ordered by the Court, and also pay all costs and damages that may be adjudged against him; the bond shall be filed with the Justice, and shall be for the use of any person injured by the proceeding.

Plaintiff to execute bond

SEC. 153. The Justice shall thereupon issue a writ, directed to the Sheriff or any Constable of the county, commanding him to take the property therein described and deliver the same to the plaintiff, and summon the defendant to appear and answer the same on the return day mentioned in the writ.

Writ to be issued by justice

SEC. 154. In obedience to such writ, the officer must forthwith take possession of the property mentioned in the writ, if the same be in the possession of the defendant or his agent, for which purpose he may break open any dwelling house or other inclosure, having demanded entrance and exhibited his authority if required.

Duty of officer in executing writ

SEC. 155. If a third person claim the property, he must be made a co-defendant.

Third person claiming property to be co-defendant

SEC. 156. If the property sought be not obtained, the plaintiff, if he establishes his right thereto, shall recover the value of the property and whether obtained or not, he shall recover the damages he has sustained in consequence of the illegal detention thereof.

If property be not obtained what plaintiff shall recover

SEC. 157. If the plaintiff fails to establish his right to the

Plaintiff failing to establish his right what defendant shall recover property, the defendant shall recover such damages as under the circumstances he shows himself entitled to ; and in addition thereto, may have judgment for the return of the property or the value thereof, if the same has been taken out of his possession or delivered to the plaintiff.

PROCEEDINGS BY ATTACHMENT.

- SECTION 158. Creditor to proceed by attachment.
159. Affidavit to be made—what to contain.
160. Attachment, when returned.
161. Form of attachment.
162. Attachment, how executed.
163. Defendant, when to obtain possession of property.
164. Perishable Goods may be sold.
165. Compensation allowed for keeping property.
166. Defendant not summoned—cause continued and notice given.
167. Form of Notice.
168. Notice published and posted.
169. Defendant not appearing, judgment entered ; no Execution until bond given.
170. Pleadings same as in other cases.
171. Attachment, how dissolved.
172. Attachment, when dissolved, property to be released.
173. Third person may keep property by giving bond.
174. Execution issue, when judgment rendered.

Creditor to proceed by attachment SEC. 158. Any creditor shall be entitled to proceed by attachment in a Justice's Court, against the property of his debtor, in the cases, upon the conditions, and in the manner provided in this Act.

Affidavit to be made—what to contain SEC. 159. Before any such writ of attachment shall be issued, the plaintiff, or some person in his behalf, shall make and file with the Justice, an affidavit stating that the defendant therein is indebted to the plaintiff, in a sum exceeding five dollars ; and specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment or decree of some Court, and containing a further statement that the deponent has good reason to believe either :

1. That the defendant is a non-resident corporation ; or
2. That the defendant is not a resident of this State, and has not resided therein for six months immediately preceding the time of making such affidavit :
3. That the defendant has absconded, or is about to abscond from this State :

4. That the defendant has removed, or is about to remove his property out of this State, with intent to defraud his creditors.

5. That the defendant resides in any other county, and more than two hundred miles from the residence of the Justice :

6. That the defendant contracted the debt under fraudulent representations :

7. That the defendant so conceals himself that the process of summons cannot be served upon him ; or

8. That the defendant has fraudulently conveyed or disposed of, or is about fraudulently to convey or dispose of his property or effects, so as to hinder or delay his creditors :

SEC. 160. In the first five cases mentioned in the preceding Section, the writ of attachment shall be returnable in three days ; but in all other cases, it shall be returnable as an ordinary summons. Attachment,
when returned

SEC. 161. The writ of attachment shall be in the following form : Form of at-
tachment

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable of said county :

In the name of the State of Minnesota you are commanded to attach the goods and chattles, rights, moneys, effects, and credits of _____, or so much thereof, as shall be sufficient to satisfy the sum of _____, with interest and costs of suit, in whosoever hands or possession the same may be found in your county, and so provide that the goods and chattels so attached, may be subject to further proceedings thereon, as the law requires ; and also to summon the said _____, if to be found, to be and appear at my office in said county, on the _____ day of _____ A. D. 18____, at _____ o'clock in the _____ noon, to answer to _____, in a civil action to plaintiff's damage one hundred dollars or under.

Given under my hand and seal at _____, this _____ day of _____, A. D. 18____

J. P., Justice of the Peace. [L. s.]

SEC. 162. The officer shall execute a writ of attachment by summoning the defendant, as in case of a summons, if to be found within the county, and by attaching the goods and chattels, moneys and credits, of the defendant, not exempt by law. Attachment,
how executed

SEC. 163. When property of the defendant shall be actually seized on attachment, the defendant, or any other person for him, may obtain possession thereof, by giving bond and security to the satisfaction of the officer executing the writ, in double the value of the property so attached, conditioned that the same shall be forthcoming, when and where the Justice shall direct, and shall abide the judgment of the Justice.

SEC. 164. When property shall be seized on attachment, which is likely to perish or depreciate in value before the probable end of the suit, or the keeping of which would be attended with much loss or expense, the Justice may order the same to be sold by the officer, in the same manner and on the same notice, as goods are required to be sold on an execution; and the proceeds of such sale shall remain in the hands of the officer, subject to be disposed of as the property would have been if seized upon in specie.

SEC. 165. When property is seized on attachment, the Justice may allow to the officer having charge thereof, such compensation for his trouble and expense, in keeping and maintaining the same, as shall be reasonable and just.

SEC. 166. When the defendant cannot be summoned, and his property or effects shall be attached, if he do not appear in the action, at the return of the writ, the Justice shall enter an order in his docket, requiring the plaintiff to give notice to the defendant, by publishing in a newspaper, if there be one printed in the county, or by three written or printed advertisements, set up at three of the most public places in the county, that a writ has been issued against him, and his property attached to satisfy the demand of the plaintiff; and that unless he appear before the Justice at some time and place to be mentioned in said notice, not less than twenty, nor more than ninety days from the date thereof, judgment will be rendered against him, and his property sold to pay the debt.

SEC. 167. The notice may be in the following form :

Form of notice
State of Minnesota, }
County of } ss. In Justice's Court :
A. B. }
vs. }
C. D. }

To C. the defendant in the above entitled cause :

You are hereby notified that a writ of attachment has been

issued against you, and your property attached, to satisfy the demand of _____, amounting to _____

_____ : Now, unless you shall appear before J. P., a Justice of the Peace in and for said county, at his office in said town, on the _____ day of _____

A. D. 18 _____, at _____ o'clock in the _____ noon, judgment will be rendered against you, and your property sold to pay the debt.

Dated this _____ day of _____ A. D. 18 _____

J. P., Justice of the Peace. [L. s.]

SEC. 168. Such notice shall be set up, or published at least thirty days before the expiration of the time at which the party is required to appear, and the setting up may be proved, either by the return of the officer upon a copy of the notice, or by the affidavit of any person who would be a competent witness in the case. Notice published and posted

SEC. 169. When the defendant shall be notified as aforesaid, and shall not appear and answer to the action, his default shall be entered by the Justice in his docket, and the plaintiff may proceed thereon to final judgment as in actions commenced by summons; but no execution shall be issued on such judgment, either against the defendant, or money paid to the Justice thereon, until the plaintiff, or some person in his behalf, shall execute a bond in double the amount of such judgment, to the defendant with security, to be approved by the Justice, conditioned that if the defendant shall, within one year from the rendition of such judgment, appear and disprove the debt or damages adjudged against him, or any part thereof; the plaintiff will refund the whole, or such part thereof as may be found not justly due him in a review of the case, together with interest at the rate of twenty-five per cent. per annum. (1) Defendant not appearing &c

SEC. 170. Like pleadings of the parties and proceedings shall be had as far as practicable, in suits commenced by attachment, and suits founded on contracts and commenced by summons. Pleadings same as in other cases

SEC. 171. Attachments may be dissolved, on motions made in behalf of the defendant, at any time before final judgment, if the defendant shall appear and plead to the action and give bond to the plaintiff, with good and sufficient surety to be approved by the Justice, in double the amount of property, effects, and credits attached, condi- Attachment, how dissolved

(1) See Majority Report, Sec. 169.

tioned that if judgment be rendered against him in such suit, he will pay the amount thereof, with costs and interests thereon.

Attachment, when dissolved property to be released . SEC. 172. When any attachment shall be dissolved, the property and effects attached shall be released, and the garnishees shall be discharged, and the suit proceed as if it had been commenced by a summons only.

Third person may keep property by giving bond SEC. 173. When property of the defendant, found in the hands or possession of any other person than the defendant, shall be attached, such person may retain the possession thereof, by giving bond and security to the satisfaction of the officer executing the Writ, in double the value of the property so attached, conditioned that the same shall be forthcoming when and where the Justice shall direct, and shall abide the judgment of the Justice.

Execution is- sue when judgment rendered SEC. 174. When judgment shall be rendered in any attachment case, execution may issue thereon and the property attached may be sold in the same manner as in other cases, except as otherwise provided by this act.

PROCEEDINGS FOR CONTEMPTS BEFORE JUSTICES OF THE PEACE.

SECTION 175. In what cases Justices may punish for contempt.

176. Punishment for contempt to be by fine or imprisonment.
177. Persons charged with contempt to be heard.
178. Offender present may be summarily arraigned.
179. Form of warrant for contempt.
180. Record of conviction to be made and filed in District Court.
181. Warrant of commitment for contempt.
182. Form of record of conviction.
183. Proceeding where witness refuses to be sworn or to answer.
184. Order committing witness, what it shall state.
185. Case to be adjourned if witness refuse to testify.
186. Persons refusing to obey subpoena, how punished.

SEC. 175. In the following cases and no others, a Justice of the Peace may punish for contempt:

In what cases Justices may punish for contempt 1. Persons guilty of disorderly, contemptuous and insolent behavior towards such Justice, whilst engaged in the trial of a cause, or in rendering judgment, or in any judicial proceeding which tends to interrupt such proceeding, or to impair the respect due to his authority.

2. Persons guilty of any breach of the peace, noise or disturbance, intending to interrupt the official proceedings of such Justice.

3. Persons guilty of resistance, or disobedience to any lawful order or process made or ordered by him.

SEC. 176. Punishment of contempt may be by fine not exceeding twenty dollars, or by imprisonment in the county jail not exceeding two days, unless otherwise provided, at the discretion of the Justice. Punishment for contempt &c

SEC. 177. No person shall be punished for contempt before a Justice of the Peace, until an opportunity shall have been given him to be heard in his defence; and for that purpose the Justice may issue his warrant to bring the offender before him. Persons charged with contempt to be heard

SEC. 178. If the offender be present, he may be summarily arraigned by the Justice, and proceeded against in the same manner as if a warrant had been previously issued, and the offender arrested thereon. Offender present may be arraigned

SEC. 179. The warrant for contempt may be in the following form: Form of warrant for contempt

State of Minnesota, }
County of } ss.

To the Sheriff and Constable of said county:

In the name of the State of Minnesota, you are hereby commanded to apprehend A. B., and bring him before J. P., one of the Justices of the Peace of said county, to show cause why he, the said A. B. should not be convicted of a contempt alleged to have been committed on the

day of _____ A. D., 18____, before the said Justice, while engaged as a Justice of the Peace in judicial proceedings.

Dated this _____ day of _____ A. D., 18____
J. P., Justice of the Peace. [L. s.]

SEC. 180. Upon the conviction of any person for contempt, the Justice shall make a record of the proceedings on the conviction, stating the particular circumstances of the offence, and the judgment rendered thereon, and shall file the same in the office of the Clerk of the District Court, and shall also enter the same in his docket as in civil cases. Record of conviction to be filed

SEC. 181. The warrant of commitment for any contempt, shall set forth the particular circumstances of the offence, or it shall be void. Warrant of commitment for contempt

SEC. 182. The record of conviction may be in the following form: Form of record of conviction

State of Minnesota, }
County of } ss.

Whereas, on the _____ day of _____, A. D. 18____,

while we, the undersigned, one of the Justices of the Peace of said county, was engaged in the trial of a cause between C. D., plaintiff, and E. F., defendant, in said county, according to the statute in such case made and provided, A. B., of the said county, did interrupt the said proceedings, and impair the respect due to the authority of the undersigned, by (here describe the cause particularly) and whereas, the said A. B., was thereupon required by the undersigned, to answer for the said contempt, and show cause why he should not be convicted thereof; and whereas, the said A. B. did not show any cause against the said charge: Be it therefore remembered, that the said A. B. is adjudged to be guilty, and convicted of the contempt aforesaid, before the undersigned, and is adjudged by the undersigned to pay a fine of dollars, or to be imprisoned in the common jail of said county for the term of two days, or until he be discharged from imprisonment according to law.

Dated this day of A. D. 18

J. P., Justice of the Peace. [L. S.]

SEC. 183. When any witness attending before a Justice of the Peace in any cause shall refuse to be sworn in some form prescribed by law or to answer any pertinent or proper question, such Justice may by order commit such witness to the jail of the county.

Proceeding
weere witness
refuses to be
sworn

SEC. 184. Such order shall specify the cause for which the same is issued: and if it be refusing to answer any question such question shall be specified therein;—and such witness shall be closely confined pursuant to such order until he submit to be sworn, or to answer, as the case may be.

Order com-
mitting witness

SEC. 185. The Justice shall thereupon adjourn such case, at the request of the party, for such time as may be reasonable, or until such witness shall testify in the case.

Case to be
adjourned &c

SEC. 186. If any person duly subpoenaed and obliged to attend as a witness shall fail to do so, he shall be considered guilty of contempt, and shall be fined all the costs of his apprehension, unless he shall show reasonable cause to the satisfaction of the Justice for his omission to attend—in which case the party requiring such appearance shall pay the costs thereof.

Persons re-
fusing to obey
subpoena, how
punished

GENERAL PROVISIONS CONCERNING JUSTICES OF THE PEACE.

SECTION 187. All process to be signed by Justice.

188. Summons or process to be entirely filled.

- SECTION 189. Provisions in case of vacancy in office of Justice.
 190. Justice elected to fill vacancy to take oath and file bond.
 191. Execution to issue where judgment for costs only.
 192. Justices of the Peace to enter upon duties first of January.
 193. Where Justice member of Legislature need not act.
 194. Where Justice dies nearest Justice may demand and receive books and papers.
 195. Proceedings where such books and papers are withheld.
 196. Further proceedings where such books and papers are withheld.
 197. Neglect or refusal of Justice to pay money collected a misdemeanor in office.
 198. Courts of Justices of the Peace to be public.

SEC. 187. All process issued by any Justice of the Peace shall be signed by him and shall be under seal. All process to be signed by justice

SEC. 188. Every summons or process issued by a Justice of the Peace shall be entirely filled up, and shall have no blank either in date or otherwise at the time of its delivery to an officer to be executed. Every such process which shall be issued and delivered to an officer to be executed contrary to the foregoing provisions, shall be void. Summons or process to be filled

SEC. 189. When from any cause a vacancy shall occur in the office of a Justice of the Peace in any of the organized counties of this State, the Clerk of the Board of Supervisors upon being notified that any such vacancy exists, may issue a notice to the electors of the town where such vacancy exists, stating in such notice, that a vacancy has occurred in the said office, and that an election will be held in the said town, to fill said vacancy; which notice shall be given in the same manner, and under the same regulations that other notices of elections are required by law to be given. Provisions in case of vacancy

SEC. 190. Whenever any one or more Justices of the Peace shall be elected in any town of this State, to supply a vacancy or vacancies at the time existing, such Justice or Justices may take the oath and file their official bond, and forthwith enter upon the duties of their office. Justice to fill vacancy

SEC. 191. Whenever, by reason of a dismissal, non-suit, or for any other cause, a judgment shall be rendered against either party for costs only, by a Justice of the Peace, execution may issue to enforce such judgment, in the same manner and with the same effect as in every other case. Executions to issue for costs only

SEC. 192. All persons elected Justices of the Peace in this State shall enter upon the duties of their respective offices, on the first day of January next succeeding their election, unless otherwise provided for in this Act. Justice to enter upon duty

When justice
member of
legislature

SEC. 193. No Justice of the Peace, being a member of the Senate or House of Representatives, shall be obliged to take cognizance of any action, or to entertain any proceedings under the provisions of this Act; but he may act therein or not, at his discretion.

Where justice
dies, &c

SEC. 194. In case any Justice of the Peace shall die, or his office shall in any wise become vacant, and any books or papers belonging to such Justice in his official capacity, shall come into the hands of any person, the nearest Justice may demand and receive such books and papers, from the person having the same in his possession.

Proceedings
where books
and papers are

SEC. 195. If any books or papers required to be delivered to the nearest Justice, by the preceding section, be withheld, or if any Justice shall refuse to deliver over to his successor any books or papers in either case, the person entitled to receive the said books or papers, may make complaint to the Judge of the District Court of the proper county, and if such Judge be satisfied by the oath of the complainant, or any other person, that any such books or papers are withheld, he may grant an order, directing the person so refusing, to show cause before him on a day to be mentioned in said order, why he should not be compelled to deliver the same.

Further pro-
ceedings, &c

SEC. 196. At the time so appointed or at any other time to which the matter may be adjourned, upon due proof being made of the service of such order, such Judge shall proceed to inquire into the circumstances; and if it shall appear that the said books and papers are withheld, the officer before whom the proceedings are had, shall by warrant commit the person so withholding, to the jail of the proper county, there to remain until he shall deliver such books and papers or be otherwise discharged according to law.

Neglect or re-
fusal of justice
&c

SEC. 197. If any money shall be collected for any party, by a Justice of the Peace in his official capacity, and he shall have neglected or refused, within a reasonable time after demand, to pay over the same, such neglect or refusal shall be deemed a misdemeanor, and on conviction thereof, such Justice shall forfeit his office.

Courts to be
public

SEC. 198. The Courts of Justices of the Peace shall be public and every person may freely attend the same.

FORMS OF CIVIL ACTIONS IN JUSTICES' COURTS.

SECTION 199. Forms in Civil Actions.

SEC. 199. The following, or equivalent forms shall be

used by Justices of the Peace, in proceedings to be had under this Act, to wit :

Forms of civil
actions

Form of Warrant

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable of said county :

In the name of the State of Minnesota, you are hereby commanded to take the body of _____, if he shall be found within your county, and bring him forthwith before the undersigned, one of the Justices of the Peace, in and for said county, at _____ to answer to _____, in a civil action ; and you are hereby commanded to give due notice thereof to the said plaintiff ; and have you then and there this writ.

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

J. P., Justice of the Peace. [L. s.]

Form of Summons.

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable of said county :

In the name of the State of Minnesota, you are hereby commanded to summon _____ if he shall be found in your county, to be and appear before the undersigned, one of the Justices of the Peace, in and for said county, on the _____ day of _____ 18 _____, at _____ o'clock, in the noon, at _____ in said county, to answer to _____ in a civil action ; and have you then and there this writ.

Given under my hand and seal this _____ day of
A. D. 18 _____

J. P., Justice of the Peace. [L. s.]

Form of Execution.

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable of said county :

Whereas judgment against _____ for the sum of _____ lawful money of the United States and for costs of suit, was recovered on the _____ day of _____ before me, at the suit of _____ ; these are therefore in the

name of the State of Minnesota to command you to levy upon the goods and chattels of the said _____ (excepting such as the law exempts) and make sale thereof according to law, to the amount of the said sum, together with twenty-five cents for this execution, and the same return to me within thirty days, to be rendered to the said _____ for said _____ and costs. Hereof fail not under the penalty of the law.

Given under my hand and seal this _____ day of
A. D. 18 .

J. P., Justice of the Peace. [L. S.]

Form of Execution against the Goods or the Body.

State of Minnesota, }
County of _____ } ss.

To the Sheriff or any Constable of said county :

Whereas judgment against _____ for the sum of _____ lawful money of the United States, and for costs of suit was recovered on the _____ day of _____ before me at the suit of _____ These are therefore in the name of the State of Minnesota to command you to levy upon the goods and chattels of the said _____ (excepting such as the law exempts,) and make sale thereof according to law, to the amount of such sums, together with twenty-five cents for this execution, and the same to return to me within thirty days, to be rendered to the said _____ for _____ and _____ and costs : (and in case where imprisonment is allowed by law, the following shall be added,) and for want of such goods and chattels whereon to levy; take the body of the said _____ and convey and deliver unto the keeper of the common prison of said county, who is hereby commanded to receive, and keep the said _____ in safe custody in said prison, until the aforesaid sum and all legal expenses be paid and satisfied, or until he be discharged therefrom by due course of law. Hereof fail not under the penalty of the law.

Given under my hand and seal this _____ day of
A. D. 18 .

J. P., Justice of the Peace. [L. S.]

Form of a Writ of Replevin.

State of Minnesota, }
County of _____ } ss.

To the Sheriff or any Constable of said county :

Whereas A. B. complains that C. D. has taken and does unjustly detain (or does unjustly detain as the case may be particularly describing the goods and chattels to be Replevied and the value thereof) therefore in the name of the State of Minnesota, you are commanded that you cause the said goods and chattels to be Replevied without delay; and if the said A. B. shall give security as required by law, that you cause the said goods and chattels to be delivered to the said A. B., and also that you summon the said C. D. to be and appear before me, one of the Justices of the Peace, in and for said county, on the day of A. D. 18 ,
at o'clock, in the noon, at in the said county, to answer complaint of

Given under my hand and seal day of
A. D. 18

J. P., Justice of the Peace. [L. S.]

Form of Subpœna.

State of Minnesota, }
County of } ss.

In the name of the State of Minnesota, you are hereby required to appear before the undersigned, one of the Justices of the Peace in and for said county, at on the day of at o'clock, in the noon of said day, to give evidence in a certain cause then and there to be tried between plaintiff, and defendant, on the part of the

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

J. P., Justice of the Peace. [L. S.]

Form of a venire for a Jury.

State of Minnesota, }
County of } ss.

In the name of the State of Minnesota, you are hereby commanded to summon to be and appear before the undersigned one of the Justices of the Peace, in and for said county, on the day of at o'clock, in the noon of said day, in the town of to serve as Jurors for the trial of a civil action between plaintiff, and defendant, and have you then and there this writ.

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

J. P., Justice of the Peace. [L. s.]

THE JURISDICTION OF JUSTICES IN CRIMINAL CASES, AND THE
PROCEEDINGS THEREIN.—(1).

SECTION 200. Jurisdiction of Justices in criminal cases.

201. Justices may hold Court to try offences.†
202. Justice how to proceed upon complaint made.
203. Justice to docket suit.
204. Justice to hear cause on return of warrant, accused may give bail.
205. Charge read to accused, he required to plead.
206. Justice shall try on plea, not guilty, if no Jury demanded.
207. Court shall convict upon plea of guilty.
208. Jury must be drawn unless waived by accused.
209. Justice, when to direct person to strike out Juror.
210. Duty of officer to whom venire is directed.
211. When bystanders may be summoned.
212. When new Jury may be summoned.
213. Either party may challenge for cause.
214. Form of oath for Juror.
215. When Jury sworn, how to proceed.
216. Verdict to be delivered to Court.
217. Justice to render judgment, if guilty.
218. Accused if discharged, judgment against complainant for costs.
219. When convicted person may appeal to District Court.
220. If complainant refuse to give security for costs, how to proceed.
221. Judgment—by-whom executed.
222. Jurors and witnesses liable for contempt as in civil actions.
223. Justice shall make certificate of conviction.
224. Certificate to be filed within twenty days.
225. Certificate to be evidence in Courts.

SEC. 200. Justices of the Peace shall have power and jurisdiction throughout their respective counties, as follows:

1. To cause to be observed all laws made for the preservation of the peace.

2. To cause to come before them, or any of them, persons who shall break the peace, and fine or commit them to jail or bail them, as the case may require.

3. To arrest and cause to come before them, persons who attempt to break the peace, persons who keep houses of ill-fame, or frequenters of the same, or common prostitutes, and

(1) See Section 123, of this Title.

Jurisdiction of
justices in cri-
minal cases

compel them to give security for their good behavior, and to keep the peace.

4. To cause to come before them persons who are charged with committing any criminal offence, and commit them to jail or bail them as the case may require.

SEC. 201. Justices of the Peace shall have power to hold a Court subject to the provisions hereinafter contained, to hear, try and determine the charges for offences arising within their respective jurisdictions.

Hold court

SEC. 202. Upon complaint made to any Justice of the Peace by any constable or other person, that any such offence has been committed within the county, he shall examine the complainant on oath, and the witness produced by him, and shall reduce the complaint to writing and cause the same to be subscribed by the complainant; and if it shall appear that such offence has been committed, the said Justice shall issue his warrant, reciting the substance of the complaint, and requiring the officer to whom it is directed, forthwith to arrest the accused and to bring him before such Justice or some other Justice of the same county, to be dealt with according to law; and in the same warrant, may require the officer to summon such witnesses as shall be named therein, to appear and give evidence at the trial.

How to proceed

SEC. 203. The Justice shall enter a suit in his docket, in which the State shall be plaintiff, and the accused defendant, and he shall make all such other entries as are required in civil causes.

To docket suit

SEC. 204. On the return of the warrant with the accused, the said Justice shall proceed to hear, try and determine the cause within one day, unless continued for cause. From the time of the return of the warrant, until the time of the trial, the accused may give bail, with one or more sufficient sureties for his appearance at the time fixed for the trial; or in the event of failure so to do, may be committed to jail for safe keeping, by order of said justice, or left in the custody of the arresting officer.

To hear cause on return of warrant — bail

SEC. 205. The charge made against the accused, as stated in the warrant of arrest, shall be distinctly read to him, and he shall be required to plead thereto, which plea the Court shall enter in their minutes; if the accused refuse to plead, the Court shall enter the fact with a plea of not guilty, in behalf of such accused, in his minutes.

Charge read

SEC. 206. If the plea of the accused be not guilty, and no

Trial on plea not guilty Jury be demanded by him, the said Court shall proceed to try such issue, and to determine the same according to law and the evidence which may be produced against and in behalf of such accused.

Convict upon plea of guilty SEC. 207. If the accused shall plead guilty to such charge, the Court shall thereupon adjudge him guilty of the offence charged, and render judgment thereon.

Jury drawn SEC. 208. After the joining of issue, and before the Court shall proceed to an investigation of the merits of the cause, unless the accused shall expressly waive his right to a trial by Jury, the Court shall direct the Sheriff or any Constable of the county, to make a list in writing of the names of eighteen inhabitants of the county, qualified to serve as Jurors in the Courts of Record of this State, from which list the complainant and accused may each strike out six names.

To strike out juror SEC. 209. In case the complainant or the accused shall neglect to strike out such names, the Court shall direct some suitable disinterested person to strike out the names for either or both of the parties so neglecting; and, upon such names being struck out, the Justice shall issue a venire, directed to the Sheriff or any Constable of the county, requiring him to summon the six persons whose names shall remain upon such list, to appear before such Court, at the time and place to be named therein, to serve as Jurors on the trial of such offence. (1) [See Act of 1857, Chapter 10, Approved May 23.]

Duty of officer to whom venire is directed SEC. 210. The officer to whom such venire shall be delivered, shall summon such Jury personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return the same with such venire, to the court, within the time therein specified.

Bystanders summoned SEC. 211. If any of the Jurors named in such venire, shall fail to attend in pursuance thereof, or if there shall be any legal objection to any that shall appear, the Court shall supply the deficiency by directing the Sheriff, or any Constable who may be present and disinterested, to summon any of the bystanders or others who may be competent, and against whom no cause of challenge shall appear, to act as Jurors in the cause.

SEC. 212. If the officer to whom the venire shall have been delivered, shall fail to return the same, as thereby re-

(1) See Section 123, of this Title.

quired, or if the Jury shall fail to agree, and shall be discharged by the Court, a new Jury shall be selected and summoned in the same manner, and the same proceedings shall thereupon be had as herein prescribed, in respect to the first Jury, unless the accused shall consent to be tried by the Court; in which case the Court shall proceed to the trial of the issue, as if no Jury had been demanded.

New jury summoned

SEC. 213. In all trials for criminal offences before a Justice of the Peace, either party may challenge any Juror for cause.

Challenge for cause

SEC. 214. To each Juror, such Justice shall administer the following oath or affirmation :

“ You do solemnly swear (or you do solemnly and sincerely declare and affirm, as the case may be,) that you will well and truly try the issue joined in this cause, wherein the State of Minnesota is Plaintiff, and _____ is defendant, and a true verdict give according to law, and the evidence given you in Court, unless discharged by the Court.”

Oath of juror

SEC. 215. After the Jury shall have been sworn, they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public, and in the presence of the accused; and after hearing such proofs and allegations, the Jury shall be kept together in some convenient place, until they agree on a verdict or are discharged by the Court; and a Sheriff or Constable shall be sworn to take charge of the Jury in like manner, as upon trial in Justices' Courts in civil proceedings.

Jury sworn—how proceed

SEC. 216. When the Jurors have agreed on their verdict, they shall deliver the same to the Court publicly, who shall enter it in his docket.

Verdict delivered to court

SEC. 217. Whenever the accused shall be tried under the preceding provisions of this Act, and found guilty either by the Court, the Jury, or shall be convicted of the charge made against him on a plea of guilty, the Court shall render judgment thereon, and inflict such punishment, either by fine or imprisonment, or both, as the nature of the case may require; but such punishment shall, in no case, exceed the limit fixed by law for the offence charged.

Judgment

SEC. 218. Whenever the accused, tried under the preceding provisions of this Act either by the Court or by a Jury, shall be acquitted, he shall be immediately discharged; and if the Court before whom the trial is had, shall certify in his docket that the complaint was wilful and malicious, and without probable cause, it shall enter a judgment against the com-

Accused if discharged, complainant pay costs

plainant, to pay all costs that shall have accrued, in the proceedings had upon such complaint; and unless he give satisfactory security by bond to the State, with one or more sureties, to pay the same in thirty days after the said trial, execution shall issue therefor.

SEC. 219. The person charged with and convicted by any Justice of the Peace of any offence, may appeal from the judgment of such Justice to the District Court: *Provided*, Said person shall within twenty-four hours enter into a recognizance with one or more sufficient sureties, conditioned to appear before said court and abide the judgment of the court therein; and the justice from whose judgment an appeal is taken, shall make a special return of the proceedings had before him, and shall cause the warrant and return, together with the recognizance or recognizances, to be filed in said District Court on or before the first day of the term of the District Court next to be holden for said county; and the complainant and witnesses may also be required to enter into recognizances, with or without sureties, in the discretion of the Court, to appear at the said District Court at the time last aforesaid, and to abide the order of the Court therein.

SEC. 220. If the complainant shall refuse or neglect to pay such costs, or to give such security, the Court may forthwith enter judgment against him for the amount of such costs, and forthwith issue execution thereon in the same manner, and with the like effect, as in case of an execution issued by a Justice of the Peace on a judgment, in an action for a trespass or other wrong, and such moneys, when collected, shall be paid over to such Court.

SEC. 221. The judgment of every such court shall be executed by the sheriff or any constable of the county where the conviction shall be had, by a warrant under the hand and seal of the Justice who held the Court, to be directed to such officers, and specifying the particulars of such judgment.

SEC. 222. In case any person summoned to appear before any Court held by a Justice of the Peace, pursuant to the provisions of this article, as a juror or witness, shall fail to appear, or if any witness appearing shall refuse to be sworn or to testify, he shall be liable to the same penalties, and may be proceeded against in the same manner as provided by law in respect to jurors and witnesses in Justices' Courts in civil proceedings.

SEC. 223. Whenever any conviction shall be had before a

Appeal

Complainant
refuse security
—how to proceedJudgment by
whom executedJurors and
witnesses liable
for contempt

Court held by a Justice of the Peace, the Justice by whom such Court shall have been held, shall make a certificate of such conviction under his hand and seal, in which it shall be sufficient briefly to state the offence charged, and the conviction and judgment thereon, and if any fine has been collected, the amount thereof. Certificate of conviction

SEC. 224. Within twenty days after such conviction, the said magistrate shall cause such certificate to be filed in the office of the Clerk of the District Court of the county. Certificate to be filed

SEC. 225. Every certificate of conviction made and filed under the foregoing provisions, or a duly certified copy thereof, shall be evidence in all courts and places of the facts therein contained. Certificate to be evidence in courts

MISCELLANEOUS PROVISIONS IN CRIMINAL CASES.

- SECTION 226. Offences to be tried before Justices of the Peace.
227. Justices issue warrant on his own knowledge, may arrest the offender.
228. Breach of recognizance to be certified and proceeded against in District Court.
229. Justice, how to proceed if he has not final jurisdiction.
230. Justice, whom to summon.
231. In case of conviction, judgment to be entered for fine and costs.
232. If judgment affirmed, judgment may be entered for fine and costs.
233. When cause continued, witnesses present may be verbally required to appear.
234. Justice may require security for costs.
235. Justice to pay fines received to county treasurer.
236. Fines to be paid to Sheriff, if party committed.
237. District Attorney to commence suits for all fines not paid over.

SEC. 226. No assault, battery or affray, shall be indictable, (except aggravated assaults and batteries, punishable in the District Courts,) but all such offences shall be prosecuted and determined in a summary manner, by complaint made before a Justice of the Peace, and on conviction thereof the offender may be punished by fine not less than five dollars, nor more than one hundred dollars, according to the nature of the offence. Offences tried before justices of the peace

SEC. 227. If any Justice of the Peace shall have any knowledge that any or the offences mentioned in the last section, are about to be committed, he shall issue his warrant, and proceed as is directed, when complaint has been made ;

and if any such offence be committed, threatened or attempted in his presence, he shall immediately arrest the offender, or cause it to be done, and for this purpose no warrant or process shall be necessary; but the Justice may summon to his assistance any sheriff, coroner, or constable, and all other persons there present, whose duty it shall be to aid the Justice in preserving the peace, arresting and securing the offenders, and all such as obstruct and prevent the Justice, or any of his assistants, in the performance of their duty; and any person who shall, when summoned to aid in arresting and securing an offender, refuse to give such assistance, shall forfeit and pay ten dollars to the use of the county.

Issue warrant
to arrest of
offender

SEC. 228. In case of the breach of any recognizance entered into in a criminal case, the same shall be certified and returned to the District Court, to be proceeded in according to law.

Breach of re-
cognizance

SEC. 229. If, in the progress of any trial before a Justice of the Peace, under the provisions of this Act, it shall appear to the Justice that he has not final jurisdiction in the case before him, and the accused ought to be put upon his trial for an offence cognizable before the District Court, the Justice shall desist from further proceedings before him and proceed as in other criminal cases cognizable before the District Court.

How to pro-
ceed if he has
not final juris-
diction

SEC. 230. In all cases arising under this Act, it shall be the duty of the Justice of the Peace acting, to summon the injured party, and all others whose testimony may be deemed material, as witnesses at the trial, and to enforce their attendance by attachment, if necessary.

Whom to sum-
mon

SEC. 231. In all cases of conviction under the provisions of this Act, the Justice shall enter judgment for the fine and costs against the defendant, and may commit him until the judgment is satisfied, or issue execution on the judgment to the use of the county.

Conviction—
judgment en-
tered

SEC. 232. If, upon an appeal to the District Court, the judgment of the Justice shall be affirmed, or the defendant shall be convicted, and any fine assessed, judgment shall be rendered for such fine and the costs in both courts against the defendant and his sureties.

Judgment af-
firmed — judg-
ment entered

SEC. 233. When a trial under the provisions of this Act shall be continued by the Justice, it shall be necessary for the Justice to summon any witness who may be present at the continuance, but said Justice shall verbally notify such

Cause contin-
ued

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

J. P., Justice of the Peace. [L. s.]

Form of Certificate of Conviction.

State of Minnesota, }
County of } ss.

At a Justice's Court, held at my office in said county, before me, a Justice of the Peace in and for said county, for the trial of for the offence hereinafter stated, the said of &c., was convicted of having on the day of A. D., 18 , at in said county, (here state the offence as in the warrant,) and upon such conviction, the said Court did adjudge and determine that the said should pay a fine of dollars, (and if imprisonment be allowed, add,) and be imprisoned in the common jail of the county days, (if the fine be paid, add,) and the said fine has been paid to me.

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

J. P., Justice of the Peace. [L. s.]

Form of Execution.

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable of said county:

Whereas, at a Justice's Court held at my office in said county, for the trial of , for the offence hereinafter stated, the said of &c. was convicted of having, on the day of A. D. 18 , in said county (here state the offence as in the warrant,) and upon conviction, the said Court did adjudge and determine that the said should pay a fine of dollars; and whereas, the said fine has not been paid by the said these are therefore in the name of the State of Minnesota, to command you to levy upon the goods and chattels, (&c. as in execution against the goods or body in civil cases.)

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

J. P., Justice of the Peace. [L. s.]

Form of Order to bring up Prisoner.

State of Minnesota, }
County of } ss.

To the keeper of the common jail of said county:

The undersigned, one of the Justices of the Peace in and for said county, sitting at a Court for the trial of now in your custody in the common jail of said county, in the name of the State of Minnesota, do hereby order and direct you to bring the said forthwith before me, at my office in said county, together with the warrant by which he was committed to your custody, in order that he may be tried.

Given under my hand and seal this day of A. D. 18 .

J. P., Justice of the Peace. [L. s.]

Form of Commitment upon Sentence.

State of Minnesota, }
County of } ss.

To any Constable and the keeper of the common jail of said county:

Whereas, at a Justice's Court held at my office in said county, for the trial of , for the offence, hereinafter, stated, the said , of, &c., was convicted of having, on the day of A. D. 18 , in the said county; (here state the offence, as in the warrant,) and upon conviction, the said Court did adjudge and determine, that the said , should be imprisoned in the common jail of said county for days; therefore, you the said Constable, are commanded in the name of the State of Minnesota, forthwith to convey and deliver the said to the said keeper; and you, the said keeper, are hereby commanded to receive the said into your custody, in the said jail, and him there safely keep until the expiration of said days, or until he shall be thence discharged by due course of law.

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

J. P., Justice of the Peace. [L. s.]

Form of Commitment after Arrest, and before Trial.

State of Minnesota, }
County of } ss.

To the Sheriff or any Constable, and to the keeper of the common jail of said county:

Whereas, has been this day brought before the undersigned, one of the Justices of the Peace in

and for said county, charged on the _____ day of _____, A. D. 18 _____, in said county (here state the offence, as in the warrant,) and the said _____ not having given bail to appear and answer for the said offence, therefore you, the said Constable, are commanded in the name of the State of Minnesota, forthwith to convey, and deliver into the custody of the said keeper, the body of the said _____; and you, the said keeper, are hereby commanded to receive the said _____ into your custody in the said jail, and him there safely keep, until he shall be required to be brought before the Court to be tried, or shall be otherwise discharged by due course of law.

Given under my hand and seal, this _____ day of _____ 18 _____
J. P., Justice of the Peace. [L. S.]

Form of Commitment where Justice on the Trial shall find that he has not Jurisdiction of the Case.

State of Minnesota, }
County of _____ } ss.

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 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 and seal this day of ,
 A. D. 18 .

J. P., Justice of the Peace. [L. s.]

FORM OF CIVIL ACTIONS—LAW AND EQUITY.

SECTION 239. Distinctions between actions at law and suits in equity abolished; to be but one form—to be called a civil action.

240. Parties how designated.

SEC. 239. The distinctions between actions at law and civil action suits in equity are abolished. (1)

SEC. 240. In such action, the party complaining shall be Parties how known as the Plaintiff, and the adverse party as the De-^{designated} defendant.

STATUTE OF LIMITATIONS.

TIME OF COMMENCING CIVIL ACTIONS.

SECTION 241. Action where to be commenced.

242. Actions to recover real property to be commenced within ten years.

243. Actions upon judgment to be commenced within seven years.

244. Actions to be brought within six years.

245. Actions to be commenced within one year and six months.

246. Actions to be commenced within five years.

247. Actions to be commenced within one year.

248. Mutual accounts: when time begins to run.

249. Penal actions within one year.

250. Actions for relief within five years.

251. Limitations apply to actions brought in the name of the State.

252. When action is commenced.

253. Attempt to commence action when deemed equivalent.

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

255. Certain disabilities not a part of the limitation: infancy, insanity, imprisonment, and coverture.

256. When actions may be commenced by and against personal representatives.

257. With alien, time of war not part of the limitation.

258. In case of injunction such time not part of the limitation.

259. Disability must exist when right accrued.

260. Two or more disabilities.

(1) See Sec. 11 of Title 2 of this Act.

- SECTION 261. Promise to take case out of statute, how made.
 262. Payments, and their effect upon statute.
 263. Judgment reversed, when to sue.
 264. To what this Act applies.
 265. Not to apply to corporations.
 266. Not to apply to stockholders and directors.

Actions when commenced SEC. 241. Civil actions can only be commenced within the periods prescribed in this Title (1), after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute: but the objection that the action was not commenced within the time limited can only be taken by answer.

Action to recover real property to commence within ten years SEC. 242. WITHIN TEN YEARS: No action for the recovery of real property, or the recovery of 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 ten years next preceding the commencement of the suit.

Action upon judgment to be commenced within seven years SEC. 243. WITHIN SEVEN YEARS: An action upon a judgment or decree of a Court of the United States, or of any State or Territory of the United States or a foreign country.

Within six years SEC. 244. WITHIN SIX YEARS: 1. An action upon a contract or other obligation, express or implied, excepting those mentioned in the last two preceding sections. 2. An action upon a liability created by statute, other than those upon a penalty or forfeiture.

Within three years WITHIN THREE YEARS: 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.

Within two years WITHIN TWO YEARS: 5. An action for criminal conversation, or 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.

One year and six months SEC. 245. WITHIN ONE YEAR AND SIX MONTHS:

(1) See Secs. 402, 404 and 407 of this Title.

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

Actions to be commenced within one year and six months

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.

SEC. 246. Within one year:

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

Actions to be commenced within one year.

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

SEC. 247. An action against a Sheriff, or other officer, for the escape of a person arrested or imprisoned by a civil process.

SEC. 248. In an action brought to recover a balance due upon a mutual, open and current account, where 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.

Mutual accounts: when time begins to run.

SEC. 249. An action upon a statute for a penalty given, in whole or in part, to the person who prosecutes for the same, must be commenced within one year after the commission of the offence; 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 State, by the Attorney General, or District Attorney of the county where the offence was committed.

Penal actions within one year.

SEC. 250. An action for relief not being before provided for, must be commenced within five years after the cause of action shall have accrued.

Actions for relief within five years.

SEC. 251. The limitations prescribed in this title apply to actions brought in the name of the State, in the same manner as to actions by private parties.

Limitations apply to actions brought in name of State.

SEC. 252. 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 commenced.

SEC. 253. An attempt to commence an action, is deemed equivalent to the commencement thereof, within the meaning of this title when the summons is delivered, with the intention that it shall be actually served, to the Sheriff or other officer

Attempt to commence action when deemed equivalent.

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.

Sec. 254. If, when the cause of action accrue against a person, he be out of the State, the action may be commenced within the time herein limited after his return to the State; and if, after the cause of action accrues, and the creditor's right and ability to institute suit shall have become complete, the debtor shall depart from the State wherein such debt shall have been contracted, such absence shall not be pleaded in bar of the statute, "when the statute begins to run it never ceases." (1)

And when an action cannot be maintained upon a contract or demand, by the laws of the State wherein the same shall have been contracted, no action shall be maintained thereon in and by any of the Courts of this State.

Sec. 255. If a person entitled to bring an action mentioned in this title except for a penalty, or forfeiture, or against a Sheriff or other officer for an escape, be, at the time the cause of action accrued, either

Certain disabilities not a part of limitation: infancy, insanity, imprisonment &c.

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 less time than his natural life, or
4. A married woman.

The time of such disability is not 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.

Sec. 256. 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 representative after the expiration of the time limited for the commencement thereof.

When actions may be commenced by and against personal representatives.

(1) See Angel on Limitations, Sec. 3, Chapt. 7, page 57.

tion of the time, and within one year from his death, but not after. 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 representative after the expiration, and within one year after the issuing of letters testamentary or of administration.

SEC. 257. 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. With alien, time of war not part of limitation

SEC. 258. 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. In case of injunction such time not part of limitation.

SEC. 259. No person can avail himself of a disability, unless it existed at the time his right of action accrued. Disability must exist when right accrued.

SEC. 260. 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. Two or more disabilities.

SEC. 261. 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 statute, unless the same is contained in some writing, signed by the party to be charged thereby. Promise to take case out of statute, how made.

SEC. 262. 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. Payments and their effect upon statute.

SEC. 263. 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 appeal, the plaintiff may commence a new action within one year after such reversal or arrest. Judgment reversed, when to sue.

SEC. 264. This Act 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. To what this Act applies.

SEC. 265. This act shall not affect actions to enforce the payment of bills, notes, or evidence of debt issued by monied corporations, or issued or put in circulation as money, Not to apply to corporations.

Not to apply
to stockholders
and directors.

SEC. 266. This act shall not affect actions against directors, or stockholders of a moneyed corporation, or banking association to recover a penalty or forfeiture imposed or enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

PROPERTY EXEMPT FROM SALE ON EXECUTION.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS—THE EXECUTION.

- SECTION 267. What property exempt from execution.
268. Property not exempt from execution upon judgment for purchase money.
269. Officer, how to proceed when part of the property is exempt.
270. Levy may be made of grain or grass growing.
271. Real and personal property of wife not liable to husband's debts.
272. Jurisdiction of District Court in certain cases.
273. Writ, how executed.
274. Before sale notice must be given, notice how given and what to contain.
275. Sale, how to be made.
276. Real estate, how may be redeemed.
277. How may redeem.
278. Real estate, when to be redeemed—judgment debtor may redeem.
279. Redemptioner must produce authority to redeem.
280. Court may grant order to stay waste.
281. When purchaser is evicted, may recover price paid with interest.
282. In case of several defendants, when may contribution be compelled.

What prop-
erty exempt
from execution

SEC. 267. The following named property shall be exempt from attachment or sale under any execution, writ of attachment, or any other final process of a Court, together with such Homestead as shall be set apart and exempt by law. Also,

1. All spinning wheels, weaving looms, with the apparatus, and all stoves and pipes with their utensils, put up or kept in any dwelling house :

2. A seat, pew, or slip, occupied by any person or family, in any house or place of public worship :

3. All cemeteries, monuments, tombs, and rights of burial, while in use as repositories of the dead:

4. All arms and accoutrements required by law to be kept by any person :

5. All wearing apparel of every person or family :

6. The miscellaneous library, and school books, of every individual and family, not exceeding in value one hundred and fifty dollars, and all family pictures :

7. To each householder, ten sheep, with their fleeces, and the yarn and cloth manufactured from the same, two cows, five swine, and provisions and fuel for the comfortable sustenance of such householder and family for six months :

8. To each householder, all household goods, furniture and utensils, not exceeding in value two hundred and fifty dollars :

9. The tools, implements, material, stock, apparatus, team, vehicle, horses, harness, library, or other things, to enable any person to carry on the profession, trade, occupation or business in which such person may be wholly or principally engaged, not exceeding in value three hundred and fifty dollars : the word team, in this subdivision, shall be construed to mean either one yoke of oxen, a horse, or a pair of horses, as the case may be :

10. A sufficient quantity of hay, grain, feed and vegetables necessary for keeping for six months the animals mentioned in the several subdivisions of this section exempt from execution, and any chattel mortgage, bill of sale, or other lien created on any part of the property, except such as is mentioned in the ninth subdivision of this section, shall be void, unless such mortgage, bill of sale, or lien, be signed by the wife of the party making such mortgage, bill of sale, or lien.

SEC. 268. The property hereinbefore mentioned shall not be exempt from any execution or other process issued upon a judgment rendered for the purchase money for the same property. Property not exempt from execution upon judgment for purchase money.

SEC. 269. When a levy shall be made upon property of any class or species, which is by law exempt from execution to a specified amount or value, the officer levying the execution may make an inventory of the whole of such property, and cause the same to be appraised at its cash value, by two disinterested freeholders of the town where the prop- Officer, how to proceed when part of property is exempt.

erty may be, on oath to be administered by him to such appraisers. The appraisers shall be entitled to fifty cents each for their services, and six cents per mile for traveling fees, for which the plaintiff in the execution shall be liable to them, but the same may be collected on the execution for his use. Such inventory being completed, the defendant in the execution, or his authorized agent, may select from such inventory an amount of such property, not exceeding, according to such appraisal, the amount or value exempt by law from execution; but if neither such defendant nor his agent shall appear and make such selection, the officer shall make the same.

Levy may be made of grain or grass growing.

SEC. 270. A levy may be made upon grain or grass while growing, and upon any other unharvested crops; but no sale thereof shall be made under such levy, until the same shall be ripe or fit to be harvested; and any levy thereon by virtue of an execution, issued by a Justice of the Peace, shall be continued beyond the return day thereof, if necessary, and the execution thereof may be completed at any time within thirty days after such grain, grass, or other unharvested crop shall be ripe, or fit to be harvested.

Real and personal property of wife not liable for husband's debts.

SEC. 271. Any real or personal estate which may have been acquired by any female before her marriage, either by her own personal industry, or by inheritance, gift, grant, or devise, or to which she may at any time after her marriage, be entitled by inheritance, gift, grant or devise, and the rents, profits and income of any such real estate, shall be and continue the real and personal estate of such female after marriage, to the same extent as before marriage; and none of such property shall be liable for her husband's debts, engagements or liabilities; but such property shall be liable for all debts of the wife contracted prior to her said marriage: *Provided*, That nothing in this section contained, shall be construed to authorize any married woman to give, grant or sell any such real or personal property during coverture, without the consent of her husband, except by order of the District Court of the county: and, *Provided further*, That in the case of a separation or divorce between such husband and wife, by an adjudication of a Court, such married woman shall in no case be authorized to remove any such property from the premises of her husband without his consent, except by order of the Court.

SEC. 272. The District Court for the county where the parties, or either of them reside, shall have jurisdiction in all cases arising under the provisions of the preceding section, Jurisdiction of Dist. Courts in certain cases. except when the amount in controversy is less than one hundred dollars, and relates to personal estate, in which case a Justice of the Peace shall have jurisdiction, and the wife may institute proceedings to enforce the said provisions, in her own name, or otherwise.

SEC. 273. The Sheriff shall execute the writ against the property of the judgment debtor, by levying on the property in the same manner as similar property is attached, collect- Writ, how executed. ing the things in action, as prescribed by statute, selling the other property and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

SEC. 274. Before the sale of property on execution, notice thereof shall be given as follows:

1. In case of personal property, by posting written notice Before sale notice must be given, notice how given and what to contain. of the time and place of sale, in three public places of the county where the sale is to take place, six days successively.

2. In case of real property, by posting a similar notice, describing the property with sufficient certainty to enable persons to identify it, for six weeks successively, in three public places of the county where the property is situated, and also where the property is sold, and publishing a copy thereof, once a week, for the same period, in a newspaper of the county, if there be one, if there be none and the property is not occupied by the judgment debtor, or by a tenant or purchaser under him, then in a paper at the capital of the State.

SEC. 275. An officer selling without the notice prescribed by the last section, shall forfeit one hundred dollars to the aggrieved party, in addition to his actual damages; and a Sale, how to be made. person taking down or defacing the notice posted, if done before the sale, or the satisfaction of the execution, and without the consent of the parties, shall forfeit fifty dollars, and the sale shall be void. (1)

SEC. 276. A sale shall be made by auction between nine o'clock in the morning and sunset; after sufficient property Real estate, how may be redeemed. has been sold to satisfy the execution, no more shall be sold; neither the officer holding the execution nor his deputy, can purchase, when the sale is of personal property capable of manual delivery, it shall be within view or those who attend the sale, and be sold in such parcels as are likely to bring

(1) See Sec. 197, Title 9, of this report. See, also, Sec. 465 of the majority report. I should deem property unsafe while such was the law.

the highest price; and when the sale is of real property and consisting of several known lots or parcels, they must be sold publicly and separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold.

How may redeem. SEC. 277. Upon a sale of real property, where the estate is less than a leasehold of two years unexpired term, the sale shall be absolute; in all other cases, the property sold shall be subject to redemption, as provided in this act, the officer shall give to the purchaser a certificate of the sale, proved or acknowledged, so that it may be recorded; containing,

1. A particular description of the property sold,
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption, it shall be so stated; a duplicate of which certificate shall be filed by the officer, with the Register of Deeds of the county.

Real estate, when to be redeemed—judgment debtor may redeem. SEC. 278. Property sold subject to redemption, as provided in the last section, or any part separately, may be redeemed in the manner provided in this act, by the following persons or their successors in interest: (1)

1. The judgment debtor, or his successor in interest, in the whole or any part of the property :
2. A creditor having a lien by judgment or mortgage of the property sold, or on some share or part thereof, subsequent to that on which the property sold. The persons mentioned in this and the preceding subdivision other than the judgment debtor are in this chapter termed redemptioners.

Payment may be made to the purchaser or redemptioner as the case may be, or for such purchaser or redemptioner to the officer who made the sale, or his successor in office ; and a tender of the money shall be equivalent to the payment thereof.

SEC. 279. A redemptioner shall produce to the officer or person from whom he seeks to redeem :

Redemption-er must produce authority to redeem. 1. A copy of the record of the judgment, under which he claims the right to redeem, certified by the clerk of the court of the county where the judgment is docketed, or if he redeems upon a mortgage or other lien, a note of the record thereof, certified by the clerk.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of a subscribing witness thereto ; and,

(1) See Sec. 197, Title 9.

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

4. Such redemptioner shall file, or cause to be filed, the papers specified in the three last subdivisions of this section, together with a notice of his redemption, in the office of the Register of Deeds of the county where the property sold may be situated, and such Register shall note the same in a book to be procured by him for that purpose, stating the name of the judgment debtor, a description of the property redeemed, and the time of filing the notice of redemption.

A copy of such notice shall also be deposited in the sheriff's office, for the use of such sheriff, or the officer who made the sale.

SEC. 280. Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order granted with notice, on the application of the purchaser or judgment creditor. Court may grant order to stay waste.

SEC. 281. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom, in consequence of irregularity in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. When purchaser is evicted, may recover price paid with interest. If the recovery was in consequence of the irregularity, shall thereupon be entitled to a new execution on the judgment, for the price paid on the sale with interest; and for that purpose the judgment shall be deemed valid against the judgment debtor, his personal representatives, heirs, or devisees; but not against a purchase in good faith, or an incumbrancer, whose title or incumbrance shall have accrued before a levy on such new execution.

SEC. 282. When property, liable to an execution against several persons, shall be sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pay without a sale, more than his proportion, he may compel contribution from the others; and when judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel re-payment from the principal. In case of several defendants, when may contribution be compelled. In such cases, the person so paying or contributing shall be entitled to the benefit of the judgment to enforce contribution or re-payment, if within ten days after his payment, he file with the clerk of the court where the judgment was rendered,

notice of his payment, and claim to contribution or repayment; upon filing of such notice, the clerk shall make an entry thereof in the margin of the docket. (1)

OF TAKING THE TESTIMONY OF WITNESSES IN THIS STATE.

- SECTION 283. Deposition of witnesses may be taken.
284. When deposition may be taken.
285. Party may apply to Justice of the Peace; duty of Justice.
286. Notice may be served on agent of adverse party.
287. Service on one of several parties, sufficient.
288. Notice how served.
289. Party may waive right to notice.
290. Deponent, how sworn, and examined.
291. Examination, how conducted.
292. Deposition to be written by Justice.
293. Certificate to be annexed; form of certificate.
294. Deposition shall be delivered to the Court.
295. Deposition when not to be used.
296. Objection to competency of witness may be taken.
297. When deposition taken in one suit may be used in another.
298. In case of appeal, deposition to the court below may be used in Appellate Court.
299. Court may make rules as to the time and manner of taking depositions.
300. When person may be compelled to give deposition.

SEC. 283. Depositions may be taken in the manner and according to the regulations provided in this chapter, to be used before any magistrate or other person authorized to examine witnesses in any other than criminal cases.

Deposition of witnesses may be taken.

SEC. 284. When a witness, whose testimony is needed in any civil cause pending in this State, shall live more than thirtymiles from the place of trial, or shall be about to go out of the State, and not to return in time for trial, or is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial, his deposition may be taken in the manner hereinafter provided.

When deposition may be taken.

SEC. 285. At any time after the cause is commenced by the service of process or otherwise, or after it is submitted to arbitrators or referees, either party may apply to any Justice of the Peace, who shall issue a notice to the adverse party, to appear before the said Justice, or any other Justice of the Peace, at the time and place appointed for taking the

Party may apply to Justice of the Peace; duty of Justice.

(1) For chapter 2 of Title 9 of the Majority Report, see section 202 Title 9 of this Report.

For costs, see Title 10 Majority Report; also Title 10, sec. 215, of this Report

deposition, and to put such interrogatories as he may think fit, which shall be pertinent to the case. (1)

SEC. 286. The said notice may be served on the agent or attorney of the adverse party, and shall have the same effect as if served on the party himself. Notice served on agent of adverse party.

SEC. 287. When there are several persons plaintiffs or defendants, or parties on either side in the cause, a notice served on either of them shall be sufficient. Service on one of several parties, sufficient.

SEC. 288. The notice shall be served by delivering an attested copy thereof to the person to be notified, or by leaving such copy at his place of abode, allowing in all cases not less than twenty-four hours after such notice before the time appointed for taking the depositions, and also allowing time for his travel to the place appointed after being notified, not less than at the rate of one day, Sundays excepted, for every twenty miles travel. Notice how served.

SEC. 289. The written notice before prescribed may be wholly omitted if the adverse party or his attorney shall in writing waive the right to it. Party may waive right to notice.

SEC. 290. The deponent shall be sworn to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which the deposition is taken, and he shall then be examined by the parties if they think fit, or by the Justice, and his testimony shall be taken in writing. Deponent, how sworn and examined.

SEC. 291. The party producing the deponent shall be allowed first to examine him, either upon verbal or written interrogatories, on all points which are material, and then the adverse party may examine the deponent in like manner; after which either party may propose such further interrogatories as the case may require. Examination how conducted.

SEC. 292. The deposition shall be written by the Justice or by the deponent, or by some disinterested person, in the presence and under the direction of the Justice, and it shall be carefully read to or by the deponent, and shall then be subscribed by him. Deposition to be written by Justice.

SEC. 293. The Justice shall annex to the deposition a certificate substantially as follows: Certificate to be annexed; form of certificate.

State of Minnesota, }
County of } ss.

I, A. B., Justice of the Peace in and for said county, do hereby certify that the above deposition was taken before

(1) Sec. 615 Majority Report.

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

Dated at _____ the _____ day of _____ one
 thousand eight hundred and _____

A. B., Justice of the Peace. [L. s.]

SEC. 294. The deposition shall be delivered by the Justice
 to the Court or Arbitrators, or Referees, before whom the
 cause is pending, or shall be inclosed and sealed by him, and
 directed to them, and shall remain sealed, until opened by
 said Court, or the Clerk thereof, or Arbitrators, or Referees.

SEC. 295. No deposition shall be used if it shall appear
 that the reason for taking it, no longer exists: *Provided*
however, That if the party producing the deposition, in such
 case shall show any sufficient cause then existing for using
 such deposition, it may be admitted.

SEC. 296. Every objection to the competency or credibility
 of the deponent, and to the propriety of any question put to
 him, or of any answer made by him, may be made when the
 deposition is produced, in the same manner as if the witness
 was personally examined on the trial; *Provided*, That all ob-
 jections to any interrogatory shall be made before it is
 answered, and if the interrogatory is not withdrawn, the
 objection shall be noted in the deposition, or otherwise the
 objection shall not be afterwards allowed.

SEC. 297. When the plaintiff in any suit shall discontinue
 it, or the suit be dismissed for any cause, and another suit
 shall afterward be commenced for the same cause between
 the same parties, or their respective representatives, all

Deposition shall be delivered to Court.

Deposition when not to be used.

Objection to competency of witness may be taken.

When deposition taken in one suit may be used in another.

depositions lawfully taken for the first suit may be used in the second, in the same manner and subject to the same conditions and objections as if originally taken for the second suit; *Provided*, That the deposition shall have been duly filed, in the Court where the first suit was pending, and shall remain in the custody of the Court, from the termination of the first suit, until the trial of the second.

SEC. 298. When a suit shall have been appealed from one Court to another, all depositions lawfully taken to be used in the court below, may be used in the appellate court in the same manner, and subject to such exception for informality or irregularity, and none other, as were taken to such depositions in writing in the Court below.

In case of appeal, deposition to Court below may be used in Appellate Court.

SEC. 299. The Court may from time to time make such Rules as they shall find proper and convenient, as to the time and manner of filing depositions, and the safe keeping thereof, and any other regulations concerning the taking and using of depositions, which may not be inconsistent with the provisions of law.

Court may make rules as to time and manner of taking depositions

SEC. 300. Any witness may be subpoenaed and compelled to give his deposition, at any place within twenty miles of his abode, in like manner, and under the same penalties, as he may be subpoenaed and compelled to attend as a witness in any Court.

When person may be compelled to give deposition.

TAKING THE TESTIMONY OF WITNESS OUT OF THE STATE.

SECTION 301. Deposition, how taken out of the State.

302. When commission may issue.

303. Deposition, how taken.

304. Court may make rules, as to issuing commission.

305. Certain depositions to be taken or rejected, at the discretion of the Court.

SEC. 301. The deposition of any witness without this State may be taken under a commission, issued to one or more competent persons, in any State or County, by the Court in which the cause is pending, and the deposition may be used in the same manner, and subject to the same conditions and objections, as if it had been taken in this State.

Deposition, how taken out of the State.

SEC. 302. No commission shall be issued, to take testimony out of this State, except when the following requisites are complied with:

When commission may issue.

1. When an issue has been joined in a civil action in a Court of Record in this State:

2. When it shall appear on the application of either party to such action, that any witness not residing in this State, is material to the prosecution or defence of such action, and where it shall also appear upon such application that due notice of such application is served on the adverse party at least ten days before such application is made.

Deposition,
how taken.

SEC. 303. Every such deposition shall be taken upon written interrogatories, to be exhibited to the adverse party, or his attorney, and cross interrogatories to be filed by him if he shall think fit.

Court may
make rules, as
to issuing com-
mission.

SEC. 304. The Court may make Rules as to the issuing of commissions, either in vacation or term time, and the filing of interrogatories, and all other matters relating to depositions taken out of the State; *Provided*, That such rules be not inconsistent with the provisions of law. (1)

Certain dep-
ositions to be
taken or re-
jected, at dis-
cretion of the
Court.

SEC. 304. All depositions taken out of, or within the State in any other manner than is prescribed in the preceding sections may be admitted or rejected, in the discretion of the Court, if it appears that the adverse party had sufficient notice of the taking thereof, and opportunity to cross-examine the witness.

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

SECTION 306. Testimony, how perpetuated.

307. Judge shall cause notice to be given.

308. Deponent, how sworn and examined.

309. Deposition, certificate, and statement to be recorded.

} Deposition, when and by whom used.

310. } Any witnesses may be summoned to testify, in perpet-
ual remembrance.

Testimony,
how perpetua-
ted.

SEC. 306. When any person shall be desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest, in or to the subject concerning which he desires to perpetuate the evidence, and the names of all other persons interested, or supposed to be interested therein, and also the name of the witness proposed to be examined, and shall deliver the said statement to the Judge of a Court of Record, requesting him to take the deposition of the said witness.

SEC. 307. The said Judge shall thereupon cause notice to

(1) See Title 15, Section 363.

be given of the time and place appointed for taking the deposition, to all persons mentioned in the said statement, as interested in the case, which notice shall be given in the same manner as is prescribed in this Title, respecting notice upon taking deposition in this State, to be used in any cause here pending.

Judge shall
cause notice to
be given.

SEC. 308. The deponent shall be sworn and examined, and his deposition shall be written, read and subscribed in the same manner as is prescribed respecting the depositions mentioned in this act, (see Section 283 to 300, this Title) and the Judge shall annex thereto a certificate under his hand, of the time and manner of taking it, and that it was taken in perpetual remembrance of the thing, and he shall also insert in the certificate, the name of the person at whose request it was taken, and of all those who did attend the taking thereof.

Deponent,
how sworn and
examined.

SEC. 309. The deposition with the certificate, and also the written statement of the party at whose request it was taken, shall within ninety days after the taking thereof, be recorded in the Registry of Deeds, in the county where the land lies, if the deposition relates to real estate, otherwise in the county where the parties, or some of them reside.

Deposition,
certificate, and
statement to
be recorded.

SEC. 310. If any suit shall, either at the time of taking such deposition, or at any time afterwards, be pending between the person at whose request it was taken, and the persons named in the written statement, or any of them who were notified as aforesaid, or any person claiming under either of the said parties respectively, concerning the title, claim or interest set forth in the statement, the deposition so taken, or a certified copy of it from the Registry of Deeds, may be used in such suit, in the same manner, and subject to the same conditions and objections as if it had been originally taken for the said suit. Any witness may be subpoenaed and compelled to give his deposition in perpetual remembrance of the thing, as before prescribed, in the like manner and under the same penalties as are provided in this Title, respecting other depositions taken in this State.

Deposition,
when and by
whom used.
Any witness
may be sum-
moned to testi-
fy, in perpetu-
remembrance.

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

SECTION 311. Depositions to perpetuate testimony of parties out of the State may be taken.

312. Depositions, how taken.

313. Notice to be given, and how.
 314. When court shall issue commission.
 315. Deposition, how taken and returned.
 316. Person applying may file statement with clerk in vacation.
 317. Supreme Court may make rules respecting such depositions.
 318. How such depositions may be used.

Depositions to perpetuate testimony of parties out of State may be taken. SEC. 311. Depositions to perpetuate the testimony of witnesses living without the State, may be taken in any State, or in any foreign country, upon a commission to be issued by any Court of Record in the manner hereinafter provided.

Depositions how taken. SEC. 312. The person who proposes to take the deposition shall apply to any such Court and file therein a statement like that below prescribed, to be delivered to the Judge or Justice of the Peace, upon taking such deposition within this State: and if the subject of the proposed deposition relate to real estate within this State, the statement shall be filed in the county where the lands or any part thereof lies; otherwise, in the county where the parties, or some of them, reside.

Notice to be given and how SEC. 313. The Court shall order notice of such application and statement to be served on all the persons mentioned therein as adversely interested in the case and living within the State: which notice shall be served fourteen days, at least, before the time appointed for hearing the parties.

When Court shall issue commission. SEC. 314. If, upon such hearing of the parties, or of the applicant alone, should no adverse party appear, the Court shall be satisfied that there is sufficient cause for taking the deposition, they shall issue a commission therefor, in like manner as for taking a deposition to be used in any cause pending in the same Court.

Deposition how taken and returned. SEC. 315. The deposition shall be taken upon written interrogatories filed by the applicant, and cross-interrogatories filed by any party adversely interested, if he shall think fit; and it shall be taken and returned substantially in the same manner as if taken to be used in any cause pending in the same Court.

Person applying may file statement with clerk in vacation. SEC. 316. The person who proposes to take the deposition may file his statement in the clerk's office, and may cause notice thereof to be given to the persons therein named as adversely interested, by serving them with an attested copy of the said statement fourteen days at least before the time appointed for the hearing; and the court may thereupon proceed to hear the parties and to issue the commission as before provided.

SEC. 317. The District Courts may, from time to time, make Rules as to taking depositions, to perpetuate the testimony of witnesses without the State, when taken under a commission from said Courts, and as to the filing and recording of such depositions: *Provided*, Such rules be not inconsistent with the provisions of law. (1)

Supreme Court may make rules respecting such depositions

SEC. 318. All depositions to perpetuate the testimony of witnesses, taken at any place without this State according to the provisions of this Title, may be used in like manner as if taken within this State.

How such depositions may be used.

THE PERPETUATION OF TESTIMONY WITHIN AND WITHOUT THIS STATE, AS AGAINST ALL PERSONS.

SECTION 319. Deposition may be taken.

320. } Deposition how taken.

321. }
322. When and where deposition to be recorded.

323. When and where may be used.

SEC. 319. Depositions to perpetuate the testimony of witnesses within or without this State, so that the same may be evidence against all persons, may be taken upon a commission to be issued, after public notice by the Court of Record.

Deposition may be taken

SEC. 320. The person who desires to have such deposition taken may apply to any such Court in the manner before prescribed in the case of taking a deposition to perpetuate the testimony of a witness living without the State, and all the proceedings thereon shall be the same as in the case last mentioned.

Deposition how taken

SEC. 321. The Court shall, in addition to the proceedings before prescribed, inquire, upon the oath of the applicant, or otherwise, in their discretion, as to all persons known or supposed to be interested in the case: and shall, in the commission, direct the commissioner or commissioners to publish in such newspaper or newspapers within or without the State, or both, or in such other manner as the Court shall consider most effectual, such notice of the time and place of taking such deposition and of the subject-matter thereof as the Court shall think proper—which notice shall be addressed specially by name to all persons who are known or supposed to be interested in the case, and generally to all others, that they may attend and propose cross-interrogatories to the witness; and the Court may also require personal notice of the time and place of

(1) See Sec. 364, Title 15.

taking and the subject-matter of such deposition to be given to such persons, and in such manner as under all the circumstances shall seem proper.

When and where deposition to be recorded
 SEC. 322. Such deposition having been taken and returned to the Court by whose order the commission issued, and being found by the Court to have been taken according to law and the directions contained in the commission, the Court shall order it to be recorded within thirty days in the Registry of Deeds of the county in which the land lies, if the deposition relates to real-estate—otherwise, in the county in which the parties, or some of them, reside.

When and where may be used
 SEC. 323. Any deposition taken and recorded under the provisions of the four preceding sections, or a certified copy thereof from the Registry, may be used by the person at whose request it was taken, or by any person claiming under him, against any person whatever, in any suit or proceeding wherein shall be brought in question the title, claim or interest set forth in the statement upon which the commission was founded, in the same manner and subject to to the same conditions and objections as if it had been originally taken for said suit or proceeding.

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

SECTION 324. Witness may be compelled to give evidence to be used in another State.

Witness compelled to give evidence
 SEC. 324. Any witness may be subpœnaed and compelled in like manner, and under the same penalties as are prescribed in this Title, to give his deposition in any cause pending in a Court in any State or government, which deposition may be taken before any Justice of the Peace in this State, or before any commissioner that may be appointed under the authority of the State or government in which the suit is pending; and if the deposition is taken before such commissioners, the witness may be subpœnaed and compelled to appear before them by process from any Justice of the Peace in this State.—(1)

OF THE LAWS OF THIS AND OTHER STATES AND GOVERNMENTS, AND OF THE RECORDS AND PROCEEDINGS OF COURTS.

SECTION 325. When records, &c., of courts of other States, &c., evidence.

(1) See Sec. 358—This Title.

326. Printed statutes of this State to be evidence.
 327. Printed statutes of other States to be evidence.
 328. Common law of other States—how proved.
 329. Foreign laws—how proved.
 330. Judgments in Justices' Courts how proved.

SEC. 325. The records and judicial proceedings of any Court of any State or Territory of the United States, shall be admissable in evidence in all cases in this State, when authenticated by the attestation of the Clerk, Prothonotary or other officer having charge of the records of such Court, with the seal of such Court annexed. When record of other courts evidence

SEC. 326. The printed copies of all statutes, acts, and resolves of this State, whether of a public or private nature, which shall be published under the authority of the State, shall be admitted as sufficient evidence thereof in all Courts of law, and on all occasions whatsoever. Printed statutes to be evidence

SEC. 327. Printed copies of the statute laws of any State or Territory of the United States, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their Courts, shall be admitted in all Courts of Law and Equity, and on all other occasions in this State, as *prima facie* evidence of such law. Printed statutes of other States to be evidence

SEC. 328. The unwritten or common law of any State or Territory of the United States, may be proved as facts by parole evidence, and the books or reports of cases adjudged in their Courts, may also be admitted as evidence of such law. Common law of other States—how proved

SEC. 329. The existence and the tenor, or effect of all foreign laws, may be proved as facts, by parole evidence, but if it shall appear that the law in question is contained in a written Statute or Code, the Court may, in their discretion, reject any parole evidence of such law. Foreign laws—how proved

SEC. 330. An exemplification of a judgment rendered by any Justice of the Peace, in any State or Territory, of the United States, officially certified by such Justice as a full and correct copy of all the proceedings in that case from his docket, with a certificate of magistracy thereon, signed and authenticated by a clerk of a Court of Record in the county, where such judgment was rendered, with the seal thereof attached, shall be good and legal evidence in any Court or legal proceedings in this State, to prove the facts contained in such exemplification. Judgment in justices' court—how proved

DOCUMENTARY EVIDENCE AND ITS PRESERVATION.

- SECTION 331. Notice of application published, to be affidavit, what to contain and when filed.
332. Affidavit of publication of notice of sale of real property, what to contain and when filed.
333. Copy of such affidavits shall be evidence of the facts therein contained.
334. Affidavit of printer shall be evidence of publication.
335. Copy of affidavit must be certified.
336. When seal of Court is not required.
337. Written instruments, how proved.
338. Registers and Clerks of Courts shall receive papers and receipt therefor.
339. Duties of receivers of such papers.
340. Papers so deposited, how withdrawn.
341. Such papers shall be open to examination.
342. Effect of certificate of officer that he cannot find certain papers. Copies of records in the offices shall be received as evidence.

Notice of application to be published &c

SEC. 331. When notice of any application to any Court, or judicial officer for any proceeding authorized by law, is required to be published in one or more newspapers, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the time when, and the paper in which such notice was published may be filed with the proper officer of the Court, or with the judicial officer before whom such proceeding shall be pending; at any time within six months after the last day of the publication of such notice, unless sooner specially required.

Affidavit of publication of real property &c

SEC. 332. When any notice of a sale of real property is required by law, to be published in any newspaper, an affidavit of the printer of such newspaper, or of his foreman or principal clerk, annexed to a printed copy of such notice, taken from the paper in which it was published, and specifying the times when, and the paper in which such notice was published may be filed at any time within six months after the last day of such publication with the Register of Deeds in the county in which the premises to be sold are situated.

Copy of affidavit to be evidence

SEC. 333. The original affidavit so filed pursuant to the last two preceding Sections and copies thereof, duly certified by the officer in whose custody the same shall be, shall be presumptive evidence in all cases, and in every Court or judicial proceeding, of the facts contained in such affidavit.

SEC. 334. The affidavit of the printer, or foreman or clerk of such printer, of any public newspaper published in this State, of the publication of any notice or advertisement which by any law of this State shall be required to be published in such newspaper, shall be entitled to be read in evidence in all Courts of Justice in this State, and in all proceedings before any officer, body, or board, and shall be *prima facie* evidence of such publication, and of the facts stated therein.

Affidavit of printer to be evidence of publication

SEC. 335. Whenever a certified copy of an affidavit, record, document or other paper, is allowed by law to be evidence, such copy shall be certified by the officer in whose custody the same is required by law to be, to have been compared by him with the original and to be a correct transcript therefrom; and if such officer have any official seal by law, such certificate shall be authenticated by such seal.

Copy of affidavit must be certified

SEC. 336. But the preceding Section shall not be construed to require the affixing of the seal of a Court to any certified copy of a rule or order made by such Court, or of any paper filed therein, when such copy is used in the same Court or before any officer thereof.

When seal of court is not required

SEC. 337. Every written instrument except promissory notes, and bills of exchange, and except the last Wills of deceased persons may be proved or acknowledged in the same manner now provided by law for taking the proof or acknowledgment of conveyances of real estate, and the certificate of the proper officer indorsed thereon, shall entitle such instrument to be read in evidence in all Courts of Justice, and all proceedings before any officer, body or board, with the same effect, and in the same manner as if such instrument were a conveyance of real estate.

Written instruments, how proved

SEC. 338. The Register of Deeds, and the Clerk of any Court of Record in every county of this State, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any instruments or papers which any person shall offer them for that purpose, and if required, shall give such person a written receipt therefor.

Registrars and Clerks to receive papers and receipt therefor

SEC. 339. Such instruments or papers, shall be properly indorsed so as to indicate their general nature and the names of the parties thereto, shall be filled by the officer receiving the same, stating the time when received, and shall be deposited and kept by him and his successors in office, in the same manner as his official papers, in some place separate and distinct from such papers.

Duties of receivers of such papers

§ Papers so deposited, how withdrawn

SEC. 340. The instruments or papers so received and deposited, shall not be withdrawn from such office, except on the order of some Court for the purpose of being read in evidence in such Court and then to be returned to such office; nor shall they be delivered without such order to any person, unless upon the written order of the person who deposited the same, his Executors or Administrators.

§ Such papers shall be open to examination

SEC. 341. Such instruments or papers so deposited, shall be open to the examination of any person desiring the same, upon the payment of the fees allowed by law.

Copies of records received as evidence

SEC. 342. Whenever any officer to whom the legal custody of any document, instrument or paper shall belong, shall certify under his official seal, that he has made diligent examination in his office for such paper, instrument or document, and that it cannot be found, such certificate shall be presumptive evidence of the facts so certified in all causes, matters, and proceedings, in the same manner and with the like effect as if such officer had personally testified to the same in the Court, or before the officer before whom such cause, matter or proceeding may be pending. Copies of the records in the offices of Registers of Deeds, the Surveyor General of the District, or Districts in which this State is, or may be, and the Registers and Receivers of the land offices in this State, certified to be full and correct by the officer having charge of the same, shall be received as evidence of the facts therein stated, and the production of the original records, or the personal attendance and examination of such officer shall not be required.

OF THE LOSS OF INSTRUMENTS AND PROCEEDINGS THEREON.

SECTION 343. Proceeding when party allowed to prove loss of Instrument.

344. Party can recover if loss of note proved.

345. To be entitled to recovery—bond of Indemnity must be executed and delivered to adverse party.

Proceeding when party allowed to prove loss of instrument

SEC. 343. Whenever a party to any action, shall have been permitted to prove by his own oath, the loss of any instrument, in order to admit other proof of the contents thereof, the adverse party may also be examined by the Court, on oath to disprove such loss, and to account for such instrument.

SEC. 344. In any suit founded on any negotiable promissory note, or bill of exchange, or in which such note, if pro-

duced, might be allowed as a set-off in the defence of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereupon, parole or other evidence of the contents thereof may be given on such trial, and notwithstanding such note or bill was negotiable, such party shall be entitled to receive the amount due thereon, as if such note or bill had been produced.

Party recover
if loss of note
proved

SEC. 345. But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties to be approved by the Court in which the recovery shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other persons on account of such note or bill, and against all costs and expenses by reason of such claim.

Entitled to re-
cover &c

OF BOOK ACCOUNTS, INSTRUMENTS AND JUSTICES' DOCKETS.

- SECTION 346. Account Books, when received as *prima facie* evidence of the matters contained therein.
347. Entries in hand writing of Clerk—when proved, have same effect—when such books are not evidence.
348. When ledger must be produced.
349. Entry by party, now dead, may be received as evidence.
350. Instrument purporting to have been signed, shall be so deemed.
351. Justices' docket, when evidence.
352. Transcript of docket shall be evidence to prove facts therein contained.
353. Certificate of Clerk of Court necessary to entitle it to be read in another county.
354. Proceedings in a cause before Justice, how proved. If dead, how proved.

SEC. 346. Whenever a party in any cause or proceeding, shall produce at the trial, his account books, and swear that the same are his account books kept for that purpose, that they contain the original entries of charges for goods or other articles delivered, or work or labor or other services performed, or materials found, and that such entries are just to the best of his knowledge and belief, that said entries are in his own hand writing, and that they were made at or about the time said goods or other articles were delivered, said work and labor or other services were performed, or said materials were furnished, the party offering such book or books as

Account book
received as
evidence

evidence, being subject to all the rules of cross-examination by the adverse party, that would be applicable by the rules to any other witness, giving testimony relating to said book or books, if it shall appear upon the examination of said party, that all of the interrogatories in this section contained, are satisfactorily established in the affirmative, then the said book or books shall be received as *prima facie* evidence in proof of the charges therein contained.

SEC. 347. Whenever the original entries mentioned in the preceding section, are in the hand writing of an agent, servant or clerk of the party, the oath of such agent, servant or clerk, may in like manner be admitted to verify the same, and said books shall be testimony in the same manner as the books mentioned in the preceding section: *Provided*, That such books mentioned in this and the preceding section, shall not be admitted as testimony of any item of money delivered at one time, exceeding five dollars, or of money paid to third persons, or of charges for rent.

Entries in
handwriting of
clerk &c

SEC. 348. Where a book has marks that show that the items have been transferred to a ledger, the book shall not be testimony unless the ledger be produced.

SEC. 349. Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence in a case proper for the admission of such books as evidence.

Ledger pro-
duced

SEC. 350. Every written instrument purporting to have been signed or executed by any person, shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed, shall deny the signature or execution of the same upon his oath or affidavit; but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof.

Entry by par-
ty now dead

SEC. 351. Whenever it shall become necessary in an action before a Justice of the Peace to give evidence of a judgment or other proceeding had before him, the docket of such judgment, or other proceeding, or a transcript thereof certified by him, shall be good evidence thereof before such Justice.

Instrument
purporting to
have been sign-
ed

SEC. 352. A transcript from the docket of the Justice of the Peace of any judgment had before him, of the proceedings in the case previous to such judgment, of the execution issued thereon, if any, and of the return to such execution, if any, when certified by such Justice, shall be evidence to prove

Justices' dock-
et when evi-
dence

Transcript of
docket when
evidence

the facts contained in such transcript in any Court in the county, where such judgment was rendered.

SEC. 353. To entitle such transcript to be read in evidence in a different county than that in which the judgment was rendered, or the proceedings originated, there shall be attached thereto or endorsed thereon, a certificate of the Clerk of the District Court of the same county in which such Justice resides, under the seal of said Court, specifying that the person subscribing such transcript was, at the date of the judgment therein mentioned, an acting Justice of the Peace of such county.

Certificate of
clerk of court
necessary

SEC. 354. The proceedings had in any cause before a Justice, not reduced to writing by said Justice, nor being the contents of any paper or document produced before said Justice, unless such paper or document be lost or destroyed, may be proved by the oath of the Justice. In case of his death or absence, they may be proved by producing the original minutes of such proceeding entered in a book kept by the Justice, accompanied by proof of his handwriting; or they may be proved by producing copies of such minutes sworn to by a competent witness, as having been compared by him with the original entries, with proof that such entries were in the hand writing of the Justice.

Cause before
justice proved
—if dead how
proved

MISCELLANEOUS PROVISIONS.

SECTION 355. When party not excused from answering questions.

356. Possession of bill of exchange evidence that the same was endorsed.

357. Notices may be given to Attorney.

358. How depositions of persons out of State, to be used in Justice's Court, may be taken.

359. Certificate of purchase of public land, of what it shall be evidence.

360. When deed, &c., deemed to have been executed.

SEC. 355. Any competent witness in a cause, shall not be excused from answering a question pertinent to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish the fact, that such witness owes a debt or is otherwise subject to a civil suit.

Party not ex-
cused from an-
swering ques-
tions

SEC. 356. In all actions brought on promissory notes or bills of exchange by the indorsee, the possession of the note shall be *prima facie* evidence that the same was indorsed by the persons by whom it purports to be indorsed.

Bill of ex-
change endors-
ed

Notices given
to attorney

SEC. 357. All notices required by this chapter to be given to or by an adverse party, may be given by or to the agent or attorney of the said party.

Depositions of
persons out of
the State

SEC. 358. The depositions of persons out of this State, to be used in cases before Justices of the Peace within this State, may be taken in the same manner, and under the same regulations, as depositions are now authorized by law, to be taken of persons within this State, and shall be subject to the same exceptions: *Provided*, That in no case shall more than forty days notice of the taking of such depositions be required to be given to the adverse party. (1)

Certificate of
purchase of
public lands

SEC. 359. The receiver's receipt or certificate of purchase of public lands, signed by the receiver, and under the official certificate of any register or receiver, of the entry or purchase of any tract or tracts of land, or of the location of any tract or tracts by a military land warrant, shall be *prima facie* evidence in Court in this State, that the title of the lands mentioned or described in said receipt or certificate is in the person or persons named therein, or their heirs, or assigns; but the said certificate shall not be construed to apply to cases in which the land was held, owned, or occupied by any person or persons as mineral ground at the time of said entry, and on which discoveries of lead or copper ore had been made: *Provided*, The same be held by the original claimant, or his legal or equitable assignee.

Deed executed
&c

SEC. 360. All deeds, mortgages, or other instruments of writing, relating to real estate situate within this State, which shall have been recorded in the office of any Register of Deeds before this section shall take effect, purporting to have been acknowledged without this State, and having upon them substantially the ordinary form of a certificate of acknowledgment or proof, purporting to have been signed by some officer in another State or country, shall be deemed *prima facie* in all legal proceedings to have been acknowledged or proved, (as the case may be,) before the proper officer and in conformity with the laws of such state or country, where the same purport to have been acknowledged or proved; and the transcript of such records of all such deeds, mortgages and instruments, certificates of acknowledgment or proof, may be read in evidence, in like manner and with the same effect as the originals. (2.)

(1) See Sec. 324 of this Title.

(2.) See Sec. 690, Majority Report.

OF ADMINISTERING OATHS.

SECTION 361. Oath—before whom taken, when certified, where may be used.

362. When person may affirm.

363. When person may be sworn in a peculiar manner.

364. How person not a christian shall be sworn.

365. When court may examine person to test capacity.

366. When person deemed guilty of perjury.

SEC. 361. Whenever any oath or affidavit is or may be required or authorized by law—(except oaths to jurors and witnesses in the trial of a cause, and such other oaths as are required by law to be taken before particular officers)—the same may be taken before any Judge, Judge of Probate, Clerk of any Court of Record, Notary Public, or Justice of the Peace: and when certified by any such officer to have been taken before him, may be read and used in any Court of Law or Equity, of Record, or not of record, within this State, and before any officer—judicial, executive or administrative. Oath where
sed

SEC. 362. Every person who shall declare that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his solema declaration or affirmation. When person
may affirm

SEC. 363. Whenever the Court before which any person shall be offered as a witness shall be satisfied that such person has any peculiar mode of swearing which is more solemn or obligatory in the opinion of such person than the usual mode, the Court may, in its discretion, adopt such mode of swearing such person. Person sworn
in a peculiar
manner

SEC. 364. Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies. Person not a
christian shall
be sworn how

SEC. 365. The Court before whom an infant, or a person of apparently weak intellect shall be produced as a witness may examine such person, to ascertain his capacity and whether he understands the nature and obligations of any oath; and any Court may inquire of any person what are the peculiar ceremonies observed by him in swearing which he deems most obligatory. Court may ex-
amine person
to test capaci-
ty

SEC. 366. In all cases in which an oath or affidavit is required or authorized by law, the same may be taken in any of the usual forms; and every person, swearing, affirming or declaring in any such form shall be deemed to have been law- Person guilty
of perjury

fully sworn: and to be guilty of perjury, for corruptly or falsely swearing, affirming or declaring in any such form.

ACTIONS IN PARTICULAR CASES.

1. Actions respecting corporations.
2. Proceedings against corporations.
3. Actions by and against Heirs, Executors, Administrators, Devisees and Legatees.
4. Actions on official securities, and for fines and forfeitures.
5. Actions by and against public officers and bodies.
6. Actions to vacate charters and letters-patent, and to prevent the usurpation of an office or franchise. (1)

1. ACTIONS RESPECTING CORPORATIONS.

SECTION 367. What corporations included in Title.

368. Corporation, when subject to the jurisdiction of a Court of this State.

369. Actions against foreign corporations, where and by whom brought.

370. When foreign corporation may sue.

371. When foreign corporation may not sue.

372. Actions, how commenced against corporations.

373. Existence of corporation, when to be proved.

374. It shall not be necessary to set forth act of incorporation.

375. Ten per cent. interest, when allowed.

SEC. 367. This Title embraces all corporations included in such designation, all Associations having any corporate rights, whether created by special acts of legislation or under general laws—except that no part of this Title other than Section —, extends to municipal or religious corporations. or to a corporation for a public library, a cemetery, an academy, or a society for literary or charitable purposes, or for the encouragement of the fine arts: unless such corporation has, by its charter or the law of its organization, shares or stock from which in some contingencies a dividend may be made.

SEC. 368. No corporation is subject to the jurisdiction of a Court of this State, unless it appear in the Court, or have been created by or under the laws of this State, or have an agency established therein for the transaction of some portion of its business, or have property therein: and in the last case, only to the extent of such property at the time the jurisdiction attached.

(1) See Title 13, Secs. 331 to 350.

SEC. 369. An action against a corporation created by or under the laws of any other State, government or country, may be brought in the District Court, in the following cases: <sup>Actions a-
gainst corpo-
rations &c</sup>

- 1. By a resident of this State for any cause of action :
- 2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated within this State.

SEC. 370. A foreign corporation, created by the laws of any other State or country, may prosecute in the Courts of this State, in the same manner as corporations created under the laws of this State, upon giving security for the payment of costs of suit, in the same manner that non-residents are required by law to do. <sup>When foreign
corporations
may sue</sup>

SEC. 371. A foreign corporation shall not maintain an action in this State, upon an obligation or liability arising out of, or in consideration of an act which may be contrary to the law or policy of this State, or which shall be thereby forbidden in respect to corporations or associations therein, whose general business shall be similar to that of such foreign corporation. <sup>When foreign
corporations
may not sue</sup>

SEC. 372. Actions may be commenced against corporations in the same manner as other civil actions, and where service of summons shall be made according to the statute, the plaintiff may proceed thereupon in such action, in the same manner as in civil actions against natural persons. <sup>Actions how
commenced</sup>

SEC. 373. In actions brought by a corporation in the Courts of this State, it shall not be necessary to prove on the trial of the cause, the existence of the corporation, unless the defendant shall in his answer, deny the existence of such corporation. (1) <sup>Existence of
corporation
proved</sup>

SEC. 374. In actions by or against corporations, under the laws of this State, it shall not be necessary to set forth in the complaint or answer, the act or acts of incorporation, or the proceedings by which such corporation was created, or to set forth the substance thereof, but the same may be proved by reciting the title of such Act. <sup>Act of incor-
poration</sup>

SEC. 375. When judgment shall be rendered against a bank or banking association, for any bill or other contract, for the absolute payment of money, payment of which has been refused on presentment, at the bank or place of business of the defendant, the plaintiff may recover interest at the rate of ten per cent. a year, from the time of such refusal, ^{Interest}

(1) See Sec. 380, this Title.

unless in the act of incorporation, a different rate of interest or measure of damages has been prescribed.

2.—OF PROCEEDINGS AGAINST CORPORATIONS.

- SECTION 376. Injunction against corporation in certain cases.
377. When injunction may be issued.
378. Jurisdiction of Court over officers.
379. Construction of Section 379.
380. Jurisdiction, how to be exercised.
381. Court may sequester property.
382. Distribution upon decree.
483. Corporation, when deemed to have surrendered its franchise.
384. Proceedings against certain insolvent corporations.
385. Who may apply for injunction.
386. Court may appoint receivers.
387. Powers and obligations of receivers.
388. When stockholders may be parties.
389. When stockholders, &c., made parties after decree.
390. Complaint against stockholders.
391. Proceedings upon complaint.
392. Proceedings if corporation be insolvent.
393. Distribution of property upon final decree.
394. When stockholders compelled to pay amount due on stock.
395. Enforcing payment by Directors.
396. Discovery by corporation.
397. Discovery by officers.
398. Answers, how far evidence.
399. Answer, &c., not to be used in criminal prosecution.
400. Staying proceedings in civil actions.
401. Certain corporations excepted.

Injunction

SEC. 376. When a complaint shall be filed under the direction of the Attorney General in any District Court, such Court shall have power to restrain by injunction, any corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business not authorized by the Charter of such corporation, and in the same manner to restrain any individuals from exercising any corporate rights, privileges, or franchises not granted to them by any law of this State.

When issued

SEC. 377. Such injunction may be issued before the coming in of the answer, upon satisfactory proof that the defendant complained of, has usurped, exercised, or claimed any franchise, privilege, liberty, or corporate right not granted to them, and after the coming in of the answer, such injunction may be continued, until judgment shall have been had.

SEC. 378. The District Court shall have jurisdiction over directors, managers, trustees, and other officer of corporations : Jurisdiction
of court

1. To compel them to account for their official conduct in the management and disposition of, the funds and property committed to their charge :

2. To decree and compel payment by them, to the corporation which they represent, and to its creditors of all sums of money, and of the value of all property which they may have acquired to themselves, or transferred to others, or may have lost or wasted by any violation of their duties as such creditors, managers, trustees, or other officers:

3. To suspend any such trustee, or other officer from exercising his office whenever it shall appear that he has abused his trust:

4. To remove any such trustee, or officer from his office, upon proof or conviction of gross misconduct:

5. To direct, if necessary, new election to be held by the body or board duly authorized for that purpose, to supply any vacancy created by such removal:

6. In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorized to fill such vacancies:

7. To set aside all alienations of property made by the trustees, or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purpose for which the same was made; and,

8. To restrain and prevent any such alienation, in cases where it may be threatened, or there may be good reason to apprehend that it is intended to be made.

SEC. 379. Whenever any visitatorial powers over any corporation, are or shall be vested by statute, in any corporate body or public officer, the provisions of the preceding section shall not be construed to restrict or impair the powers so vested. Section 379

SEC. 380. The jurisdiction conferred by section 376 shall be exercised as in ordinary cases, on complaint or petition, as the case may require, or as the Court may direct, at the instance of the Attorney General prosecuting in behalf of this State, or at the instance of any director, trustee, or other officer of such corporation, having a general superintendence of its concerns. Jurisdiction
exercised

Court sequestrate property SEC. 381. Whenever a judgment, or decree, shall be obtained against any corporation incorporated under the laws of this State, and an execution issued thereon, shall have been returned unsatisfied in whole or in part, upon the petition of the person obtaining such judgment or decree, or his representatives, the District Court within the proper county, may sequesterate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same.

Distribution SEC. 382. Upon a final decree on any such petition, the Court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among the fair and honest creditors of such corporation, in proportion to their debts respectively, who shall be paid in the same order as provided in the case of a voluntary dissolution of a corporation.

Corporation when franchise surrendered SEC. 383. Whenever any incorporated company shall have remained insolvent for one year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges, and franchises, granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved.

Proceedings against insolvent corporations SEC. 384. Whenever any corporation having banking powers, or having the power to make loans on pledges, or deposits, or authorized by law to make insurances, shall become insolvent, or unable to pay its debts, or shall neglect or refuse to pay its notes or evidences of debt on demand, or shall have violated any of the provisions of its act or acts of corporation, or of any other law, binding on such corporation, any Court having jurisdiction, may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges, and franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person, any of the moneys, property, or effects of such corporation, until such Court shall so order.

Injunction SEC. 385. Such injunction may be issued on the application of the Attorney General, in behalf of the State, or on the application of any creditor or stockholder of such corporation, upon complaint or petition, filed for that purpose, and

upon due proof of any of the facts in the last section required, to authorize the issuing of the same.

SEC. 386. Upon such application being made, in any stage of the proceedings, the Court may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for, and recover the debts and demands that may be due, and the property that may belong to such corporation, who shall in all respects be subject to the control of the Court.

Court may appoint receivers

SEC. 387. Such receivers shall possess all the powers and authority conferred, and be subject to all the obligations and liabilities imposed upon receivers appointed in case of the voluntary dissolution of a corporation.

Powers and obligations of receivers

SEC. 388. If such application be made by a creditor of any corporation whose directors or stockholders are made liable by law for the payment of such debt in any event or contingency, such directors or stockholders, or any of them, may be made parties to the complaint or petition, either in the filing thereof or in any subsequent stage of the proceedings, whenever it shall become necessary to enforce such liability.

When stockholders may be parties

SEC. 389. If any creditor of a corporation desire to make such directors or stockholders parties to the suit, after a decree therein against the corporation, he may do so on filing a supplemental complaint against them founded upon such decree; and if such decree was rendered in a proceeding instituted by the Attorney General, such creditor may, on his application, be made plaintiff therein, and may in like manner make the directors and stockholders sought to be charged, defendants in such suit.

When stockholders made parties after decree

SEC. 390. Whenever any creditor of a corporation shall seek to charge the Directors, Trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any District Court which shall possess jurisdiction to enforce such liability.

Complaint against stockholders

SEC. 391. The Court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more Receivers, who shall possess all the powers conferred and be subject to all the obligations imposed on Receivers in case of the voluntary dissolution of a corporation.

Proceedings upon complaint

Proceedings if corporation be insolvent SEC. 392. But if, on the coming in of the Answer, or upon the taking of any such account, it shall appear that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the Court may proceed, without appointing any Receiver, to ascertain the respective liabilities of such Directors and stockholders, and enforce the same by its decree as in other cases.

Distribution of property upon final decree SEC. 393. Upon a final decree being made upon any such application to restrain a corporation, or upon any such complaint filed against Directors or stockholders, the Court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among its fair and honest creditors, in the order and in the proportions prescribed in the case of the voluntary dissolution of a corporation.

When stockholders to pay on stock SEC. 394. In all cases in which the Directors, or other officers of a corporation, or the stockholders thereof, shall have been made parties to a suit in which a decree shall be rendered, if the property of such corporation shall be insufficient to discharge its debts, the Court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the company.

Enforcing payment by directors SEC. 395. If the debts of the company shall remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the Directors or other officers, and of the stockholders, and to decree the amount payable by each, and to enforce such decree as in other cases.

Discovery by corporation SEC. 396. Upon any application to the Court having jurisdiction in any of the cases provided in this Act, such Court may compel such corporation to discover—in the manner provided for in this Act—any stock, property, things in action, or effects alleged to belong or to have belonged to it: the transfer and disposition thereof, and consideration, and all the circumstances of such disposition.

Discovery by officers SEC. 397. Every officer, agent or stockholder of any corporation against which proceedings shall be instituted according to the provisions of this Act, and every person to whom it shall be alleged that any transfer of property or effects of such corporation has been made, or in whose possession or control any such property or effects shall be alleged to be, may be compelled to appear and give his testimony in reference to the matter in the preceding section speci-

fied—notwithstanding such answer may expose the corporation of which he is a member to a forfeiture of its corporate rights or any of them.

SEC. 398. The answers of the officers or agents of any corporation shall be evidence against the corporation, in the same manner and to the same extent as if such testimony had been given upon an examination of such officers or agents as witnesses in the cause; and such officers or agents may be subsequently examined as witnesses by either party.

Answers, how far evidence

SEC. 399. The answers of any officer or agent shall not be used as evidence upon an indictment or other criminal prosecution or proceeding against him.

Answer not to be used in criminal prosecution

SEC. 400. Whenever any complaint shall be filed or any application shall be made against any corporation, its Directors or other superintending officers or stockholders, according to the provisions of this Title, the Court may by injunction, on the application of either party, and at any stage of the proceedings, restrain all proceedings by any creditor against the defendants in such suit, and, whenever it shall appear necessary or proper, may order notice to be published in such manner as the Court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit within a reasonable time, not less than six months from the first publication of such order: and in default thereof to be precluded from all benefit of the decree which shall be made in such suit, and from any distribution which shall be made under such decree.

Staying proceedings in civil actions

SEC. 401. The provisions of this title shall not extend to any incorporated library or lyceum society, to any religious corporation, or any incorporated academy, or select school, nor to the proprietors of any burying ground, incorporated under the laws of this State.

Certain corporations excepted

3. ACTIONS BY AND AGAINST HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES AND LEGATEES.

- SECTION 402. A cause of action for injury to a person does not survive.
 403. All other causes of action do survive.
 404. For what action personal representatives may be sued.
 405. Damages to be recovered, and how appropriated—Representatives of deceased persons regarded as one person.
 406. Failure to answer not deemed evidence of assets.
 407. Statute of limitations in case of death.
 408. Executor of executor not to sue as such.

409. Real property not bound by judgment against executors, &c.
410. By what evidence inventory may be repelled.
411. Executor of his own wrong how responsible.
412. Next of kin who receive distributive shares liable for debts.
413. Recovery must be apportioned.
414. When next of kin may compel contribution.
415. Legatees when liable for debts.
416. Costs in actions against next of kin and legatees must be apportioned.
417. Recovery exonerates from further liability.
418. Heirs and Devises liable for debts to the amount received from deceased.
419. Heirs not liable unless insufficiency of personality.
420. Heirs liable when debts expressly charged by will.
421. Preference of debts.
422. No preference between debts of same class.
423. Effect of defence that there are debts of prior class.
424. Judgment only for excess over prior debts.
425. Payment by heirs, &c., of prior debts to be allowed.
426. Judgment affects real property inherited.
427. When heirs personally liable.
428. Contribution among heirs or devisees.
429. Devisees only liable when insufficiency of other property.
430. Devisees liable for deficiency only.
431. Devisee not exonerated if property devised was charged with debts.
432. Devisees subject to proceedings same as heirs.
433. Posthumous child how provided for.
434. Provision for witness who is devisee.

SEC. 402. A cause of action arising out of an injury to the person, dies with the person of either party, except as otherwise provided by this act. See Sec. 404, also Sec. 241 to 266.

A cause of action for injury to a person does not survive

SEC. 403. All other causes of action, by one against another, whether arising on contract or not, survive to the personal representatives of the former, and against the personal representatives of the latter; therefore, the executors or administrators may maintain the action against the party against whom the cause of action accrued, or after his death, against his representatives.

All others to survive

SEC. 404. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission;

For what action may be sued

but the action must be commenced within two years after the act or omission by which the death was caused; the damages thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased.

SEC. 405. In an action against several executors or administrators, they shall all be considered as one person, representing their testator or intestate, and judgment may be taken and execution issued against all who shall be named as defendants in the summons, although it be served only on part of them, in the same manner as if served on all, except as provided in the next section.

Damage of be recovered &c

SEC. 406. When a judgment shall be taken against an administrator or executor, upon failure to answer, it shall not be deemed evidence of assets in his hands, unless it appear that the complaint alleged assets, and was personally served on him.

Failure to answer not deemed evidence

SEC. 407. The time which shall have elapsed between the death of a person, and the granting of letters testamentary, and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters shall not be deemed any part of the time limited for the commencement of actions by executors or administrators. (1)

Statute of limitations in case of death

SEC. 408. An executor of an executor shall have no authority as such to commence or maintain an action or proceeding relating to the property of the testator of the first executor, or to take any charge or control thereof.

Executor of executor not to sue as such

SEC. 409. The real property which belonged to a deceased person shall not be bound or in any way affected by a judgment against his executors or administrators, nor liable to be sold by virtue of an execution issued upon such judgment.

Real property not bound &c

SEC. 410. In an action against executors or administrators, in which the fact of their having administered the estate of their testators or intestate, or any part thereof, shall come in issue, and the inventory of the property of the deceased, filed by them, shall be given in evidence, the same may be repelled by evidence:

By what evidence inventory may be repelled

1. That any property has been omitted in such inventory, or was not returned therein at its full value :
2. That such property has perished, or has been lost with-

(1) See Statute of Limitations, Title 1, Sec. 241 to 266.

out the fault of such executors or administrators, or that it has been fairly sold by them at private or public sale, at a less price than the value so returned, or that, since the return of the inventory, such property has deteriorated or increased in value; in such action, the defendants shall not be charged for any things in action specified in their inventory, unless it shall appear that they have been collected, or might, with due diligence, have been collected.

SEC. 411. No person shall be liable to an action as executor in his own wrong, for having taken, received or interfered with the property of a deceased person; but shall be responsible to the executor, as general or special administrator of such deceased person, for the value of all property so taken or received, and for all damages caused by his acts, to the estate of the deceased.

SEC. 412. The next of kin of a deceased person shall be liable to an action by a creditor of the estate to recover the distributive shares received out of such estate, or so much thereof as may be necessary to satisfy his debt; the action may be against all the next of kin jointly, or against any one or more of them severally.

SEC. 413. In such action, the plaintiff may recover the value of all the assets received by all the defendants in the action, if necessary to satisfy his demand; and the amount of the recovery shall be apportioned among the defendants, in proportion to the value of the assets received by each; and no allowance or deduction can be made from such amount, on account of there being other relatives to whom assets have also been delivered.

SEC. 414. Any one of the next of kin, against whom a recovery is had pursuant to the last section, may maintain an action against the other relatives of the testator, to whom any such assets have been paid jointly, or against any of them separately, for a just and equal contribution, and may recover of each defendant, such amount as shall be in the same proportion to the whole sum collected of the plaintiff, as the value of the assets delivered to such defendant, bore to the value of all the assets delivered to all the relations of the deceased.

SEC. 415. Legatees shall be liable to an action by a creditor of the testator, to recover the value of a legacy received by them. The action may be brought against all, or only one

of the legatees. In such action the plaintiff shall not recover unless he shall show:

1. That no assets were delivered, by the executor or administrator of the deceased, to his heirs or next of kin; or,
2. That the value of such assets has been recovered by some other creditor; or,
3. That such assets are not sufficient to satisfy the demands of the plaintiff; and in the last case, he shall recover only the deficiency.

The whole amount which the plaintiff can recover shall be apportioned among all the legatees of the testator, in proportion to the amount of their legacies respectively, and his proportion shall only be recovered of each legatee.

Sec. 416. If an action be brought against several next of kin jointly, or against several legatees jointly, for assets delivered to them, and a recovery be had against them, the costs of such action shall be apportioned among the several defendants, in proportion to the amount of debt, or damages, recovered against each of them.

Costs in actions must be apportioned

Sec. 417. In case a judgment against several next of kin, of a testator or against several legatees, the payment on satisfaction of the amount recovered, against any one of the defendants, discharges such defendant and exonerates him and his property from the judgment.

Recovery exonerates from liability

Sec. 418. Heirs and devisees shall be liable to an action by a creditor of a deceased person, to recover the debt, to the extent of the value of any real property inherited by or devised to them; if such action be against the heirs, all the heirs who may be liable shall be made parties to the action.

Heirs &c liable for debts

Sec. 419. But the heirs shall not be liable for the debt, unless it appear that the personal assets of the deceased were not sufficient to discharge it, or that after due proceedings before the Probate Court, the creditor shall have been unable to collect the debt, from the personal representatives of the deceased, or from his next of kin, or legatee; if the personal assets were sufficient to pay a part of the debt, or in case a part thereof shall have been collected, as mentioned in the last section, the heirs of such deceased person shall be liable for the residue; in the event that the assets have not been wasted, but have been applied to the payment of the debts due from the estate. (1)

Heirs not liable unless insufficiency of personality

(1) I deem it advisable to throw additional protection around the estates of deceased persons to that contained in Sec. 749 of the Majority Reports. • Creditors may collude with the administrator, in the misapplication of the assets of the intestate. If so, they should do it at their peril.

SEC. 420. But the last section shall not affect the liability of the heirs, for a debt of their ancestors, where such debt was by his will, expressly charged exclusively on the real property descended to such heirs, or where such debt is by the will expressly directed to be paid out of the real property descended before resorting to the personal property.

SEC. 421. In cases, where the next of kin, legatees, heirs, and devisees shall be liable for the debts of their ancestors, as herein provided, they must give preference in the payment of the same, and are liable therefor, in the following order :

1. Debts entitled to a preference under the laws of the United States:

2. Judgments, against the ancestor or testator according to the priority thereof respectively:

3. Recognizances, mortgages, bonds, sealed instruments, notes, bills, unliquidated demands and accounts.

SEC. 422. No preference shall be given by any next of kin, legatee, heir, or devisee, to one debt over another, of the same class, except one specified in the second subdivision of the last section ; nor shall a debt, due and payable, be entitled to a preference over a debt not due ; nor shall the commencement of an action against any next of kin, legatee, heir, or devisee, for the recovery of a debt, entitle it to preference over others of the same class.

SEC. 423. The next of kin, legatees, heirs, and devisees, may show that there are debts of a prior class, unsatisfied ; or that there are unpaid debts of the same class, with that on which the action shall be brought ; and if it appear, that the value of the personal property delivered to them, or of the real estate descended or devised to them, shall not exceed the debts of a prior class, judgment shall be rendered in their favor.

SEC. 424. If the personal property delivered to such next of kin or legatee, or of the real estate, descended or devised to such heir, and devisee, exceed the amount of debts which shall be entitled to a preference over a debt for which the action shall be brought, judgment shall be rendered against them only for such sum as shall be a just proportion to the other debts of the same class, with that on which the action shall be brought.

SEC. 425. If a debt of a class prior to that on which the action is brought, or of the same class, shall have been paid

by any next of kin, legatees, heirs, or devisees, they may prove such payment, and the amount of the debt so paid shall be estimated in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the last two sections, and they shall be allowed the same.

Payment by heirs &c

Sec. 426. If it appear that the real property so descended was not aliened by the lean or debt as aforesaid, at the commencement of the action, or if the heir confess the claim, and show what real property has descended to him, the Court shall order that the debt of the plaintiff, or the proportion thereof, which he is entitled to recover, be levied on the real property so descended, and not otherwise; and every judgment rendered in such action, shall have preference as a lien on the real property descended, to any judgment obtained against such heir personally, for a debt or demand in his own right.

Judgment affects property inherited

Sec. 427. When it appears in the action, that before the commencement thereof, the heir has aliened the real property descended to him, or any part thereof, he shall be personally liable for the value of the property so aliened, and judgment may be rendered therefor, and execution awarded, as in actions for his own debts. But no real property aliened in good faith by an heir, before action commenced against him shall be liable to execution, or in any manner affected by a judgment against him.

When heirs personally liable

Sec. 428. In actions brought against several heirs jointly, or several devisees jointly, the amount which the plaintiff shall recover, shall be apportioned among all the heirs, of the ancestor, or among all the devisees of the testator, in proportion to the value of the real property descended or devised, and such proportion only shall be recovered of each heir or legatee.

Contribution among heirs &c

Sec. 429. Devisees made liable, by the foregoing provisions of this Title, to the creditor of their testator, shall not be so liable, unless it shall appear that his personal assets, and the real property of the testator descended to his heirs, were insufficient to discharge the debt: or unless it shall appear that after due proceedings before the Probate Court, the creditor has been unable to recover the debt, or any part thereof, from the personal representatives of the testator, or from his next of kin, or legatees, or from his heirs.

When devisees liable

Sec. 430. In either of the cases specified in the last sec-

Devises liable for deficiency only

tion, the amount of the deficiency or of the personal assets, and of the real property descended to satisfy the debt of the plaintiff and the amount which such plaintiff may have failed to recover from the personal representatives of the testator, his next of kin, legatees and heirs, may be recovered of the devisees of such testator, to the extent of the real property devised to them respectively.

Devisee not exonerated

SEC. 431. But the last two sections do not affect the liability of devisees, for a debt of their testator, where such debt was, by his will, expressly charged exclusively upon the real property devised, or by the terms of the will made payable exclusively by such devisee, or made payable out of the real property devised, before resorting to the personal property, or to any other real property descended or devised.

Devises subject to proceedings same as heirs

SEC. 432. The provisions of this Title, with regard to heirs, and to proceedings by and against them, and to judgments and executions against them, are applicable to actions and proceedings against devisees, and they must in like manner be jointly sued.

Posthumous child how provided for

SEC. 433. In cases where, by the provisions of any statute, a child, born after the making of a will, shall be entitled to succeed to a portion of the testator's real and personal property, such child shall have the same rights and remedies to compel a distribution of the personal property, and a partition of the real property, as are provided for next of kin, and for heirs, and shall in all respects, be liable in the same manner, and to the same extent, to the creditors of his ancestor, in respect to the personal property delivered to him, and the real property, descended to him, as is herein prescribed in relation to next of kin and heirs, and such child may recover of the legatees and devisees who may have received or taken any real or personal property of the testator, the share or portion thereof to which he may be entitled.

Provision for witness who is devisee

SEC. 434. The provisions of the last Section, relative to a child born after the making of a will, shall apply equally to every person, who being a witness to a will, shall be entitled, by the provisions of any statute, to recover a portion of the real or personal property of the testator, from the legatees and devisees named in such will.

4.—ACTIONS ON OFFICIAL SECURITIES AND FOR FINES AND FORFEITURES.

SECTION 435. Official bonds, how construed.

436. Any person injured may prosecute.
437. Before action brought, leave of Court to be obtained, leave how obtained.
438. Judgment for one delinquency shall not effect suit for another.
439. Amount to be recovered not to exceed amount in undertaking.
440. Execution to be first enforced against principal.
441. When executions several judgments, what amount to be collected from sureties.
442. Actions for fines and forfeitures, by whom and how prosecuted.
443. Amount to be recovered in certain cases.
444. Effects of recovery by collusion.
445. Fines and forfeitures, when unappropriated must be paid into Treasury.

SEC. 435. The official bonds, or other security of a public officer, to the State, whether with or without sureties, shall be construed as security to the State and also to all persons severally, for the official delinquences against which they are intended to provide. If it be a county, city, village, or other municipal body, it shall in like manner be construed as security severally, to all persons intended to be secured, as well as the body politic named therein.

Official bonds

SEC. 436. When a public officer shall by official misconduct or neglect of duty, forfeit his official bond, or render his sureties liable upon an official security, any person injured thereby, or who shall by law be entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer and his sureties, to recover the amount to which he may be entitled by reason of the delinquency.

Person prosecute

SEC. 437. Before an action be brought by a plaintiff, other than the State or body politic named in the security, leave shall be obtained of the District Court, or a Judge thereof within the district or county where the action shall be triable, and leave can only be granted on the production of a copy of the bond, and an affidavit showing the delinquency, and if the delinquency be such, as that if established on the trial, it would entitle the party applying to recover in the action, leave shall be granted.

Action brought

SEC. 438. A judgment in favor of a party for one delinquency, shall not preclude the same or another party, from an action on the same security for another delinquency.

Delinquency

Amount recovered

SEC. 439. If it shall appear in an action against a surety, on an official security, that he has already been obliged, by reason of recoveries against him on the same, to pay amounts, which in the aggregate are equal to the extent of his undertaking, or that by reason of the insolvency of his principal, he will be obliged to pay to that extent, on judgments already recovered against the surety, the recovery against a surety shall in all such cases be limited by the amount of his undertaking, except as otherwise provided by law.

Execution against principal

SEC. 440. Upon the execution issued on a judgment, recovered upon the official security of a public officer, against him and a surety, there shall be endorsed a direction to the officer to whom the execution is delivered, to collect the same out of the property of the principal, if sufficient can be found, and if not, then to collect it out of the property of the surety.

Collected from sureties

SEC. 441. If there be several judgments, on which executions are, at the same time, in the Sheriff's hands, against a public officer, and his sureties, amounting in the aggregate to a sum greater than that for which the sureties are liable, the Court shall, on their application, limit the amount to be collected of them, to the amount of their respective liabilities, and may cause the same to be applied on the judgment or execution, in proportion to such amount.

Actions for fines &c

SEC. 442. Actions for fines and forfeitures, may be prosecuted by the officers or persons to whom they shall by law be given, or who, by special provision of law, shall be authorized to recover them; and whether prosecuted by public officers, or by private persons, shall be governed by the same rules as other civil actions, except as otherwise specified in this Title.

Amount recovered in certain cases

SEC. 443. When an action shall be brought for a penalty, which shall be limited by law, not to exceed a certain amount, the action may be brought for that amount, and upon trial, the amount recovered shall be determined in proportion to the offence.

Recovery by collusion

SEC. 444. A recovery of a judgment, for a penalty or forfeiture, by collusion between the parties, with intent to save the defendant from the consequences contemplated by law, in case where the penalty or forfeiture shall be given wholly or partly to the prosecutor, shall not prevent the recovery of the same, by another person.

SEC. 445. Fines and forfeitures, not specially granted or

appropriated by law, shall be paid into the treasury of the State; and whenever, by the provision of law, any property, real or personal, shall be forfeited to the State, or to any officer, ^{Fines &c paid into treasury} for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer, in the District Court of any County where such property may be. (1)

5—ACTIONS

BY AND AGAINST PUBLIC OFFICERS AND BODIES.

- SECTION 446. Who may sue in official capacity.
 447. When such persons may sue.
 448. Organized department of municipal corporation, when deemed to be the real party in interest.
 449. How action may be brought.
 450. When action may be brought.
 451. When certificate of judgment to be presented to board of supervisors.
 452. Duty of supervisors thereupon.
 453. Treasurer must pay judgment against county.
 454. Execution not to issue without leave of Court—Leave, when granted.

SEC. 446. The following officers may prosecute actions in their official capacity:

Who may sue

The Board of Supervisors of a County :

The Trustees of a School District :

Any organized department of a Municipal Incorporation, having a board of officers in charge of a particular branch of public service, and especially authorized by statute to prosecute. In such action, the plaintiffs may be designated by their official name, or the action may be brought in the name of the body, in whose behalf the action is brought.

SEC. 447. Every such action shall be either,

When persons may sue

1. On a contract made with them in their official capacity;

or,
 2. To enforce a liability, or a duty enjoined by law in favor of such officers, or the body represented by them; or,

3. To recover a penalty or forfeiture given to such officers or body; or,

4. To recover damages for an injury to their official rights or property.

SEC. 448. When an organized department of a Municipal

(1) See Title 13, Sec. 350.

Real party
in interest

Corporation, is authorized by statute to sue, it shall, for purposes of the action, be deemed the real party in interest, though the corporation, of which it is a department, be the party ultimately to be benefitted by the action, or responsible for any loss incurred therein.

Action how
brought

SEC. 449. Any action may be brought against the officers mentioned in section 441, in their official capacity, or against the body they represent, either upon a contract made by such officers in their official capacity, and within the scope of their authority, or for an injury to the rights of the plaintiff, arising from some act or omission of such officers, or of the body represented by them.

Action when
brought

SEC. 450. The actions authorized by this title may be brought by or against the officers mentioned in section 441, upon a cause of action which accrued during the term of their predecessors, as well as during their own term of office, and when brought, may be continued by or against the successors in office, of the parties, whose names may for that purpose be substituted in the action.

Certificate of
judgment pre-
sented

SEC. 451. If judgment for the recovery of money, be rendered against a County, or the Board of Supervisors of a county, on account of the liability of such county, and the judgment be not satisfied, or proceedings thereon stayed by appeal, or otherwise, before the next annual meeting of the Board of Supervisors of the county, a certified copy of the judgment, may be presented to the Board of Supervisors at their annual meeting.

Supervisors

SEC. 452. The Board of Supervisors shall, thereupon, cause the amount due on the judgment, with interest from the time of the recovery, until the first Monday in February after such meeting, to be added to the tax of the county, for whose liability the same was recovered, and the same shall be collected as other contingent charges of the county.

Treasurer pay
judgment

SEC. 453. The treasury of a county against which, or against whose officers, a judgment shall have been recovered, for a liability of the county, the execution of which has not been stayed upon appeal, shall, upon demand, and the delivery to him of the certified copy of the docket of the judgment, pay the amount due thereon, if there be sufficient money of the county in his hands, not otherwise specifically appropriated. If he fail to do so, he shall be personally liable for the amount, unless the collection thereof, be afterwards stayed upon appeal.

SEC. 454. Execution shall not be issued on a judgment mentioned in sections 446 and 448 of this title, without leave of the Court, nor shall leave be granted until the Court shall be satisfied that payment has been demanded of the proper county officers, as provided in the last two sections, and that the board of supervisors have wrongfully omitted to include the amount in the tax list, as provided in section 447; when execution shall be issued, the property of the county only shall be liable thereon. Execution not-
issued &c

ACTIONS RELATING TO REAL PROPERTY.

1. Proceedings to compel the determination of claims to real estate.
2. Partition of real property.
3. Actions for nuisance, waste, &c.

1. PROCEEDINGS TO COMPEL THE DETERMINATION OF CLAIMS TO REAL ESTATE.

SECTION 455. Action to determine adverse claim to real property—by whom brought.

456. If defendant disclaim, no costs allowed.

457. In action to recover dower, denial of right must be shown.

458. Proceedings, when right terminated during pendency of action.

459. New trial may be had.

460. When court may order a third trial.

461. Judgment how entered after new trial—Restitution ordered, if execution on prior judgment.

462. Damages—how much may be recovered.

463. Court may allow survey of property to be made.

464. Order for survey—what to contain.

465. A mortgage not a conveyance.

466. Purchaser of land may recover for injury after sale.

467. A sale of land, pending the action, shall not prejudice rights.

SEC. 455. An action may be brought by any person in possession, by himself or his tenant of real property, against any person who shall claim an estate or interest therein, adverse to him, for the purpose of determining such adverse claim, estate or interest. Action, by
whom brought.

SEC. 456. If the defendant in such action, shall disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs. No costs al-
lowed

SEC. 457. In an action for the recovery of dower, before

To recover
dower admeasurement, or by a tenant in common, or joint tenant of real property, against a co-tenant, the plaintiff must show, in addition to the evidence of his right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial.

Proceedings
when termina-
ted SEC. 458. In an action for the recovery of specific, real or personal property, when the plaintiff shall show a right to recover, at the time the action was commenced, but if it appears that such right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact, and the plaintiff may recover damages for withholding the property.

New trial SEC. 459. Any person against whom a judgment for the recovery of specific real property shall be rendered, may within six months after written notice of the judgment, upon the payment of all costs and damages recovered thereby demand another trial, by notice in writing to the adverse party, or his attorney in the action, and thereupon the action may be brought to trial by either party.

Court order a
new trial SEC. 460. If on a second trial, as provided in the last section, the judgment be to the same effect as on the first, no further trial shall be had, unless the Court in its discretion, on motion by the party, as to whom the judgment last rendered is less favorable than the first, order a third trial.

Judgment how
entered SEC. 461. The judgment given on a trial to be had under the last two sections, shall be annexed to the judgment roll of the former trial, and the judgment last given shall be the final determination of the rights of the parties. If a prior judgment shall have been executed, restitution shall be ordered as the last judgment may determine the rights of the parties, and the same may be enforced by execution.

Damages SEC. 462. Damages for withholding the property recovered shall in no case exceed the fair value of the property, exclusive of the use of improvements made by the defendant for a period not exceeding six years; and when permanent improvements shall have been made by a defendant or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value thereof shall be allowed as a set-off against the damages of the plaintiff for the use of the property.

Survey of pro
perty SEC. 463. The Court in which an action shall be pending for the recovery of real property may on motion, upon notice by either party and for cause shown, grant an order allowing

to such party the right to enter upon the property, and make survey and measurement thereof for the purpose of the action.

SEC. 464. The order shall describe the property, and a copy thereof shall be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and make such survey and measurement, but if any unnecessary injury be done to the property he shall be liable therefor. Order for survey

SEC. 465. A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure. Mortgage not a conveyance

SEC. 466. When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after the sale and before possession shall be delivered under the conveyance. Purchaser may recover

SEC. 467. An action for the recovery of real property, against a person in possession or in receipt of the rents and profits thereof, shall not be prejudiced by an alienation made by such person either before or after the commencement of the action; but in such case, if the defendant have no property sufficient to satisfy the damages recovered for the withholding of possession, such damage may be collected by action against the purchaser. A sale of land shall not prejudice rights

PARTITION OF REAL PROPERTY.

- SECTION 468. Action to partition real property allowed.
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479. Tenants in dower, &c. not affected.
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482. Where part is sold, if life estate, to be set off in the remainder.

- 483. Before sale, creditors may be made parties.
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- 510. What the conveyance shall be a bar of.
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- 517. Guardian of insane person, when qualified to receive share of such person.
- 518. Guardian may consent to partition.
- 519. State may be made party.
- 520. Costs of partition how allowed.

Action to partition real property allowed

SEC. 468. When several persons hold and are in possession of real property as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance for life or years, an action may be brought by one or more of such persons in the District Court of the proper county, for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property or a part of it, if it appears that a partition cannot be made without great prejudice to the owners.

SEC. 469. The summons shall be addressed by name to all the joint tenants, or tenants in common, who are known, and generally to all persons unknown, having, or claiming an interest in the property.

To whom summons addressed

SEC. 470. The interest of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly as far as known to the plaintiff, and if any one or more of the parties or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance, depend upon executory devise or the remainder be a contingent remainder so that such parties cannot be named, that fact shall be set forth in the complaint.

Complaint how to set forth interests of parties

SEC. 471. The plaintiff may at his option make creditors, having specified or general lien upon the property, or upon any particular portion thereof, parties to the action.

Creditors may be parties

SEC. 472. When the lien shall be on an undivided interest or estate of any of the parties, such lien, if partition be made, shall be henceforth a charge only on the share assigned to such party, but such share shall be first charged with its first proportion of the cost of the partition in preference to such lien.

Lien on individual shares

SEC. 473. If a party having a share or interest be unknown, or either of the known parties reside out of the State, or cannot be found therein, and such fact be made to appear by affidavit, the summons may be served on such absent or unknown party by publication, directed by the Court or Judge in the manner hereinbefore prescribed. When the publication shall be made, the summons as published shall be accompanied by a brief description of the property which is the subject of the action.

Unknown owners made parties &c

SEC. 474. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action. And where a defendant shall fail to answer, or where the sale of the premises shall be necessary, the title shall be ascertained by proof, to the satisfaction of the Court, before the judgment for partition or sale shall be given.

Rights may be determined

SEC. 475. If it be alleged in the complaint and established by evidence to the satisfaction of the Court that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may

Court may order sale or partition

order a sale thereof, and for that purpose may appoint one or more commissioners, otherwise, upon the requisite proofs being made, it shall order a partition according to the respective rights of the parties as ascertained by the action and appoint three commissioners thereof, and shall designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained.

How to make partitions

SEC. 476. In making the partition, the commissioners shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the Court, designate the several portions by proper land marks, and may employ a surveyor, with the necessary assistant to aid them therein.

Report proceedings

SEC. 477. The commissioners shall make report to the Court of their proceedings, specifying the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

Effect of judgment

SEC. 478. The Court may confirm or set aside the report, and if necessary appoint new commissioners; upon the report being confirmed, judgment shall be rendered, that such partition be effectual forever, which judgment shall be binding and conclusive :

1. On all the parties named therein and their legal representatives who have at the time any interest in the property, divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder, or inheritance of such property, after the determination of a peculiar estate therein, or who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in an individual share thereof, as tenants for years, for life, by the curtesy, or in dower.

2. On all persons interested in the property who may be known, to whom notice shall have been given of the application or partition, by the publication directed by section eighty-two of Title six ; and,

3. On all other persons claiming from such parties or persons or either of them.

Tenants in dower not affected

SEC. 479. But such judgment and partition shall not affect tenants or persons having claims as tenants in dower, by the curtesy, or for life, to the whole of the property which shall be the subject of the partition ; nor can such judgment

and partition preclude any person except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition is made.

SEC. 480. The expenses of the commissioners, including those of surveyor and his assistants, when employed, shall be ascertained and allowed by the Court, and the amount thereof, together with the fees allowed by law to the commissioners, shall be paid by the plaintiff, and may be allowed as part of the charges. Plaintiff to pay expenses

SEC. 481. If the commissioners report to the Court that the property, of which partition shall have been directed, or any distinct portion thereof shall be so situated that a partition thereof cannot be made without great prejudice to the owners, and the Court shall be satisfied that such report is correct, it may thereupon, by an order, direct the commissioners to sell the property or portions so situated: Sale, when ordered

SEC. 482. When a part of the property only shall be ordered to be sold, if there be an estate by the curtesy, in dower, or for life, or years, in an undivided share of the property, the whole of said estate may be set off in any part of the property not ordered to be sold. Life estate to be set off

SEC. 483. Before the making of an order for sale, where the creditors having specific liens have not been made parties, the Court, on the motion of either party, shall direct the plaintiff to amend his complaint if necessary, by making every person having a specified lien on the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise, a party of the action. Creditors may be made parties

SEC. 484. The plaintiff shall produce to the Court the certificate of the Clerk of the District Court, where the property is situated, showing whether there are any general liens by judgment upon the property or any part thereof. Show liens on the property

SEC. 485. Unless it be made to appear to the Court, by the certificate of the Clerk, pursuant to the last section, that there are outstanding no general liens upon the property, or on any share or parcel thereof, the Court shall order a reference to ascertain them. But if it shall appear by the certificate, that there are outstanding of record, such general liens, the Court shall appoint a commissioner to ascertain whether such liens have been paid, or if not paid, what amount remains due, or secured by them respectively, and the order of priority in which they are entitled to be paid out of the property. Reference as to liens

Creditors to
make proof

SEC. 486. The plaintiff shall cause a notice to be served at least ten days before the time for appearance, on each person having such general liens, to appear before the commissioner, at a specified time and place, to make proof by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely, on his judgment.

Duty of com-
missioners

SEC. 487. The commissioner shall receive the evidence and report the names of the creditors whose liens are established, the amounts thereof, and their priority, respectively, and if such liens shall be contingent, he shall specify them. He must attach to his report the proof of service of the notices, and the affidavits and copies of other evidence before him.

May have re-
port corrected

SEC. 488. Any creditor having a lien, and being dissatisfied with the report of the commissioner, may move the Court to correct it at any time before distribution of the proceeds of sale, on ten days notice to the plaintiff, and the other persons in whose favor liens are reported, and thereupon the Court may correct the report on the evidence reported, or if necessary, may order a new reference of the whole or of any part of the matter. When confirmed, the report shall be conclusive of the rights of the several creditors on whom notice was served.

Proceeds of
sale

SEC. 489. The proceeds of the sale of the incumbered property shall be applied, under the direction of the Court, as follows :

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the commissioner.
3. To satisfy and cancel of record the several liens, in their order of priority, by payment of the sums due, and to become due, the amount remaining due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares.

Sale not de-
layed

SEC. 490. The proceedings, to ascertain the amount of incumbrances, and to determine their priority, as above provided, or those herein authorized, to determine the rights of parties to funds paid into Court, shall not delay the sale nor affect any other party whose rights are not involved in such proceedings.

SEC. 491. The proceeds of sale, and the securities taken by the commissioners on any part thereof, may be distribu-

ted by them to the persons entitled thereto whenever the Court so directs ; but in case no direction shall be given, all such proceeds and securities shall be paid into Court, or be deposited as required by law, or directed by the court.

Securities

SEC. 492. When the proceeds of sale of any shares or parcels, belonging to persons who have become parties to the action, and who are known, shall be paid into Court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the Court ; further testimony may be taken in Court, or by a commissioner, at the discretion of the Court, and the Court may if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

Litigating amount shares.

SEC. 493. All sales of real property made by commissioners under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution ; the notice shall state the terms of the sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or specific lien, that shall be stated in the notice.

Sales at auction

SEC. 494. The Court shall, in the order of sale, direct the terms for credit which may be allowed for the purchase money, of any portion of the premises, of which it may direct a sale on credit, and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, parties out of the State, or tenants in dower, or by the curtesy, or for life, or years, when the estate of such tenants are ordered to be sold.

Terms of sale Securities

SEC. 495. The commissioners may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, on such parts of the property, as are directed by the Court to be sold on credit, in the name of the Clerk of the District Court, and his successor in office, and for the shares of any known owner of full age, in the name of such owner.

Securities for purchase money

SEC. 496. When the estate of a tenant in dower, or by the curtesy, or for life, or years, in the whole or any part of the property in question, has been admitted by the parties, or ascertained by the Court to be existing at the time of the order of sale, and the person entitled to such estate has been made a party to the action, such estate may be first set

Estate for life.

off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the Court, a due regard to the interest of all the parties require that such estate be sold, the sale may be so ordered.

Title by sale

SEC. 497. If a sale of the property, including such estate, shall be ordered, the estate and interest of every such tenant or person shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property, discharged from all claims, by virtue of such estate or interest, whether the same be to the individual share of a joint tenant, or tenant in common, or to the whole, or any part of the property sold.

Tenants in dower

SEC. 498. The persons entitled to such estate, in dower, tenancy by curtesy, or tenancy for life or years, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument under seal duly acknowledged or proved, in the same manner as deeds for the purpose of record.

Sum deposited in court

SEC. 499. If such consent be not given at or before the report of sale, the Court shall ascertain and determine what proportion of the proceeds of the sale, deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower, by the curtesy, or for life, and shall order the same to be deposited in Court for that purpose.

Proportions of proceeds

SEC. 500. The proportions of the proceeds of the sale to be invested, shall be ascertained and determined in the several causes as follows:

1. If an estate in dower be included in the order of sale its proportions shall be one-third of the proceeds of the sale of the property, or of the sale of the individual share of such property, upon which the claim of dower existed:

2. If an estate by the curtesy, or other estate for life or years, be included in the order of sale, its proportion shall be the whole proceeds of the sale of the property or of the sale of the individual share thereof in which such estate may be.

And, in all cases, the proportion of the expenses of proceedings shall be deducted from the proceeds of the sale.

SEC. 501. If the persons entitled to such estate in dower:

by the curtesy, or for life or years, be unknown, the Court shall provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

Unknown tenants in dower

SEC. 502. In all cases of sales in partition, when it shall appear that a married woman has an inchoate right of dower in any of the property divided or sold, or that any person has a vested or contingent future right or estate therein, the Court shall ascertain and settle the proportional value of such inchoate, contingent or vested right or estate according to the principles of law applicable to annuities and survivorships, and shall direct such proportion of the proceeds of the sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Inchoate rights

SEC. 503. A married woman may release such right, interest or estate to her husband, and acknowledge the same in the manner required by law in respect to the acknowledgment of deeds by married women, before any officer authorized to take acknowledgment of deeds, or, if executed out of this State, before any officer residing in the state, territory district or county where the acknowledgment is made, who is authorized to take the acknowledgment of deeds to be recorded in this State. Upon the release, the share of the proceeds of the sale arising from her contingent interest shall be paid to her husband; and the release, or the payment, investment or otherwise securing of a share of the proceeds of a sale, shall be a bar against such right, estate or claim.

Dower how released

SEC. 504. The terms of the sale shall be made known at the time; and if the premises consist of distinct farms or lots they shall be sold separately.

Terms of sale published

SEC. 505. Neither of the commissioners, nor any person for the benefit of either of them, can be interested in the purchase, nor the guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section, shall be void.

Who may not purchase

SEC. 506. After completing the sale, the commissioners shall report the same to the Court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any taken; the report shall be filed in the office of the Clerk of the District Court of the county where the party shall be situated.

Commissioners to report sale

SEC. 507. If the sale be confirmed by the Court, an order shall be entered, directing the commissioners to execute conveyances, and take securities pursuant to such sale, which they are authorized to do; such order may also give directions to them respecting the disposition of the proceeds of the sale.

SEC. 508. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the commissioners may take his receipt for so much of the proceeds of the sale as belongs to him, and shall also pay over to the plaintiff or his attorney, and take his receipt for the costs and charges of the action.

SEC. 509. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons have been served as is directed by Section 351 of Title 13, and against all persons having claims from them or either of them.

SEC. 510. The conveyances shall also be a bar against all persons having specific or general liens or incumbrances, by judgment, on any undivided share or interest in the premises sold, who shall have been served with notice, as prescribed by Sections 352 and 353 of Title 13, and also against all persons having specific liens of any undivided share or interest therein, who shall have been made parties to the action; but no creditor having such specific lien can be affected by the sale or conveyance, unless he has been made a party.

SEC. 511. When there shall be proceeds of sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, or when there shall be proceeds arising from the sale of an estate subject to the prior estate of a tenant in power, or by the curtesy or tenant for life, or years, which shall be paid into Court, or deposited with an officer by order of the Court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto.

SEC. 512. When security for the proceeds of sale shall be taken, or, when an investment of any such proceeds shall be made, it shall be done, except as herein otherwise provided, in the name of the Clerk of the District Court of the county where the papers are filed, and his successors in office, who,

shall hold the same, for the use and benefit of the parties interested, subject to the order of the Court.

SEC. 513. When security shall be taken by the commissioners on a sale, and the parties interested in such security, by an instrument in writing under their hands, delivered to the commissioners, agree upon the shares and proportions to which they shall be respectively entitled, or when such shares and proportions have been previously adjudged by the Court, such securities shall be taken in the names of, and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor; such agreement and receipt shall be returned and filed with the clerk.

SEC. 514. The clerk in whose name a security shall be taken, or by whom an investment shall be made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the Court may direct; and shall file in his office, all securities taken, and keep an account, in a book provided and kept for that purpose, in the clerk's office free for inspection by all persons, of investments, and moneys received by him thereon, and the disposition thereof.

SEC. 515. When it shall appear that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interest of some of them, the Court may adjudge compensation to be made by one party, to another for equality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant, it shall appear that such child has personal property sufficient for that purpose, and that such child's interest will be promoted thereby.

SEC. 516. When the shares of an infant shall be sold, the proceeds of the sale may be paid by the commissioners making the sale, to its general guardian, or to the special guardian appointed for such child in the action, if such general or special guardian, before the payment of such share into Court shall have given the security required by statute.

SEC. 517. The Guardian who may be entitled to the custody and management of the estate of an insane person, or other person, adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive in behalf of such person his share of the pro-

ceeds of such real property, from the commissioners, if the Guardian before the money is paid into Court, shall have executed with sufficient sureties, an undertaking approved by a Judge of the District Court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Guardian consent to partition
 SEC. 518. The general Guardian of an infant, and the Guardian entitled to the custody and arrangement of an estate of an insane person, or other person adjudged incapable of conducting his own affairs, who shall be entitled to real estate, held in joint tenancy, or in common, or in any other manner, to authorize his being made party to an action for the partition thereof, may consent to a partition, without action and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order from the Court.

State made party
 SEC. 519. The State may be made a party to an action for the sale or partition of real property, in which case, the summons and complaint shall be served upon the Attorney General, who shall appear on behalf of the State.

Costs of partition how allowed
 SEC. 520. The costs of partition, including fees of commissioners, and other disbursements, shall be paid by the parties respectively entitled to share, in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment; in that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against the parties separately. Where however a litigation shall arise between some of the parties only, the Court may require the expense of such litigation, to be paid by the parties thereto, or any of them, as shall be equitable.

3.—ACTIONS FOR NUISANCES, WASTE, &C.

- SECTION 521. Nuisance defined, action thereon.
 522. Who may bring action for waste.
 523. What judgment allowed.
 524. Damages for wilfully cutting trees.
 525. When damages mitigated.
 526. What can be recovered for cutting timber for highway.
 527. Damages for forcible eviction.
 528. Damages for three times the amount may be recovered in case of forcible eviction of party with good title.

SEC. 521. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action; such action may be brought by any person whose property shall be injuriously affected, or whose personal enjoyment shall be lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Nuisance defined, action therein

SEC. 522. If a Guardian tenant by the curtesy in dower for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person injured by the waste may bring an action against him therefor, and for the stay thereof, in which action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the property.

Who may bring action for waste

SEC. 523. Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice.

What judgment allowed

SEC. 524. Every person who shall cut down or carry off any wood or underwood, tree, or timber, or girdle or otherwise injure any tree, timber, or shrub, on the land of another person, or in the street or highway in front of any person's house, village or city or cultivated grounds, or on the commons, or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action in any Court having jurisdiction, except as provided in the next section.

Damages for wilfully cutting trees

SEC. 525. If, upon trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that of the person in whose service, or by whose direction, the act was done, judgment shall be given for only the single damages assessed in the action.

When damages mitigated

SEC. 526. Nothing in the last two sections authorizes the recovery of more than the just value of the timber taken from uncultivated wood-land for the repair of a public highway or bridge upon the land, or adjoining it.

What can be recovered &c

Damages for
forcible evic-
tion

SEC. 527. If a person be put out of real property in a forcible manner, without lawful authority, or being so put out, be afterwards kept out by force, recover damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed.

Damages may
be recovered

SEC. 528. In case of forcible entry or forcible detention, if a person claiming in good faith under cover of title to be rightfully in possession so put out, or kept out, recover damages therefor, judgment may be entered in his favor for three times the amount at which the actual damages are assessed.

OF SPECIAL PROCEEDINGS.

1. Designation of Parties and Judgment.
2. Of Writs of Mandamus,
3. Of Writs of Prohibition.
4. Of the Writ of *Habeas Corpus*.

1.—DESIGNATION OF PARTIES AND JUDGMENT.

- SECTION 529. Parties, how designated in special proceedings.
530. Judgment same as in civil actions.

Parties, how
designated

SEC. 529. The party prosecuting a special proceeding shall be known as the plaintiff, and the adverse party as the defendant.

Judgment
same as civil
actions

SEC. 530. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action, are applicable to similar acts in a special proceeding.

2—OF WRITS OF MANDAMUS. (1)

- SECTION 531. Mandamus, how regulated.
532. When and to whom issued.
533. Not issued when remedy in ordinary course of law.
534. Writ alternative or peremptory.
535. Proceedings.
536. Answer as in civil action.
537. If no answer, peremptory writ allowed.
538. No pleadings but writ and answer.
539. } Issue of fact, how tried.
540. }
541. Trial same as in civil action.
542. If Judgment for Plaintiff, damages recovered.
543. Where fine may be imposed.
544. District Courts to have original Jurisdiction.

(1) See Sec. 332, Title 13.

SEC. 531. The Writ of Mandamus is regulated as in this Title prescribed. Mandamus,
how regulated:

SEC. 532. It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of its functions, it cannot control judicial discretion. When and to
whom issued

SEC. 533. The Writ shall not be issued, in any case, where there is a plain, speedy and adequate remedy in the ordinary course of the law. It shall be issued on the information of the party beneficially interested. Not issued in
ordinary
course of
law

SEC. 534. The Writ is either alternative or peremptory. The alternative Writ shall state concisely the facts, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the Writ, or at some other specified time, he do the act required to be performed, or show cause before the Court, out of which the Writ issued, at a specified time and place, why he has not done so; and that he then and there return the Writ, with his certificate of having done as he is commanded. The Peremptory Writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, shall be omitted. When the right to require the performance of the act shall be clear, and it shall be apparent that no valid excuse can be given for not performing it, a Peremptory Mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued. Writ alterna-
tive or per-
emptory

SEC. 535. The motion for the writ, the allowance and the service thereof, and the enforcement of obedience thereto, shall be such as is provided in case of Writs of Review. Proceedings

SEC. 536. On the return day of the alternative writ, or such further day as the Court may allow, the party on whom the writ shall have been served, may show cause by answer, made in the same manner as an answer to a complaint in a civil action. Answer

SEC. 537. If no answer be made, a peremptory mandate shall be allowed against the defendant; if an answer be made containing new matter, the same shall not in any respect conclude the plaintiff, who may, on the trial or other proceedings, avail himself of any valid objection to its sufficiency; or may countervail it by proof, either in direct denial, or by way of avoidance. Writ allowed

No pleadings SEC. 538. No other pleading or written allegation shall be allowed than the writ and answer; these shall be the pleadings in the case, and have the same effect, and shall be construed and may be amended in the same manner as proceedings in a civil action, and the issues thereby joined, shall be tried and the further proceedings had, in the same manner as in civil action.

Issue of fact SEC. 539. Issues of fact, joined in the case of mandamus where the same is issued out of the Supreme Court, may be tried as provided in the next section.

SEC. 540. When the parties consent thereto, the Court may try the issues of fact arising upon the pleadings or the same may be referred, as in civil actions in the District Court; but when either party refuses to consent to a trial, other than a trial by jury, the said Supreme Court may order a jury of twelve men, (possessing the requisite qualifications for jurors in the District Courts,) to be summoned to appear forthwith, before the said Court, to try the said issue; and in case any of the jurors, so summoned, should for any cause be rejected, or be disqualified to act as a juror in the case, the Court may order others to be summoned until a Jury shall be obtained.

§§ Trial same as in civil actions SEC. 541. When a Jury shall be empaneled, the same proceedings shall be had as in the trial of a civil action in the District Court.

Damages recovered SEC. 542. If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the Court, or Jury, or by Referees, as in a civil action, together with costs and charges, and a peremptory mandamus shall also be awarded without delay.

Fine imposed SEC. 543. Whenever a peremptory mandamus shall be directed to a public officer, body, or board, commanding the performance of any public duty specially enjoined by law, if it appear to the Court, that such officer or any member of such body or board has, without just excuse, refused or neglected to perform the duty so enjoined, the Court may impose a fine not exceeding two hundred and fifty dollars, upon every such officer or member of such body or board; such fine, when collected, shall be paid into the State Treasury, and the payment of such fine shall be a bar to an action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

SEC. 544. The several District Courts of this State shall have original jurisdiction in cases of mandamus, except in cases where such writ is directed to one of the Judges of said District Court in his official capacity, and the said Court shall proceed upon all such cases, in the same manner as in a civil action, except as hereinbefore otherwise provided.

3.—WRITS OF PROHIBITION.

SECTION 545. Writ of Prohibition to issue from Supreme Court—where issued—contents thereof.

546. Service and return.

547. Proceedings when party shall adopt return.

548. Proceedings when party shall not adopt return.

549. Court to render judgment.

550. Prohibition absolute, when granted.

SEC. 545. Writs of Prohibition shall only be issued out of the Supreme Court, and such writs shall be applied for upon affidavit by motion to the Court, or a Judge thereof in vacation, in the same manner as Writs of Mandamus; and if the cause shown shall appear to the Court or Judge to be sufficient, a writ shall thereupon be issued, which shall command the Court and party, or officer to whom it shall be directed, to desist and refrain from any further proceedings in the suit or matter specified therein, until the next term of said Supreme Court, or the further order of the Court thereon; and to show cause at the next term of said Court, or some day to be named in the same term at the option of the Court, if issued in term time, why they should not be absolutely restrained from any further proceeding in such suit or matter.

SEC. 546. Such writ shall be served upon the Court and party or officer, to whom it shall be directed, in the same manner as a Writ of Mandamus; and a return shall in like manner be made thereto by such Court, which may be enforced by attachment.

SEC. 547. If the party to whom such Writ of Prohibition shall have been directed, shall, by an instrument in writing signed by him and annexed to such return, adopt the same return, and rely upon the matters therein contained, as sufficient cause why such Court shall not be restrained, as mentioned in said writ, such party shall thenceforth be deemed the defendant in such matter, and the person prosecuting such writ may take issue, or demur to the matters so relied upon by such defendant; and the like proceedings shall be had for

the trial of issues of law or fact joined between the parties, and for the rendering of judgment thereupon, as in a mandamus.

Party not a dopt. return **Sec. 548.** If the party to whom such Writ of Prohibition shall be directed, shall not adopt such return, as above provided, the party prosecuting such writ shall bring on the argument of such return, as upon a rule to show cause; and he may, by his own affidavit, and other proofs, controvert the matters set forth in such return.

Judgment **Sec. 549.** The Court, after hearing the proofs and allegations of the parties, shall render judgment either that a prohibition absolute, restraining the said Court and party or officer, from proceeding in such suit or matter do issue, or a writ of consultation, authorizing the Court and party to proceed in the suit or matter in question, and may make and enforce such order in relation to costs and charges, and the amount thereof, as may be deemed just.

Prohibition **Sec. 550.** If the party to whom such first writ of prohibition shall be directed, shall adopt the return of the Court thereto, as above provided, and judgment shall be rendered for the party prosecuting such writ; a prohibition absolute shall be issued, but if judgment be given against such party, a writ of consultation shall be issued as above provided.

4.—OF THE WRIT OF HABEAS CORPUS.

- SECTION 551.** Who may obtain Writ of Habeas Corpus.
 552. Who not entitled to it.
 553. Application how and to whom made.
 554. When proof that no officer is in proper county, required.
 555. Petition what to contain.
 556. Writ to be granted without delay.
 557. Form of writ.
 558. Writ not discharged for defect in form.
 559. Penalty if officer refuse to grant writ.
 560. Return what to contain.
 561. Officer to bring person in custody before the Court.
 562. If return be insufficient, attachment may issue.
 563. If sheriff neglect to return writ, attachmen to issue to coroner.
 564. Precept to sheriff.
 565. Precept, how executed.
 466. Officer to inquire into cause of imprisonment.
 567. If no legal cause, person to be discharged.
 568. When party to be remanded.
 569. In what cases party to be discharged.
 470. Legality of judgment or order not to be inquired into.

571. On commitment for criminal offence, how to proceed.
 572. If party remanded, to whose custody given.
 573. Until judgment, party how kept.
 574. Notice when to be given to adverse party.
 575. Notice when to be given to District Attorney.
 576. Return may be controverted.
 577. In case of sickness, how to proceed.
 578. Obedience to writ or order enforced by attachment.
 579. Officer not liable to action for obeying writ.
 580. Party, once discharged, cannot be again imprisoned for same cause, when not deemed same cause.
 581. Penalty for imprisoning person, who has been discharged.
 582. }
 583. } Transferring party to elude writ, a misdemeanor.
 584. Person aiding and assisting, guilty of a misdemeanor.
 585. Punishment on conviction.
 586. In case of danger that party will be carried off, warrant may issue.
 587. Arrest of person having custody of party.
 588. Warrant and proceedings.
 589. Person to be committed or bailed.
 590. Penalty for refusing to deliver copy of order.
 591. Writ when made returnable.
 592. Writ to be endorsed.
 593. Writ by whom served.
 594. }
 595. } Writ how served.
 596. Duty of officer to obey writ. Charges of bringing up prisoner may be ordered to be paid; when return to be made. Writ to bring up prisoner to testify. Common-law provisions abrogated.

Sec. 551. Every person imprisoned or otherwise restrained of his liberty, except in the cases in the following section specified, may prosecute a Writ of Habeas Corpus according to the provisions of this Title, to obtain relief from such imprisonment or restraint, if it shall prove unlawful. Habeas corpus

Sec. 552. The following persons shall not be entitled to prosecute such writ:

1. Persons committed or detained by virtue of any process issued by any Court of the United States or any Judge thereof, in cases where such Court or Judge has exclusive jurisdiction under the Laws of the United States, or shall have exclusive jurisdiction by the commencement of suits in such Court. Who not entitled

2. Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree.

But no order of commitment for any alleged contempt or upon proceedings as for contempt, to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section: nor shall any attachment or other process issued upon such order be deemed an execution within the meaning of this section.

Application how and to whom made SEC. 553. Application for such writ shall be made by petition, signed either by the party for whose relief it is intended or by some person in his behalf, as follows:—To any Judge of the Supreme or District Court being within the county where the prisoner is detained: or, if there be no such officer within such county, or if he be absent or for any cause incapable of acting, or have refused to grant such writ,—then, to some officer having such authority residing in any adjoining county.

No officer in county SEC. 554. Whenever application for any such writ shall be made to any officer not residing within the county where the prisoner shall be detained, he shall require proof by the oath of the party applying, or by other sufficient evidence, that there is no officer in such county authorized to grant the writ; or if there be one, that he is absent, or has refused to grant such writ; or for some cause, to be specially set forth, is incapable of acting, and if such proof be not produced, the application shall be denied.

SEC. 555. The petition must state in substance:

- Petition**
1. That the person in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming both parties, if their names be known, or describing them if they are not.
 2. That such person is not committed or detained by virtue of any process, judgment, decree, or execution, specified in section 252.
 3. The cause or pretense of such confinement or restraint, according to the best of the knowledge and belief of the party.
 4. If the confinement or restraint shall be by virtue of any warrant, order, or process, a copy thereof shall be annexed, or it shall be averred that by reason of such prisoner being removed or concealed before the application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused.

5. If the imprisonment be alleged to be illegal, the petition shall also state in what the alleged illegality consists.

6. It shall be verified by the oath of the party making the application.

SEC. 556. Any officer empowered to grant any writ applied for under this chapter, to whom such petition shall be presented, shall grant such writ without delay, unless it shall appear from the petition itself, or from the documents annexed, that the party applying therefor is, by the provisions of this Title, prohibited from prosecuting such writ.

Writ granted

SEC. 557. Every writ of *habeas corpus*, issued under the provisions of this Title, shall be substantially in the following form :

Form of writ

In the name of the State of Minnesota, (1) to the sheriff of, &c., (or to A. B.)

"You are hereby commanded to have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by what soever name the said C. D. shall be called or charged, before E. F., Judge of the District Court, as &c. (or immediately after the receipt of this writ,) to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ. "Witness. &c."

SEC. 558. Such writ of *habeas corpus* shall not be disobeyed for any defect or form. It shall be sufficient:

Defect in writ

1. If the person having the custody of the prisoner be designated either by his name or office, if he have any, or by his own name, or if both such names be unknown, or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ, shall be deemed the person to whom it was directed, although it may be directed to him by a wrong name or description, or to another person.

2. If the person directed to be produced, be designated by name, or if his name be uncertain or unknown, he may be described in any other way, so as to designate the person intended.

SEC. 559. If any officer, authorized by the provisions of this chapter, to grant writs of *habeas corpus* shall willfully refuse to grant such writ when legally applied for, he shall forfeit for every such offence, to the party aggrieved, one thousand dollars.

Penalty to officer

SEC. 560. The person upon whom any such writ shall

(1) In Majority Report, sec. 905.

have been duly served, shall state in his return plainly and unequivocally:

Return

1. Whether he have or have not the party in his custody or power, or under his restraint, and if he have not, whether he has had the party in his custody, or under his power or restraint, at any time and what time, whether prior or subsequent to the date of the writ.

2. If he have the party in his custody or power, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large.

3. If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited on the return of the writ, to the officer before whom the same is returnable.

4. If the person, upon whom such writ shall have been served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority such transfer took place. The return shall be signed by the person making the same, and except where such person shall be a sworn public officer, and shall make his return in his official capacity, it shall be verified by oath.

Person before
court

SEC. 561. The person or officer on whom the Habeas Corpus shall have been served shall also bring the body of the person in his custody, according to the command of such writ, except in case of the sickness of such person, as hereinafter provided.

Return insuf-
ficient

SEC. 562. If the person upon whom such writ shall have been duly served shall refuse or neglect to obey the same, by producing the party named in such writ and making a full and explicit return to such writ within the time required by the provisions of this Title, and no sufficient excuse shall be shown for such refusal or neglect, it shall be the duty of the officer before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person, directed to the Sheriff of any county in this State, and commanding him forthwith to apprehend such person and to bring him immediately before such officer; and on such person being so brought, he shall be committed to close custody in the jail of

the county in which such officer shall be, until he shall make return to such writ and comply with any order that may be made by such officer in relation to the person for whose relief such writ shall have been issued.

SEC. 563. If a Sheriff of any county shall have neglected to return such writ, an attachment may be directed to any ^{Sheriff neglect to return writ} Coroner or other person to be designated therein, who shall have full power to execute the same: and such Sheriff, upon being brought up, may be committed to the jail of any county other than his own.

SEC. 564. The officer by whom any such attachment shall be issued may, also, at the same time or afterwards, issue a ^{Precept to Sheriff} precept to the Sheriff or other person to whom such attachment shall have been directed, commanding him to bring forthwith before such officer the party for whose benefit such writ shall have been allowed, who shall thereafter remain in the custody of such Sheriff or person until he shall be discharged, bailed or remanded, as such officer shall direct.

SEC. 565. In the execution of such attachment or precept ^{Precept how executed} or either of them, the Sheriff or other person to whom they shall be directed may call to his aid the power of the county, as in other cases.

SEC. 566. The officer before whom the party shall be brought on such writ, shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party—whether the same shall have been upon commitment for any criminal offense or not. ^{Cause of imprisonment}

SEC. 567. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, such officer shall discharge such party from the custody or restraint under which he is held. ^{Person discharged}

SEC. 568. It shall be the duty of the officer forthwith to remand such party, if it shall appear that he is detained in ^{Party remanded} custody either—

1. By virtue of process issued by any Court or Judge of the United States, in a case where such Court or Judge has exclusive jurisdiction: or,

2. By virtue of the final judgment or decree of any competent Court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree: or,

3. For any contempt specially and plainly charged in the commitment by some Court, officer or body having authority to commit for the contempt so charged: and,

4. That the time during which such party may be legally detained has not expired.

What cases
party discharg
ed

SEC. 569. If it appear on the return, that the prisoner is in custody by virtue of civil process of any Court legally constituted, or issued by an officer in the course of judicial proceedings before him authorized by law, such prisoner can only be discharged in one of the following cases:—

1. When the jurisdiction of such Court or officer has been exceeded either as to matter, place, sum, or person.

2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has taken place afterward, the party has become entitled to be discharged.

3. Where the process is defective in some matter of substance required by law, rendering such process void.

4. Where the process, though in proper form, has been issued in a case not allowed by law.

5. Where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; or,

6. Where the process is not authorized by any judgment, order or decree of any Court, nor by any provision of law.

SEC. 570. But no officer, on the return of any Habeas Corpus issued under this Title, shall have power to inquire into the legality or justice of any judgment, decree or execution specified in the preceding second subdivision: nor into the justice or propriety of any commitment for a contempt made by the Court, officer or body, according to law and charged in such commitment as hereinbefore provided.

Legality of
judgment or
order

Commitment

SEC. 571. If it appear that the party has been legally committed for any criminal offence, or if he appears, by the testimony offered with the return, upon the hearing thereof, to be guilty of such an offense, although the commitment be irregular, the officer before whom such party shall be brought shall proceed to let such party to bail, if the case beailable and good surety be offered: or if not, shall forthwith remand such party.

Remanded in-
to custody

SEC. 572. If the party be not entitled to his discharge, and be not bailed, the officer shall remand him to the custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, be legally entitled thereto: if not so entitled, he shall be committed by such officer to the custody of such officer or person as by law is entitled thereto.

SEC. 573. Until judgment be given upon the return, the officer before whom such party shall be brought may either commit such party to the custody of the Sheriff of the county in which such officer shall be, or place him in such care or under such custody as his age and other circumstances may require. Party how kept:

SEC. 574. When it shall appear from the return to any such writ that the party named therein is in custody on any process under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it shall appear that the party so interested, or his Attorney, if he have one—if to be found within the county—shall have had sufficient notice of the time and place at which such writ shall be made returnable. Notice given to party

SEC. 575. When it shall appear from the return, that such party is detained upon any criminal accusation, such officer shall make no order for the discharge of such party, until sufficient notice of the time and place at which such writ shall have been returned, or shall be made returnable, shall be given to the District Attorney, of the county in which such officer shall be, if to be found within the county. Notice given to district attorney

SEC. 576. The party brought before any such officer, on the return of any writ of *habeas corpus*, may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such officer shall proceed in a summary way, to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require. Return controverted

SEC. 577. Whenever from the sickness or infirmity of the person, directed to be produced by any Writ of *habeas corpus*, such person cannot, without danger, be brought before the officer before whom the writ is made returnable, the party in whose custody he is, may state the fact in his return to the writ, verifying the same by his oath; and if such officer be satisfied of the truth of such allegation, and the return be otherwise sufficient, he shall proceed to decide upon such return, and to dispose of the matter; and if it appear that the person detained, is illegally imprisoned, confined, or restrained of his liberty, the officer shall grant a Writ of discharge, commanding those having such person in their cus- In case of sickness

tody, to discharge him forthwith; and if it appear that such person is legally detained, imprisoned, or confined, and is not entitled to be bailed, such officer shall cease from all further proceedings thereon.

Obedience to writ or order enforced SEC. 578. Obedience to any writ of discharge, or to any order for the discharge of any prisoner, granted pursuant to the provisions of this Title, may be enforced by the officer issuing such writ, or granting such order, by attachment, in the same manner as herein provided for a neglect to make a return of a Writ of *habeas corpus*, and with the like effect in all respects; and the person guilty of such disobedience, shall forfeit to the party aggrieved, one thousand two hundred and fifty dollars, in addition to any special damages such party may have sustained.

Officer not liable SEC. 579. No Sheriff or other officer shall be liable to any civil action for obeying any such writ or order of discharge; and if any action shall be brought against such officer, for suffering any person committed to his custody to go at large, pursuant to any such writ or order, he may set up the same in answer, in bar of the action.

Imprisoning twice SEC. 580. No person who has been discharged by the order of any officer, upon a *habeas corpus*, issued pursuant to the provisions of this Title, shall be again imprisoned, restrained or kept in custody, for the same cause; but it shall not be deemed the same cause :

1. If he shall have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offence, by legal order or process of the Court wherein he shall be bound by recognizance to appear, or in which he shall be indicted, or convicted for the same offence, by the legal order or process of the Court wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offence; or,

2. If, after a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner be again arrested on sufficient proof, and committed by legal process for the same offence: or,

3. If in a civil suit the party has been discharged for any illegality in the judgment or process hereinbefore specified, and is afterwards imprisoned by legal process for the same cause of action: or,

4. If in any civil suit, he shall have been discharged from commitment on process, and shall be afterwards committed

on execution in the same cause, or on mesne process in any other cause after such first suit shall have been discontinued.

SEC. 581. If any person shall knowingly recommit, imprison, or restrain of his liberty, or cause to be committed, imprisoned, or restrained of his liberty, for the same cause, except as provided in the last section, any person so discharged, or shall knowingly aid or assist therein, he shall forfeit to the party so aggrieved, one thousand two hundred and fifty dollars; and shall also be deemed guilty of a misdemeanor. Penalty for imprisoning

SEC. 582. Any one having in his custody, or under his power, any person who, by the provisions of this Title, would be entitled to a Writ of *Habeas Corpus*, to inquire into the cause of his detention, who shall with intent to elude the service of any such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor. Transferring party to elude writ

SEC. 583. Any one having in his custody, or under his power, any person for whose relief a Writ of *Habeas Corpus* shall have been duly issued, pursuant to the provisions of this Title, who, with the intent to elude the service of such writ or to avoid the effect thereof, shall transfer such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor. Aiding and assisting

SEC. 584. Every person who shall knowingly aid, or assist in the violation of either of the last two preceding sections, shall be deemed guilty of a misdemeanor. Punishment

SEC. 585. Every person convicted of any offence under either of the last four sections, shall be punished by fine or imprisonment or both, in the discretion of the Court in which he shall be convicted; but such fine shall not exceed one thousand dollars, nor such imprisonment six months. Party carried off

SEC. 586. Whenever it shall appear by satisfactory proof that any one is held by illegal confinement, custody, or restraint, and that there is good reason to believe that he will be carried out of the State, or suffer some irreparable injury before he can be relieved by the issuing of a *habeas corpus*, any officer authorized to issue such writs may issue a warrant under his hand and seal, reciting the facts, and directed to any Sheriff, Constable, or other person, commanding such Arrest of person having party in custody

officer or person to take such prisoner, and forthwith to bring him before such officer, to be dealt with according to law.

SEC. 587. When the proof mentioned in the last section, shall also be sufficient to justify an arrest of the person having such prisoner in custody, as for a criminal offence, committed in the taking or detaining of such prisoner, the warrant shall also contain an order for the arrest of such person for that offence.

Warrant and
proceedings

SEC. 588. Any officer or person to whom such warrant shall be directed, shall execute the same by bringing the prisoner therein named, and the person who detains him, if so commanded by the warrant, before the officer issuing the same; and thereupon the person detaining such prisoner shall make a return in like manner, and the like proceedings shall be had as if a Writ of *habeas corpus* had been issued in the first instance.

Committed or
bailed

SEC. 589. If the person having such prisoner in his custody, shall be brought before such officer as for a criminal offence, he shall be examined, committed, bailed or discharged by such officer, in like manner as in other criminal cases of the like nature.

Refuse copy
of order

SEC. 590. Any officer or other person refusing to deliver a copy of any order, warrant, process or other authority by which he shall detain any person, to any one who shall demand such copy, and tender the fees therefor, shall forfeit two hundred dollars to the person so detained.

Writ returnable

SEC. 591. Every Writ of *habeas corpus* may be made returnable on a day certain, or forthwith, as the case may require. Every such writ shall be endorsed with a certificate that the same has been allowed, and with the date of such allowance, which endorsement shall be signed by the officer allowing the same.

Writ endorsed

SEC. 592. Writs of *habeas corpus* can only be served by an elector of some county within this State; and the service thereof shall not be deemed complete so as to require the bringing up of the prisoner before the officer issuing the same, unless the party serving the same, shall tender to the person in whose custody the prisoner may be, if such person be a Sheriff, Coroner, Constable or Marshall, the fees allowed by law for bringing up such prisoner; nor unless he shall also give a bond to the Sheriff, Coroner, Constable or Marshall, as the case may be, in a penalty double the amount of

the sum for which such prisoner may be detained, if he be detained for any specific sum of money; and if not, then in such sum as the officer granting the writ shall direct, not exceeding one thousand dollars, conditioned that such person shall pay the charges of carrying back such prisoner, if he shall be remanded, and that such prisoner will not escape by the way, either in going to or returning from the place to which he is to be taken; but if such fees be not paid, or such bond be not tendered, the officer to whom the writ is directed, shall make return thereto in the manner required by section 560, and thereupon the officer or Court granting the writ, may order the prisoner to be brought up notwithstanding, or proceed as if he were before him.

SEC. 593. Every Writ of *habeas corpus* issued pursuant to this Title may be served by delivering the same to the person to whom it is directed; if he cannot be found ^{Writ by whom served} it may be served by being left at the jail, or other place in which the prisoner may be confined, with any under officer or other person of proper age, having charge for the time of such prisoner.

SEC. 594. If the person on whom the writ ought to be served, conceal himself, or refuse admittance to the party ^{Writ how served} attempting to serve the same, it may be served by affixing the same in some conspicuous place on the outside, either of his dwelling house, or of the place where the party is confined.

SEC. 595. It shall be the duty of every Sheriff, Coroner, Constable or Marshal, upon whom a Writ of *habeas corpus* shall be served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein described, to obey and return such writ, according to the exigency thereof; and it shall be the duty of every other person, upon whom such writ shall be served, having the custody of the individual for whose benefit the writ shall be issued, to obey and execute such writ according to the command thereof, without requiring any bond or the payment of any charges, unless the payment of such charges shall have been required by the officer issuing such writ.

SEC. 596. Every officer allowing a Writ of *habeas corpus*, directed to any other than a Sheriff, Coroner, Constable, or Marshal, may, in his discretion, require as a duty to be performed, in order to render the service thereof effectual, that ^{Duty of officer &c}

the charges of bringing up such prisoner shall be paid by the petitioner, and in such case he shall, in the allowance of a writ, specify the amount of such charges, so to be paid, which shall not exceed the fees allowed by law to sheriffs for similar services. If the writ be returnable at a certain day, such return shall be made, and such prisoner shall be produced at the time and place specified therein; if it be returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced within twenty-four hours; and the like time shall be allowed for every additional twenty miles. The provisions of the common law in regard to the Writ of *habeas corpus*, treated of in this Title, are hereby abrogated, except so much and such parts thereof as may be necessary to carry into full effect the provisions herein contained; and the authority of courts and officers to award such writ, or to proceed thereon by the common law, shall be exercised in conformity to the provisions of this Act in all cases therein provided. Nothing contained in this Act shall be construed to restrain the power of any Court to issue a Writ of *habeas corpus*, when necessary to bring before them any prisoner for trial, in any criminal case lawfully pending in the same Court, or to bring any prisoner to be examined as a witness, in any suit or proceeding, civil or criminal, pending in such Court, when they shall think the personal attendance and examination of the witness, necessary for the attainment of justice.

FEES OF CERTAIN OFFICERS, AND OTHER PERSONS, GENERAL PROVISIONS TOUCHING FEES.

- SECTION 597. Allowance of Fees.
- 598. Fees of Clerk of the District Court.
 - 599. Fees of Clerk of the Supreme Court.
 - 600. Fees of Commissioners to take testimony.
 - 601. Fees of Judge of Probate.
 - 602. Fees of Executors and Administrators.
 - 603. Fees of witnesses.
 - 604. Fees of Sheriffs, &c.
 - 605. Fees of Coroners.
 - 606. Fees of Constables.
 - 607. When services of Constable performed by another.
 - 608. Fees of Notaries Public.
 - 609. Fees of Justices of the Peace.
 - 610. Costs in civil actions before Justices of the Peace.
 - 611. Justice, when to tax costs.

- 612. No fees for travel of witnesses allowed unless proof.
- 613. When fees allowed for serving subpoena, &c.
- 614. Fees of but two witnesses allowed to prove one fact.
- 615. When fees for copies, &c., not allowed.
- 616. When allowance made for disbursements.
- 617. Charge of service may be disproved.
- 618. Return of Sheriff to be evidence.
- 619. Justice may require Constable to attend trial; his fees.
- 620. Fees of Register of Deeds.
- 621. Fees of Appraisers, Commissioners, &c.
- 622. Fees of Jurors.
- 623. Fees of witnesses and Jurors in Probate Court.
- 624. Fees of Sheriffs and Constables in Probate Court.
- 625. Fees allowed in chancery cases.
- 626. Printer's fees for publishing notices.
- 627. Form of notice.
- 628. Fees of publishing other notices.
- 629. When and how notice of mortgage sale shall be served.
- 630. Officer shall set up table of his fees in his office.
- 631. This Chapter not to apply to special cases.
- 632. "Folio" defined.
- 633. Extortion prohibited.
- 634. When fees not to be taken.
- 635. Penalty.
- 636. Charges for services not actually rendered.
- 637. Prospective costs.
- 638. Allowance for one draft only.
- 639. What not to be computed part of draft.
- 640. Fees paid for certified copies allowed.
- 641. Attorney not allowed fees as witness.
- 642. Officer receiving fees to give receipt in items.
- 643. Fees for administering oath of office.
- 644. Fees allowed to one officer shall be paid to another performing the service.
- 645. When witnesses for State shall receive fees.
- 646. When fees of prosecution to be paid by county.
- 647. Attorney General may issue subpoenas, &c.
- 648. When Clerk to give witness certificate, &c.
- 649. Construction of the two preceding sections.

THE FEES OF CERTAIN OFFICERS.

SEC. 597. For the services mentioned in this Act, hereafter done or performed in the several Courts in this State, by the officers thereof, or in any proceedings authorized by law, the fees hereinafter prescribed, shall be allowed. Allowance of fees

FEES OF CLERKS OF THE DISTRICT COURTS.

SEC. 598. The fees of the Clerks of the District Courts for

any services herein specified, to be rendered by them, shall be as follows :

Fees of clerk
of district
court

For issuing and sealing every writ, fifty cents ; and each exemplification or certificate when required, twenty-five cents.

Entering the return of every writ, and filing such writ, fifteen cents per folio.

Entering an appearance, discontinuance, non-suit, or default, fifteen cents.

Entering every other rule or order, fifteen cents for each folio.

Entering every other rule not-exceeding two folios, ten cents for each folio, and for every additional folio, four cents

For certified copies of rules, the same fees as for entering such rules.

Every report upon an assessment of damages, or other matter referred to him, fifty cents.

Every certificate, twenty-five cents, but not to be allowed for certifying any paper to be a copy, for the copying of which he shall be paid.

Calling and swearing a jury, fifty cents.

Swearing each witness on trial, ten cents; and swearing every constable to take charge of a jury, twelve cents.

Entering recognizance, fifty cents.

Entering every cause in a calendar for the Court, and making a copy thereof for the bar, ten cents.

Receiving and entering a verdict, twenty cents.

Entering every cause or suit without process, fifty cents.

Certified copy of the minutes of a trial when required, fifty cents.

Entering every final judgment, fifty cents.

Entering satisfaction of a judgment, fifteen cents, for each judgment entered.

Drawing a special jury in any cause, fifty cents.

Attendance in striking a special jury, certifying the names selected, and delivering such certificate to each party, fifty cents.

Reading and filing a habeas corpus, certiorari, or writ of error, fifteen cents.

For a subpoena, summons, or execution when issued by a clerk, on request, and for sealing the same, twenty-five cents.

Filing a complaint or other pleading, an affidavit, or other papers or proceedings, ten cents; all papers annexed together and filed at the same time, to be considered as one paper

er, and no allowance to be made for reading any paper or proceeding in any case.

Copies and exemplifications of records and of pleadings, to be returned on appeal, certiorari or writ of error; copies and exemplifications of all records, pleadings, and proceedings furnished on request, when no special provision is otherwise made, ten cents for each folio.

Searching the records or files in his office, if a copy is not required, twenty cents for the records or files of each year, except for officers of the Court.

Receiving and filing the papers of any insolvent, ten cents for each paper filed.

Copies of such papers, ten cents for each folio.

For administering the oath of office to any officer, and certifying the same, twenty-five cents.

Recording credentials of ordination of ministers, and giving certificate of the same, one dollar.

Recording certificate of the solemnization of marriage, fifty cents.

Entering transcript of Justice's judgment, ten cents for each folio.

Entering appeal from Justice's Court, fifty cents.

For each blank writ furnished attorneys, with seal for the same, ten cents.

Entering a surrender of bail, fifteen cents.

Issuing commission to take deposition, one dollar.

Issuing venire facias, fifty cents.

Certificate of jurors' or constables' attendance at Court, to be paid from the county treasury, each ten cents.

Entering forfeiture of recognizance, fifteen cents.

Entering discharge of bail, twenty cents.

For entering a declaration to become a citizen of the United States, twenty-five cents.

For a certified copy of such declaration, under the seal of the Court, fifty cents.

For entering the final admission of an alien to the rights of citizenship, twenty-five cents.

For a certified copy thereof, under the seal of the Court, fifty cents.

For all services required by law, to be performed by such clerks respectively, and not specially provided for by law, such fees as the Supreme Court shall, by general rule or order prescribe, corresponding, as near as may be, with the

rates herein prescribed; *Provided*, That the gross amount of the fees of any Clerk of the District Court shall, in no case, exceed the following sums:

In case of a judgment by cognovit or confession, two dollars.

In any case wherein there is no appearance by the defendant, three dollars; and in any other case, two dollars.

FEES OF THE CLERKS OF THE SUPREME COURT.

SEC. 599. For drawing a Writ of Error or other process issued under seal of the Court, one dollar.

Fees of clerk
of supreme
court

For affixing the seal to any process of the Court, twenty-five cents.

For filing the papers sent at one time from a District Court, ten cents for each paper.

Reading and filing any petition relating to any proceeding in Court, ten cents.

Entering the appearance of default of appellant or plaintiff or of defendant, or respondent, fifteen cents.

Entering every rule or order, fifteen cents for each folio.

For a certified copy of every such rule or order, and all papers, pleadings, and proceedings filed with him, ten cents for each folio.

Entering every decree or sentence, ten cents for each folio.

Entering every judgment or order, fifteen cents, and ten cents for each folio more than two.

Engrossing every remitter to be sent to a District Court, ten cents for each folio.

Every certificate given on request relative to any matter or cause, twenty-five cents.

Taxing costs, fifty cents.

Entering every satisfaction on the record, fifteen cents.

Taking security in cases authorized by law, fifty cents.

Entering each cause in the calendar, and making copy for the bar, ten cents.

For searching records and files in his office, except for suitors and their attorneys, twenty-five cents.

For services required by law, or the rules of the Court not herein provided for, such fees as the Court shall direct.

Entering cause without process, fifty cents.

Admission of attorneys, one dollar.

FEES OF COMMISSIONERS TO TAKE TESTIMONY.

SEC. 600. The person to whom any commission shall be issued to take testimony in any cause or matter pending in law or equity, shall be entitled to receive the same fees as allowed to Justices of the Peace for the same services. (1)

Fees of com
missioners

FEES OF JUDGE OF PROBATE. (2)

SEC. 601. For granting letters of administration, when not contested, seventy-five cents; when contested or approved, one dollar and fifty cents.

Fees of judge
of probate

Hearing any complaint, or an application for the appointment of a guardian, fifty cents.

Appointing a guardian, fifty cents, and when one guardian shall be appointed for more than one person at the same time, twenty-five cents for each person after the first, for whom such guardian shall be appointed.

Decree for probate of a will, when not contested, seventy-five cents; when contested, one dollar and seventy-five cents.

Decree for settling an estate, seventy-five cents.

Partition of real estate, one dollar and fifty cents.

Order for distribution, seventy-five cents.

Examining and allowing an inventory, fifteen cents for each folio.

Administering an oath to an executor or other person, and certifying the same when necessary, fifteen cents.

Examining and allowing accounts of executors, administrators, or other person, for the first page, fifteen cents, and for each additional page, five cents.

For each citation, summons, or other process, twenty-five cents.

Warrant to appraise or divide an estate, seventy-five cents.

Issuing a commission to examine and allow claims against an estate, fifty cents.

Approving and filing a bond given on appeal, fifty cents.

Approving securities of executors or others, twenty-five cents.

Each order to divide an estate among heirs, or to set off dower, twenty-five cents.

(1) See Sec. 609 of this Title.

(2) I have not included the additional fees allowed to Judges of Probate by Chapter 5, page 12, approved March 1st, 1856, for the reason that I believe them exorbitant, this bill of fees is certainly high.

Order for allowance to a widow, or to children under seven years of age, twenty-five cents.

Appointment of agent or partition of real estate, twenty-five cents.

Order for sale of personal estate, or for publication of any notice, or any other ordinary order, in proceedings before him, where no other provision is expressly made twenty-five cents.

Each order for sale of real estate to pay debts of an estate, fifty cents.

Extending the time for settling an estate, or examining and allowing claims against an estate, twenty-five cents.

Granting reference of accounts of executors or administrators, or allowing report thereon, fifty cents.

For a bond of executors, administrators, or guardians, on an appeal, fifty cents.

Disallowing application for letters of administration, or probate of a will, to be paid by the party applying, fifty cents.

For a warrant set off dower, fifty cents.

Ordering and drawing a quietus, fifty cents.

Proportioning an insolvent estate among the creditors, seventy-five cents.

Entering and filing a caveat, fifteen cents.

Entering the accounts of an executor, administrator, or guardian, fifteen cents for each folio.

Entering each oath of an executor, or administrator, fifteen cents.

Searching the records or files in his office, for each year, fifteen cents.

Recording wills and the proof thereof, letters of administration, of guardianship, and every other matter required to be recorded, for each folio, fifteen cents; and where any will or other matter is in any other than the English language, eighteen cents for each folio.

For a translation of any will from any other than the English language, twenty-five cents for each folio.

Copies and exemplifications of the probate of a will, or of letters testamentary, or of administration, or of any other proceeding or order had or made before him, or of any other papers filed or recorded in his office, transmitted on appeal, or furnished on request to any person, fifteen cents for each folio.

For all services required by law to be performed by Judges of Probate, for which a compensation is not herein provided, such fees as shall from time to time be established by the Supreme Court, by general rules corresponding as near as may be with the rates herein specified; *Provided*, That the whole amount of fees taxed by any Judge of Probate in his own behalf, in any case not contested, shall in no case exceed fifteen dollars, unless the same be audited and certified to be just by any Judge of the District Court of the county. All laws in conflict with this section are hereby repealed. (1)

FEEES OF EXECUTORS AND ADMININTRATORS.

SEC. 602. For actual services, and in lieu of all other fees, one dollar per day, and fifty cents for each half day, and their actual and necessary disbursements for the benefit of the estate; but the Probate Court may allow executors and administrators, in cases of unusual difficulty or responsibility, such further sum as the Judge may deem reasonable, subject to an appeal. ^{Fees of executors &c}

FEEES OF WITNESSES.

SEC. 603. For attending in any suit or proceeding pending in a Court of Record, one dollar for each day, and fifty cents for each half day. ^{Fees of witnesses}

For attending in any Justice's Court, or before any officer, person, or board authorized to take the examination of witnesses, one dollar for each day, and fifty cents for each half day.

For traveling, at the rate of six cents per mile in coming to the place of attendance, to be estimated from the residence of such witness, if within this State, or from the boundary line of this State, which such witness passed in coming, if his residence be out of the State.

The Secretary of State, Treasurer, Attorney General, and Clerk, Register of Deeds, County Surveyor, or Judge of Probate, attending on a subpoena, requiring the same, with bills, records, or other written evidence, shall be entitled to one dollar per day, and for traveling, at the rate of six cents per mile, coming and returning from the residence of such witness.

(1) See Sec. 24, this Title.

FEEs OF SHERIFF IN EXECUTING PROCESS ISSUED OUT OF THE COURTS OF LAW AND EQUITY, (2) AND BY JUDICIAL AND OTHER OFFICERS, AND FOR OTHER SERVICES.

Fees of sher-
iffs &c

SEC. 604. For serving a summons, replevin, or any process issued by a Court of Law, or a subpoena to appear and answer in chancery, one dollar, when service is made on one defendant only, and for the service on each additional, fifty cents.

For traveling in making such service, ten cents per mile for going only, to be computed in all cases from the Court House of the county in which the service is made, or from the place where the Court has usually been held therein.

For taking a bond of plaintiff in replevin, or taking a bond on the arrest of a defendant, or in any other case where he is authorized to take the same, fifty cents.

For a certified copy of such bond when requested, twenty-five cents.

For a note of every capias delivered to a defendant, on request, ten cents.

For a copy of every summons or complaint, served by him when made by the Sheriff, ten cents for each folio.

For a copy of every other writ when demanded, or required by law, fifteen cents.

For serving an attachment for the collection or payment of money, or an execution for the payment of money, or a warrant issued for the same purpose, and delivered to him by the county Treasurer or any member of the Board of Supervisors, for collecting the sum of two hundred and fifty dollars or less, four per cent., and for any sum more than two hundred and fifty dollars, two per cent.; advertising goods, or chattels, lands or tenements, for sale on any execution, if a sale be made, one dollar, and if the execution be stayed or settled after advertising and before sale, fifty cents.

The fees allowed by law, and paid to any printer by such Sheriff, for publishing an advertisement, of the sale of real estate, for not more than six weeks, and for publishing the postponement of any such sale, shall be paid by the party requiring the same.

The fees herein allowed for the levy of an execution and

(1) The United States Circuit and District Courts now established in this State by act of Congress, are Courts of Equity or Chancery, as well as of Common Law.

for advertising thereon, shall be collected by virtue of such execution, in the same manner, as the sum therein directed to be levied; but when there shall be several executions against the defendant at the time of advertising his property, in the hands of the same Sheriff, there shall be but one advertising fee charged on the whole, and the Sheriff shall elect on which execution he will receive the same.

For every certificate of the sale of real estate, fifty cents; and for each copy thereof, twenty-five cents; which, together with the Register's fee for filing the same, shall be collected as other fees on execution.

For drawing and executing a deed, pursuant to law, of a sale of real estate, one dollar, to be paid by the grantee, in such deed.

Serving a writ of possession, or of restitution, putting any person entitled, into the possession of premises, and removing the occupant, one dollar; and the same compensation for traveling as is herein allowed on other writs.

Taking a bond for the liberties of the jail, when the same is authorized, fifty cents.

Summoning a jury upon a writ of inquiry, attending such jury, and making and returning the inquisition, one dollar and fifty cents.

Summoning a special jury, struck pursuant to an order of the Court, and returning the panel, one dollar.

Summoning a jury pursuant to any precept or summons of any officer, in any special proceeding, seventy-five cents, and for attending such jury when required, fifty cents.

Bringing up a person upon a *habeas corpus*, to testify or answer in any Court, one dollar; and for traveling, each mile from the jail, fifteen cents.

For attending any Court with such prisoner, one dollar per day, besides actual necessary expenses.

Bringing up a person upon a *habeas corpus*, with the cause of his arrest, and detention, one dollar; and for traveling, fifteen cents, for each mile from the jail.

Attending before any officer with a prisoner, for the purpose of having [him surrendered in exoneration of his bail, or attending to receive a prisoner so surrendered, who was not committed at the time, and receiving such prisoner into his custody, in either case, one dollar.

Attending a "view" when ordered by the Court, one dollar and twenty-five cents per day, including the time occupied in going and returning.

Serving an attachment upon any ship, boat, or vessel in proceedings to enforce any lien thereon created by law, one dollar, with such additional compensation for his trouble and expenses in taking possession of and preserving the same, as the officer issuing the warrant shall certify to be reasonable.

For making and returning an inventory, and appraisal of property attached in any case, one dollar per day each to the appraisers, for each day actually employed; and fifty cents for each half day; and for drafting the inventory, twenty-five cents for each folio; and for copying the same, six cents for each folio.

For selling any ship, boat or vessel, or the tackle, apparel, and furniture thereof so attached, and for advertising such sale, the same fees as for sales on execution.

For giving notice of any general or special election to the Supervisors of the different towns and wards in the county which may be required by law, twenty-five cents for each copy of notice, and ten cents per mile traveling one way, and expenses of publishing such notice as required by law; such fees and expenses to be paid by the county, as other contingent expenses thereof.

For any services which may be rendered by a Constable, the same fees as are allowed by law for such services to a Constable.

For attending the Supreme Court, one dollar and fifty cents each day, to be allowed by the Auditor on the certificate of the Clerk, and paid out of the State treasury.

For summoning grand or petit jurors, to attend the District Court, fifty cents per each juror summoned.

Serving a subpoena for witnesses, fifty cents for each witness summoned, and ten cents for each mile actually traveled in going only; but when two or more witnesses live in the same direction, traveling fee shall be charged only from the farthest.

Keeping and providing for a debtor in jail, in all cases where the debtor is unable to support himself, fifty cents for each day.

For mileage on every execution, five cents per mile for going only, to be computed from the Court House of his county.

For selling lands on the foreclosure of a mortgage by advertisement, and executing a deed to the purchaser, and for all services required on such sale, three dollars.

FEEs OF CORONERS.

SEC. 605. For all services rendered by Coroners, the same fees as are herein allowed to Sheriffs for similar service. Fees of coroners

For confining a Sheriff in any house on civil process, fifty cents for each day, to be paid by such Sheriff before he shall be entitled to be discharged from such confinement, unless otherwise ordered by the Court.

FEEs OF CONSTABLES.

SEC. 606. Constables may be allowed to receive the following fees:

For serving a Warrant or other writ, not herein provided for, on each person named therein, twenty-five cents. Fees of constable

For a copy of every summons delivered on request, or left at the place of residence of defendant, fifteen cents.

For serving a subpoena or summons, on each party or name therein, fifteen cents.

For serving an attachment, fifty cents.

For each copy of an attachment, fifteen cents.

For each copy of inventory of property seized on attachment, fifteen cents.

For issuing summons on garnishee, fifty cents.

For copy of any affidavit or other paper not otherwise enumerated, per folio, ten cents.

For posting up each notice, fifteen cents.

For each mile actually traveled to serve any process, to give or post up notice, ten cents.

Committing to prison, fifty cents.

For summoning a jury, one dollar.

For writing a list of jurors, fifteen cents.

For attending on a jury, fifty cents.

On all sums made on execution and paid over, charged up on the defendant, five per cent.

For notifying a plaintiff of a service of warrant, or summons, or attachment, returnable in three days, twelve cents.

For serving every writ of Replevin, fifty cents.

For summoning and swearing appraisers, and taking appraisement, fifty cents.

For taking and approving security in any case, twenty-five cents.

SEC. 607. When the services mentioned in the last section are performed by any other person, duly deputized, the same

Services of fees shall be allowed as Constables are entitled to receive, constable performed by another and no more.

FEEs OF NOTARIES PUBLIC.

Fees of notary public

SEC. 608. For drawing and copy of protest of the non-payment of a promissory note, or bill of exchange, or of the non-acceptance of such bill, one dollar, in the cases where by law, such protest is necessary to bind the party, but in no other case.

For drawing, and a copy of every other protest, fifty cents

For drawing, copy, and serving every notice of non-payment of note or non-acceptance of a bill, fifty cents.

For drawing any affidavit or other paper or proceeding, for which provision is not herein made, twenty cents for each folio, and copying the same, six cents for each folio.

For taking the acknowledgment of deeds, and for other services authorized by law, the same fees as are allowed to other officers for similar services.

FEEs OF JUSTICES OF THE PEACE.

Fees of justice of the peace

SEC. 609. Justices of the Peace may be allowed to receive the following fees, and may tax the same in all cases where applicable:

For a summons, warrant, or subpoena, twenty-five cents.

For a venire for a jury, twenty-five cents.

For a warrant in a criminal case, twenty-five cents.

For taking a recognizance of bail, twenty-five cents.

For administering an oath, ten cents.

For certifying the same when administered out of court, fifteen cents.

For a writ of attachment, twenty-five cents.

For entering a judgment, twenty-five cents.

For every adjournment, fifteen cents.

For every bond, recognizance, or security directed by law to be taken and approved by the Justice, twenty-five cents.

For swearing a jury, twenty-five cents.

For taking an examination, deposition, or confession, per folio, fifteen cents.

For copy of proceedings, or of any paper or examination, in any case when demanded, per folio, fifteen cents.

For entering a satisfaction of judgment, twenty-five cents.

For entering amicable suit without process, twenty-five cents.

For a transcript of judgment, twenty-five cents.

For opening a judgment for rehearing, twenty-five cents.

For filing every paper required to be filed, five cents.

For issuing a commission or notice to take deposition, twenty-five cents.

For taking recognizance, certifying oath, or affidavit, and making return to an appeal, including travel, one dollar.

For making return to writ of certiorari, per folio, fifteen cents.

For a search warrant, twenty-five cents.

For every affidavit, or other paper drawn by the Justice, for which no other allowance is made by law, per folio, fifteen cents.

For a commitment to jail, twenty-five cents.

For an order to bring up prisoner, twenty-five cents.

For an order to discharge prisoner, issued to jailor, twenty-five cents.

For discharging a prisoner after a hearing, on motion to discharge, fifteen cents.

For an execution, twenty-five cents.

For every other writ, not herein enumerated, twenty-five cents.

For taxing costs, fifteen cents.

For marrying, and making return thereof, one dollar and fifty cents, and such other sum as may be allowed by the party making the application.

For holding an inquisition, in cases of forcible entry and detainer, (1) in addition to other fees, one dollar.

For taking and certifying the acknowledgment of a deed, twenty-five cents.

For traveling to perform any duty, when not otherwise provided for, and such travel is necessary, going, per mile, ten cents.

FEEES IN JUSTICES' COURT.

SEC. 610. In all civil actions, unless otherwise provided, the party in whose favor judgment is given, shall recover costs, and the Justice may give or refuse costs on all motions at their discretion, unless otherwise directed.

SEC. 611. At the time of entering a judgment for costs,

(1) See Revised Statutes of the late Territory of Minnesota, Chapter 87, pages 439 to 444.

Justice when to tax costs in any case, the justice may proceed to tax the costs in such case, and no notice of such taxing need be given to the party against whom judgment is rendered.

Fees for travel SEC. 612. The justice shall allow no fees for the travel of witnesses unless the same be proved on the oath of some person qualified to testify in the cause.

Fees for serving subpoena SEC. 613. No fees shall be allowed for travel, in serving a subpoena, unless the same be charged by a constable, or sheriff, or be proved by the oath of the person who served the same.

Fees of two witnesses to prove one fact SEC. 614. The attendance of only two witnesses to each particular fact before a Justice of the Peace, shall be taxed in the bill of costs.

Fees for copies SEC. 615. No fees for copies, or exemplifications of documents or papers, or for depositions, shall be allowed, unless such copies of depositions were used upon the trial.

Allowance for disbursements SEC. 616. No allowance for disbursements, except to officers, shall be allowed, unless the items are particularly specified, and proved to the justice, and the same were, in the opinion of the justice, necessary and reasonable in amount.

Charge of service SEC. 617. The justice shall hear any evidence which may be offered to him, to prove that any charge is unreasonable, or that the service has not been rendered.

Return of sheriff evidence SEC. 618. The return of a Sheriff or Constable to any writ, shall be deemed *prima facie* evidence, that such return is correct, and that the service has been rendered, or disbursement made.

Constable to attend trial SEC. 619. The Justice shall have power, when he shall deem it necessary, to command any Constable to attend at the trial of the cause, and shall make an entry thereof in his docket, and may tax in the bill of costs, fifty cents for each half day such Constable shall so attend by his command.

FEEs OF REGISTERS OF DEEDS.

Fees of register of deeds SEC. 620. For entering and recording any deed or other instrument, twelve and a half cents for each folio, to be paid when the same is let for record.

For every certificate, twenty-five cents.

For copies of any records or papers, when required, seven cents for each folio.

For recording any deed or other paper, in any other than the English language, twenty cents for each folio.

For every entry of a discharge of a mortgage, in the margin of the record, ten cents.

For filing every other paper and making an entry thereof when necessary, six cents.

Searching for every such paper, on request, three cents for each paper examined.

For searching the record, ten cents. (1)

FEEs OF APPRAISERS, COMMISSIONERS, AND OTHERS.

SEC. 621. All Appraisers of estates of deceased persons, Appraisers of property taken on writ of attachment or replevin, persons appointed under a legal process, or order for assigning dower, or making partition of real estate, Sheriffs' aids in criminal cases, and all other private persons performing any other like services required by law, or in the execution of legal process, where no express provision is made for compensation therefor, shall be entitled to one dollar for each day, and fifty cents for each half day, for their services, and four cents a mile for travel in going and returning.

Fees of appraisers &c

FEEs OF JURORS.

SEC. 622. Each Grand and Petit Juror, except talesmen, shall be entitled to one dollar and fifty cents for each day's attendance upon any District Court, and six cents for each mile traveled in going and returning by the most usual route, to be paid out of the treasury of the county by the Treasurer thereof, on the certificate of the Clerk of the Court.

Fees of jurors

Each talesman summoned and acting as a Juror in a Court of Record, shall be entitled to fifty cents for his services in each cause, to be paid in the same manner as herein provided for the payment of Grand Jurors.

Each Juror sworn in any action in a Justice's Court, or before any Sheriff, on any writ of inquiry, shall be entitled to fifty cents, to be paid in the first instance by the party requiring such Jury.

Each Juror sworn before any Coroner, on any inquest taken by him, shall be entitled to one dollar for each day's attendance on such inquest.

SEC. 623. The fees of Witnesses and Jurors in the Probate Courts, shall be the same as allowed by law to Jurors and Witnesses in the District Courts.

Fees of witnesses and jurors

(1) Inasmuch as the fees of Registers are frequently taxed in the progress of a cause, for recording papers therein, I have inserted them in this Section.

Fees of sheriff and constable

SEC. 624. The fees of Sheriffs and Constables, for services rendered in Probate Courts, and for the service of process therefrom, shall be such as are allowed by law to Constables for similar services in civil proceedings before Justices of the Peace, and where no fees for such services are provided for by law, they shall be entitled to such fees as are allowed to Sheriff's for similar services in the District Court.

FEES ALLOWED THE PARTY RECOVERING JUDGMENT IN EQUITABLE CAUSES ; THE SAME SHALL NOT BE TAXED NOR ALLOWED SAVE BY ORDER OF THE COURT.

Fees in chancery cases

SEC. 625. Copying every bill, answer, or other pleading or proceeding in a cause when the same shall be required by law, or by any rule or order of Court, for every folio, twenty-five cents.

For every additional copy of such draft to file, for every folio, ten cents.

For every other necessary copy, seven cents.

Attending the Judge out of term, upon petition or upon any special motion, one dollar.

Attending the Court in term, upon a special motion, founded on a previous notice, one dollar.

Serving every rule or order or copy of interrogatories, twenty-five cents.

Serving a subpoena to appear and answer on an injunction, fifty cents.

Every necessary notice or summons actually served, including a copy thereof and service, thirty-seven cents.

Drawing instructions for the examination of each witness, twenty-five cents.

Copying brief for counsel, or any special motion or petition, of which notice shall have been given, one dollar.

Copying brief for counsel, upon the hearing of a cause before the Court, when there has been an answer, or demurrer to the bill, or before any proper officer on a reference to take and state an account, two dollars.

Drawing or copying charges or discharges before a master, for each folio, twenty-two cents, before any proper officer, but these fees shall only be taxed and allowed upon an order of the Court in which such cause shall be pending, and shall be in the discretion of the Court.

SEC. 626. For publishing notices of any application of an insolvent, for six weeks, and furnishing evidence of such

publication, one dollar and sixty-seven cents; if published ten weeks, two dollars. Printers' fees:

SEC. 627. Such notice may be published in, the following manner :

1. A general heading, stating whether such notices are for the purpose of being discharged from debt, or for the purpose of having the person exonerated from imprisonment, shall be prefixed to each class of applicants; next, the name of the applicant; next, the date of the first publication of such notice; next, the name of the officer before whom the creditors are required to appear; next, the place appointed for such appearance; next, the time for such appearance. And every such application shall be deemed as valid as if such notice had been published at length. Form of notice

SEC. 628. For publishing any other notice, or any order, citation, summons, or any other proceeding or advertisement, required by law, to be published in any newspaper, not more than forty cents per folio, for the first insertion, and twenty-five cents per folio for each insertion after the first. Fees for publishing other notices

SEC. 629. When notice of any sale by virtue of a mortgage shall be published in other than the county in which the premises are situated, a copy of such notice shall be served, at least four weeks before the time of such sale, on the person in possession of the mortgaged premises, in all cases where the same are occupied: and where they are not occupied, and the mortgagor, his heirs or personal representatives shall reside in the county where such premises lie, then upon such mortgagor, his heirs or personal representatives, as the case may be. Proof of the service of such notice may be made, certified and recorded in the same manner and with the like effect as proof of the publication of a notice of sale under a mortgage. (1) Mortgage notice how served

GENERAL PROVISIONS.

SEC. 630. Every officer whose fees are hereinbefore ascertained, limited and appointed shall publish and set up in his office fair tables of his fees, according to this Act, within six months after the passage thereof, in some conspicuous place, for the inspection of all persons who have business in such office, upon pain of forfeiting, for each day the same shall not be put up through such officer's neglect, a sum not Officers post-up fees

(1) See Sec. 275, Title 1.

exceeding two dollars, which may be recovered by a civil action in the name of any person, before any Justice of the Peace of the same county.

Chapter not
to apply to spe-
cial cases

SEC. 631. The allowance of any fees by this Act shall not apply to any case where special provision is otherwise made by law for any particular service, but the fees for such service shall be such as are provided in the statute requiring the service or providing the compensation therefor.

Folio defined

SEC. 632. The term "folio" when used as a measure for computing fees or compensation, shall be construed to mean one hundred words, counting every figure necessarily used as a word; and any portion of a folio when in the whole draft or paper there shall not be a complete folio, and when there shall be any excess over the last folio, shall be computed as a folio.

Extortion pro-
hibited

SEC. 633. No Judge, Justice, Sheriff or other officer whatever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any greater fee or reward for such service but such as is or shall be allowed by law; and any attempt to violate the provisions of this Act by charging excessive fees shall work a forfeiture of office.

Fees not to
be taken

SEC. 634. No fee or compensation allowed by law shall be demanded or received by any officer or person for any service unless such service was actually rendered by him, except in the case of prospective costs hereinafter specified; but this section shall not prevent any officer from demanding any fee herein allowed for any service of which he is entitled by law to require the payment, previous to rendering such service.

Penalty

SEC. 635. A violation of either of the last two sections shall be deemed a misdemeanor, and the person guilty thereof shall be liable to the party aggrieved for treble the damages sustained by him.

Charges for
services not
rendered

SEC. 636. No fees shall be taxed for services as having been rendered by any attorney, solicitor, clerk, sheriff or other officer in the progress of a cause, unless such service was actually rendered, except when otherwise expressly provided.

Prospective
costs

SEC. 637. Prospective costs may be charged and taxed for filing decree and for one execution.

Allowance for
one draft only

SEC. 638. Whenever any allowance is made for drafting any process, pleading, or proceeding, it shall be made for only one draft of the same, although several may have been issued and used.

SEC. 639. No record, writ, return, pleading, instrument or other writing copied into any proceeding, entry, process, or suggestion, shall be computed as any part of the draft of such proceeding, entry, process, or suggestion. Not part of draft

SEC. 640. The legal fees paid for certified copies of the depositions of witnesses, filed in any Clerk's office, and of any documents or papers recorded or filed in any public office, necessarily used on the trial of a cause, or on the assessment of damages, shall be allowed in the taxation of costs. Fees paid

SEC. 641. No attorney, solicitor, or counsel, in any cause, shall be allowed any fee for attending as a witness in such cause. Attorney no fee as witness

SEC. 642. Every officer, upon receiving any fees for any official duty or service, shall, if required by the person, paying the same, make out in writing and deliver to such person a particular account of such fees, specifying for what they respectively accrued, and shall receipt the same; and if he refuse or neglect to do so, he shall be liable to the party paying the same for three times the amount so paid. Officer to give receipt in item

SEC. 643. No fee shall be charged by any officer for administering the oath of office to any member of the Legislature, to any military officer, or to any township officer, and no more than ten cents shall be charged for administering such oath to any other officer. Fees for administering oath of office

SEC. 644. When a fee is allowed to one officer, the same fee shall be allowed to other officers for the performance of the same services, when such officers are by law authorized to perform such services. Fees one officer paid to another

SEC. 645. When any person shall attend a Court of Record as a witness in behalf of the State, upon the request of the public prosecutor, or upon a subpoena, or by virtue of a recognisance for that purpose, and it shall appear that such person has come from any other State or Territory of the United States, or from any foreign country, or that such person is poor, the Court may, by order, on its minutes, direct the County Treasurer, of the county in which the Court shall be sitting, to pay to such witness such sum of money as shall seem reasonable for his expenses. Fees of state-witnesses

SEC. 646. When any prosecution, instituted in the name of this State, for breaking any law of this State, shall fail, or when the defendant shall prove insolvent or escape, or be unable to pay the fees, when convicted, the fees shall be paid Fees of prosecution

out of the county treasury, unless otherwise ordered by the Court: *Provided*, That no fees shall be paid out of the county treasury for mileage to the District Attorney.

Subpoena is sued
SEC. 647. The Attorney General and District Attorney in each county is authorized to issue subpoenas, and compel the attendance of witnesses, on behalf of the State or county, without paying or tendering fees in advance; and any witness failing or neglecting to attend, after being served with a subpoena, may be proceeded against, and shall be liable in the same manner as provided by law in other cases where fees have been paid or tendered, which fact shall be made known to such witness by the officer.

Witness certificate
SEC. 648. The Clerk of any Court, at which any witness shall have attended on behalf of the State, in a civil action, shall give to such witnesses a certificate of travel and attendance, which shall entitle him to receive the amount from the Treasurer of the county where the suit arises.

Construction of two preceding sections
SEC. 649. The provisions of the last two preceding sections of this Title, shall extend to all suits and informations brought in the name of the Attorney General, or any other person or persons, for the benefit of the county where the suit arises. (1)

GARNISHMENT.

PROCEEDINGS AGAINST GARNISHEES.

SECTION 650. When and in what cases party may be summoned as garnishee.

651. Garnishee, how summoned in District Court.

652. Garnishee, how liable.

653. Proceedings, when garnishee refuse to appear.

654. Warrant, what to contain.

655. Suit when commenced against garnishee.

656. Appearance and examination of garnishee.

657. Case, when adjourned.

658. Court, when to render judgment in case of garnishee.

659. Proceedings, when discontinued as to garnishee.

660. Execution, how to issue.

661. Garnishee, when entitled to costs.

662. Payment by the garnishee to officer, same as payment to defendant.

663. Indorsement of officer evidence of facts therein stated.

664. } Officer holding execution, how to proceed.

665. }

(1) See Sec. 229, Title 10, of this Report; also Sec. 336, Title 13.

666. Effect of judgment against garnishee.
 667. Defendant cannot maintain action against garnishee.
 668. Limitation of preceding section.
 669. Promissory notes, deemed effects.
 670. } Proceedings when moneys are due to defendant at a
 671. } future time.
 672. Corporations may be proceeded against under this Title.

SEC. 650. In any action commenced in any Court of Record, or Justice's Court, founded upon contract, express or implied, or upon a judgment or decree, or after the rendition of said judgment in any action, if the plaintiff, his agent, or attorney, shall make and file with the Clerk of the Court, or Justice of the Peace, stating that he has good reason to believe, and does believe, that some person (naming him) has property, moneys, or effects, in his hands or under his control, belonging to the defendant in such action, or that such person is indebted to the defendant, if the action be in the Justice's Court, the Justice shall issue a summons against said person, requiring him to appear before such Justice at a time and place mentioned in said summons, not less than six nor more than twelve days from the date thereof, and answer under oath all questions put to him, touching his indebtedness to such defendant, and the property, money, and effects of the defendant in his possession, within his knowledge, or under his control, which summons shall be served and returned in the same manner as a summons issued against a defendant in other cases; the garnishee shall be entitled to the same fees as he would if he were subpoenaed as a witness in such case.

Summoned as
garnishee

SEC. 651. In actions pending in the District Court, the garnishee may be summoned in the same manner as defendants are summoned in that Court; the summons must require the garnishee to appear before the Court or Judge, or the Clerk thereof, at a time and place mentioned in the summons, not less than twenty days from the service thereof, and answer such questions as shall be put to him touching his indebtedness to the defendant in the action. On the appearance of the garnishee before the Court or Judge, or the Clerk thereof, he may be examined, or a reference may be ordered to take and return the examination of the garnishee, who may be compelled to attend before the referee from time to time for that purpose.

Garnishee summoned in district court

Garnishee how
liable

SEC. 652. The person summoned as a garnishee, from the time of the service of such summons, shall be deemed liable to the plaintiff in such suit, to the amount of the property, money, or effects in his hands, or possession, or under his control, or due from him to the defendant in such suit: *Provided*, That when the defendant is a householder having a family, nothing herein contained shall be applicable to any indebtedness of such garnishee to the defendant for the personal labor of such defendant, or his family.

Proceedings
when garnish-
ee refuse to ap-
pear

SEC. 653. If such garnishee neglect or refuse to appear, at the time and place mentioned in such summons, and answer as aforesaid, the Court shall continue the cause to some other day, and without further showing than the proof that the summons had been properly served upon the garnishee, and his fees paid or tendered, issue a warrant to bring such garnishee before him.

Warrant what
to contain

SEC. 654. Such warrant shall command the officer forthwith to take the body of such garnishee, and bring him before such Court, and shall contain a further command that such officer shall, after he shall have arrested the garnishee, notify the plaintiff of such arrest; and such warrant shall be served and returned in the same manner as warrants issued in other cases.

Suit commenc-
ed

SEC. 655. The personal service of a summons upon such garnishee, shall be deemed the commencement of suit in the name of the plaintiff, against such garnishee, which may be entered on the docket as suits in other cases.

Appearance
and examina-
tion of garni-
shee

SEC. 656. On the appearance of such garnishee before the Justice, Court, Judge, or Referee, or on some day to which the proceeding may be adjourned, the plaintiff may proceed to examine the garnishee, on oath or otherwise, as the plaintiff may elect, touching the matter alleged in the affidavit, and the Justice, Judge, or Referee shall take minutes of such examination, and file the same with the other papers in the cause.

Case when ad-
journing

SEC. 657. Upon closing the examination, if a suit be pending and undetermined between the plaintiff and defendant, the cause shall be continued, but it shall not be necessary to adjourn the same to any day certain.

Render judg-
ment

SEC. 658. After the final determination of the action against the defendant in the case mentioned in the preceding Section, the Court in which the action is pending shall, if judgment be rendered in favor of the plaintiff, proceed to render judg-

ment in the matter pending against the said garnishee ; and if it appear from the testimony of the said garnishee or other testimony which may have been taken in the case that the said garnishee is indebted to the defendant, or that he has property belonging to the defendant in his possession, the Court shall proceed to render judgment against the said garnishee, to the amount of his indebtedness to the said defendant, or for so much thereof as may be necessary to satisfy the plaintiff's demand.

SEC. 659. If the plaintiff fail to recover judgment against the defendant, in the cases mentioned in Section 658 of this Title, or if the defendant pay the judgment rendered in such cases, or stay the execution thereon, within the time and in the manner prescribed by law, it shall in either case be deemed a discontinuance of all proceedings against the garnishee.

Proceedings when discontinued

SEC. 660. If judgment be rendered against the garnishee, the Court may issue execution thereon as in other cases.

Execution

SEC. 661. If the garnishee shall on demand, deliver to the officer having such execution, all the property, money, and effects, in his possession, or under his control, belonging to the defendant, and pay all moneys found to be due from him to the defendant, at the time the suit was commenced against him, or so much of the money, property, and effects, as may be necessary to satisfy such execution, then the costs which may have accrued against such garnishee, shall be paid out of the property, money, and effects so paid over or delivered to such officer.

Garnishee entitled to costs

SEC. 662. The officer having such execution shall indorse all moneys received from such garnishee, and a description of all property and effects delivered to him by the garnishee, and such delivery or payment shall be deemed a delivery or payment to the defendant in such suit.

Payment to officer &c

SEC. 663. Upon the return of such execution so indorsed, the same shall be entered on the docket of the Court, as fully as such return upon such execution, and such entry or transcript thereof shall be *prima facie* evidence of the facts therein stated.

Indorsement of officer &c

SEC. 664. Whenever the garnishee shall pay or deliver to the officer having such execution, any property which may be sold on an execution by existing laws, the officer shall proceed to levy upon and sell the same at public auction or vendue, as in other cases; and if the garnishee shall deliver

Officer holding execution

to the officer any notes, bills, bonds, or other choses in action, the officer shall return the same to the Court, to be retained in his hands for the use of the plaintiff, and the plaintiff may sue and collect the same, or so much thereof as may be necessary to pay the judgment against the defendant, and costs; the balance, if any, shall be returned to the garnishee or the defendant. All bills, bonds, notes, accounts, and other choses in action, secured or delivered under the provisions of this section, shall be taken, subject to all liens, set-offs, liabilities, and equities existing between the original parties thereto.

**Officer hold-
execution how
to proceed** SEC. 665. If the garnishee pay to the officer having such execution, any bank note or bill, the same shall be paid over to the plaintiff at the par value thereof, if he will accept the same, if not, it shall be sold in the same manner as other personal property.

**Effect of judg-
ment** SEC. 666. Judgments rendered against the garnishee, under the provisions of this Act, shall have the same force and effect, as they would have under existing laws, if such defendant had been named as plaintiff therein.

**Defendant can-
not maintain
action against
garnishee** SEC. 667. No suit shall be maintained or recovery had by such defendant against the garnishee, for the amount of money sworn, proved, or admitted to be due from such garnishee to the defendant, or for property or the value thereof money or effects in the hands of such garnishee as aforesaid, while such proceeding is pending.

**Limitation of
preceding sec-
tion** SEC. 668. The preceding section shall not be so construed, as to prevent such defendant from prosecuting for, and recovering of such garnishee, any other or future sum of money due from such garnishee, or the possession or value of any other property or effects in the hands of such garnishee belonging to such defendant.

**Promissory
notes** SEC. 669. Bills of exchange, and promissory notes not due, in the hands of the garnishee at the time of the service of the summons, shall be deemed "effects," under the provisions of this Act.

**Proceedings
when money is
due &c** SEC. 670. If it shall appear upon any examination or trial, had under the provisions of this Act, that any sum or sums of money is, or are owing and payable from the garnishee to the defendant, at some future time or times, it shall be the duty of such Court, after the examination or the rendition of the verdict, if a trial by jury is had, and after the trial, (if the cause is tried by the Court) to note the time or times

when the sum or sums of money mentioned in this section, shall become due and payable, and shall thereupon continue the cause until after the time or times so noted.

SEC. 671. After the said sum or sums of money become due and payable as mentioned in the preceding section, the Court shall, at the request of the plaintiff, render judgment against the garnishee, as mentioned in section 658, of this Act, and the same proceedings shall be had thereon and with the like effect, as if the said sum or sums of money had been due and payable at the time of the service of the summons.

Proceedings
when money is
due &c

SEC. 672. Corporations may be proceeded against as garnishees, in the same manner and with the like effect as individuals, under the provisions of this Act, and the rules of law regulating proceedings against corporations. (1)

Corporation
proceeded a-
gainst

ARBITRATIONS. (2.)

REFEREES.

- SECTION 673. Controversy may be submitted to arbitrators.
674. When submission not to be made.
675. Parties to make agreement of submission; form of agreement.
676. Agreement to submit, what to contain.
677. Submission not to be revoked.
678. To appoint a time and place for the hearing.
679. Arbitrators to be sworn.
680. Award made after time fixed by parties not to have effect.
681. Award to be in writing.
682. To be delivered to the Clerk.
683. Court to have cognizance of award.
684. Award may be accepted, rejected or recommitted.
685. On what grounds party may move Court to set aside award.
686. In what cases Court may alter award.
687. Award when to be returned to Court.
688. Judgment how rendered; costs how taxed.
689. Record of judgment, how made.
690. Record, how filed and docketed, &c.
691. Arbitrators may make award concerning costs.
692. Court may enforce judgment.
693. Arbitrators may receive testimony of parties.

SEC. 673. All controversies which might be the subject of a personal action at law, or of a suit in equity, may be sub-

Controversy
submitted

(1) See Sections 148, 149—Title 1.

(2.) For the manner of proceeding on Arbitrations, see Sec. 180, Title 8.

mitted to the decision of one or more arbitrators in the manner provided in this Act.

Submission
not to be made

SEC. 674. No such submission shall be made respecting the claim of any person to any estate in fee, or for life to real estate, but any claim to an interest for a term of years, or for two years or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration.

Agreement of
submission

SEC. 675. The parties shall appear in person, or by their lawful agents or attorneys, before some Justice of the Peace, and shall there sign and acknowledge an agreement in substance as follows:

Know all men, that _____ of _____ and _____ of _____ have _____ agreed to submit the demand a statement whereof is hereto annexed, (and all other demands between them, as the case may be,) to the determination of _____ and _____ : the award of whom or the greater part of whom being made and reported within _____ from this day, may be taken by appeal to the District Court for the county of _____, the judgment thereon shall be final;—and if either of the parties shall neglect to appear before the arbitrators, after due notice given them of the time and place appointed for hearing the parties, the arbitrators may proceed in his absence.

Dated this _____ day of _____ in the year _____

And the Justice shall subjoin to the said agreement his certificate, in substance as follows:

State of Minnesota, }
County of _____ } ss.

Then the above-named _____ and _____ personally appeared, (or the above-named _____ personally, and the said _____ by the said _____ his attorney, appeared, as the case may be,) and acknowledged the above instrument by them signed to be their free act.

Before me,

_____, J. P., Justice of the Peace. [L. S.]

Agreement to
submit

SEC. 676. If any specific demand is submitted to the exclusion of others, the demand submitted shall be set forth in the statement annexed to the agreement: otherwise it shall not be necessary to annex any statement of a demand, and

the words in the agreement relating to such statement may be omitted, and the submission may then be of all demands between the parties, or of all demands which either of them has against the other, or the submission may be varied in this respect in any other manner, according to the agreement of the parties.

Sec. 677. Neither party shall have power to revoke a submission made as herein provided without the consent of the other; and if either of them shall neglect to appear before the arbitrators after due notice, the arbitrators may nevertheless proceed to hear and determine the cause upon the evidence produced by the other party, as provided in the agreement of submission.

Submission
not revoked

Sec. 678. The arbitrators thus selected shall appoint a time and place for the hearing, and shall adjourn the same from time to time as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing to a time not extending beyond the day fixed in such submission for rendering their award.

Hearing

Sec. 679. Before proceeding to hear any testimony, the arbitrators shall be sworn by any officer authorized to administer oaths, faithfully and fairly to hear and examine the matters in controversy, and to make a just award according to law and evidence, to the best of their understanding.

Arbitrators
sworn

Sec. 680. The time within which the award shall be made and reported may be varied according to the agreement of the parties; and no award made after the time so agreed upon shall have any legal effect or operation unless made upon a re-commitment of the award by the Court to which it is appealed.

Award made
after time &c

Sec. 681. To entitle any award to be enforced according to the provisions of this Title, it must be in writing, subscribed by the arbitrators making the same.

Award in writ-
ing

Sec. 682. The award shall be delivered by one of the arbitrators to the clerk of the Court to which the same is appealed, or shall be inclosed and sealed by them and transmitted to the clerk, and shall remain sealed until opened by the Court.

Delivered to
clerk

Sec. 683. The Court to which the award is appealed shall have cognizance thereof in the same manner, and the same proceedings shall be had thereon, as if it had been made by referees appointed by the Court.

Cognizance
of award

Sec. 684. The award may be accepted or rejected by the

Award may be accepted, rejected or re-committed Court for any legal and sufficient reason, or it may be re-committed to the same arbitrators for a rehearing by them; and when an award is reviewed and confirmed by the Court, judgment shall be rendered thereon in the same manner as upon a like award made by referees appointed by the Court, and execution shall issue accordingly.

SEC. 685. Any party complaining of such award may move the Court to vacate the same upon either of the following grounds:

Award set aside

1. That such award was procured by corruption, fraud, or other undue means:

2. That there was evident partiality or corruption in the arbitrators, or either of them.

3. That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy, or any other misbehaviour by which the rights of any party shall have been prejudiced:

4. That the arbitrators exceeded their powers, or that they so imperfectly executed them, that a mutual, final and definite award on the subject matter submitted was not made:

5. That the award was contrary to law and evidence.

SEC. 686. Any party to such submission may also move the Court to modify or correct such award in the following cases:

Award altered

1. Where there is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in such award:

2. Where the arbitrators shall have awarded upon some matter not submitted to them, nor affecting the merits of the decision upon the matters submitted:

3. Where the award shall be imperfect in some matter of form not affecting the merits of the controversy, and where, if it had been a verdict, such defect could have been amended or disregarded by the Court according to law.

SEC. 687. The award may be taken by appeal to the next term of the District Court succeeding such award, and the parties shall attend at such term without any express notice for that purpose, in like manner as if an action for the same were pending between them in Court; but the Court may require actual notice to be given to either party, when it shall appear necessary or proper, before they proceed to act upon the award.

Award returned

SEC. 688. Upon such award being confirmed or modified, the Court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same, and if the award shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such order; the costs of proceedings shall be taxed as in suits, and if no provision for the fees and expenses of the arbitrators shall have been made in the award, the Court shall make a suitable allowance.

Judgment how rendered

SEC. 689. A record of such judgment shall be made, commencing with a memorandum reciting the submission, then stating the hearing before the arbitrators, their award, the proceedings of the Court thereupon in modifying or confirming such award, and the judgment of the Court for the recovery of the debt or damages awarded, and that the parties perform the acts ordered by the award, and for the recovery of the costs allowed.

Record of judgment

SEC. 690. Such record shall be filed and docketed as records of judgments in other cases, shall have the same force and effect in all respects, be subject to all the provisions of law in relation to judgments in actions, and may in like manner be removed and reversed by appeal, and execution shall issue thereupon.

Filed and docketed

SEC. 691. If there be no provision in the submission concerning the costs of the proceedings, the arbitrators may make such award respecting the costs, as they shall judge reasonable, including therein a compensation for their own services; but the Court may reduce the sum charged for the compensation of the arbitrators, if it shall appear to them unreasonable.

Award concerning costs

SEC. 692. Where by such judgment any party shall be required to perform any act other than the payment of money, the Court rendering such judgment shall enforce the same by rule; and the party refusing or neglecting to perform and execute such act, or any part thereof, shall be subject to all the penalties of contemning an order of such Court.

Court enforcement

SEC. 693. The arbitrators shall hear and receive the testimony of either party under oath, subject to the restrictions contained in Sec. 301 of Title 12, of this Code. See Sec. 180, Title 8.

Arbitrators to receive testimony

TITLE TWO.

CODE OF

PLEADINGS AND PRACTICE

IN

CIVIL ACTIONS.

TITLE II.

THE REMEDIES APPLIED BY THE COURTS.

GENERAL DEFINITIONS AND DIVISIONS.

- SECTION 1. Division of remedies.
2. Definition of an action.
 3. Definition of a special proceeding.
 4. Division of actions.
 5. Definition of criminal actions.
 6. Definition of a civil action.
 7. Civil and criminal remedies not merged.
 8. Division of this Act, and to what actions it relates.

SECTION 1. Remedies in the Courts of Justice are divided into: Division of remedies

1. Actions.
2. Special proceedings.

SEC. 2. *Action.* An action is an ordinary proceeding in a Court of Justice by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. Definition of an action

SEC. 3. *Special Proceedings.* Every other remedy is a special proceeding. Definition of a special proceeding

- SEC. 4. *Division of Actions.* Actions are of two kinds: Division of action
1. Civil.
 2. Criminal.

SEC. 5. *Criminal Actions.* A criminal action is prosecuted by the "State," (1) as a party against a person charged with a public offence, for the punishment thereof. Definition of criminal action

SEC. 6. *Criminal Action.* Every other is a civil action. Definition of a civil action

SEC. 7. *Remedies not merged.* Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. Civil and criminal remedies not merged

SEC. 8. *Division of this Act.* This Act is divided into Titles and Sections. Division of this act, and to what actions it relates

(1.) See Constitution, Sec. 14, Article 6.

Title 1st relates to the several Courts of Justice, and their jurisdiction.

The remaining Titles relate to and define Civil Actions to be instituted in said Courts, on and after the 10th day of December, A. D. 1858, except as is otherwise provided herein.

A limited *criminal* jurisdiction is by this Act conferred upon Justices of the Peace.

OF JUSTICES' COURTS. (1)

SECTION 9. Jurisdiction of Justice not changed.

10. Rules of Pleadings.

1. Pleadings.
2. Pleadings, how put in.
3. Complaint.
4. Answer.
5. Pleadings, what to contain.
6. Demurrer.
7. Proceedings or demurrer.
8. Plaintiff to prove his case if defendant do not appear.
9. Proceedings in action on account or instrument for payment of money only.
10. Variance when disregarded.
11. Amending pleadings.
12. Execution, when issuable and returnable.
13. Execution on Justice's judgment docketed.
14. Requiring party to exhibit his account.
15. Certain provisions made applicable to these Courts.

Jurisdiction of justices not changed

SEC. 9. Justices of the Peace shall continue to exercise the jurisdiction now vested in them respectively, (See Constitution, Sections 5 and 8, Article 6; see also Jurisdiction, Title 1, Sec. 22, of this Code;) and the proceeding in such Courts shall be as now prescribed by law, except as otherwise provided by this Act.

Rules of pleadings

SEC. 10. The following Rules of Pleading and Practice, shall be observed by Justices of the Peace. The pleadings in Justices' Courts must take place at the time mentioned in the summons for the appearance of the parties, or at such time thereafter, not exceeding one week, as the Justice may appoint for the convenience of the parties, and by their consent.

1. The pleadings in these cases are:
 1. The complaint of the plaintiff:
 2. The answer by the defendants.

(1) See Section 66--Title 1.

2. The pleadings may be oral or in writing; (1) if oral, the substance shall be entered by the Justice in his docket; if in writing, they shall be filed by him, and a reference to them be made in the docket. Pleadings—
how put in

3. The complaint shall state in a plain and direct manner, and with sufficient legal intent, (the facts in the case,) as to enable the Court or Jury to apply the remedy in conformity with the known rules of law and evidence. Complaints

4. The answer may contain a denial of the complaint or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defence. Answer

5. Pleadings are not required to be in any particular form, but must be of sufficient legal intent to warrant the relief desired. Pleadings—
what to contain

6. Either party may demur to a pleading of his adversary, or any part thereof, where it is not sufficiently explicit, or it contain no cause of action or defence, although it be taken as true. Demurrer

7. If the Court deem the demurrer well taken, it shall order the pleading to be amended, and if the party shall neglect or refuse to amend, the party demurring shall be entitled to all the advantage to which such defects would have entitled him in Courts of Common Law or Equity. Proceedings
on demurrer

8. In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case, except in cases provided by law. Plaintiff to
prove his case
if defendant do
not appear

9. In an action or defence founded upon an account or an instrument for the payment of money, it shall be sufficient for a party to deliver the account or instrument to the Court, and to state that there is due to him from the adverse party, a specified sum which he claims to recover or set off. Proceedings
in action on ac-
count an instru-
ment for the
payment of
money

10. A variance between the proof on the trial and the allegations in a pleading, shall be regarded as immaterial, unless the Court shall be satisfied that the adverse party has been misled to his prejudice thereby. Variance when
disregarded

11. The pleadings may be amended at any time before the trial or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the Court, by oath, Amending
pleadings

(1) I fear that the provisions of Section 91, of the Majority Report, requiring the pleadings in Justices' Courts to be in writing, will be found oppressive. It will require the aid of counsel in matters which the parties might conduct in person.

that an adjournment has become necessary to the adverse party, in consequence of such amendment an adjournment shall be granted. The Court may, also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the Court; but no amendment shall be allowed after a witness is sworn on a trial, when an adjournment thereby will be made necessary. (1.)

Execution when issuable and returnable

12. Execution may be issued on a judgment heretofore or hereafter rendered in a Justice's Court, at any time within two years after the rendition thereof, and shall be returnable thirty days from the date of the issue.

Execution on justices judgment docketed

13. If the judgment be docketed with the Clerk of the District Court, the execution shall be issued by him to the Sheriff of the county, and have the same effect, and be executed in the same manner as other executions and judgments of that Court.

Requiring party to exhibit his account

14. The Court may, at the joining of issue, require either party, at the request of the other, at that or some specified time, to exhibit his books of account and demand, or to state the nature thereof as far as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated. (2)

Certain provisions made applicable to these courts

15. The provisions of this act respecting forms of actions, parties to actions, and the examination of parties and witnesses, shall apply to Justices of the Peace. (3)

FORMS IN CIVIL ACTIONS.

- SECTION 11. Distinction between actions at law and suits in equity, and form of all such actions and suits modified.
12. Parties to an action, how designated.
13. Actions on judgments, when and how brought
14. Feigned issues abolished and order for trial substituted.

Distinctions between actions and suits abolished

SEC. 11. The various forms in suits and actions heretofore in use in this State are changed, and hereafter there shall be but one form of action for the enforcement or protection of private rights, or the redress of private wrongs. This shall be denominated a "CIVIL ACTION."

(1) See Section 81, Title 6.

(2) See Sec. 346 to 354, Title 1.

(3) See Sec. 213, Title 9.

Provided, That parties may resort to such forms (after the suit be instituted,) of pleading and practice as were heretofore known to the Courts of Common Law and Equity, in cases where a full, complete and adequate remedy cannot be had under the provisions of this act, as shall best subserve the ends of justice.

Sec. 12. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Parties to an action how designated

Sec. 13. No action shall be brought upon a judgment rendered in any Court of this State, except the Court of a Justice of the Peace, between the same parties, without leave of the Court, for good cause shown, on notice to adverse party; and no action on a judgment rendered by a Justice of the Peace shall be brought in the same county within two years after its rendition, (1) except in cases of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

Actions on a judgment how and when bro't

Sec. 14. Feigned issues are abolished, and instead thereof, in cases where the power heretofore existed to order a feigned issue, or when a question of fact, (not put in issue by the pleadings,) is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and the issue joined between the parties—see Sec. 274, Title 11—and such order shall be the only authority necessary for such trial.

Feigned issues abolished and order for trial substituted

TITLE III.

PARTIES TO CIVIL ACTIONS.

- SECTION 15. Action to be in the name of the real party in interest.
16. Assignment of a thing in action not to prejudice a defence.
17. Executor or Trustee may sue without the persons beneficially interested.
18. When a married woman is a party, the husband to be joined, except, &c.
19. When husband cannot be joined, sue by next friend, or as sole.

(1) For time of commencing Civil Actions, see Statutes of Limitation, Title I, Sec. 241 to 266.

SECTION 20. Infant to appear by guardian—how appointed. Father or mother, may prosecute for seduction of daughter, Father, or mother, may sue for injury to child. When father has deserted family, wife may prosecute or defend.

22. Who may be joined as defendants.

23. Parties united in interest when to be joined, and when one or more may sue and defend for the whole.

24. Plaintiff may sue in one action all the parties to commercial paper.

25. Actions when not to abate by death, marriage, or other disability, and proceedings in such case.

26. Court when to decide controversy, or to order other parties to be brought in. Proceeding instead of bill of interpleader.

SEC. 15. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section seventeen of this Title; but this Section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

SEC. 16. In case of an assignment of a thing in action, the action shall be in the name of the original party for the "use" of the assignee, and shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment, but this Section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith, and upon good consideration before due.

SEC. 17. An Executor or Administrator, a Trustee of an express trust, or a person expressly authorized, by statute, may sue without joining with him the person for whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this Section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

SEC. 18. When a married woman is a party, her husband must be joined with her, except that;

1. When the action concerns her separate property, she may sue alone.

2. When the action is between herself and husband, she may sue or defend alone.

SEC. 19. But where the husband cannot be joined with her, as herein provided, she may prosecute and defend by her next friend, or as a *feme sole*, unless she be within the scope and meaning of subdivision 3, of Sec. 39, Title 5.

SEC. 20. When an infant is a party, he must appear by his next friend or guardian as now provided by law. Such guardian may be appointed by the Court or Judge before whom the action is pending, or to be instituted. Infant to appear by guardian

The guardian shall be appointed, when the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years ; or if under that age, upon the application of his general or testamentary guardian, if he have any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one ; if he has none, then to the person with whom such infant resides.

When the infant is defendant, upon the application of the infant, if he be of 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 relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State ; if he has none, then to the infant himself if over fourteen years of age, and within the State ; or if under that age, and within the State, to the person with whom the infant resides.

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 such seduction, or afterwards, and there be no loss for service.

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.

When a husband and father has deserted his family, the wife and mother may prosecute or defend, in her own name, (1) any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had.

SEC. 21. All persons having an interest in the subject of the action and in obtaining the relief desired, must be joined

(1) See Sec. 276, Majority Report. I feel disposed to dispense with the use of the name of the husband, by the wife and mother, who is compelled to act as the head of a family, and provide for its physical and mental wants, by all means leave her free from the thralldom of him who has imposed upon her this responsibility.

Who may be joined as plaintiffs

as plaintiffs or defendants, except as otherwise provided in this Title.

Who may be joined as defendants

SEC. 22. Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

Parties united in interest when joined, and when one or more may sue and defend for the whole

SEC. 23. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiffs, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of common or general interest to many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of the whole, but such proceeding shall be conducted equitably as to parties not before the Court.

Plaintiff may sue in one action all the parties to commercial paper

SEC. 24. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them be included in the same action, at the option of the plaintiff.

Actions when not to abate by death marriage or other disability and procedure in such case

SEC. 25. No action shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the Court, on motion at any time within one year thereafter or afterwards, on a supplemental bill of complaint, may allow the action to be continued by or against his representative or successor.

Court when to decide controversy or to order other parties to be brought in

SEC. 26. The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights, but when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in; and when in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the Court to be made a party, it may order him to be brought in by the proper amendment. A defendant, against whom an action is pending, upon a contract, or for specific, real, or personal property, may at any time before, answer upon affidavit, state that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property,

and, upon due notice to such person, and the adverse party apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount of the debt, or delivering the property or its value to such person as the Court may direct, and the Court may, in its discretion, make the order.

Proceeding
instead of bill
of interpleader

TITLE IV.

VENUE IN CIVIL ACTIONS.

- SECTION 27. Certain actions to be tried where the subject is situated.
 28. Other actions where the cause arose.
 29. Other actions according to the residence of the parties unless changed on demand of defendant.
 30. In what cases place of trial may be changed.
 31. Where place of trial is changed, papers to be transferred also.

SEC. 27. 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 venue in the cases provided by statute:

Certain actions
to be tried
where the sub-
ject is situated

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.

SEC. 28. Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like powers of the Court to change the venue in the cases provided by statute:

Other actions
where cause a-
rose

1. For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any one county bordering upon such lake, river, or stream where the offence was committed: *Provided*, That no county shall intervene between the place of the offence and that of trial.
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, shall do anything touching the duties of such officer.

SEC. 29. In all other cases, the action shall be tried in the county in which the defendant or any of them shall reside at the commencement of the action, *Provided*, That such action as is set forth in this section, may be tried in the county where the defendant is served with process, *And, provided further*, That nothing in this section shall be construed to change the *venue* where an action against a corporation might have been heretofore tried, save that in an action against an insurance company, the same may be tried in the county where the cause of action arose; or if none of the parties shall reside in the State, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the Court to change the *venue* in the cases provided by statute. If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the Court as provided in this section.

Other actions according to the residence of the parties unless changed on demand of defendant

SEC. 30. The Court may change the *venue* in the following

In what cases place of trial may be changed

- CASES :
1. Where the county designated for that purpose in the complaint, is not the proper county :
 2. Where 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.

Where the place of trial is changed papers to be transferred also

SEC. 31. When the *venue* is changed, all other proceedings shall be had in the county to which the *venue* is changed unless otherwise provided by the consent of the parties in writing duly filed, or by order of the Court, and the papers shall be filed or transferred accordingly.

TITLE V.

MANNER OF COMMENCING CIVIL ACTIONS.

SECTION 32. Actions, how commenced. Summons.

33. Summons, requisite of.

34. Notice to be inserted in certain actions.

35. Complaint need not be served with summons. In such case, summons must state where it is or will be filed : when must be served : when notice of object of suit may be served with summons.

36. Defendant unreasonably defending, when to pay costs.
37. Notice of pendency of action affecting title to real property.
38. Summons, by whom served.
39. Summons, how served and returned.
40. Publication when defendant cannot be found. Affidavit what to contain : in what cases publication may be made : what the order shall contain : personal service of summons and complaint, equivalent to publication : when defendant may be allowed to defend : bonds for restitution : in all cases, complaint to be first filed.
41. Proceedings when there are several defendants and part only are served.
42. When service complete in case of publication.
43. Service of summons, how proved.
44. When jurisdiction of an action acquired by Court.

SEC. 32. Civil actions in the Courts of Record of this State shall be commenced by the service of a summons issuing out of and under the seal of the Court, dated the day of its issue, and tested by the clerk of said Court, and returnable on a day therein named. (1) Actions how commenced

SEC. 33. The summons shall be subscribed by the clerk, and directed through the proper officer to the defendant, and shall require him to answer the complaint and file his answer or a copy thereof in the office of such clerk, as follows:— Summons, requisite of &c
 If the summons shall be served upon the defendant twenty days before the session of any general or special term of the Court, on the first day of such term ; if it be served at a period within twenty days of the commencement of such term, then such answer, or a copy thereof, shall be so filed within thirty days after the service of such summons, unless further time be given by the Court upon motion.

SEC. 34. The Clerk shall insert in the summons a notice in substance as follows :

1. In an action arising on contract for the recovery of money only, that the plaintiff will move the Court for judgment for a sum specified therein, if the defendant fail to answer the complaint in twenty or thirty days, (as the case may be,) after the service of the summons, in accordance with the provisions of the last preceding section. Notice to be inserted in certain actions

2. In other actions, that if the defendant shall fail to answer the complaint within the time specified in the last preceding section, after service of the summons, the plaintiff will apply to the Court for the relief desired in the complaint.

(1) See Secs. 288 and 289 of the Majority Report.

SEC. 35. A copy of the complaint need not be served with the summons. In such case the summons shall state where the complaint is or will be filed. And if the defendant, within twenty days thereafter, in person or by attorney, demand, in writing, a copy of the complaint, specifying a place within the State where it may be served, a copy of it shall be served within twenty days thereafter accordingly; and after such service, the defendant shall have twenty (or thirty) days to answer; but only one copy need be served on the same attorney. In the case of a defendant against whom no personal claim is made in an action, the officer (1) may deliver to such defendant, with a summons, a notice setting forth the general object of the action. A brief description of the property affected by it, if it affect specific, real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless, within the term for answering, he shall, in writing, demand the same.

Complaint need not be served with summons in such case summons must state where it is or it will be filed

When must be served

When notice of action of suit may be served with summons.]

Defendant unreasonably defending when to pay costs

Notice of pendency of action affecting title to real estate

Summons by whom served

SEC. 36. If a defendant on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff if ordered by the Court.

SEC. 37. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, may file with the Register of Deeds of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

SEC. 38. The summons may be served by the Sheriff of the county where the defendant may be found, or by any other person not a party to the action *duly deputised* to execute or serve the same.

(1) It is contemplated by this Act, that all *original* and *final* process be served or executed by the duly elected and sworn officers of the law, or their deputies. I will here remark, that it is urged as an objection to this system, that the "officers charge too much," to this I reply that they charge no more than do attorneys for the same service, yet if these fees are too high, let them be at once reduced.

The service shall be made and the summons returned, with proof of the service, to the clerk whose name is subscribed thereto, with all reasonable diligence.

The Clerk issuing the summons may at the instance of the plaintiff, by endorsement thereon, fix the time in which the same shall be served, and the same shall, if practicable, be served accordingly.

SEC. 39. The summons shall 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, Cashier, Treasurer, Director or Managing Agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose therein.

Summons how served and returned

2. If against a minor, under the age of twenty-one years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the State, then to any person having the care or control of such minor, or with whom he shall reside or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally.

4. In all other cases to the defendant personally, or if not found, by leaving a copy thereof at his usual place of abode, in presence of some one of the family of suitable age and discretion, who shall be informed of the contents thereof.

SEC. 40. When the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the State, and that fact shall appear by affidavit to the satisfaction of the Court or a Judge thereof, or Court Commissioner, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to an action relating to real property, in this State, such Court or Judge may grant an order that the service be made by the publication of the summons, in either of the following cases:

Affidavit what to contain

1. Where the defendant is a foreign corporation and has property within this State, or the cause of action arose therein.

In what cases publication to be made

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

3. Where he is a non-resident but has property therein, and the action is on contract, and the Court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent therein, or the relief desired consists wholly or partly in excluding the defendant from any interest or lien therein.

5. Where the action is for divorce in the cases prescribed by law:

What the order shall contain
The order shall direct the publication to be made in one newspaper, to be designated by the Court, as most likely to give notice to the person to be served, and for such length of time as shall be deemed reasonable, not less than once a week for six weeks, nor more than six months.

Personal service of summons and complaint equivalent to publication
In case of publication, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. (1)

When the publication is ordered, personal service of a copy of the summons and complaint out of the State, shall be equivalent to publication and deposit in the post office.

When defendant may be allowed to defend
If the summons shall not be personally served on a defendant, nor received by such defendant, through the post office, in the cases provided for in this section, he or his representatives shall, on application and sufficient cause shown, at any time before judgment, be allowed to defend the action; and except in actions for divorce, the defendant or his representative may, in like manner, upon good cause shown, be allowed to defend after judgment, at any time within one year after notice thereof, and within three years after its rendition; on such terms as shall be just, and if the defence be successful, and the judgment or any part thereof, shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the Court shall direct; and the Court shall require bonds to be given for such restitution

Bonds for restitution in all such cases complaint to be first filed

(1) See Sec. 42, this Title.

before execution is issued, as is now required by law, but the title to property sold under such judgment, to a purchaser in good faith, shall not thereby be affected; and in all cases where publication is made, the complaint shall be first filed, and the summons as published shall state the time and place of such filing.

Sec. 41. When the action is against two or more defendants, and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

1. If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served, unless the Court shall otherwise direct; or,

2. In an action against defendants severally liable, he may proceed against the defendant or defendants, served in the same manner as if such defendant or defendants were the only parties proceeded against; *Provided*, That this shall not be so construed as to permit the plaintiff to neglect or refuse to take steps to perfect his judgment against a principal debtor, who is within the jurisdiction of the Court, while he is prosecuting the same demand against a surety.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone. (*See Sec. 158, Title 8.*)

Sec. 42. In the cases mentioned in Section forty, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

Sec. 43. Proof of the service of the summons and of the complaint, or notice, if any, accompanying the same, shall be as follows:

1. If served by the Sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office, as required by law, if the same shall have been deposited; or,
4. The written admission of the defendant. In case of service otherwise than by publication, the certificate, affidavit or admission shall state the time, place, and manner of service.

Sec. 44. From the time of the service of the summons in

Proceedings where there are several defendants, and part only are served

When service complete in case of publication

Service of summons how proved

When jurisdiction of action required

a civil action, or the allowance of a provisional remedy, the Court shall be 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.

TITLE VI.

PLEADINGS IN CIVIL ACTIONS.

- CHAPTER 1. The complaint.
2. The demurrer.
 3. The answer.
 4. The reply.
 5. General rules of pleading.
 6. Mistakes in pleading and amendments.

CHAPTER I.

THE COMPLAINT.

- SECTION 45. Forms of pleadings heretofore existing, abolished—sufficiency of.
46. First pleading to be complaint.
 47. Complaint, what to contain.

Forms of pleading heretofore existing abolished

SEC. 45. The forms of pleading heretofore existing, are modified or abolished, and hereafter the forms of pleading in civil actions, in Courts of Record, and the rules by which the sufficiency of the pleadings are determined are those prescribed by this act.

First pleading to be complaint

SEC. 46. The first pleading on the part of the plaintiff is the complaint.

Complaint what to contain

SEC. 47. The complaint shall contain,

1. The title of the cause, specifying the Court in which the action is brought, the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant :
2. A plain and concise statement of the facts constituting the cause of action without unnecessary repetition :
3. A prayer for the relief to which the plaintiff supposes himself entitled; if the recovery of money be sought, the amount thereof shall be stated.

CHAPTER II.

THE DEMURRER.

- SECTION 48. Defendant to demur or answer.

- 49. When the defendant may demur and causes of demur.
- 50. Demurrer must specify grounds of objections to complaint.
- 51. How to proceed if complaint be amended.
- 52. Objection not appearing on complaint, may be taken by answer.
- 53. Objection when deemed waived.

SEC. 48. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the summons, or a copy of the complaint if demanded.

Defendant to demur or answer

SEC. 49. The defendant may demur to the complaint, when it shall appear upon the face thereof; either,

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

When the defendant may demur and causes of demur

SEC. 50. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Demurrer must specify grounds of objection to complaint

SEC. 51. If the complaint be amended, a copy thereof must be served on the defendant, who must answer the same within twenty days, or the plaintiff upon filing with the clerk, due proof of the service, and of the defendant's omission, may proceed to obtain judgment as provided by Section 158, but where an application to the Court for judgment is necessary, eight days' notice thereof must be given to the defendant.

How to proceed if complaint be amended

SEC. 52. When any of the matters enumerated in section forty-nine do not appear upon the face of the complaint, the objection may be taken by answer.

Objection not appearing on complaint may be taken by answer

SEC. 53. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of

Objection when deemed waived

(1) See Sec. 80, Title 6.

the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER III.

THE ANSWER AND REPLY.

- SECTION. 54. Answer, what to contain.
 55. What constitutes a set-off.
 56. May set forth as many grounds of defence as exist, but must be separately stated.
 57. Demurrer as to some causes of action, and answer as to others.
 58. Sham defences to be stricken out on motion.
 59. Reply, when necessary, and what to contain. What case plaintiff may demur to answer.
 60. When defendant may move for judgment upon an answer.
 61. Demurrer to reply.

Answer what
to contain

- SEC. 54. The answer of the defendant must contain,
 1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;
 —(1)
 2. A statement of any new matter constituting a defence or set-off, in concise language, without unnecessary repetition.

What consti-
tutes a set-off

SEC. 55. The set-off (2) mentioned in the last section, must be one existing in favor of the defendant and against the plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action :

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 matter of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. (See Sec. 59, 75, Title 6.)

SEC. 56. The defendant may present by answer as many defences and set-offs as he may have, whether they be such

(1) See Sec. 75,—this Title.

(2) I have caused the "Set-off" to embrace whatever is included in the Majority Report, under both the set-off and counter claim combined.—See Sec. 109, Title 1.

as have been heretofore denominated legal or equitable, or both, they must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

May set forth as many grounds of defence as exist, but must be separately stated

SEC. 57. The defendant may demur to one or more of several causes of action stated in the complaint and answer the residue.

Demurrer as to some causes of action and answer as to others

SEC. 58. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the Court may, in its discretion, impose.

Sham defences to be stricken out on motion

SEC. 59. When the answer contains new matter, constituting a set-off, the plaintiff may, within twenty days, reply to such new matter, denying, generally or specifically, each allegation controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege, in concise language, without unnecessary repetition, any new matter not inconsistent with the complaint constituting a defence to such new matter in the answer, and the plaintiff may, in all cases, demur to the answer, for insufficiency, when upon its face it does not constitute a defence, stating in his demurrer, the grounds thereof, and the plaintiff may demur to one or more of several defences or set-offs, set up in the answer, and reply to the residue. (1)

Reply when necessary, and what to contain

In what cases plaintiff may demur to answer

SEC. 60. If the answer contain a statement of new matter constituting a set-off or defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry may issue, and a Jury assess the damages.

When defendant may move for judgment upon an answer

SEC. 61. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, stating therein the cause of such demurrer.

Demurrer to reply

CHAPTER V.

GENERAL RULES OF PLEADING.

SECTION 62. Pleadings, how subscribed and when verified.

63. Verification of pleadings.

64. How to state an account in pleading.

65. Pleadings to be liberally construed.

1) See Sec. 75 of this Title.

66. Irrelevant and redundant matter to be stricken out—made more certain.
67. Judgments, how to be pleaded.
68. Condition precedent, how to be pleaded.
69. Private statutes, how pleaded.
70. Libel and slander, how stated in complaint.
71. Answer in such cases.
72. In actions to recover property distrained for damage, answer need not set forth title.
73. What causes of action may be joined.
74. To what such causes must belong.
75. Allegation not denied, when to be deemed true.
76. What matters deemed controverted without reply—material allegation defined.

**Pleading—how
subscribed and
when verified**

SEC. 62. Every pleading in a Court of Record must be subscribed by the party, or his attorney, and when a pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

**Verification of
pleadings**

SEC. 63. The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those, he believes them to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the party be absent or incapable of making the same, and if the action or defence be founded upon a written instrument for the payment of money, and such instrument be in the possession of the agent or attorney; or if all the material allegations of the pleadings be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by an officer thereof. And when the State, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegations might subject the party to a prosecution for felony. And any pleading may be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.

SEC. 64. 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: which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof, or if an inspection of the original books of account shall be desired by a party, the same shall be produced on notice. The Court, or a Judge thereof, may order a further account when the one delivered is defective; and the Court may in all cases order a bill of particulars of the claim of either party to be furnished.

How to state
an account

SEC. 65. In the construction of a pleading for the purpose of determining its legal effect and intent, its allegations shall be legally yet liberally construed, with a view to substantial justice between the parties.

Pleadings to be
liberally con-
strued

SEC. 66. If irrelevant and redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence be not apparent, the Court may require the pleading to be made legally definite and certain.

Irrelevant and
redundant mat-
ter to be strick-
en out

SEC. 67. 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 jurisdiction.

Judgment how
to be pleaded

SEC. 68. 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. In an action or defence founded upon an instrument for the payment of money, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum which he claims, and for which he asks judgment.

Condition pre-
cedent how to
be pleaded

SEC. 69. In pleading a private statute, or a right derived

Private statute
—how pleaded

therefrom, it shall be sufficient to refer to such statute by its title and the day of its approval, and the Court shall thereupon take judicial notice thereof.

Libel and slander—how stated in complaint

SEC. 70. 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 of and 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; *Provided always*, That any words written or spoken of a woman or maiden which amount, in common parlance, to an imputation upon her chastity, such words shall be deemed and held to be actionable without proving special damages.

Answer in such cases

SEC. 71. In the actions 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.

In action to recover property distrained for damage, answer need not set forth title

SEC. 72. In an action to recover the possession of property distrained, doing damage, (damage feasant) an answer that the defendant or person by whose command he acted, was law fully 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.

What causes of action may be joined in same action

SEC. 73. The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both, where they arise out of—

1. The same transaction, or transactions connected with the same cause of action:
2. Contract, express or implied; or,
3. Injuries with or without force, to person and property, or either; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for the 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 operation of law.

Sec. 74. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be stated separately. To what such causes must be long

Sec. 75. Every material allegation of the complaint not specifically controverted by the answer, as prescribed in Section 54, and every material allegation of new matter in the answer constituting a set-off, not controverted by the reply, as prescribed in Section 59, shall, for the purposes of the action, be taken as true. Allegation not denied when to be deemed true

Sec. 76. But the allegation of new matter in the answer, not relating to a set-off, or to matter material to the defence, or of such new matter, in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require, 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. What matters deemed controverted without reply

A material allegation is one essential to the claim or defence, and which could not be stricken from the pleading, without leaving it insufficient or defective.

CHAPTER VI.

JOCFAHS.

MISTAKES IN PLEADINGS AND AMENDMENTS.

SECTION 77. Material variances, how provided for.

78. In material variances, how provided for.

79. What to be deemed a variance.

80. Amendments of course and after demurrer.

81. Amendments by the Court.

82. General control of Court over proceedings.

83. Suing a party by fictitious name, when allowed.

84. No error or defect to be regarded, unless it affects substantial rights.

85. Supplemental complaints, answer and reply.

Sec. 77. No variance between the allegations in a pleading and the proof shall be deemed material, unless it shall mislead the adverse party to his prejudice in maintaining his action or defence upon its merits. Wherever it shall be alleged that a party has been so misled, that fact shall be Material variances, how provided

proved to the satisfaction of the Court, and in what respect he has been so misled, and thereupon the Court may order the pleading to be amended upon such terms as may be just.

Immaterial variances, how provided for SEC. 78. Where the variance is not material as provided in the last section, the Court may direct the fact to be found in accordance with the evidence, or may order an immediate amendment without costs.

What to be deemed a variance SEC. 79. Where, however, the allegation of the cause of action or defence to which the proof is directed, be unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a variance within the meaning of the last two sections, but a *failure* of proof.

Amendments of course and after demurrer SEC. 80. 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 it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it appear to the Court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term, for which it is or may be noticed, and if it appear to the Court, that such amendment was made for that purpose, the same may be stricken out and such terms imposed as to the Court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the Court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over on such terms as may seem just. If the demurrer be allowed for the cause mentioned in the 5th sub-division of section 49, the Court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the cause of action therein mentioned.

Amendments by the court SEC. 81. The Court may, before or after judgment in furtherance of justice, and upon such terms as may be proper, amend any pleading, process or proceedings, 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 defence, by conforming the pleading or proceed-

ing to the facts proved, and to the extent provided in the Statute "Jeofails," protect the rights of the parties.

SEC. 82. The Court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after making such extension, or of the entering of any order or decree, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertance or surprise, or excusable neglect, but not thereafter, 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 this Code, the Court may in like manner and upon like terms permit an amendment of such proceeding so as to make it conformable thereto.

SEC. 83. When the plaintiff shall be 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 shall be discovered, the pleading or proceeding may be amended accordingly.

SEC. 84. The Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

SEC. 85. 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, or of which the party was ignorant when his former pleading was made.

TITLE VII.

PROVISIONAL REMEDY IN CIVIL ACTIONS.

- CHAPTER 1. Arrest and bail.
2. Claim and delivery of personal property.
 3. Injunction.
 4. Attachment.
 5. Provisional remedies.

CHAPTER I.

ARREST AND BAIL.

- SECTION 86. No person to be arrested except as prescribed by this Act.
87. Cases in which the defendant may be arrested.
88. Order for arrest, by whom made.
89. Affidavit to obtain order.
90. Security by plaintiff before order for arrest.
91. Order—when made, and its form.
92. Affidavit and order to be delivered to Sheriff, and copy served on defendant.
93. Arrest, how made.
94. Defendant to be discharged on bail or deposit.
95. Bail, how given.
96. Surrender of defendant.
97. Bail may arrest and surrender.
98. Bail, how proceeded against.
99. Bail, how exonerated.
100. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.
101. Notice of justification and new undertaking of other bail.
102. Qualification of bail.
103. How to justify.
104. Allowance of undertaking.
105. Deposit of money with Sheriff.
106. Payment of money by Sheriff.
107. Substitution of bail for deposit.
108. Money deposited, how applied or disposed of.
109. Sheriff when liable as bail, and his discharge from liability.
110. Proceeding against Sheriff.
111. Bail liable to Sheriff.
112. Motion to vacate, arrest or reduce bail. Imprisonment for debt abolished.
113. Affidavits on motion.

SEC. 86. No person shall be arrested in a civil action except as prescribed by this act; but this provision shall not apply to proceedings for contempts. (1)

SEC. 87. The defendant may be arrested, as hereinafter prescribed, in the following cases:

Cases in which defendant may be arrested

1. In an action for the recovery of damages, on a cause of action for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property.

2. In an action for a fine or penalty, or for the breach of a promise to marry, or for money received in a fiduciary capa-

(1) See Sec. 112, Title 7.

city, or for property embezzled, or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment, or 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.

3. In an action to recover 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, and with the intent that it should not be so found or taken, in order and with the intent of depriving the plaintiff of the benefit thereof. But no female shall be arrested in any action except for a willful injury to person, character or property. (1) And when the defendant has removed or disposed of his property, or is about to do so with intent to defraud his creditors.

Sec. 88. An order for the arrest of the defendant must be obtained from a Judge of the Court in which the action is brought, or from a Court Commissioner. Order for arrest by whom made

Sec. 89. The order may be made where it shall appear to the Judge or Commissioner, by the affidavit of the plaintiff, or of some other credible person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 87. Affidavit to obtain order

Sec. 90. Before making the order, the Judge or Commissioner shall require a written undertaking on the part of the plaintiff, with sureties, 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 arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars. If the undertaking be executed by the plaintiff and his sureties, they shall annex thereto an affidavit, that they are residents and householders or freeholders within the State, and worth double the sum specified in the undertaking, and above all their debts, liabilities and exemptions. Security by plaintiff before order for arrest

(1) See Section 112, Title 7.

Order when made and its form SEC. 91. The order may be made to accompany the summons, or at any time afterwards, before judgment. It shall 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 at a time and place therein mentioned, to the Court by which it shall have been issued.

Affidavit and order to be delivered to the sheriff and copy served on defendant SEC. 92. The affidavit and order of arrest shall be delivered to the Sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

Arrest how made SEC. 93. The Sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

Defendant to be discharged on bail or deposit SEC. 94. The defendant, at any time before execution, shall be discharged from arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Bail how given SEC. 95. The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence, 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 sub-division of Section 87, an undertaking to the same effect as that provided by Section 119.

Surrender of defeneant SEC. 96. 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 shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall 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 Court, or Court Commissioner, 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 shall not apply to the arrest for the causes mentioned in the third sub-division of Section 87, so as to discharge the bail from an undertaking given to the effect provided by Section 119.

SEC. 97. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower the proper officer to do so. Bail may arrest and surrender

SEC. 98. In case of failure to comply with the undertaking, the bail may be proceeded against by action only. Bail how proceeded against

SEC. 99. The bail may be exonerated, either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender 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. Bail how exonerated

SEC. 100. Within the time limited for that purpose, the Sheriff shall deliver the order of arrest to the Clerk by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff within ten days thereafter, may serve upon the Sheriff, a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the Sheriff shall be exonerated from liability. Delivery of undertaking to plaintiff

SEC. 101. On the receipt of such notice, the Sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the arrest was ordered, notice of justification of the same, or other bail, (specifying the places of residence 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 shall be a new undertaking, in the form prescribed in section ninety-five. Notice of justification and new undertaking if other bail

SEC. 102. The qualifications of bail must be as follows : Qualification of bail

1. Each of them must be a resident and householder or freholder, within the State :

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but a Judge or a 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.

SEC. 103. For the purpose of justification, each of the bail shall 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 shall be reduced to writing, and subscribed by the bail, if required by the plaintiff. (See Sec. 121, Title 7.)

How to justify **Allowance of undertaking** SEC. 104. If the Judge or Justice of the Peace find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the Clerk; and the Sheriff shall thereupon be exonerated from liability.

Deposit of money with sheriff SEC. 105. 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 shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

Payment of money into court by sheriff SEC. 106. The Sheriff shall, within four days after the deposit, pay the same into Court, and shall take from the officer receiving the same two certificates of payment, the one of which he shall 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.

Substitution of bail for deposit SEC. 107. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section one hundred and one, any time before judgment; and thereupon the Judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the Sheriff to the defendant, and it shall be refunded accordingly.

Money deposited—how applied or disposed of SEC. 108. Where 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 shall, under the direction of the Court, apply the same in satisfaction thereof; and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the Clerk shall refund to him the whole sum deposited, and remaining unapplied.

SEC. 109. 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, through or by the collusion or neglect of the Sheriff, he shall himself be liable as bail. But

he may discharge himself from such liability by the giving and justification of bail, as provided in Sections 101, 102, 103 and 104 of this Title, at any time before process against the person of the defendant to enforce an order or judgment in the action. Sheriff when liable as bail and his discharge from liability

SEC. 110. If a judgment be recovered against a Sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the Sheriff, to collect the deficiency as in other cases of delinquency. Proceedings on judgment against sheriff

SEC. 111. The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the Sheriff by action for damages which he may sustain by reason of such omission. Bail liable to sheriff

SEC. 112. 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: *Provided, always*, That no person shall hereafter be subject to arrest or imprisonment for debt in this State, save in accordance with the provisions of Section twelve of Article One of the Constitution, and an Act entitled "An Act to abolish imprisonment for debt and for other purposes, Approved March 3, 1855."⁽¹⁾ Motion to vacate arrest or reduce bail

SEC. 213. If the motion be made upon affidavit on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavit or other proof, in addition to those on which the order or arrest was made. Affidavit on motion

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

- SECTION 114. Delivery of personal property, when it may be claimed.
115. Affidavit and its requisites.
116. Requisition to Sheriff to take and deliver the property.
117. Security on part of the plaintiff and jurisdiction.
118. Exception to sureties, and proceedings thereon, or on failure to accept.
119. Defendant when entitled to re-delivery.
120. Justification of defendant's sureties.
121. Qualification and justification of sureties.
122. Property, how taken when concealed in building or enclosure.
123. Property, how kept.
124. Claim of property by third person, and proceeding thereon.
125. Notice of affidavit, when and where to be filed.

(1) Imprisonment for debt abolished.

Delivery of
personal prop-
erty when it
may be claim-
ed

SEC. 114. The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this Act.

Affidavit and
its requisites

SEC. 115. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing :

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 shall be set forth.

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.

Requisition to
sheriff to take
and deliver the
property

SEC. 116. The plaintiff may thereupon, by an endorsement in writing upon the affidavit, require the Sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

Security on
part of the
plaintiff and
justification

SEC. 117. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, 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 thereof be adjudged, and for the payment to him of such sum as may for any cause be recovernd against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall 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 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.

SEC. 118. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give nc-

tice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall 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 objection to them is either waived, as above provided, or until they justify or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Exception to sureties and proceedings thereon or on failure to accept

SEC. 119. 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 to 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 Sheriff, 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 shall be delivered to the plaintiff, except as provided in Section 124, Title 7.

Defendant when entitled to re-delivery

SEC. 120. The defendant's sureties, upon a notice to the plaintiff, of not less than two nor more than six days, shall justify before a Judge or Justice of the Peace in the same manner as upon bail on arrest; upon such justification the Sheriff shall deliver the property to the defendant. The Sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed, or expressly waived, and may retain the property until that time, but if they or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Justification of defendant's securities

SEC. 121. The qualification of sureties and their justification, shall be as prescribed by Sections 102 and 103 of this Title, in respect to bail upon an order of arrest.

Qualification and justification of sureties

SEC. 122. If the property or any part thereof be concealed in a building or enclosure, the Sheriff shall publicly, and in the hearing of the party concealing the same, demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

Property how taken when concealed in building or enclosure

Property how kept

SEC. 123. When the Sheriff shall have taken property as in this Title provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Claim of property by third person and proceedings thereon

SEC. 124. If the property taken be claimed by any other person than the defendant, or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, 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, shall indemnify the Sheriff, against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth, independent of such property as is exempt from sale on execution, double the value of the property specified in the affidavit of the plaintiff, and freeholders or 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 made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Notice and affidavit when and where to be filed

SEC. 125. The sheriff shall 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.

CHAPTER III.

INJUNCTION.

SECTION 126. Injunction may be in form of an Order.

127. Injunction, in what cases granted.

128. At what time it may be granted and upon what granted.

129. Notice, when required. Temporary injunction.

130. Security upon injunction and damages thereon, how ascertained.

131. Order to show cause why injunction should not be granted.

132. Security upon injunction to suspend business of corporation.

133. Motion to vacate or modify injunction.

134. Affidavits on motion.

Injunction may be in the form of an order

SEC. 126. The writ of injunction may, if deemed preferable to the ancient form, be in the form of an order as prescribed in this Act. The order may be made by the Court in

which the action is brought, or by a Judge thereof, or by a Court Commissioner, in the cases provided in the next Section ; and, when made, may be enforced as the order of the Court.

SEC. 127. Where it shall appear by the complaint that the plaintiff is entitled to the relief desired, and that such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act and to stay waste. And where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such disposition.

SEC. 128. The injunction may be granted at the time of commencing the action, or as an interlocutory order or decree, at any time afterwards before judgment, upon its appearing satisfactorily to the Court or Judge, or Court Commissioner, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor, stating the circumstances. A copy of the affidavit must be served with the injunction.

SEC. 129. An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained, until the decision of the Court or Judge, granting or refusing the injunction.

SEC. 130. Where no provision is made by statute, as to security upon an injunction, the Court, or Judge, or Commissioner, shall require a written undertaking, or bond, on the part of the plaintiff, with or without securities, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the Court shall direct.

Order to show cause why injunction should not be granted

SEC. 131. If the Court, or Judge, or Commissioner deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Security upon injunction to suspend business of corporation

SEC. 132. An injunction to suspend the general or ordinary business of a corporation, shall not be granted, except by the Court or Judge thereof; nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except in proceedings to enforce the liability of directors and stockholders in banking associations. And except where the people of this State are a party to the proceeding, unless the plaintiff shall give bond, executed by two sufficient sureties, to be approved by the Court or Judge, to the effect, that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the bond, which such corporation may sustain, by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the Court shall direct.

Motion to vacate or modify injunction

SEC. 133. If the injunction be granted by a Judge of the Court, or by a Court Commissioner, without notice, the defendant, at any time before the trial, may apply, upon notice, to the Judge of the Court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

Affidavits on motion

SEC. 134. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may traverse, and oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

CHAPTER IV.

ATTACHMENT.

- SECTION 135. Attachments, when may issue, and in what cases.
136. Warrant of attachment, and by whom granted.
137. In what cases warrant may be issued.
138. Security on attachment.
139. Warrant, to whom directed and what to require.
140. Mode of proceeding in executing warrant.

141. Proceeding in case of perishable property or vessels.
142. Interest in corporation or association liable to attachment.
143. Attachment, how executed on property incapable of manual delivery.
144. Certificate of defendant's interest to be furnished by corporation.
145. Judgment, how satisfied.
146. When action to recover note, &c., attached, may be prosecuted by the plaintiff in the action in which the attachment issued.
147. Bond to sheriff on attachment, how disposed of on judgment for defendant.
148. Discharge of attachment and return of property or its proceeds to defendant.
149. Undertaking on the part of the defendant, in such cases.
150. When and how sheriff to return warrant.
151. Sheriff's fee.
152. Motion to set aside attachment for insufficiency, and affidavits and proceedings for that purpose.

SEC. 135. In an action for the recovery of money against a corporation created by or under the laws of any other State, government or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself; or,

Attachments,
when may issue and in
what case

Whenever any person or corporation is about to remove any of his or its property from the State, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff may, at the time of issuing the summons, or at any time afterwards, have the property of such defendant or corporation attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; or,

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; or,

When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. The plaintiff, at the time of obtaining the summons, or at any time afterwards, may have the property of such defendant attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

Warrant of attachment and by whom granted

SEC. 136. A warrant of attachment must be obtained from a Judge of the Court in which the action is brought, or from a Court Commissioner.

In what cases warrant may be issued

SEC. 137. The warrant may be issued whenever it shall appear, by affidavit, to the satisfaction of the Court, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the case is one of those mentioned in Section 135, Title 7, and not in conflict with Section 112 thereof.

Security on attachment

SEC. 138. Before issuing the warrant, the Judge or Commissioner (1) 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.

Warrants to whom directed and what to require

SEC. 139. The warrant shall be directed to the Sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county that shall be liable to execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses, the amount of which must be stated in conformity with the complaint. Several warrants may be issued at the same time to Sheriffs of different counties.

Mode of proceeding in executing warrant

SEC. 140. The Sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects in the manner required of him by law in case of attachments; shall make and return an inventory, and shall keep the property seized by him or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the Court or Judge, collect and receive into his possession, all debts, credits and effects of the defendant. The Sheriff may also take such legal proceedings, either in his own name, or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the Court or Judge may direct.

The Sheriff to whom the warrant is delivered shall execute the same without delay, as follows:

(1) I have referred to the "Court Commissioner" for the reason that Sec. 15 of Article 6 of the Constitution, contemplates such an officer, and that he shall be clothed with important powers and prerogatives. See Sec. 388, Majority Report, in which this power is conferred upon the Clerk.

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, and by filing a certified copy of such warrant and of his return thereon in the office of the Register of Deeds of the county in which such real property may be, which warrant and return shall be recorded in the book of mortgages, and, from the time of filing the same, shall be and continue a lien on all real estate mentioned or described, in the return in such county, until the same shall be discharged; and when said lien shall be discharged by order of the Court or by satisfaction of the judgment rendered in the action, it shall be the duty of the Register, when requested, to record the certificate of satisfaction, 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 satisfaction or discharge.

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

SEC. 141. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments.

SEC. 142. The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and the profits thereon, and all other property in this State of such defendant not exempt from sale on execution, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution.

SEC. 143. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the Sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

SEC. 144. Whenever the Sheriff shall, with a warrant of attachment or execution against the defendant, apply to such officer, debtor or individual for the purpose of attaching or levying upon such property, such officer, debtor or individual shall furnish him with a certificate under his hand, designa-

Proceedings in
case of perish-
able property
or vessels

Interest in cor-
poration and
association lia-
ble to attach-
ment

Attachment,
how executed
on property in-
capable of man-
ual delivery

Certificates of defendant's interest to be furnished by corporation

ting the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation or individual, for the benefit of or debt owing to the defendant. If such officer, debtor or individual 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 obedience to such order may be enforced by attachment.

Judgment, how satisfied,

SEC. 145. In case judgment be entered for the plaintiff in such action, the Sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

By paying over avails of sales of perishable property

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

By issuing execution against attached property

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in sub-division four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares, in the stock of a corporation or association, the Sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.

Right or shares in corporation, how disposed of

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, such Sheriff shall repossess himself of the same and for that purpose have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the Sheriff, shall be liable to double damages at the suit of the party injured.

Sheriff may repossess himself of all property attached

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

Sheriff may collect notes and accounts attached

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

SEC. 146. The actions herein authorized 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, costs and expenses 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 a householder and worth double the amount of the penalty of the bond over and above all demands, exemptions and liabilities.

When actions to recover note &c., attached, may be prosecuted by the plaintiff in the action in which the attachment issued

SEC. 147. If the foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the Sheriff, except such as are mentioned in the last Section, all the proceeds of sales, and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

Bond to sheriff on attachment —how disposed of on judgment for defendant

SEC. 148. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the Court, for an order to discharge the same; and if the same be granted, all the proceeds of sales or moneys collected by him, and all property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

Discharge of attachment and return of property or its proceeds to defendant

SEC. 149. Upon such application, the defendant shall deliver to the Court, or officer, a bond, executed by at least two sureties, resident and freeholders in this State, approved by such Court or officer, 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 bond, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the value of the property attached be less than the amount claimed by the plaintiff, the Court or officer issuing the attachment may order the same to be appraised, and the amount of the undertaking

Undertaking on the part of defendant in such cases

shall be double the amount so appraised. And in all cases the defendant may move to discharge the attachment, as in case of other provisional remedies.

When and how
sheriff to re-
turn warrant

SEC. 150. When the warrant shall be fully executed or discharged, the Sheriff shall return the same with his proceedings thereon, to the Court in which the action was brought. The Sheriff may deliver any of the property attached to any third person claiming the same, upon his giving a written undertaking therefor, executed by one or more sufficient surties, 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. If an action be brought upon such undertaking against the principal or his sureties, it shall be a defence 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. If the property be claimed by a third person, as his property, the Sheriff may summon a jury to try the validity of such claim, and proceedings shall be had thereon, with like effect as in case of seizure upon execution. 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, thereupon, be examined on oath concerning the same.

Sheriff's fees

SEC. 151. The Sheriff shall be entitled to the same fees and compensation for services, and the same disbursements under this title as are allowed by law for like services in other cases.

Motion to set
aside attach-
ment for insuf-
ficiency and af-
fidavits and
proceedings
for that pur-
pose

SEC. 152. The defendant may, at any time before the time to answer expires, make a motion before the Judge of the District, to set aside or discharge the attachment, on the ground that sufficient cause for the granting of the same did not exist. Such motion may be made upon the affidavit for the attachment, or additional affidavits, on the part of the defendant, controverting the grounds upon which the attachment was issued, and in case the defendant uses additional affidavits, the plaintiff may use additional affidavits on his part to sustain the same, and the plaintiff may, on reasonable notice for that purpose given, require the defendant or other person to appear on the hearing of such motion, and be examined orally touching the grounds upon which said attachment was issued; and if the defendant neglect or refuse to

attend as required, the motion to discharge the attachment shall be denied.

CHAPTER V.

OTHER REMEDIES.

- SECTION 153. Powers of Court as to receivers.
 154. Deposit of money or other property in Court.
 155. Court may order property or money deposited to be delivered or conveyed, or may pass title to real estate by judgment or decree.
 156. When answer admits part of plaintiff's claim, Court, on motion, may order defendant to satisfy that part, if no set-off.

SEC. 153. A receiver may be appointed :

1. Before judgment, on the application of either party, when he establishes an apparant right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired:

Powers of court as to receivers

2. After judgment to carry the judgment into effect :

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

4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights:

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

SEC. 154. When it is admitted by the pleadings or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which being the subject of the litigation is held, by him as trustee for another party, or which belongs, or is due to another party, the Court may order the same to be deposited in Court, or delivered to such party with or without security, subject to the further direction of the Court.

Deposit of money or other property in court

SEC. 155. Whenever in the exercise of its authority, a Court shall have ordered the deposit, delivery or conveyance

Court may order property or money deposited, to be delivered or conveyed, or may pass title to real estate by judgment or decree of money or other property, and the order is disobeyed, the Court, besides punishing the disobedience as for contempt, may make an order requiring the Sheriff to take the money or property, and deposit, deliver or convey it in conformity with the direction of the Court.

When answer admits part of plaintiffs claim, court on motion may order defendant to satisfy that part

SEC. 156. When the answer of the defendant admits part of the plaintiff's claim to be just, the Court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order, as it enforces a provisional remedy: *Provided*, That such interlocutory order shall not be made when the defendant shall give notice of set-off.

TITLE VIII.

TRIAL AND JUDGMENT IN CIVIL ACTIONS.

- CHAPTER 1. Judgment upon failure to answer.
2. Issue and mode of trial.
 3. Trial by Jury.
 4. Trial by the Court.
 5. Trial by referees.
 6. Manner of entering judgment.

CHAPTER I.

JUDGMENT UPON FAILURE TO ANSWER.

- SECTION 157. Judgment, what.
 158. Judgment on failure of defendant to answer.
 159. Judgment on frivolous demurrer, answer or reply.

Judgment—
what

SEC. 157. A judgment is the final determination of the rights of the parties in the action.

Judgment on failure of defendant to answer

SEC. 158. Judgment may be had if the defendant fail to answer the complaint, as follows:

Action on contract

1. In any action arising on contract for the recovery of money, the attorney for the plaintiff may file with the Clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons, according to the provisions of Section 35, and that no answer has been received, and that the time has expired. The Clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant, or against one or more of several defendants, in the cases provided for in Sec. 41, Title 5. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the Clerk, on

its production to him, shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action from his examination under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to twenty days notice of the time and place of such motion, and no execution shall issue until after the expiration of a regular term of the Court, which would be authorized on cause shown to set aside such judgment. (See Sec. 188, Title 8, to Sec. 288, Title 12.)

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 desired in the complaint. If the taking an account or the proof of any fact be necessary to enable the Court to give judgment or to carry the judgment ^{In other action} 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 or of specific, real or personal property, with damages for the detention 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. In case the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days notice of the time and place of application to the Court for the relief sought by the complaint.

3. In actions where the service of the summons was by publication, the plaintiff may in like manner apply for judgment, and the Court shall thereupon cause proof to be taken ^{Cases of publication of summons} of the demand mentioned in the complaint, and in case the defendant is a non-resident, shall cause the plaintiff or his agent to be examined on oath, as to any payment that may have been made to such plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, and before entering judgment, the Court shall require the plaintiff to cause to be filed satisfactory security to abide the order of the Court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives, shall apply and be admitted to defend the

action and shall succeed in such defence. See Sec. 51, Title 6, and 179, Title 8.

Judgment on frivolous demurrer, answer or reply

SEC. 159. If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of ten days may apply to a Judge of the Court, either in or out of term, for judgment thereon, and judgment may be given accordingly.

CHAPTER II.

ISSUE AND MODE OF TRIAL.

SECTION 160. The different kinds of issue.

161. Issue of law.

162. Issue of fact.

163. Issue of both law and fact, the issue of law to be tried first.

164. Trial defined.

165. Issue, how tried.

166. Either party may give notice of trial and note of issue.

167. Order of disposing of issue on the calendar.

The different kinds of issue

SEC. 160. Issues arise upon the pleadings when a fact or conclusion of law is asserted by the one party and denied by the other; they are of two kinds:

1. Of Law.

2. Of Fact.

Issue of law

SEC. 161. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Issue of fact

SEC. 162. An issue of fact arises,

1. Upon a material allegation in the complaint traversed or denied by the answer; or,

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

3. Upon new matter in the reply, except an issue of law is joined thereon.

Issue of both law and fact, the issue of law to be first tried

SEC. 163. Issues both of law and of fact may arise upon different parts of the pleadings in the same action; in such cases the issue of law must be first tried, unless the Court otherwise direct.

Trial defined

SEC. 164. A trial is the judicial examination of the issues between the parties, whether they be issues of law or fact.

SEC. 165. An issue of law must be tried by the Court, unless it be referred as provided in sections 180 and 181 of Title 8. An issue of fact in an action for the recovery of

money, or of specific, real or personal property, must be tried by a Jury, unless a Jury trial be waived as provided in Sections 176 and 181, Title 8. Every other issue is triable by the Court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it as provided in sections 180 and 181 as above.

Issues—how
tried

All issues of fact triable by a Jury or by the Court, must be tried before a single Judge.

Issues of law must be tried at a term of the District Court or a special term, and shall, unless the Court otherwise direct, have preference on the calendar.

A motion to postpone a trial for the absence of evidence, can only be made on affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to secure it; the Court may also require the moving party to state the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and consent that it be considered as actually given on the trial, or offered, and overruled as improper, the trial shall not be postponed.

SEC. 166. At any time after issue, and at least ten days before the sitting of the Court, either party may give notice of trial. The party giving the notice shall furnish the Clerk, at least ten days before the sitting of the Court, with a note of the issue, containing the title of action, the names of the attorneys, and the time when the last pleading was served or filed, and the Clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

Either party
may give no-
tice of trial
and note of
issue

SEC. 167. The issues of the calendar shall be disposed of in the following order, unless, for the convenience of parties or dispatch of business, the Court shall otherwise direct:

Order of dis-
posing of issues
of the calendar

1. Issues of fact to be tried by a Jury.
2. Issues of fact to be tried by the Court.
3. Issues of law.

CHAPTER III.

TRIAL BY JURY.—(1)

SECTION 168. Party noticing for trial may proceed with the case; separate trials.

169. Court to be furnished with copy of pleadings.

170. General and special verdicts defined.

(1) See Sec. 123, Title 1.

171. When Jury may render general or special verdict, and when Court may direct special finding.
 172. Special finding shall control general verdict.
 173. Jury to assess damages in certain cases.
 174. Entry of the verdict; motion for a new trial.
 175. Motion for a new trial, when to be heard.

Party noticing for trial may proceed with the case

SEC. 168. Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the Court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict, or a judgment, as the case may require. A separate trial between the plaintiff and any of the several defendants may be allowed by the Court, whenever, in its opinion, justice will be thereby promoted.

Parties may sever

Court to be furnished with copy of pleadings

SEC. 169. When the issue shall be brought to trial by the plaintiff, he shall exhibit to the Court the summons, and pleadings or copies thereof, with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect to furnish the Court with the summons and pleadings, and the offer of the defendant, the same may be furnished by the defendant, or the Clerk of the Court.

General or special verdict defined

SEC. 170. A general verdict is that by which the Jury pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the Jury find the facts only, leaving the judgment to the Court.

When jury may render general or special verdict, and when court may direct special;

SEC. 171. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. In every action for the recovery of money, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the Court may direct the jury to find a special verdict, in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be

stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the Clerk and entered upon the minutes.

SEC. 172. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.

Special findings shall control general verdict

SEC. 173. When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the Court, assess the amount of the recovery when the Court give judgment for the plaintiff on the answer. If a set-off established at the trial exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Jury to assess the damages in certain cases

SEC. 174. Upon receiving a verdict, the Clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the Court, the Clerk must enter judgment in conformity with the verdict. If exception be taken, it may be reduced to writing at the time, or entered in the Judge's minutes, and afterwards settled as provided by the rules of Court, and then stated in writing, with the case or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made, except the same be desired by Counsel. If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the Court or a Judge thereof. The Judge who tries the cause, may, in his discretion, entertain a motion, to be entered upon his minutes, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term at which the trial is had, unless the same be necessarily deferred.

Entry of the verdict

When such motion is heard and decided upon the minutes.

Motion for a
new trial

of the Judge, and an appeal is taken from the decision, a case or bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

Motion for a
new trial—
when to be
heard

SEC. 175. A motion for a new trial on exceptions or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, or to set aside the report of referees, must, in the first instance, be heard and decided by the Court, at a special or general term thereof. Save that when exceptions are taken, the Judge trying the cause may at the trial direct them to be heard in the first instance at the regular term, and the judgment in the mesne-time suspended; and in that case they must be there heard in the first instance, and judgment there given. And when upon a trial the case presents only questions of law, the Judge may direct a verdict, subject to the opinion of the Court, at the regular term, and in that case the application for judgment must be made at the regular term. Every judgment rendered upon a verdict, taken subject to the opinion of the Court, at the regular term, may be reviewed by the Supreme Court in the same manner, and with the like effect, as if exceptions had been duly taken at the proper time; provided it shall appear by the return, that questions of law were involved in the rendition of the judgment.

CHAPTER IV.

TRIALS BY THE COURT.

SECTION 176. Trial by Jury, how waived.

177. On trial by the Court, judgment to be given in twenty days, and what decision to contain.

178. Exceptions, when and how taken.

179. Proceedings upon judgment on issue of law.

Trial by jury—
how waived

SEC. 176. Trial by jury may be waived by the several parties, to an issue of fact, in actions on contract, with the assent of the Court, in other actions, in the manner following:

1. By failing to appear at trial:

2. By written consent of the party, signed by himself, or his attorney, and filed with the clerk:

3. By oral consent in open Court, entered on the minutes.

On trial by the
court, judg-
ment to be giv-
en in twenty
days—and
what decision
to contain

SEC. 177. Upon the trial of a question of fact by the Court, its decision shall be given in writing, and filed with the clerk within twenty days after the adjournment of the Court at which the trial took place. Judgment upon the decision shall

be entered accordingly, and the Judge shall state in his decision separately:

1. The facts found by him, and
2. His conclusions of law thereon.

SEC. 178. For the purpose of appeal, either party may except to a decision on a matter of law, arising upon such trial, within ten days after notice of the judgment in the same manner and with the same effect as upon a trial by Jury. And either party desiring a review upon the evidence appearing upon the trial, either of fact or law, may within ten days after the notice of such judgment, or within the time prescribed by the rules of the Court, make a case or take exceptions in like manner as upon trials by jury; except that the Judge, in settling the matter, must briefly specify the facts found by him, and his conclusions of law.

Exceptions—
how and when
taken

SEC. 179. On a judgment for the plaintiff, upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two sub-divisions of Section 158, of this Title, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking an account or the proof of any fact be necessary to enable the Court to complete the judgment, a reference or assessment by a Jury may be ordered, as in that Section provided. (1)

Proceedings
upon judgment
on issue of law

CHAPTER V.

ARBITRATION. (2)

TRIAL BY REFEREES.

- SECTION 180. All issues referable by consent.
181. When reference may be ordered by Court.
 182. Mode of trial, motion to set aside report, when motion made and proceeding for that purpose.
 183. Referees, how chosen.

SEC. 180. All or any of the issues in an action either of fact or law, or both, may be referred upon the written consent of the parties.

All issues referable by consent

SEC. 181. Where the parties do not consent, the Court may, upon the application of either, or of its own suggestion, except where the investigation will require the decision

When references may be made by court

(1) See Majority Report, Sec 427.

(2) See Sec. 673, Title 1.

of difficult questions of law, direct a reference in the following cases :

1. Where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein ; or,

2. Where the taking of an account shall be necessary for the information of the Court, before judgment, or for carrying a judgment or order into effect, or

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

Mode of trial SEC. 182. The trial by referees shall be conducted in the same manner and on similar notice, as a trial by the Court ; they shall have the same power to grant adjournments as the Court upon such trial, to compel the attendance of witnesses, preserve order and punish for contempt. (1)—(See Sec. 183, Title 8.)

Motion to set aside report They must state the facts found and the conclusions of law separately, and their decision must be given in writing, and may be excepted to and reviewed in like manner, and on motion before the Court to set aside the report upon a case or bill of exceptions, to be settled by the referees as in case of trial by the Court, and on which motion the Court may set aside such report or alter or modify the same, and the judgment entered upon such report, under direction of the Court, may be appealed from in like manner as judgments upon motions for a new trial on cases or exceptions as provided in Section 175, Title 8.

When motion made and proceedings for that purpose The report of the referees upon the whole issue stands as the decision of the Court, and judgment may be entered thereon in the same manner as if the action had been tried by the Court, unless either party shall file exceptions, and desire to make a motion to set aside the report, as herein provided. And in case either party desires to make such a motion, a Judge of the District Court may stay the entry of judgment for twenty days, to enable the party to prepare his case or bill of exceptions, and in case it is prepared, all proceedings on the report shall be stayed until the decision of the Court

(1) I have deemed it unsafe to grant to Referees the same power "to allow amendments to the pleadings as the Court" possess upon the trial of a cause. See Majority Report, Sec. 430.

thereon, or the case is set aside or dismissed. When the reference shall report the facts, the report has the effect of a special verdict.

SEC. 183. In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the Court shall appoint one or more referees, not exceeding three, who shall be free from exception, and may administer oaths. (See Sec. 324, Title 12.)

Referees—how chosen

CHAPTER VI.

MANNER OF ENTERING JUDGMENT.

SECTION 184. Judgment may be for or against any of the parties.

185. The relief to be awarded to the plaintiff.

186. Rates of damage where damages are recoverable.

187. Judgment in action for recovery of personal property.

188. Judgment to be entered by direction of Judge or report of referees.

189. Clerk to keep a judgment docket.

190. Judgment to be entered in judgment docket.

191. Judgment roll, of what composed.

192. Judgment, when and how to be docketed—satisfaction, how entered.

SEC. 184. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, both upon the subject matter of the suit, or the costs accruing therein, in accordance with the practice in Courts of Chancery in like cases, and it may determine the ultimate rights of the parties on each side, as between themselves, and may grant to the defendant any relief to which he may show himself by his pleadings and proofs to be entitled. 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 may be proper. The Court may also dismiss the complaint, with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to summon other defendants, or to proceed in the cause against the defendant or defendants served.

Judgment may be for or against any of the parties

SEC. 185. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have asked in his complaint; but in any other case the Court may grant him any

The relief to be awarded to the plaintiff

relief consistent with the case made by the complaint, and embraced within the issue, which shall be sustained by the proof.

Rates of damages where damages are recoverable SEC. 186. Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action, in a different or separate action.

Judgment in action for recovery of personal property

SEC. 187. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and a defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Judgment to be entered by direction of judge or report of referees

SEC. 188. Judgment upon an issue of law, or of fact, or upon confession, or upon failure to answer (except where the Clerk is authorized to enter the same by the first sub-division of Section one hundred and fifty-eight, and by Section two hundred and eighty-eight of this Title,) shall, in the first instance, be entered, upon the direction of the Judge, or report of Referees, subject to review on the demand of either party, as herein provided.

Clerk to keep judgment docket

SEC. 189. The Clerk shall keep among the records of the Court a book for the entry of judgments, to be called the "Judgment Docket."

Judgment to be entered in judgment docket

SEC. 190. The judgment shall be entered in the "Judgment Docket," and shall set forth the character of the decree or relief granted, or such other determination as shall have been had in the cause.

Judgment roll, of what composed

SEC. 191. Immediately after entering judgment in any case touching the estate of any deceased person, or affecting that of any minor, or affecting any real property, or where the judgment or decree shall exceed five hundred dollars independent of costs, the Clerk of the Court in which such judgment is rendered, shall record the pleadings and proceedings, at length, in a journal to be kept for that purpose, together with the final judgment or decree had therein :

1. He shall also make and keep in his office, as part of the records of such office, an Index, which shall refer to such

entries as shall be so made. He shall also file and preserve the original pleadings, papers and depositions used in the progress and on the trial of any cause. Also a memorandum of the issue and return of process, including the execution and final satisfaction of such judgments as shall be paid and discharged. This record shall constitute the Judgment Roll:

2. In all other cases the pleadings and papers in a cause shall be carefully collected, labelled and filed, and then enclosed in a strong envelope, bound with tape and sealed, and carefully marked, and entitled as of the case in which they belong, and carefully preserved as the record of such proceeding. And for his services in so doing, he shall receive such compensation as is allowed and prescribed in Sec. 598 of Title I. (1)

SEC. 192. On filing a judgment roll, upon a judgment directing in whole or in part the payment of money, it shall be docketed by the Clerk of the District Court of the District where it was rendered, and in any other county, upon filing with the Clerk of the Court thereof a transcript of the original "docket," and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same, in the county where it was rendered. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in this Code, the Court in which such judgment was recovered, may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the Clerk on the docket of said judgment, that the same is "secured on appeal," and thereupon it shall cease, during the pendency of the appeal, to be a lien on the real property of the judgment debtor, as against purchasers and mortgagees in good faith. Satisfaction of a judgment may be entered in the Clerk's register and docket upon an execution returned

Judgment
when and how
to be docketed

Satisfaction—
how entered

(1) I regard the mode of preserving the records of a cause, as prescribed by sec. 439 of the Majority Report, as inadequate, hence the changes in this section.

satisfied, or upon an acknowledgment of satisfaction by the judgment creditor or his attorney, filed with the Clerk. Whenever a judgment is satisfied in fact, otherwise than upon an execution, it shall be the duty of the party or his attorney to acknowledge the satisfaction of the same, and, upon motion, the Court may compel it, or may order the entry of satisfaction to be made without such acknowledgment; and whenever a judgment is satisfied in fact, as to any one of several defendants, an entry to that effect may be made in the register and docket.

TITLE IX

EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER 1. The execution.

2. Proceedings supplemental to execution.

CHAPTER I.

THE EXECUTION. (1)

SECTION 193. The execution to be issued within two years of course.

194. After two years to be issued only by leave of Court, and leave, how obtained.

195. Other judgments how enforced, Court may pass title by decree or judgment.

196. The different kinds of execution.

197. To what counties execution may be issued—redemption of property.

198. Execution against the person, in what cases and when,

199. Form of the execution.

200. To be returnable within sixty days.

201. Existing laws relating to execution continued until otherwise provided.

SEC. 193. Writs of execution for the enforcement of judgments as now used, are modified in conformity to this Title, and the party in whose favor judgment has been heretofore or shall hereafter be rendered, may, at any time within two years after the entry of judgment, proceed to enforce the same, as prescribed by this Act.

Execution to
be issued with-
in two years of
course

SEC. 194. After the lapse of two years from the entry of judgment, if no execution shall have issued, an execution can be issued only by leave of the Court, upon motion, with personal notice to the adverse party, which notice shall be in

(1) See Sec. 126 to 149, Title 1.

the nature of a *seirefacias*, unless he be absent or non-resident, or cannot be found to make such service, in which case, such service may be made by publication, or in such other manner as the Court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. When the judgment shall have been rendered by a Justice of the Peace, and docketed in the office of the Clerk of the District Court, the application for leave to issue execution must be to the Court where judgment is docketed. (1)

After two years to be issued only by leave of court, and leave how obtained

SEC. 195. When the judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced by execution, as provided in this Title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he shall refuse, he may be punished by the Court as for a contempt.

Other judgments, how enforced---court may pass title by judgment

SEC. 196. There shall be three kinds of execution: one against the property of the judgment debtor, another against his person; (see Sec. 112, Title 7,) and the third for the delivery of the possession of the real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the Court, and shall be sealed and subscribed by the Clerk, as prescribed in Section 199 of this Title.

The different kinds of executions

SEC. 197. (2) Where the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it must be issued to the Sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold, must be sold in the county where it lies, by the Sheriff of that county or by a Commissioner appointed by the Court for that purpose, and thereupon the Sheriff or Commissioner shall execute a conveyance to the purchaser, which

To what counties execution may be issued

(1) I have omitted that portion of Sec. 442, of the Majority Report, which permits an execution to issue against the property of a deceased debtor, as therein provided.

(2) See Sec. 278, Title 1.

conveyance shall be effectual to pass the rights and interest of the parties adjudged to be sold. All property liable to an attachment shall be liable to execution; it shall be levied on, in the same manner as similar property is attached; until a levy, property shall not be affected by the execution, subject to the right of any judgment debtor or mortgagor, or any one claiming through or under him or them, to redeem the same at any time within two years from the day of such sale or foreclosure, upon paying to the purchaser, mortgagee or judgment creditor the sum or amount for which the same was sold or foreclosed, and interest thereon at the rate of twelve per cent. per annum. Other creditors of the original judgment debtor or mortgagor, may at any time within one year after such sale, redeem such premises upon the same terms as the judgment debtor or mortgagee, by paying to the first or previous purchaser, the amount of his bid and interest as aforesaid, and so on as often as one purchaser, mortgagee or creditor shall purchase or redeem from another; *Provided*, That the original debtor shall have the period of two years for the redemption upon each and every such sale, foreclosure, advance or redemption, after the same shall have been made and notice thereof filed in the office of the Register of Deeds in the county where such real-estate shall be situated. (1)

Redemption of property sold

Execution against the person, in what cases and when Form of execution

SEC. 198. If the action be one in which the defendant might have been arrested as provided in Section 87 and Section 89, an execution against the person of the judgment-debtor may be issued to any county within the jurisdiction of the Court, after the return of an execution against his property unsatisfied in whole or in part. (2)

Writ to be directed to sheriff or coroner

SEC. 199. The execution must be directed to the Sheriff, or Coroner when the Sheriff is a party or interested, subscribed by the Clerk of the Court: and must intelligibly refer to the judgment, stating the Court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of the judgment (if it be for money), and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer as follows:

1. If it be against the property of the judgment debtor, to

(1) See Title 1, Sec. 275 to 282. I have excluded from this Title several Sections found in Title 9 of the Majority Report. I deemed them more properly to belong to Title 1, where a portion of them may be found somewhat modified in their character and provisions. See Sec. 201, Title 9.

(2) See Sec. 112, Title 7.

satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law: *Provided, always,* That all writs and executions shall run in the name of the State, be tested in the name of the Chief Justice or District Judge, and be signed by the Clerk of the Court whence they issue, and bear the impress or seal thereof: *And Provided further,* That no execution shall hereafter issue against the body of a debtor save, in accordance with the provisions of Sec. 112 of Title 7 of this Code and the authorities therein mentioned.

Writ to run in
name of state

Imprisonment
for debt abolished

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits recovered by the same judgment or decree, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall, in that respect, be deemed an execution against the property of the debtor.

Sec. 200. The execution shall be returnable within sixty days after its receipt by the officer, to the Clerk with whom the record of judgment is filed. If the property levied on be claimed by a third person as his property, the Sheriff shall summon from his county any twelve persons, qualified as jurors, between the parties, to try the validity of the claim; they, and the witnesses shall be sworn by the Sheriff, and if their verdict be in favor of the claimant, the Sheriff shall relinquish the levy; the fees of the Jury shall be paid by the

To be returnable
within sixty days

claimant if the verdict be against him, otherwise, by the plaintiff. The following property shall be exempt from execution, except as herein otherwise specially provided together with such homestead as prescribed by law. (1).

Existing laws relating to executions continued, until otherwise provided

Sec. 201. Until otherwise provided by the Legislature the existing provisions of law, not in conflict with this Act, relating to executions and their incidents, the property liable to sale on execution, including the sale and redemption of property, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the several provisions prescribed in and by this Title.

CHAPTER II.

PROCEEDINGS SUPPLEMENTAL TO THE EXECUTION. (2)

- SECTION 202. When execution returned unsatisfied, order for discovery of property allowed. Also, when judgment debtor refuses to apply property to satisfy judgment.
203. Manner of proceeding to examine judgment debtor.
204. Any debtor may pay execution against his creditor to Sheriff.
205. Examination of debtors or of those having property belonging to them.
206. Witnesses required to testify.
207. Compelling party or witnesses to attend.
208. What property may be ordered to be applied to the execution.
209. Judge may appoint a receiver, and prohibit transfer of property.
210. Proceedings upon claim of another party to property or a denial of indebtedness to judgment debtor.
211. Reference by Judge.
212. Costs of proceedings.
213. Disobedience of order, how punished.

When execution returned unsatisfied, order for discovery of property allowed; also when judgment debtor refuses to apply property to satisfy judgment

SEC. 202. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the Sheriff of the county where he resides, or if he do not reside in the State, to the Sheriff of a county where a judgment roll or a transcript of a Justice's judgment for ten dollars or upwards, exclusive of costs, is filed, and returned unsatisfied, in whole or in part, the judg-

(1) See property exempt from sale on execution, Sec. 267, Title 1. See, also Sec. 197, Title 3.

(2) See Sec. 126 to 149, Title 1.

ment creditor at any time after such return is made, is entitled to an order from the Judge of the Court, or a Court Commissioner of the county to which the execution was issued, requiring such judgment debtor to appear and answer concerning his property before such Judge, at a time and place specified in the order, within the county to which the execution was issued. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the Court, or a Judge thereof, or a Court Commissioner, that any judgment debtor residing in the county where such Judge or officer resides, has property which he unjustly refuses to apply to the satisfaction of the judgment, such Court or Judge may, by an order, require the judgment debtor to appear, at a specified time and place, to answer concerning the same, and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution. On an examination under this section, either party may examine witnesses on his behalf, and the judgment debtor may be examined in the same manner as a witness before a master in chancery. Instead of the order requiring the attendance of a judgment debtor, the Judge may, upon proof by affidavit, or otherwise, to his satisfaction, that there is danger of the judgment debtor's leaving the State, or concealing himself, and that there is reason to believe he has property exempt from sale, which he unjustly refuses to apply to such judgment, issue a warrant requiring the Sheriff of any county where such debtor may be, to arrest him and bring him before such Judge.

SEC. 203. Upon being thus brought before the Judge, he may be examined on oath, and if it then appear that there is danger of the debtor's leaving the State, and that he has property not exempt from sale on execution which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the Judge as he shall direct, and that he will not during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by order of the Judge, as for a contempt. No person shall, on examination pursu-

Manner of proceeding to examine judgment debtor

ant to this Chapter, be excused from answering any question pertinent to the issue joined, and compatible with his constitutional privileges. (1)

Any debtor
may pay exe-
cution against
his creditor to
sheriff

SEC. 204. After issuing execution against property, any person indebted to the judgment debtor, may, upon garnishment, (2) pay to the Sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the Sheriff's receipt shall be a sufficient discharge for the amount so paid.

Examination
of debtors or of
those having
property be-
longing to
them

SEC. 205. After the issuing or return of an execution against property of the judgment debtor, or any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the Judge may, by an order, require such person or corporation, or any officer or member thereof, if situate, or residing within his jurisdiction, to appear at a specified time and place, and answer concerning the same. The Judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

Witness requir-
ed to testify

SEC. 206. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

Compelling
party and wit-
nesses to at-
tend

SEC. 207. The party or witness may be required to attend before the Judge, or before a special Commissioner appointed by the Court or Judge; if before a special Commissioner, the examination shall be taken by him and certified to the Judge; all examinations and answers before a Judge or a special Commissioner under this Title, shall be on oath except that when a corporation answers, the answer shall be on oath of an officer thereof. (3)

(1) I have changed the draft of this Section as adopted by the Majority Report (See Sec 474, subdivision 5). It is useless to say that the Constitution is not violated by compelling a party suspected of crime to acknowledge his guilt under oath, by saying if you do acknowledge the crime, "it shall not be used as evidence against you." Base men will then appear in Court testify to the act admitted, and cannot be convicted of the crime of perjury even if they commit it. The Code furnishes too many temptations to commit perjury—in this Section there are two. First, the suspected man is called upon to acquit or stultify himself; if he be a base man he will commit perjury in his own defence; if he be guilty, yet partially honest, he will testify the truth and furnish the means for some suborned wretch to convict him by committing perjury in giving testimony of a matter of which he was ignorant, save as informed by the accused, and when *this* wretch shall be tried for perjury, he can produce the record of admission to prove his innocence.

(2) See Sec. 650, Title 1.

(3) For "Court Commissioner," see Constitution, Article 6, Section 15.

SEC. 208. The Judge may order any property of the judgment debtor, not exempt from execution, in the hands either of such debtor, or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, except that the earnings of the debtor, for his personal services, cannot be so applied, when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his profession or labor, or for his own support.

What property may be ordered to be applied to the execution

SEC. 209. The Judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner and with the like authority as if the appointment was made by the Court, according to Section 153, Title 7. But before the appointment of such receiver, the Judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplemental proceedings are so pending against the judgment debtor; the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to such receivership.

Judge may appoint receiver, and prohibit transfer of property

No more than one receiver of the property of a judgment debtor shall be appointed. The Judge may also, by injunction, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, or any interference therewith.

SEC. 210. If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the Judge, may, by injunction, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such injunction may be modified or dissolved by the Judge granting the same, at any time, on such security as he shall direct.

Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor

SEC. 211. The Judge may, in his discretion, order a reference to a commissioner agreed upon or appointed by him, to report the evidence or the facts at any time during the progress of the cause.

Reference by judge

SEC. 212. The Judge may allow to the judgment creditor or to any party so examined, whether a party to the action

Costs of proceeding

or not, witnesses fees and necessary disbursements, not exceeding five dollars.

Disobedience
of order how
punished

SEC. 213. If any person, party or witness disobey an order of the Judge or commissioner duly served, such person, party or witness may be punished by the Judge as for a contempt, and in all cases of commitment under this Chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the Court or Judge committing him, or the Court in which the judgment was rendered, on such terms as may be just. The provisions of this Act shall apply to executions issued by a Justice of the Peace. (See Sec. 15, Title 2.)

TITLE X.

COSTS IN CIVIL ACTIONS. (1)

- SECTION 214. Fee bill abolished, allowances given termed costs.
215. When allowed to plaintiff.
216. When allowed to defendant.
217. When allowed to either party in the discretion of the Court.
218. Amount of costs allowed.
219. Additional allowance of a percentage on the recovery.
220. Percentage, how computed.
221. Interest on verdict or report, when allowed.
222. Costs how to be inserted in judgment.
223. Referees' fees.
224. Costs on postponement of trial.
225. Costs on motion.
226. Costs against infant plaintiff.
227. Costs in an action by or against an executor, administrator, or trustee of an express trust, or a person expressly authorized by statute to sue.
228. Costs against assignee of cause of action, after action brought.
229. Costs on a settlement and in actions in the name of the State for the use of others.

Fee bill abolished, allowances given, termed costs

SEC. 214. All statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed, (2) and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties.

(1) See "Fees" Sec. 597 to 649, Title 1.

(2) See Sec. 486 to 506 of the Majority Report.

SEC. 215. 1. Costs may be allowed to the prevailing party, on the final determination of the suit. Such costs shall comprise the fees of Sheriffs, Constables, Clerks, Commissioners, Coroners, Referees, Witnesses, and the actual disbursements made by a party for the purposes above mentioned in the progress of a suit.

YET, *Whereas*, The present practice observed by many of the legal profession under the provisions of Chapter 72, of the Revised Statutes of the late Territory of Minnesota, and amendments thereto, (the same being a reprint, substantially, of the New York Code), has become oppressive and disastrous to suitors in our Courts, on account of the enormous bills of cost which accumulate upon motions in which parties litigant have no possible interest, and by which they are certain to sustain loss, therefore,

Resolved, That, in order that those engaged in the administration of justice, may so far as is possible, be kept free from all corrupting influences, and their best energies engaged in its promotion.

It is hereby DECLARED, that no attorney or counsellor shall hereafter receive directly or indirectly, any compensation, "fees," or "fees by way of indemnity," or "costs." whether the same or any part thereof shall have been "taxed," or "allowed," in favor of, or against either of the parties litigant, for his services in the conduct or management of any suit hereafter to be instituted in any of the Courts of this State, other than such fees or compensation, as by contract express or implied, he shall stipulate to have paid him by his client, or shall reasonably deserve for the services he may have rendered.

And that any contingent interest which any attorney shall hereafter have (save as in this Section stated), in the event of any suit by him instituted or prosecuted under this Code, shall be deemed to be *champertus*, and whenever it shall appear to the Court in which any cause shall hereafter be pending, that such cause is tainted by such consideration, the same shall be declared *champertus*, and dismissed on motion with costs.

And the ancient Statutes (so far as they are applicable to the institutions of this State), of *Barratry Champerty*, and *maintenance*, are hereby declared to be in force. (2)

(2) If the above propositions be not well taken, they will receive no opposition; they can certainly do no harm; they are of high antiquity and have been found for centuries past, to be indispensable to the proper administration of justice; these provisions were the "law of our fathers; when they migrated hither;" they now stand upon the Statutes of many States in this confederacy. This Section will stop the unnecessary accumulation of costs in the progress of a cause. "Lead us not into temptation."

The following costs may be allowed :

2. In an action to recover the possession of personal property, except when a Justice of the Peace has jurisdiction.

3. In the actions of which, according to law, a Justice of the Peace has no jurisdiction.

4. In an action for the recovery of money, where the plaintiff shall recover one hundred dollars or more. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages; and in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages.

Such value must be determined by the jury, Court or referee, by whom the action is tried.

When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs, other than fees and disbursements, shall be allowed to the plaintiff.

When allowed to defendant SEC. 216. Costs shall be allowed to the defendant in the actions mentioned in the last section; *Provided*, The plaintiff shall fail to recover.

When allowed to either party in the discretion of the court SEC. 217. In other actions costs may be allowed or not, in the discretion of the Court.

Where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the Court may award costs to such of the defendants as have judgment in their favor, or any of them.

In the following cases the costs of the appeal shall be in the discretion of the Court:

1. Where a new trial shall be ordered:
2. Where a judgment shall be affirmed in part and reversed in part.

Amount of costs allowed SEC. 218. When allowed, costs may be as follows:

1. To the plaintiff for all disbursements in the cause for the actual fees of his witnesses, and the fees of officers (not including Attorneys) for copying records, serving notices, and traveling fees, (called mileage,) in an action where judgment upon failure to answer may be had without application

to Court, (in addition to the above fees,) five dollars. In an action where judgment can only be taken upon application to Court, five dollars.

2. To the defendant in case he shall be successful in the event of the suit, the same costs so far as his disbursements and witnesses are concerned, together with the sums mentioned in the last two items.

3. For the trial of issues of law, if separate from the trial of issues of fact, to the prevailing party, five dollars.

4. For the trial of issues of fact, if separate from the trial of the issues of law, to the prevailing party, five dollars.

5. For the trial of issues of fact and of law, when tried at the same time, to the prevailing party, five dollars; *Provided*, That the allowance for costs to the prevailing party under subdivision 1 to 5 inclusive, shall not exceed, in any one action, the sum of fifteen dollars.

6. To the prevailing party on appeal to the Supreme Court, ten dollars. (1)

7. The plaintiff may, in all cases, recover costs and disbursements in suits against non-residents, when he has attached real estate, without regard to the amount of the recovery, at and after rates allowed by this Act.

SEC. 219. In addition to these allowances, if the action be for the recovery of money, or of real or personal property, and a trial has been had, the Court may, in difficult or extraordinary cases, make an allowance of not more than five per cent. on the recovery or claim, as in the next section prescribed, for any amount not exceeding five hundred dollars, and not more than one per cent. for any additional amount.

Additional allowance of a percentage on the recovery or claim

Such allowance may likewise be made upon the recovery of judgment in any action for the partition of real property, or for the foreclosure of a mortgage, or in which a warrant of attachment has been issued, or for the construction of a will or other instrument of writing, and on proceedings to compel the determination of claims to real property, and also in any

(1) It is confidently believed that the amount of "costs," (as they are termed,) which are "allowed" in and by this Act, are quite sufficient to "indemnify" the plaintiff or prevailing party, for all trouble and expense in the prosecution or defence of suits in our Courts. These "costs" are not to be collected for the attorney of "either party," they are to be paid to the suitor. Attornies should be capable of making their own bargains, if they are not, they should leave the measure of their compensation to their clients, the Court or a Jury of the country or retire from the practice. Cases have occurred under the "Code" in which the Judge was not occupied one hour in the determination of the cause and settling the rights of the parties to the suit, yet was compelled to sit for two days in settling the contest between contending counsel as to a division of the *spoils* in the matter of "costs."

case where the prosecution or defence has been unreasonably or unfairly conducted, but such costs must if collected be ordered by the Court on notice.

SEC. 220. These rates may be estimated as follows:

Per centage
how computed

1. If the plaintiff recover judgment, it shall be upon the amount of money or the value of the property recovered, or affected by the construction of the will, or the amount found due upon the mortgage, in an action for foreclosure.

2. If the defendant recover judgment, it may be upon the amount of money, or the value of the property recovered by the plaintiff, or affected by the construction of the will, or if the defendant's interest in property sought to be partitioned, or the amount claimed in an action for the foreclosure, such amount of value must be determined by the Court, or referees by whom the action is tried or judgment rendered, or the Commissioners appointed to make partition in an action therefor.

Interest on
verdict or re-
port, when al-
lowed

SEC. 221. When the judgment is for the recovery of money, interest at the rate of one per cent. per annum, from the time of the verdict or report until judgment be finally entered, shall be computed by the Clerk, and added to the costs.

Costs, how to
be inserted in
judgment

SEC. 222. The Clerk shall insert in the entry of judgment, on the application of the prevailing party, upon two days' notice to the other, the sum of the charges for costs, as above provided, and the necessary disbursements and fees of officers allowed by law, including the compensation of referees and the expense of printing the papers upon any appeal in which the same shall be printed by order of the Court, (said Clerk shall receive for these and other services, such compensation as is allowed in Section 598, of Title 1, of this Code,) which shall be stated in detail, and verified by affidavits, which shall be filed.

Referee's fees

SEC. 223. The fees of referees shall be three dollars to each per day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

Costs on post-
ponement of
trial

SEC. 224. When an application shall be made to a Court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

Costs on mo-
tion

SEC. 225. Costs may be allowed on a motion, in the discretion of the Court, not exceeding five dollars.

SEC. 226. When costs are adjudged against an infant plaintiff, the Guardian by whom he appeared in the action shall be responsible therefor, and payment may be enforced by attachment. Costs against infant plaintiff

SEC. 227. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators where they are now exempt by law. Costs in action by or against an executor, administrator or trustee

SEC. 228. In actions in which the cause of action shall, by assignment, after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment, subject to the provisions contained in and referred to in Section 112, Title 7. Costs against assignee of cause of action after action brought

SEC. 229. Upon the settlement, before judgment, of any action mentioned in Section 215, no greater sum shall be demanded from the defendant as costs than at the rate prescribed in Section 218. In actions prosecuted in the name of the State for the recovery of money or property, or to establish a right or claim, for the benefit of any county city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was instituted, and not against the State. The fees of officers connected with the administration of justice in the Courts of this State, unless otherwise ordered by the Court, shall abide the event of the suit. Security for costs will at all times be required by the Court, or the Clerk thereof, upon motion. (1) Costs on a settlement—and in actions in the name of the state for the use of others

(1) See Sec. 336, Title 13—see also, Sec. 649, Title 1.
For costs see Title 10, of the Majority Report—see also, this Code, Title 11, Sec. 273. For further costs see Sec. 273, Title 11.

TITLE XI.

APPEALS.

- CHAPTER 1. Appeals in general.
2. Appeals to the Supreme Court from judgments.
 3. Appeals to the District Court from judgments of Justices of the Peace, and from the Probate Courts.

CHAPTER I.

APPEALS IN GENERAL.

- SECTION 230. Appeals taken instead of writs of error.
231. Orders made out of Court, how vacated or modified.
 232. Who may appeal.
 233. Appeal, how taken.
 234. Clerk to transmit papers to Appellate Court.
 235. What may be reviewed by Appellate Court.
 236. Judgment on appeal.
 237. In what cases appeal taken to Supreme Court.
 238. Within what time taken.
 239. Appeal from orders, and what orders may be appealed from.
 240. No appeal to Supreme Court from order at chambers, unless affirmed by Court.
 241. Appeals from order dissolving or discharging attachment or injunction, when taken, and what security.
 242. Appeals from orders at chambers to Court, and order for that purpose, how entered.
 243. Injunctions or attachments not to be dissolved at chambers by any other than a District Judge.

Appeals taken instead of writs of error

SEC. 230. It shall not be necessary to issue a writ of error to bring up any judgment or order for review before the Supreme Court, but the same may be reviewed as prescribed by this Act, by a proceeding which is hereby denominated an appeal, and the parties to such proceeding shall be known as Appellant and Respondent. But the title of the action shall be neither changed nor transposed by reason of the appeal.

Orders made out of court, how vacated or modified Who may appeal

SEC. 231. An order made out of Court without notice to the adverse party, may be vacated or modified without notice, by the Judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

SEC. 232. Any party aggrieved, may appeal in the cases prescribed by this Title.

SEC. 233. An appeal must be taken by the service of a notice in writing on the adverse party, or on the Clerk with

whom the judgment or order appealed from is entered, and both if practicable, stating the appeal from the same, or some specified part thereof. When a party shall give in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the Court may permit the omission to be perfected on such terms as may be just.

SEC. 234. Upon an appeal allowed by this Act from a judgment, the Clerk with whom the notice of appeal was filed, shall, at the expense of the appellant, forthwith transmit a copy of the record in the cause to the Supreme Court, and on an appeal allowed from an order by this Act to the Supreme Court, the Clerk with whom the notice of appeal is filed, and the order entered, shall forthwith transmit to the Supreme Court, a certified copy of the order, the notice of appeal, and the papers upon which the order was granted.

SEC. 235. Upon an appeal from a judgment, the Court may review an interlocutory order involving the merits and necessarily affecting the judgment.

SEC. 236. Upon an appeal from a judgment or order, the Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the Court shall transmit its judgment or decision to be enforced accordingly, and when the Court shall possess the power, make restitution for the injuries resulting from such erroneous judgment.

APPEALS TO THE SUPREME COURT FROM ORDERS, &C.

SEC. 237. Appeals to the Supreme Court shall be taken from the District Courts, and from any Court of Record having jurisdiction where no other Court of Appeal is provided by law.

SEC. 238. Appeals may be taken to the Supreme Court from judgments in civil actions, within one year from the entry thereof; and from orders made by the District Court within thirty days after notice of the same: *Provided*, That notice of such appeal shall be given, and entered upon the journals of such Court, previous to its adjournment, at the term in which such judgment shall have been entered.

SEC. 239. The following orders may be taken by appeal to the supreme Court:

Appeal from orders, and what orders may be appealed from

1. An order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

2. A final order affecting a substantial right made in special proceedings, or upon a summary application in an action after judgment, or a judgment or decision of a District Court in a criminal action.

3. When an order grants or refuses, continues or modifies a provisional remedy, or grants, refuses or dissolves an injunction or attachment, when it grants or refuses a new trial, or when it sustains or over-rules a demurrer; or,

4. When it involves the merits of an action, or some part thereof.

No appeal to supreme court from order at chambers, unless affirmed by district court

SEC. 240. No appeal shall be taken to the Supreme Court from an order made at chambers, unless the same shall be affirmed by the District Court; and from the order of said Court, affirming, setting aside, or altering the same, an appeal may be taken, provided such order is one of those enumerated in Section 239 of this Title.

Appeals from orders dissolving or discharging attachment or injunction, when taken and what security

SEC. 241. Upon an order made by a District Judge or Court dissolving or discharging an attachment or injunction, the party interested in continuing the same may give immediate notice of appeal to the opposite party, and tender a written undertaking with such surety as the Judge shall direct, conditioned to pay all costs and damages sustained by such party, in case the appeal be decided in his favor. And thereupon the Court may make an order in its discretion, to continue such attachment or injunction in force until the decision on the appeal, unless the respondent shall, at any time pending such appeal, give a written undertaking, with sufficient surety, to the appellant, to abide and perform the judgment in the action, if it shall be in favor of the appellant. But the Court shall discharge such order, if it shall appear at any time that such appeal is not diligently prosecuted, and such want of diligence shall be deemed *prima facie* evidence of a breach of the appellants undertaking.

Appeals from orders at chambers to court, and an order for that purpose how entered.

SEC. 242. Appeals from an order made at chambers, upon notice, may be taken within ten days after written notice of the making of such order; and such appeals shall be taken to a regular or special term of the District Court. For the purpose of such appeal, either party may require the order to be entered of record by the Clerk, and it shall be entered accordingly.

Sec. 243. No injunction or attachment shall be dissolved at chambers by any other than a District Judge; but a Court-Commissioner may discharge an attachment as provided in Sections 148 and 149, Title 7.

injunction or attachment not to be dissolved at chambers by any other than a judge

CHAPTER II.

APPEALS TO THE SUPREME COURT FROM JUDGMENTS.

- SECTION 244. On any appeal security must be given to pay costs and damages not exceeding two hundred and fifty dollars.
- 245. On judgments for money security to stay execution.
- 246. If judgment be to deliver documents, they must be deposited.
- 247. If to execute conveyance, it must be executed and deposited.
- 248. Security where judgment is to deliver property, or for sale of mortgaged premises.
- 249. Stay of proceedings upon security given.
- 250. Undertaking may be in one instrument or several.
- 251. Security to be approved and to justify.
- 252. Perishable property may be sold notwithstanding an appeal.
- 253. Undertaking must be filed.

Sec. 244. To render an appeal effectual for any purpose, a written undertaking must be executed, on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him, on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the Clerk, with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

In any appeal security must be given to pay costs and damages not exceeding 250 dollars

Sec. 245. If the appeal be from a judgment directing the payment of money, the Court may upon motion of the plaintiff, enjoin the party appealing from making any disposition of his property, or from receiving the rents and profits thereof, during the pendency of such appeal.

On judgment for money security to stay execution

Sec. 246. If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered, be brought into Court, or placed in the custody of such officer or receiver as the Court shall appoint, or unless the undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the Court or Judge thereof shall

If judgment be to deliver documents, they must be deposited

direct, to the effect that the appellant will obey the order of the Appellate Court upon the appeal.

If to execute conveyance, it must be executed and deposited

SEC. 247. If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the Clerk with whom the judgment was entered, to abide the judgment of the Appellate Court.

Security where judgment is to deliver property, or for sale of mortgaged premises

SEC. 248. If the judgment appealed from, direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and the occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by the Judge of the Court, by which the judgment was rendered, and which shall be specified in the undertaking. When there is a decree or order for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Stay of proceedings upon security given

SEC. 249. Whenever an appeal shall be perfected as provided by Sections 245, 246, 247 and 248 of Title 11, it shall stay all further proceedings in the Court below, upon the judgment appealed from, or upon the matter embraced therein; but the Court below may proceed, upon any other matter included in the action and not affected by the judgment appealed from, and the Court below may, in its discretion, dispense with, or limit the security when the appellant is an executor, administrator, trustee, or other person acting in another's right.

Undertaking may be in one instrument or several

SEC. 250. The undertakings prescribed by Sections 244, 245, 246 and 248 of Title 11, may be in one instrument, or several, at the option of the appellant, and a copy including the names and residence of the sureties must be served on the officer holding the execution with the notice of appeal, unless a deposit is made as provided in Section 244, of Title 11, and notice thereof be given.

SEC. 251. An undertaking upon an appeal, shall be of no effect, unless it is accompanied by the affidavit of the sure-

ties, that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal, and unless they or other sureties justify before a Judge of the Court below, as prescribed by Sections 103 and 194, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than two days.

Security to be approved and to justify

SEC. 252. In the cases not provided for in Sections 245, 246, 247, 248 and 249, Title 11, the perfecting of an appeal by giving the undertaking mentioned in Section 244, shall stay proceedings in the Court below, upon the judgment appealed from, except that where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof be deposited or invested, to abide the judgment of the appellate Court.

Perishable property may be sold notwithstanding an appeal

SEC. 253. The undertaking must be filed with the Clerk with whom the judgment or order appealed from was entered.

Undertaking must be filed

CHAPTER III.

APPEALS TO THE DISTRICT COURT FROM THE JUDGMENT OF A JUSTICE OF THE PEACE (2) AND FROM THE PROBATE COURT.

- SECTION 254. Existing laws repealed, and this chapter substituted.
255. By what Courts judgment to be reviewed,
256. Appeal, when taken.
257. Notice of appeal to be served and costs paid.
258. Security to stay execution.
259. Form of undertaking.
260. Execution, how stayed,
- 26g. In case of death of Justice, undertaking to be filed.
262. Filing in lieu of service of notice of appeal.
263. Return, when and how made and compelled.
264. How made if Justice be out of office.
265. Further return may be ordered.
266. If Justice be dead, insane or absent.
267. Hearing upon return, dismissing of appeal if not brought in.
268. To be heard on original papers, and new trial in what cases.
269. Judgment on appeal, and judgment roll.
270. Costs, how awarded.
27. Ordering restitution.
272. Setting off costs on recovery.
273. The costs on appeal.
274. Costs in cases of new trial.

(1) See Sec. 66 to 240, Title 1.

Existing laws repealed and this chapter substituted

SEC. 254. All statutes now in force, providing for the review of judgments in civil cases, rendered by Justices of the Peace, whether by appeal or certiorari, are hereby repealed, and hereafter the only mode of reviewing such judgments shall be on appeals to Courts in the district in which the judgment was rendered, as prescribed by this Act, and hereafter any party may appeal in the cause, and in the manner prescribed in this Act, who shall feel aggrieved by the judgment of any Justice of the Peace in this State.

By what courts judgment to be reviewed

SEC. 255. An appeal from the judgment of such Justice, in the cases mentioned in the preceding and subsequent sections, may be taken to the Courts that are now authorized to review such judgments by appeal, in the manner prescribed by this Act and in no other manner.

Appeal when taken

SEC. 256. The appellant shall, within twenty days after judgment, file with the Justice a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process, not personally served, and the defendant did not appear, he shall have twenty days after personal notice of the judgment, to file the notice of appeal, provided for in this and the next section.

Notice of appeal to be served and costs paid

SEC. 257. If the Justice be not living, or if he shall have removed beyond the limits of the County, then such notice shall be filed with his clerk, if he shall have one, or if there be none, then by serving said notice upon the plaintiff or adverse party in person, or by leaving it at his residence, with some person of suitable age and discretion, or in case the respondent is not a resident of the county, in the same manner on the attorney or agent, if any, who is a resident of such county, who appeared for him on the trial; and the appellant must, at the time of filing notice of appeal with the Justice, pay to him the costs of the action included in the judgment, together with one dollar costs of the return, which shall be refunded to him in case the judgment is reversed, and be included in the judgment for costs on reversal.

Security to stay execution

SEC. 258. If the appellant desire a stay of execution on the judgment, he shall give security, as provided in the next section.

Form of undertaking

SEC. 259. The security shall be a written undertaking executed by one or more sufficient sureties, approved by the Appellate Judge, or by the Court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied.

SEC. 260. The delivery of the undertaking to the Court below, shall stay the issuing of execution, or if it have been issued, the service of a copy of the undertaking, certified by the Court below, upon the officer holding the execution, shall stay further proceedings thereon.

SEC. 261. When by reason of the death of a Justice of the Peace, or his removal from the county or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the Clerk of the appellate Court and notice thereof given to the respondent, or his attorney or agent as provided in Section 257, of Title 11; it shall thereupon have the same effect as if delivered to the Justice.

SEC. 262. When by reason of the death of a Justice of the Peace or his absence from the county or any other cause, the notice of appeal cannot be served as provided by Section 255, of Title 11, it may be served by leaving the same with the Clerk of the district Court.

SEC. 263. The Court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate Court of the testimony, proceedings and judgment, and file the same in the appellate Court; and may be compelled to do so by attachment. But no Justice of the Peace shall be bound to make a return unless the fee prescribed by this Act be paid.

SEC. 264. When a Justice of the Peace by whom a judgment appealed from was rendered, shall have gone out of office before a return was ordered, he shall nevertheless make a return, in the same manner and with the like effect as if he were still in office.

SEC. 265. If the return be defective, the Appellate Court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order by attachment, and for such purposes the Court shall be at all times deemed to be open.

SEC. 266. If a Justice of the Peace whose judgment is appealed from shall die, become insane, or remove from the State, the Appellate Court may examine witnesses on oath touching the facts and circumstances of the trial or judgment, and determine the appeal as if the facts had been returned by the Justice. If he shall have removed to another county within the State, the Appellate Court may compel him to make the return, as if he were still within the county where the judgment was rendered.

SEC. 267. If the return be made, the appeal may be brought to a hearing, at a regular term of the Appellate Court, without further notice to either party. It shall be placed upon the calendar at the first term succeeding the appeal, and continue thereon without further notice until finally disposed of; but if neither party bring it to a hearing before the end of the second term, the Court may dismiss the appeal, or continue the same by special order for cause shown.

SEC. 268. The appeal shall be heard on the original papers, and return of the Justice containing all the material evidence, and his rulings in the cause, in the cases where the judgment, exclusive of costs, does not exceed twenty dollars.

But where the judgment shall exceed that sum, (the costs excluded,) and also where the judgment is against the complainant, or in his favor for a sum less than twenty dollars, exclusive of costs, if he shall make oath at the time of appealing that he has a valid claim against the defendant, as set forth in his complaint, exceeding the sum of twenty dollars as he verily believes, the action shall be tried in the Appellate Court as cases originally brought there; but the parties may, by consent, appearing on the return of the Justice, admit such return or any part thereof as evidence on the trial of the appeal.

SEC. 269. Upon the hearing of the appeal, the Appellate Court shall give judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. In giving judgment, the Court may affirm or reverse the judgment of the Court below, in whole or in part, as to any or all of the parties, and for errors of law or fact. This section shall only apply to cases where there is no new trial in the Appellate Court. To every judgment upon an appeal, there shall be annexed the return of the record, or proceedings on which it was heard, which shall be filed with the Clerk of the Court, and shall constitute the judgment roll.

SEC. 270. If the judgment be affirmed, the appellant shall pay the costs of said appeal, if it be reversed, the appellant shall recover the costs by him paid to the Justice on the appeal, together with the legal costs, incident to said appeal, and if it be affirmed in part, the costs, or such part as to the Court shall seem just, may be awarded to either party. This section shall apply to cases where there is, or is not a new trial in the Appellate Court.

Hearing upon return dismissing appeal if not brought in

To be heard on original papers and new trial in what cases

Judgment on appeal and judgment roll

Costs how awarded

SEC. 271. If the judgment below, or any part thereof, be collected, and the judgment be afterwards reversed, the Appellate Court shall order the amount collected to be refunded, with interest from the time of collection, at the rate of twenty-five per cent per annum. The order may be obtained upon proof of the facts, made at or after the hearing, upon a previous notice of six days.

SEC. 272. If upon an appeal, a recovery be had by one party, and costs be awarded to the other, the Appellate Court shall set-off the one against the other, and render judgment for the balance.

SEC. 273. The following fees and costs, and no other, except fees of officers and disbursements, shall be allowed upon appeals: (1)

To the appellant, on reversal, five dollars.

To the respondent, on affirmance, five dollars.

To a Justice of the Peace, for his return, one dollar.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party, shall be such sum as the Appellate Court may award, not exceeding five dollars. If the appeal be dismissed for want of jurisdiction, no costs shall be allowed to either party. (For costs, fees, and disbursements, in cases of new trials or appeals, when affirmed or reversed, in whole or in part, see Section 220, Title 10; also see Section 270, Title 11.)

APPEALS FROM THE PROBATE COURTS. (2)

SEC. 274. An appeal may be taken to the District Court from a judgment or order of a Probate Court, in the following cases:

1. An order admitting a will to record or Probate, or refusing the same.
2. An order appointing a person administrator, executor, or guardian of an infant, or a trustee for an insane person or drunkard, or removing him, or refusing to make such appointment or removal.
3. An order directing real property to be sold, mortgaged or leased, or confirming the same.
4. An order or judgment by which a debt, claim, legacy or distributive share is allowed, or payment thereof directed, or such allowance or direction refused, when the amount in controversy shall exceed twenty dollars.

(1) See Sec. 215 to 229, this Code, Title 10.

(2) See Sec. 24, Title 1.

5. Judgment upon an accounting by an executor, administrator, guardian or trustee, including an intermediate order involving the merits and necessarily affecting such judgment.

An appeal shall be taken only by a party aggrieved by the judgment or order of the Court.

The appeal may be taken upon questions of fact or law.

Appeal when
taken—how
taken

The appeal shall be taken within thirty days after notice of the judgment or order appealed from ; by serving a notice of appeal, on the adverse party, stating the appeal from the order or judgment, or some specified part thereof ; by filing a copy of said notice in the office of the Judge of Probate, together with a recognisance that shall be entered into by the party appealing, or his agent, with one or more sufficient sureties, to be approved by the Judge of Probate, to the effect that the party will prosecute his appeal with due diligence, and will pay all costs that may be adjudged against him in the District Court.

When the appellant shall comply with the provisions of this Act, the Judge of Probate shall allow an appeal, and make an entry thereof in his docket, and all further proceedings shall be suspended by the allowance of the appeal.

The Probate Judge shall, within thirty days after the allowance of the appeal, make a return to the District Court of the proceedings and judgment, and file the same with the Clerk thereof, and may be compelled to do so by attachment.

The proceedings on an appeal shall be the same as that prescribed in and by Title 11, and by Section 14 of Title two (2) of this Code. See Title I, Sec. 24 to 65. (1)

TITLE XII.

MISCELLANEOUS PROCEEDINGS IN CIVIL ACTIONS. GENERAL PROVISIONS.

- CHAPTER 1. Submitting a controversy without action.
2. Proceedings against joint debtors, heirs, devisees, legatees, and tenants, holding under a judgment debtor.
 3. Confession of judgment without action.
 4. Offers of the defendant to compromise the whole or any part of the action.
 5. Admission or inspection of writings.
 6. Examination of parties.
 7. Examination of witnesses.

(1) See Sec. 549 of the Majority Report.

- 8. Motions and orders.
- 9. Entitling affidavits.
- 10. Computation of time.
- 11. Notices, filing and service of papers.
- 12. Duties of Sheriff and Coroners.
- 13. Accountability of guardians.
- 14. Powers of referees.
- 15. Miscellaneous provisions.

CHAPTER I.

AMICABLE CONTROVERSY.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

- SECTION 275. Controversy, how submitted without action.
- 276. Judgment on, as in other cases, but without costs.
- 277. Judgment may be enforced or appealed from as in other cases.

SEC. 275. Parties to a question of difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought. But it must appear by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The Court shall thereupon hear and determine the case at a general or special term, and render judgment thereon as if an action were depending.

Controversy—
how submitted
without action

Agreed cases

SEC. 276. Judgment shall be entered in the judgment docket as in other cases, but without costs for any proceeding prior to the notice of trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

Judgment on,
as in other
cases, but with
out costs

SEC. 277. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Judgments—
may be en-
forced or ap-
pealed from as
in other ac-
tions

CHAPTER II.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

- SECTION 278. Parties not summoned in action on joint contract, may be summoned after judgment.
- 279. If judgment debtor die, his representatives may be summoned.

280. Form of summons.
 281. To be accompanied by affidavit of amount due.
 282. Parties summoned may answer and defend.
 283. Subsequent pleadings and proceedings same as in other actions.
 284. Answer and reply to be verified as in an action.

Parties not summoned in action on joint contract may be summoned after judgment

SEC. 278. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding as provided in section 41, of this Title, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned, when they shall be heard upon the merits.

If judgment debtor die, his representatives may be summoned

SEC. 279. In case of the death of a judgment debtor after judgment, the heirs, devisees or legatees of the judgment debtor, or the tenants of real property owned by him, and affected by the judgment, may after the expiration of three years from the time of granting letters testamentary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively, and the personal representatives of a deceased judgment debtor, may be so summoned at any time within one year after their appointment.

Form of summons

SEC. 280. The summons provided in the last two sections shall be subscribed by the Clerk, and shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons, and shall be served in like manner as an original summons.

To be accompanied by affidavit of am't due

SEC. 281. The summons shall contain a notice signed by the Clerk, stating that the judgment has not been satisfied to his knowledge or information and belief, and shall specify the amount due thereon.

Parties summoned may answer and defend

SEC. 282. Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently, and in addition thereto if he be proceeded against, according to Section 279 of this Title, he may make the same defence which he might originally have made to the action, except the statutes of limitation.

SEC. 283. The party causing the summons to issue, may demur or reply to the answer, and the party summoned may

demur to the reply, and the issues may be tried, and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment, may be compelled by attachment if necessary.

Subsequent pleadings and proceedings same as in other actions

SEC. 284. The answer and reply shall be verified in the like cases and manner and be subject to the same rules as the answer and reply in an Action.

Answer and reply to be verified as in an action

CHAPTER III.

JUDGMENT BY CONFESSION WITHOUT ACTION.

SECTION 285. Judgment may be confessed for debt due or contingent liabilities.

286. Statement in writing and form thereof.

287. Judgment and execution.

SEC. 285. A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this Title.

Judgment may be confessed debt due or contingent liability

SEC. 286. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

Statement in writing and form thereof

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

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

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same. (1)

SEC. 287. The statement may be filed with the Clerk of the District Court, who shall endorse upon it, and enter in the judgment docket, a judgment of the Court for the amount confessed, with five dollars costs, together with disbursements.

Judgment and execution

The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such Courts. When the debt

(1) This mode of securing parties may be made preferable to that of mortgages and other modes of indemnity now in use.

for which the judgment is confessed or recovered, is not all due, or is payable by installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the Clerk issuing the same, a direction to the Sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may in like manner be issued for the collection and enforcement of the same.

CHAPTER IV.

OFFERS OF DEFENDANT TO COMPROMISE THE WHOLE OR PART OF THE ACTION.

SECTION 288. Defendant may offer to liquidate damages conditionally.

289. Effect of acceptance or refusal of offer.

Defendant may offer to liquidate damages conditionally

SEC. 288. The defendant may at any time before the trial or judgment serve upon the plaintiff an offer to allow judgment to be taken against him, for the sum or property, to the effect therein specified. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the Clerk shall thereupon enter judgment accordingly, if the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence. And if the plaintiff fail to recover a more favorable judgment, he cannot recover costs, but must pay the defendant's costs accruing from the date of the offer. And in an action arising on contract, the defendant may, with his answer, serve upon the plaintiff, an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum, and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Effect of acceptance or refusal of offer

SEC. 289. If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give the offer in evidence, and if the damages

assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages, such expense shall be ascertained at the trial or by the Court at Chambers.

CHAPTER V.

ADMISSION OR INSPECTION OF WRITINGS.

SECTION 290. A party may be required to admit a paper to be genuine or pay expense of proving it. Inspection and copy of books, papers and documents, how obtained.

SEC. 290. Either party may exhibit to the other or his attorney at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be fully proved or admitted on the trial, such expense to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appears to the satisfaction of the Court, that there were good reasons for such refusal; the Court before which an action is pending or a Judge thereof may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of any book, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defence therein, he shall also bring into Court, or before any reference or commission, his books of account. If compliance with the order be refused, the Court on motion may exclude the paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the Court may also punish the party refusing. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness.

A party may be required to admit a paper to be genuine or pay expenses of proving it.

CHAPTER VI.

EXAMINATION OF PARTIES.

SECTION 291. Actions for discovery abolished.

292. A party may examine his adversary as a witness on the trial.

SECTION 293. Such examination also allowed before trial and proceedings therefor.

294. Party, how compelled to attend.

295. Testimony of party may be rebutted.

296. Effect of refusal to testify.

297. Testimony of a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.

298. Persons for whom action is brought or defended may be examined.

299. Examination of a co-plaintiff or co-defendant.

Actions for discovery abolished

SEC. 291. No action to obtain a discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, save under extraordinary circumstances, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this Act.

A party may examine his adversary as a witness on the trial

SEC. 292. A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission.

Such examination also allowed before trial and proceeding therefor

SEC. 293. The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a Judge of the Court, on previous notice to the party to be examined, of at least five days, unless for good cause shown, the Judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a subpoena for his attendance. And when notice of such intended examination shall be given in an action or proceeding, in which the opposite party shall reside out of the jurisdiction of the Court, such party may be examined by commission, issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest, may offer himself as a witness in his own behalf, and shall be so received.

Party, how compelled to attend

SEC. 294. The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness to be examined conditionally; and the examination may be taken and filed by the Judge in like manner, and may be read by either party on the trial.

SEC. 295. The examination of the party thus taken, may be rebutted by adverse testimony. Testimony of party may be rebutted

SEC. 296. If a party refuse to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out. Effect of a refusal to testify

SEC. 297. A party examined by an adverse party as in this Chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue; but if he testify to any new matter not responsive to the questions put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge, when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be so received. Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him

SEC. 298. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination as if he were named as a party, as prescribed in the last seven preceding and the three succeeding sections, but not otherwise. Persons for whom action is brought or defended may be examined

COMPETENCY OF CERTAIN PERSONS AS WITNESSES.

SEC. 298, *continued*. All persons without exception, otherwise than as specified in this Act, who having the power and faculty to perceive, and making known their perceptions to others, may be witnesses. Therefore, neither parties (except as herein provided) nor other persons who have an interest in the event of an action or proceeding are excluded, nor persons on account of their opinions on matters of religion, although in every case the credibility of the witness may be drawn in question. But no defendant in a criminal action or proceeding, shall be a competent witness therein for or against himself. Who may be witnesses

The following persons are not competent to testify in any action or proceeding:

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

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

There are particular relations in which it is the policy of

the law to encourage confidence and preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

Husband and
wife

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

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

A clergyman or priest shall not be examined as to the confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

A regular physician or surgeon shall not be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

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

Examination
of co-plaintiff
or co-defend-
ant

SEC. 299. A party may be examined on behalf of his plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the cases mentioned in Sections 293 and 294 of this Title, one of the several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received. And when this Act shall not furnish a sufficient guide for the examination of parties in interest and parties of record, the rules of evidence in

Courts of Chancery, and the principles there applied, shall furnish a guide to the Courts of this State. (See Sections 300 and 301 of this Title.) (1)

CHAPTER VII.

EXAMINATION OF WITNESSES.

SECTION. 300. No witness to be excluded on account of interest.

301. To whom last section inapplicable; examination of assignor and adverse party; when necessary to give notice of the examination of assignor.

SEC. 300. No person offered as a witness shall be excluded by reason of his interest in the event of the action. Such interest shall touch his credibility, and shall be subject to the qualifications and restrictions contained in Section 299 and 301, of Title 12, of this Code, and the various qualifications contained in this Act.

SEC. 301. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action or contract, is examined as a witness on behalf of any person deriving title through or under him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or under him against an assignee, or an executor, or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party. Nor shall any interested party, his assigns or beneficiaries, hereafter be permitted by their testimony to charge the estate of any deceased person, there shall be a *mutuality* touching the matter of evidence between the contending parties; neither party shall be examined until he has offered to make a witness of his adversary. Nor then, unless it shall be in the power of such adversary to be present and testify at such hearing or trial. And furthermore, this shall not be so construed as to permit a party to testify on the ground that he has offered to examine an executor or administrator upon the estate of

(1) Rule of Evidence, see Sec. 299 of this Title.

any deceased person, touching matters of which such executor or administrator does not possess all the personal knowledge possessed by his testator or intestate, at any time while living. (1)

CHAPTER VIII.

MOTIONS AND ORDERS.

SECTION 302. Definition of an order.

303. Definition of a motion, motion, how and when made.

304. When notice is necessary it must be eight days before the hearing,

305. In action in District Court, Judge and Commissioner may act at Chambers. Their orders how reviewed.

306. Special terms, number of, how designated, and business done thereat.

307. In absence of Judge at Chambers, motion may be transferred to another Judge.

308. Enlarging time for proceedings in action.

SEC. 302. Every interlocutory direction of a Court or Judge made or entered in writing, and not included in a judgment is denominated an order or decree.

Definition of an order

SEC. 303. An application for an order or decree may be denominated a motion. Motions may be made to a Judge out of Court, or at Chambers, except for a new trial on the merits. Motions must be made within the District in which the action is triable. Orders made out of Court, without notice, may be made by any Judge of the Court, in any part of the State, and they may also be made by a Court Commissioner, of the county where the action is triable except to stay proceedings after a verdict. No order to stay proceedings for a longer time than twenty days shall be granted by a Judge out of Court, except upon previous notice to the adverse party.

Definition of a motion

Motions how and where made

SEC. 304. When a notice of motion is necessary, it must be served eight days before the time appointed for the hearing, but the Court or Judge may, in an order to show cause, prescribe a shorter time.

When notice is necessary it must be eight days before the hearing

SEC. 305. In an action in the District Court, a Court Commissioner, in addition to the powers conferred upon them in this Act, may exercise within their county the powers of a District Judge at Chambers according to the existing practice, except as otherwise provided in this Act, and their orders may be reviewed by the District Court as provided in

In actions in district court commissioner may act at chambers

(1) See Sec. 292, this Title.

this Act. But such Court Commissioners as are mentioned in this Act, shall be elected in accordance with the provisions of the Constitution, (1) for the express purpose of performing the duties authorized by this Act. Their orders how reviewed

SEC. 306. There shall be held by each of the District Judges in each District, four (2) special terms, in each year, for the trial of issues of law, for the hearing and trial of causes without a Jury, for the hearing of motions, including motions for injunction and for their dissolution, and the transacting of any and all business not usually done at a regular term; the said Judges shall each designate and publish the times and places of holding said terms, and when designated, they shall not be changed within two years, except by the Legislature, and at such terms, the issues of law and motions, and all other business that may be transacted thereat, pending in any and every county in the District, may be heard and disposed of with the same force and effect as it may now be heard and disposed of in the county in which the causes or matters are pending, and when the causes or matters are pending in other counties in the District, different from the county in which the special term is held, the Clerk of the Court shall certify the orders and papers to the Clerk of the District Court of the county where the same is pending, and the papers shall be filed and entered by the Clerk of the Court of the District where the cause or matter is pending, in the same manner as if the cause or matter had been heard or decided by the Court, at a term thereof held in that county. Special number of, how designated and business done thereat

SEC. 307. When notice of a motion is given, or an order to show cause is returnable before a Judge out of Court, and at the time fixed for the motion he is absent or unable to hear it, the same may be transferred by his order to some other Judge before whom the motion might originally have been made or heard. In absence of judge at chambers motion may be transferred to another judge

SEC. 308. The time within which any proceeding in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor; by a Judge of the Court, or Court Commissioner. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded. The time within which any proceeding in Enlarging time for proceeding in action

(1) Court Commissioners, how elected, See Constitution, Sec. 15, Art. 6.

(2) Special terms of Court.

an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a Judge of the Court in which the action shall be brought. The affidavit, or a copy thereof, shall be served with a copy of the order, or the order may be disregarded. Whenever an order for the payment of a sum of money is made by a Court pursuant to a provision of the statute, the same may be enforced by execution, in the same manner as if it were a judgment, except that real property cannot be sold thereon, only in the cases where the same is by law a charge upon real property. Upon a motion, any person present in Court, whose affidavit or deposition would be admissible thereupon, may be orally examined.

CHAPTER IX.

ENTITLING AFFIDAVITS.

SECTION 309. It shall not be necessary to entitle affidavits with technical accuracy.

It shall not be necessary to title affidavits technically

SEC. 309. It shall be necessary to entitle an affidavit in the action, for which it is intended, but an affidavit made with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made, and is in other respects not calculated to deceive; and a notice or other paper, is valid and effectual, though it be defective either in respect to the title of the Court, or the names of the parties, if it intelligibly refer to such action or proceeding.

CHAPTER X.

COMPUTATION OF TIME.

SECTION 310. Time, how computed.

Time, how computed

SEC. 310. The time within which an act is to be done as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded. (See sec. 330, Title 12.)

CHAPTER XI.

NOTICES OF FILING AND SERVING SUBPŒNAS AND PAPERS.

SECTION 311. Notices and papers how served on party or attorney.

312. Service personal or by copy in office or house.

313. Service by mail, when and how.

SECTION 314. Postage to be paid.

315. Double time when service by mail.

316. Notice of motion, &c., to be eight days.

317. When papers need not be served on defendant.

318. Service of papers where party resides out of the State.

319. Summons and pleadings to be filed.

320. Service on attorney.

321. When this chapter does not apply, the issuing and service of subpoenas, and the liability of witnesses thereon.

SEC. 311. Notices shall be in writing, and notices and other papers may be served on the party, or attorney, in the manner prescribed in the next three sections where not otherwise provided by this Act.

Notices and papers how served on party or attorney

SEC. 312. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

Service personal or by copy in office or house

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

2. If upon a party, it may be made by leaving the paper at his residence between the hours of eight in the morning and five in the evening, with some person of suitable age and discretion.

SEC. 313. Service by mail may be made, where the person making the service, and the person on whom it is to be made reside in different places between which there is a regular communication by mail.

Service by mail when and how

SEC. 314. In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

Postage to be paid

SEC. 315. Where the service is by mail, it shall be at least double the time required in case of personal service.

Double time when served by mail

SEC. 316. Notice of a motion or other proceeding before a Court or Judge when personally served, shall be given at least eight days before the time appointed therefor.

Notice of motion, &c., to be eight days

SEC. 317. Where a defendant shall not have demurred or answered, service of notice or papers in the ordinary pro-

When papers need not be served on defendant

ceedings in an action need not be made upon him, unless he be imprisoned for want of bail ; but shall be made upon him or his attorney, if notice of appearance in the action has been given.

Service of paper where party resides out of the state

SEC. 318. Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the State, and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party if he have one.

Summons and pleadings to be filed

SEC. 319. The summons and the several pleadings in an action, shall be filed with the Clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice to an order from a Judge, that the same be filed, within a time specified in the order, or be deemed abandoned.

Service on attorney

SEC. 320. Where a party shall have an attorney in an action pending, the service of papers shall be made upon the attorney instead of the party.

ISSUE AND SERVICE OF SUBPŒNAS—LIABILITY OF WITNESSES.

When this chapter does not apply

SEC. 321. The provisions of this Title shall not apply to the service of a summons or other process, to bring a party into contempt.

Every Clerk of a Court of Record, and every Justice of the Peace, may issue subpœnas for witnesses in all civil cases pending before the Court, or before any Magistrate, arbitrators, or other persons authorized to examine witnesses, and the subpœnas may be in the form heretofore adopted and commonly used.

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

No person shall be obliged to attend as witness unless the fees are paid or tendered to him which are allowed by law for one day's attendance as a witness, and for traveling to and returning from the place where he is required to attend.

If any person duly subpœnaed and obliged to attend as a witness, shall fail so to do, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action.

Such failure to attend as a witness in any Court of Record

shall also be considered a contempt of the Court, and may be punished by a fine not exceeding twenty dollars.

The Court in such case may issue an attachment to bring such witness before them to answer for the contempt, and also to testify as a witness in the cause in which he was subpoenaed.

CHAPTER XII.

DUTIES OF SHERIFF AND CORONERS.

SECTION 322. Duty of sheriff or coroner in serving or executing process, and how enforced.

SEC. 322. Whenever, pursuant to this Act, the Sheriff may be required to serve or execute any summons, order or judgment or to do any other act, he shall be bound to do so in like manner as upon process issued and directed to him, and shall be equally liable in all respects, for neglect of duty, and if the Sheriff be a party, the Coroner shall be bound to perform the service, as he is now bound to execute process, when the Sheriff is a party, and all the provisions of this Act relating to Sheriffs shall apply to Coroners, where the Sheriff is a party. (See Secs. 604 and 605, Title 1.)

Duty of sheriff or coroner in serving or executing process, and how enforced

CHAPTER XIII.

ACCOUNTABILITY OF GUARDIANS.

SECTION 323. Guardians not to receive property without security given.

SEC. 323. No Guardian appointed for an infant shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a Judge of Probate, to account for and apply the same under the direction of the Court, unless he be a *testimentary* Guardian, appointed by the testator in his will, with the express declaration therein contained, that no security shall be required of such *testimentary* Guardian. (1)

Guardian not to receive property until security given

CHAPTER XIV.

POWERS OF REFEREES. (2)

SECTION 324. Referees are authorized to administer oaths and to exercise powers now vested in Referees by law.

(1) Under the provisions of this Section the most sacred trusts have been created and executed.

(2) See Sec. 673, Title 1. Also, Sec. 180, Title 8.

Referees are authorized to administer oaths and to exercise powers now vested in referees by law

SEC. 324. Every Referee appointed pursuant to this Act, shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a Referees by law. (See Sec. 180, Title 8.)

CHAPTER XV.

MISCELLANEOUS PROVISIONS.

- SECTION 325. Papers lost or withheld, how supplied.
 326. Where undertakings are to be filed.
 327. On appeal, judgment may be entered up against appellant and surety jointly, and when collected of surety.
 328. In actions for the claim and delivery of personal property, judgment to be entered against principal and surety, and when collected of surety.
 329. Judgment on bond and warrants of Attorney. Affidavit of plaintiff necessary.
 330. Time for publication of notice, how computed.

Papers lost or withheld, how supplied

SEC. 325. If any original pleading or paper be lost or withheld by any person, the Court may authorize a copy thereof to be filed and used instead of the original.

Where undertakings are to be filed

SEC. 326. The various undertakings required to be given by this Act must be filed with the Clerk of the Court, unless the Court expressly provides for a different disposition thereof, except that the undertakings provided for by the Chapter on the claim and delivery of personal property shall, after the justification of the sureties, be delivered by the Sheriff to the parties respectively, for whose benefit they are taken.

On appeal judgment may be entered up against appellant and surety when collected of surety

SEC. 327. On an appeal from a Justice of the Peace, if the Appellate Court shall give judgment against the party appealing, such judgment may be entered up against the appellant and surety jointly, but it shall not be collected of the surety by the officer to whom the execution is directed, if he can find sufficient property of the principal to satisfy the same, and the Clerk issuing execution, shall endorse a direction thereon to that effect.

Judgment against surety

SEC. 328. When a judgment shall be entered up against either party, in an action for the claim and delivery of personal property, such judgment may be entered up as well against the principal as against any surety, who shall have signed a written undertaking or bond with him, for a return or delivery of the property, as prescribed in this Act, and in case where the officer to whom the execution is directed,

may collect the value of the property or any damages or costs of the principal, he shall, if he cannot find sufficient property of the principal to satisfy the same, collect the whole or any part of the judgment, which may remain unsatisfied, of the property of such surety or sureties, and the Clerk issuing executions shall endorse a direction thereon to that effect.

SEC. 329. Judgment upon bond or note and warrant of attorney may be entered up as now provided by law, and this Act, so far as the entering of such judgment shall apply thereto, but the plaintiff, or some one in his behalf, shall cause written notice to be served upon the debtor, of such motion, stating time and place, and shall make and file with the judgment record an affidavit, stating the amount actually due on the bond or note, at the time of entering such judgment.

Judgment on bond and warrant of attorney, affidavit of plaintiff necessary

SEC. 330. The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication. (1)

Time for publication of notice how computed

TITLE XIII.

ACTIONS IN PARTICULAR CASES. (2)

- CHAPTER 1. Action on *scire facias*, *quo warranto*, and of information in the nature of *quo warranto*.
2. Action for the partition of real property.
 3. Action to determine conflicting claims to real property and concerning real property.

CHAPTER I.

ACTION ON SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATION IN THE NATURE OF QUO WARRANTO.

- SECTION 331. *Scire facias* and *quo warranto* as prescribed in this act.
332. Actions of *quo warranto* and *mandamus*, where tried.
 333. Action may be brought by Attorney General to vacate a charter, by direction of Legislature.
 334. Actions annulling corporation by Attorney General, by leave of Supreme Court.
 335. Leave, how obtained.
 336. An action by Attorney General or other persons, to try the title to an office.

(1) See Sec. 310, Title 12.

(2) See Sec. 367 to 401, Title 1.

- SECTION 337. Action, when and how brought to vacate letters patent.
 338. Relator, when to be joined as plaintiff.
 339. Complaint and arrest of defendant in action for usurping an office.
 340. Judgment in such cases.
 341. Assumption of office, &c., by relator, when judgment in his favor.
 342. Proceedings against defendant on refusal to deliver books and papers.
 343. Damages, how recovered.
 344. When actions against several persons claiming office or franchise.
 345. Penalty for usurping office or franchise, how awarded.
 346. Judgment of forfeiture against corporation.
 347. Costs against corporation, or persons claiming to be such, how collected.
 348. Restraining corporation, and appointment of a receiver.
 349. Copy of judgment roll against corporation, when to be filed.
 350. Actions for forfeiture of property to the State.

SEC. 331. The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, (1) shall be as here prescribed, and the remedies heretofore obtained in those forms may be obtained by civil action under the provisions of this Act. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by this Act. It shall not be necessary to sue out such writs with all their ancient formalities; *provided*, the legal intent be preserved.

Scire facias and quo warranto as prescribed in this act

SEC. 332. Actions of *quo warranto* and *mandamus* may be tried at special as well as at general terms of the District Court, and the Court shall have power to summon a jury for the purpose, and prescribe the manner of summoning the same. (2)

Actions of quo warranto and mandamus, where tried

SEC. 333. An action may be brought by the Attorney General, in the name of the State, whenever the Legislature shall direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured by bribery or fraud, or upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

Action may be brought by attorney general to vacate a charter by direction of the legislature

(1) See Sec. 367, to 401, Title 1.

(2) See Title 1, Sec. 531 to 544.

SEC. 334. An action may be brought by the Attorney General, in the name of the State, on leave granted by the Supreme Court or a Judge thereof, for the purpose of vacating the charter or annulling the existance of a corporation other than municipal, when such corporation shall:

Action annulling corporation by attorney general by leave of supreme court

1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or,
2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or,
3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,
4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges or franchise; or,
5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

When and for what

And it shall be the duty of the Attorney General, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave to prosecute: and upon leave granted, to bring the action in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the State against the costs and expense to be incurred thereby.

SEC. 335. Leave to bring the action may be granted upon the application of the Attorney General, and the Court or Judge may, in its discretion, direct notice of such application to be given to the corporation or its officers previous to granting such leave, and may hear the corporation in opposition thereto.

Leave, how obtained

SEC. 336. An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of any private party, against the parties offending in the following cases:—

An action by attorney general or other persons to try the title to an office

1. When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,
2. When any public officer, civil or military, shall have done or suffered an act which by the provisions of law should work a forfeiture of his office; or,
3. When any association or number of persons shall

act within this State as a corporation without being duly incorporated; or,

4. Such action may be brought in the name of the State, by a private person on his own complaint, when the Attorney General refuses to act, or when the office usurped pertains to a county, town, city or district—security being given as contemplated in Section 334 of this Title. (1)

Action, when
and how bro't
to vacate let-
ters patent

SEC. 337. An action may be brought by the Attorney General, in the name of the State, for the purpose of vacating or annulling letters patent, granted by this State, in the following cases :

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion, or concealment of a material fact, made by a person to whom the same were issued, or made with his consent or knowledge.

2. When he shall have good reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact, or,

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms or conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Relator when
to be joined as
plaintiff

SEC. 338. When an action shall be brought by the Attorney General by virtue of this Title, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the State as plaintiff.

Complaint and
arrest of de-
fendant in ac-
tion for usurp-
ing an office

SEC. 339. Whenever such action shall be brought against a person for usurping an office, the Attorney General or person complaining, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit, that the defendant has received fees or emoluments belonging to the office and by means of his usurpation thereof, an order may be granted by a Judge of the District Court, for the arrest of such defendant, and holding him to bail, and thereupon he shall be arrested and held to bail, in the same manner and with the same effect, and subject to the same

(1) See Sec. 229, Title 10 : and Sec. 649, Title 1.

rights and liabilities as in other actions not strictly criminal yet, when the defendant is subject to arrest.

SEC. 340. In every such case, after an impartial hearing, judgment shall be rendered in accordance with the law and facts in the cause, and the rights of the contending parties.

SEC. 341. If the judgment be rendered upon the rights of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty immediately thereafter, to demand of the defendant in the action, all the books and papers, in his custody, or within his power, belonging to the office from which he shall have been excluded.

SEC. 342. If the defendant shall refuse or neglect to deliver over such books or papers pursuant to the demand, he shall be guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect to compel delivery of such books and papers, as are prescribed by law.

SEC. 343. If judgment be rendered upon the right of the person so alleged to be entitled, and in his favor, he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

SEC. 344. When several persons claim to be entitled to the same office, or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise, and determine the same.

SEC. 345. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The Court may also, in its discretion, fine such defendant a sum not exceeding one thousand dollars, which fine, when collected, shall be paid into the Treasury of the State.

SEC. 346. If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this Title, has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment

Judgment in such actions

Assumption of office, &c., by relator, when judgment in his favor

Proceedings against defendant on refusing to deliver books and papers

Damages, how recovered

When actions against several persons claiming office or franchise

Penalty for usurping office or franchise, how awarded

Judgment of forfeiture against corporations

shall be rendered, that the corporation be excluded from such corporate rights, privileges and franchises, and be dissolved.

Costs against corporations or persons claiming to such, how collected

SEC. 347. If judgment be recovered in such action, against a corporation, or against persons claiming to be a corporation, the Court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors, or other officers of such corporation.

Restraining corporations and appointment of a receiver

SEC. 348. When such judgment shall be rendered against a corporation, the Court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as were heretofore exercised by Courts of Chancery in like cases.

Copy of Judgment roll against corporations, when to be filed

SEC. 349. Upon the rendition of such judgment against a corporation, or for vacating or annulling letters patent, it shall be the duty of the Attorney General to cause a copy of the judgment roll to be forthwith filed in the office of the Secretary of State.

Actions for forfeiture of property to the state

SEC. 350. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the District Court. (1)

CHAPTER II.

PARTITION OF REAL PROPERTY.

SECTION 351. Provisions of revised statutes. Application to actions of partition.

Provisions of revised statutes

SEC. 351. The provisions of the Revised Statutes, (approved March 31st, 1851, as revised and incorporated in this Act,) relating to the partition of lands, tenements and hereditaments, held or possessed by joint tenants or tenants in common, shall apply to actions for such partition, brought under this Act, so far as the same can be so applied to the substance and subject matter of the action without regard to its forms. (See Sec. 455 to 520, Title I.)

Application to actions of partition

(1) See Secs. 367 to 401, Title I—OF CORPORATIONS.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY
AND CONCERNING REAL PROPERTY.

SECTION 352. Actions to determine claims to real property, how prosecuted.

353. Provisions of revised statutes applicable to actions concerning real property brought under this act.

SEC. 352. Proceedings to compel the determination of claims to real property pursuant to the provisions of the Revised Statutes, (approved March 31st, 1851, as revised and incorporated into this Act,) may be prosecuted by action under this Act without regard to the forms of proceedings as prescribed by those Statutes.

Action to determine claims to real property, how prosecuted

SEC. 353. The general provisions of the Revised Statutes relating to actions concerning real property, (not in conflict herewith,) and for staying waste and preventing and suppressing a nuisance, shall apply to actions brought under this Act according to the subject matter of the action and without regard to its forms. (See Section 455 to 520, Title 1.)

Provisions of revised statute applicable to actions concerning real property bro't under this act

TITLE XIV.

EXISTING SUITS.

SECTION 354. Manner of reviewing judgment in existing cases.

355. Execution on judgments heretofore rendered.

356. Provisions of this Act applicable to proceedings in action.

SEC. 354. Wherever a right now exists to have a review of a judgment rendered, or order or decree made before the tenth day of December, eighteen hundred and fifty-eight, such review may be had upon an appeal taken in the manner provided by this Act. But this Section shall not extend the right of review to any case or question to which it does not now extend, nor the time for appealing, nor shall it apply to a case where a writ of error has been already issued.

Manner of reviewing judgment in existing cases

SEC. 355. An execution may be issued without leave of the Court upon a judgment docketed before the tenth day of December, eighteen hundred and fifty-eight, or now or hereafter to be rendered, in any action pending on that day, at any time within two years after the rendition of the judgment.

Execution on judgments heretofore rendered

Provisions of this act applicable to proceedings in actions

SEC. 356. The provisions of this Act apply to future proceedings in actions or suits heretofore commenced and now pending, as follows :

1. If there have been no pleadings therein, to the pleadings and all subsequent proceedings.

2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings.

3. After a judgment or order, to the proceedings to enforce, vacate, modify or reverse it, including the costs of an appeal and the question of costs generally.

TITLE XV.

DEFINITION OF REAL PROPERTY.

- SECTION 357. Definition of "real property."
 358. Definition of "personal property."
 359. Definition of "property."
 360. Definition of "District," of "Clerk," and "folio," "he" shall express male and female.
 361. Common law, rule of construction of statute applicable to this act.
 362. Statutory provisions inconsistent with this act repealed.
 363. Rules and practice inconsistent with this act abrogated.
 364. Judges of the Supreme Court to make general rules, and until then, the present rules to be the rules of practice.
 365. This act not to affect certain proceedings and statutory provisions.
 366. Certain parts of revised and other statutes repealed.

Definition of real property

SEC. 357. The words "real property," as used in this Act, are co-extensive with lands, tenements and hereditaments.

Definition of personal property

SEC. 358. The words "personal property," as used in this Act, include money, goods, chattels, things in action, and evidences of debt.

Definition of property

SEC. 359. The word "property," as used in this Act, includes property real and personal.

Definition of a district

SEC. 360. The word "district," as used in this Act, signifies Judicial District, except when otherwise specified. The word "Clerk," signifies Clerk of the Court. "Folio," defined one hundred words. See Sec. 632, Title 1.

SEC. 361. The rules and maxims of the Common Law, as embodied in and by the decisions of the Supreme Court, that

"statutes in derogation of the Common Law shall be strictly construed," are binding upon the Courts of this State. (1)

Common law rule of construction of statute applicable to this act

SEC. 362. All statutory provisions inconsistent with this Act, are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. All the rights of action given or secured by existing laws, may be prosecuted in the manner provided by this Act; yet, if a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong cannot successfully be had under this act, the Court where such action arises shall permit the parties to institute such proceedings known to the Courts of Chancery or of Common Law, as the nature of the case shall require; *Provided*, That no resort shall be had to the forms and proceedings in Equity or of Common Law, where a full, complete and adequate remedy can be had under the provisions of this Code, regard being had, touching the brevity cheapness and justice of the remedy.

Statutory provisions inconsistent with this act repealed

SEC. 363. The present rules and practice of the Courts in civil actions, inconsistent with this Act, are abrogated, but where consistent with this Act, they shall continue in force, subject to the power of the Supreme Court to relax or modify or alter the same at pleasure.

Rules and practice inconsistent with this act abrogated

SEC. 364. The Judges of the Supreme Court shall meet at the Capital, on the second Monday in January, 1859, and promulgate rules defining the practice therein, (2) as well as that of the District Courts. Said Supreme Court shall meet at the Capital, on the said second Monday in January, annually thereafter, and hear and determine such questions as shall be brought up for its consideration.

Judges of supreme court to make general rules, and until then the rules of court of the late territory shall be rules of practice

SEC. 365. Until the Legislature shall otherwise provide, this Act shall not affect proceedings, in special cases not provided for in this Act, a resort to the forms now in use may be had, except that if in the final adjustment, resort shall be had to a civil action, such action shall be conducted in conformity with this Act.

This act not to affect certain proceedings and statutory provisions

SEC. 366. All that portion of Chapter 72, of the Revised Statutes of the late Territory of Minnesota, approved March 31st, 1851, from section one, to section twenty-eight, inclu-

Certain parts of revised and other statutes repealed

(1) See Article seven (7) of amendments to the Constitution of the United States. See also Story's commentaries upon the Constitution, Sections 72 to 80, also, Sec. 855.

(2) See Sec. 304, Title 1.

sive, together with the several amendments thereto, touching the "allowance," and "taxation of fees and costs," together with all laws in conflict herewith. Also, chapter one, of the Session Laws of the late Territory of Minnesota, approved March 5th, 1853, it being "An Act to authorize the exercise of all Equity Jurisdiction in the form of Civil Actions, and for other purposes," be, and the same are hereby repealed.

