THE

GENERAL STATUTES

OF THE

STATE OF MINNESOTA,

As Amended by Subsequent Legislation.

PREPARED BY

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FOURTH EDITION.

WITH SUPPLEMENTS,

CONTAINING ALL THE GENERAL LAWS IN FORCE UP TO THE END OF THE LEGISLATIVE SESSION OF 1883.

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CHAPTER LXVI.

CIVIL ACTIONS.

TITLE 1.

OF THE FORM OF CIVIL ACTIONS.

§ 1. **Forms of actions abolished—civil action.** The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished; and there shall be in this state but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs; which shall be called a civil action.

6 M. 284 (420); 12 M. 221; 13 M. 518; 14 M. 384.

§ 2. **Parties, how styled.** The party complaining shall be known as the plaintiff, and the adverse party as the defendant.

TITLE 2.

THE TIME OF COMMENCING ACTIONS.

§ 3. **Limitations of actions.** Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute.

9 M. 54 (64).

§ 4. **Actions to recover real property.** No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action. The periods prescribed in the preceding section for the commencement of actions, are as follows:

§ 5. **Actions upon judgments or decrees.** Within ten years:

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

2 M. 201 (241.)

§ 6. **Actions upon contracts, etc., within six years.** Within six years:

First. An action upon a contract or other obligation, express or implied, excepting those mentioned in the preceding section;

9 M. 1 (13); 9 M. 54 (64); *Ozmun* v. *Reynolds*, 11 M. (459); 12 M. 522.

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

Third. An action for trespass upon real property;

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

Fifth. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on obligation, and not hereinafter enumerated;

Sixth. An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud.*

22 M. 287.

Seventh. Actions to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same. (*As amended 1877, c. 24, § 1.*)

§ 7. **Actions against certain officers, or for a penalty.** Within three years:

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

Second.—An action upon a statute for a penalty or forfeiture, where the

*NOTE.—As to actions to set aside judgments for fraud, see *post* § 285.

action is given to the party aggrieved, or to such party and the state of Minnesota.

§ 8. **Action for libel, etc., within two years.** Within two years:

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

Second.—An action upon a statute for a forfeiture or penalty to the state.

§ 9. **Action upon mutual and current account accrues, when.** In an action brought to recover a balance due upon a mutual, open and current account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

17 M. 469.

§ 10. **Action for penalty given to prosecutor within one year.** Every action upon a statute for a penalty given, in whole or in part, to the person who prosecutes for the same, shall be commenced by said party within one year after the commission of the offence; and if the action is not commenced within one year by a private party, it may be commenced within two years thereafter on behalf of the state, by the attorney general, or the county attorney of the county where the offence was committed.

§ 11. **Action to foreclose mortgage.** Every action to foreclose a mortgage upon real estate, shall be commenced within ten years after the cause of action accrues. (*As amended 1870, c. 60, § 1.*)

20 M. 264, 453; 23 M. 328.

§ 12. **Limitations apply to actions in name of state or officer.** The limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens.

§ 13. **Action, when deemed commenced and pending.** An action is commenced as to each defendant, when the summons is served on him, or on a codefendant who is a joint contractor, or otherwise united in interest with him; and is deemed to be pending from the time of its commencement, until its final determination upon appeal, or until the time for an appeal has passed, and the judgment has been satisfied.

3 M. 58 (106.)

§ 14. **Attempt to commence action, when equivalent to commencement.** An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this chapter, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation is a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business; but such an attempt shall be followed by the first publication of the summons, or the service thereof, within sixty days.

§ 15. **Effect of absence from the state.** If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action.

14 M. 268; 19 M. 488; 23 M. 328.

§ 16. **Limitation, when cause of action accrues out of the state.** When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot there be maintained by reason of the lapse of time, an action thereon cannot be maintained in this state, except in favor of a citizen thereof, who has had the cause of action from the time it accrued.

9 M. 54 (64); 13 M. 390.

§ 17. **Period of disability excluded in certain cases.** If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, is, at the time the cause of action accrued, either

First. Within the age of twenty-one years; or,

Second. Insane; or,

Third. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life.

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy, nor can it be so extended, in any case, longer than one year after the disability ceases. (*As amended 1869, c. 60, § 1.*)

§ 18. **Effect of death of party.** If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

15 M. 159.

§ 19. **Same—period between death of party and granting of letters.** The time which elapses between the death of a person and the granting of letters testamentary and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators. 123, See 1853 Sup. c. p. 77.

§ 20. **Period of war not included, when.** When a person is an alien, subject or citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action.

§ 21. **Period covered by injunction, etc., not included.** When the commencement of an action is stayed by injunction, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

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

§ 23. **Two or more co-existing disabilities.** When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are all removed.

§ 24. **Evidence of new promise must be in writing.** No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

9 M. 1 (13); 11 M. 87 (138); 12 M. 17, 352, 407; 13 M. 158; 16 M. 215.

§ 25. **Reversal on appeal—new action.** If any action is commenced within the time prescribed therefor, and judgment given therein for the plaintiff, and the same is arrested or reversed on error or appeal, the plaintiff may commence a new action within one year after such reversal or arrest.

TITLE 3.

THE PARTIES TO CIVIL ACTIONS.

§ 26. **Real party in interest—assignment of causes of action.** Every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided;

but this section does not authorize the assignment of a thing in action not arising out of contract.

1 M. 82 (105), 136 (162); 2 M. 32 (44), 89 (107); 4 M. 309 (407); 12 M. 375; 14 M. 27. 145; 15 M. 132; 21 M. 385; 23 M. 198, 263, 359.

§ 27. **Action by assignee subject to set-off, etc.—exception.** In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before due.

19 M. 181; 23 M. 175.

§ 28. **Executor, trustee, etc., may sue alone.** An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

1 M. 195 (246); 4 M. 230 (313); 22 M. 97.

§ 29. **Married women.** A married woman may sue or be sued as if unmarried, and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation. (*As amended 1869, c. 58, § 1.*)

3 M. 133 (202.)

§ 30. **Infant plaintiff—guardian—appointment—bond—removal.** When an infant is a plaintiff, he shall appear by his guardian, who shall be appointed by the court in which the action is prosecuted, or by a judge thereof, and shall be a competent and responsible person, resident of this state, and shall file his written consent to such appointment in the office of the clerk of the district court or court of common pleas before the issuing of the summons in such action. Whenever it shall appear to the court or judge that such guardian is not competent or responsible, he may be removed, and another substituted, without prejudice to the progress of the action; and before such guardian shall receive any money or property of such infant he shall be required, by an order of such court or judge, to give a bond, with sufficient sureties, to be approved by such court or judge, to secure such money or property, and account therefor to such infant. (*As amended 1871 c. 58 § 1.*)

§ 31. **Infant defendant—guardian.** That whenever an infant is a defendant, he shall appear by guardian, to be appointed by the court in which the action is pending, or the judge thereof, or the proper court commissioner; and such court or judge may make such orders as may be necessary for the protection of the rights of such infant defendant. Such guardian must be a resident of this state, and consent in writing to such appointment, which must be filed in the office of the clerk of such court at the time of said appointment. (*As amended 1871, c. 58, § 2.*)

*§ 32. **Guardian for infant party, how appointed.** That whenever it shall be necessary to appoint a guardian for any infant, a party to any action, such guardian shall be appointed as follows:

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

Second.—When the infant is defendant, upon the application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons; if he is under the age of fourteen, or neglects so to apply, then upon the application of any other party to the action, or of the general or testamentary guardian, or of a relative or friend of the infant, notice of such application, when made by such party, relative or friend, first

being given to such general or testamentary guardian, if the infant has one within this state; if he has none, then to the infant himself, if over fourteen years of age, and within this state; or if under that age, and within the state, then to the person with whom such infant resides. If such infant have no general or testamentary guardian within this state, or if such infant be not within this state, notice of such application shall be given by the publication of a copy thereof, once in each week for three successive weeks, in a newspaper printed and published in the county in which the action is brought; and if there is no such newspaper in the county, then in a newspaper printed and published at the capital of the state. The return of the sheriff of the county in which the action is brought, made upon the summons, that such infant defendant cannot be found within such county, shall be *prima facie* evidence that such infant is not within this state, and that he has no general or testamentary guardian therein. (*1877, c. 80, § 1.*)

§ 33. (SEC. 32.) **Parents or guardians may prosecute for seduction.** A father, or in case of his death, or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with, or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service.

§ 34. (SEC. 33.) **Parents may sue for injuries to infants.** A father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury of the child, and the guardian for the injury of the ward.

23 M. 463.

§ 35. (SEC. 34.) **Wife may prosecute or defend in name of husband, when.** When a husband has deserted his family, the wife may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had.

19 M. 174.

§ 36. (SEC. 35.) **Joinder of parties to instruments.** Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same instrument, may all or any of them be included in the same action, at the option of the plaintiff.

5 M. 264 (333).

*§ 37. **Discharge of one or more partners or joint debtors.** Any creditor who now has, or hereafter may have, a debt, demand or judgment against any copartnership or several joint obligors, or promisors, or debtors, may discharge one or more of such copartners, obligors, promisors or debtors, without impairing his right to recover the residue of his debt or demand against the other copartners, obligors, promisors or debtors, or preventing the enforcement of the proportionate share of any or all undischarged judgment debtors under such judgment. (*1867, c. 78, § 1.*)

*§ 38. **Same—action against parties not discharged.** In all such cases a suit may be brought and maintained against all or any of such copartners, joint obligors, promisors or debtors, not so discharged, setting forth, in the complaint thereof, that the contract was made with the defendants and the party so discharged, and that such party has been discharged. Such discharge shall have no other effect than such as is in this act mentioned. (*Id. § 2.*)

*§ 39. **Effect of discharge** Such discharge shall have the same effect for all purposes, and as to all persons, as a payment, by the party so discharged, of his equal part of the debt, according to the number of debtors, aside from sureties. (*Id. § 3.*)

*§ 40. **Same—rights of partners, etc., inter se.** This act shall not be construed so as to affect or change the liability of such copartners, joint obligors, promisors or debtors to each other. (*Id. § 4.*)

§ 41. (SEC. 36.) **Action not to abate by death, etc—proceedings in such case.** An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest, if the cause of action survives or continues. In case

of the death, marriage, or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be added or substituted in the action. After a verdict of a jury, decision or finding of a court, or report of a referee, in any action for a wrong, such action shall not abate by the death of any party. (*As amended 1876, c. 46, § 1.*)

1 M. 195 (246); 7 M. 15 (29); 9 M. 279 (295); 10 M. 127 (158); 12 M. 375; 14 M. 220; 17 M. 215; 20 M. 173, 405; 22 M. 542.

§ 42. (SEC. 37.) **Actions against defendants under firm name.** When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the process in such case being served on one or more of the associates; the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants.

7 M. 159 (217).

*§ 43. **Bringing in additional parties defendant.** Whenever the plaintiff, his agent or attorney, in any action now or hereafter pending in any of the district courts of this state, shall discover that any party ought, in order to a full and just determination of such action, to have been made defendant therein, and shall make an affidavit stating the pendency of such action, and the reasons why such party ought to have been made defendant therein, and present the same to said court or to a judge thereof, the said court or judge shall, if such reasons are deemed sufficient, grant an order reciting the summons by which the action was commenced, and requiring the said party to appear and answer the complaint in said summons named, within twenty days after the service of such order upon him, exclusive of the day of such service; and in default thereof, the judgment or relief demanded in said complaint will be rendered against him, in all respects as though he had been made a party to such action in the first instance. (*1868, c. 79, § 1.*)

*§ 44. **Same—service of order.** The order shall be served upon the party in the manner now provided by law for the service of a summons in said court in civil actions. (*Id. § 2.*)

*§ 45. **Same—stay of proceedings.** The said court or judge may, upon application of the plaintiff, at the time of applying for the order in the first section of this act named, or at any time thereafter, make an order staying all further proceedings in said action, for such time as may be necessary to enable the plaintiff to have the said party in said action named brought into court to defend in said action. (*Id. § 3.*)

*§ 46. **Same—further proceedings.** After a party has been brought into court under the provisions of this act, the action shall proceed against all the parties thereto, in the same manner as though they had all been originally made defendants therein. (*Id. § 4.*)

NOTE. See *post* c. 75, § 5, as to suits affecting real property against unknown heirs.

TITLE. 4.

THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 47. (SEC. 38.) **What actions to be tried in county where subject is situated.** Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as hereinafter provided:

First.—For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property

Second.—For the partition of real property.

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

Fourth.—For the recovery of personal property detained for any cause. (*As amended 1876, c. 51, § 1.*)

1 M. 223 (287); 5 M. 113 (148); 21 M. 15.

§ 48. (SEC. 39.) **What actions to be tried in county where cause of action arose.** Actions for the following causes shall be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial as provided by law:

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

Second.—Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

5 M. 113 (148.)

§ 49. (SEC. 40.) **Other actions, where triable—change of venue—actions of replevin—residence of corporations.** In all other cases, except when the state of Minnesota is plaintiff, the action shall be tried in the county in which the defendants, or any of them, shall reside at the commencement of the action; or if none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by law. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial shall be thereupon changed to the proper county, by the order of the court, unless the parties consent thereto: *provided*, that in an action for the claim and delivery of personal property wrongfully taken, the action may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides. A corporation shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section. The court may change the place of trial of actions included in this section, as provided by law, as in other actions. (*As amended 1877, c. 68, § 1, and 1878, c. 38, § 1.*)

1 M. 223 (287); 5 M. 113 (148).

§ 50. (SEC. 41.) **Actions by attachment against non-residents.** If the defendant is a non-resident of this state, and the plaintiff proceeds against him, by attaching his property, such action may be brought in any county where the defendant has property liable to attachment.

§ 51. (SEC. 42.) **Change of venue, in what cases—in what manner.** If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county, and the place of trial is thereupon changed by consent of parties or by order of court, as is provided in this section. The court may change the place of trial in the following cases:

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

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

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

Fourth. A change of venue may, in all civil cases, be made, upon the con-

* 49a. See 1881 Supt., p. 97. And § 49 See 1883 Supt., p. 78.

sent in writing of the parties or their attorneys. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed unless otherwise provided by the consent of the parties in writing duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

21 M. 15

TITLE 5.

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

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

§ 53. (SEC. 44.) **Requisites of summons.** The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant, requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service. (*As amended 1867, c. 62, § 1.*)

9 M. 206 (221); 12 M. 80. 255; 14 M. 537.

§ 54. (SEC. 45.) **Notice to be contained in summons.** The summons shall also contain a notice, in substance as follows:

First.—In an action arising on contract for the payment of money only, that he will take judgment for a sum specified therein, if the defendant fails to answer the complaint.

Second.—In other actions for the recovery of money only, that he will, upon such failure, have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained.

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

See 1881 Supt. p. 98. *§ 58.

14 M. 537.

§ 55. (SEC. 46.) **Service of complaint—proceedings when complaint is not served.** A copy of the complaint must be served upon the defendant with the summons, unless the complaint itself be filed in the office of the clerk of the district court of the county in which the action is commenced, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint has been filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons, the plaintiff must serve a copy of the complaint on the defendant or his attorney, within five days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case till the expiration of the time. (*As amended 1867, c. 62, § 2.*)

§ 56. (SEC. 47.) **Summons, by whom served.** The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action; and the service shall be made, and the summons returned and filed in the clerk's office, with all reasonable diligence.

15 M. 288.

*§ 57. **Fees for service not allowed, when.** Whenever any person, other than a sheriff or other proper officer, shall serve a summons issued out of the district court, no fee shall be allowed therefor, either for travelling in making such service, or for serving such summons. (*1874, c. 80, § 1.*)

*§ 58. **Service in Ramsey county.** That all writs of summons to be hereafter issued in any civil action, to be served within the said county of Ramsey, shall be served

*NOTE. As to the appointment, by a non-resident land-owner, of an agent to accept service, and as to service on unknown heirs, see *post*, c. 75, §§ 1, 5.

by the sheriff of said county, or one of his deputies, except in case of the absence or inability of said sheriff or his deputies, and in cases where the said sheriff shall be a party to such action; and in such excepted cases, either of the judges of the district court of said county may, by an endorsement upon such writ, authorize such service to be made by some disinterested person by him designated to serve the same. (*Sp. Laws 1877, c. 185, § 2.*)

§ 59. (SEC. 48.) **Summons, how served and on whom.** The summons shall be served by delivering a copy thereof, as follows:

First. If the action is against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof: *provided*, that in case none of the officers named can be found within the state, of which the return of the sheriff that they cannot be found within his county shall be *prima facie* evidence, then the summons may be served by publication; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein;

10 M. 308 (386); 13 M. 278.

Second. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there is none within this state, then to any person having the care or control of such minor, or with whom he resides, or by whom he is employed;

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

Fourth. In all other cases to the defendant personally, or by leaving a copy of the summons at the house of his usual abode, with some person of suitable age and discretion then resident therein. (*As amended 1878, c. 14, § 1.*)

§ 60. **Service on foreign corporations.** That the summons in any civil action or proceeding wherein a foreign corporation is defendant may be served by delivering a copy thereof to the president, secretary, or any managing or general agent of said foreign corporation; and such service shall be of the same force, effect and validity as like service upon domestic corporations. (*Gen. St. p. 494, § 1.*)

9 M. 225 (239); 10 M. 308 (386); 13 M. 278.

§ 61. **Act to supersede other inconsistent provisions.** This act shall have full force and effect, notwithstanding any provisions of the General Statutes, or other law of the state inconsistent herewith, and shall be published with and as a part of the General Statutes. (*Id. § 2.*)

13 M. 278.

*§ 62. **Service on railroad companies.** The service of all process and papers in any civil action or proceeding, before any justice of the peace, or in the district court, against any railroad company within this state, may be made upon any acting ticket or freight agent of such company, within the county in which the action or proceeding shall be commenced, and shall be taken and held in all cases to be a legal service: *provided*, that whenever any railroad company has appeared in an action by an attorney, thereafter such service shall be made upon the attorney of record. (*1871, c. 64, § 1.*)

*§ 63. **Service on domestic corporation without resident officers.** Whenever any corporation, created by the laws of this state or late territory of Minnesota, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property; and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the secretary of state, which shall be taken, deemed and treated as personal service on such corporation: *provided*, a copy of said summons, writ, or other process shall be deposited in the post-office, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published

at least once a week for six weeks in some newspaper printed and published in the city of St. Paul, before such service shall be deemed perfect. *(1875, c. 43, § 1.)*

§ 64. (SEC. 49.) **Service by publication—in what cases allowed.** When the defendant cannot be found within the state—of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence—and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons in the post-office, directed to the defendant at his place of residence—unless it is stated in the affidavit that such residence is not known to the affiant—and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases:

5 M. 296 (367); 10 M. 293 (366); 23 M. 539.

First—When the defendant is a foreign corporation, and has property within this state.

9 M. 225 (239); 10 M. 308 (386).

Second—When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent.

Third—When the defendant is not a resident of the state, but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action.

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

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

Sixth—When the action is to foreclose a mortgage, or to enforce a lien of any kind, on real estate in the county where the action is brought. *(As amended 1869, c. 73, § 1, and 1878, c. 9, § 1.)*

See 1881 Sup't, p. 98. § 64.

§ 65. (SEC. 50.) **Publication, how made.** The publication shall be made in a newspaper printed and published in the county where the action is brought, (and if there is no such newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state,) once in each week for six consecutive weeks; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. *(As amended 1867, c. 68, § 1.)*

§ 66. (SEC. 51.) **When defendant may appear and defend—restitution.** If the summons is not personally served on the defendant, in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and, except in an action for divorce, the defendant or his representatives may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

6 M. 315 (458); 15 M. 63.

§ 67. (SEC. 52.) **Proceedings when some of the defendants are not served.** When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

First. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise

directs; and if he recovers judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served;

3 M. 58 (106); 22 M. 203.

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

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

See *post*, § 266.

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

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

15 M. 288; 18 M. 90.

Second. In case of publication, the affidavit of the printer or his foreman, showing the same, and an affidavit of the deposit of a copy of the summons in the post-office, if the same has been deposited; or,

Third. The written admission of the defendant.

4 M. 108 (163); 4 M. 366 (473.)

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

§ 69. (SEC. 54.) **When jurisdiction of court attaches—voluntary appearance.** From the time of the service of the summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him.

10 M. 144 (178); 11 M. 184 (271); 14 M. 16; 23 M. 268, 539.

§ 70. (SEC. 55.) **Natural person subject to jurisdiction of court, when.** No natural person is subject to the jurisdiction of a court of this state, unless he appears in the court, or is found within the state, or is served with process therein, or is a resident thereof, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and then only to the extent of such property, except in cases where it is otherwise expressly provided by statute.

§ 71. (SEC. 56.) **Corporation subject to jurisdiction of court, when.** No corporation is subject to the jurisdiction of a court of this state, unless it appears in the court, or has been created by or under the laws of this state, or has an agency established therein for the transaction of some portion of its business, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and, in the last case, only to the extent of such property at the time the jurisdiction attached.

9 M. 225 (239); 10 M. 144 (178); 13 M. 278.

§ 72. (SEC. 57.) **Appearance and its effect.** A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance; after appearance, a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him.

10 M. 144 (178); 11 M. 184 (271); 12 M. 60, 529; 13 M. 66; 14 M. 170; 16 M. 38; 22 M. 1; 23 M. 268.

§ 73. (SEC. 58.) **Notice, on whom to be served.** Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections, where not otherwise provided by statute.

§ 74. (SEC. 59.) **Service of notices, how made.** The service may be personal or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

First.—If upon an attorney, it may be made during his absence from his

office, by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or if it is not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

Second.—If upon a party, it may be made by leaving the papers at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

2 M. 273 (319).

§ 75. (SEC. 60.) **Service by mail allowed, when.** Service by mail may be made, when the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

§ 76. (SEC. 61.) **Manner of service by mail.** In case of service by mail, the paper shall be deposited in the post-office, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case, the time of service shall be double that required in case of personal service.

§ 77. (SEC. 62.) **Service on party, when and how—on attorney—on clerk for party.** Where a plaintiff or defendant who has appeared resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence is known; if not known, on the clerk for him. But where a party, whether resident or non-resident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally, either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made on the clerk for the attorney. (*As amended 1872. c. 72. § 1.*)

§ 78. (SEC. 63.) **Limitation of four preceding sections.** The provisions of the four preceding sections do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

§ 79. (SEC. 64.) **Notices not insufficient when—amendment—extension of time.** A notice or other paper is valid and effectual, though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceeding; and in furtherance of justice, upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved, within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served; or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party be permitted to bring such writ of error or appeal after the time therefor has expired.

§ 80. (SEC. 65.) **Filing of pleadings, bonds, affidavits, etc.** The pleadings and various bonds required to be given by statute, and the affidavits and other written proceedings in an action, shall be filed or entered in court, or with the clerk thereof, unless the court expressly provide for a different disposition thereof; except that the bonds provided for by this chapter, on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken. Each party shall, on or before the second day of the term for which any cause is noticed, file his pleadings in the office of the clerk of the court. (*As amended 1867, c. 62, § 3.*)

§ 81. (SEC. 67.) **Defendant, without answering, may demand assessment of damages.** A

defendant who has appeared, may, without answering, demand in writing an assessment of damages, or of the amount which the plaintiff is entitled to recover; and thereupon such assessment shall be had, or any such amount ascertained, in such manner as the court on application may direct, and judgment entered by the clerk for the amount so assessed or ascertained.

§ 82. (SEC. 68.) **Time, how computed.** The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday, it shall be excluded.

16 M. 230.

§ 83. (SEC. 69.) **Publication of legal notices, made how.** The publication of legal notices required by law, or by an order of a judge or court, to be published in a newspaper once in each week for a specified number of weeks, shall be made on the day of each week in which such newspaper is published.

6 M. 123 (192); 21 M. 142.

MOTIONS AND ORDERS.*

*§ 84. **Order defined.** Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. (*1867, c. 67, § 1.*)

*§ 85. **Motion defined.** An application for an order is a motion. *(Id. § 2.)*

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

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

See 1881 Sup. p. 98

TITLE 6.

PLEADINGS IN CIVIL ACTIONS.

§ 88. (SEC. 70.) **Pleadings, etc., regulated by statute.** The forms of proceedings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be regulated by statute.

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

First. The complaint;

Second. The demurrer or reply.

And on the part of the defendant:

First. Demurrer;

Second. The answer.

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

THE COMPLAINT.

§ 90. (SEC. 72.) **Complaint defined.** The first pleading on the part of the plaintiff is the complaint.

§ 91. (SEC. 73.) **What complaint shall contain.** The complaint shall contain:

First. The title of the cause, specifying the court in which the action is brought, the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant;

18 M. 90; 22 M. 67.

(See *ante*, c. 64, § 70 as to attached counties.)

Second. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition;

Third. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount thereof shall be stated.

2 M. 171 (210); 3 M. 30 (67); 4 M. 139 (197). 164 (229).

THE DEMURRER.

§ 92. (SEC. 74.) **Defendant may demur, when—on what grounds.** The defendant may demur to the complaint within twenty days after the service thereof, when it appears upon the face thereof, either:

1 M. 83 (106); 2 M. 174 (213); 4 M. 105 (158); 9 M. 164 (178); 10 M. 106 (133.)

First. That the court has no jurisdiction of the person of the defendant or the subject of the action;

21 M. 15.

Second. That the plaintiff has not legal capacity to sue;

22 M. 272.

Third. That there is another action pending between the same parties for the same cause;

5 M. 240 (304); 11 M. 168 (243).

Fourth. That there is a defect of parties, plaintiff or defendant.

3 M. 95 (151); 5 M. 240 (304): 12 M. 124, 235.

Fifth. That several causes of action are improperly united:

3 M. 95 (151); 5 M. 240 (304); 8 M. 221 (254); 10 M. 352 (439).

Sixth. That the complaint does not state facts sufficient to constitute a cause of action. (*As amended 1867, c. 62, § 5.*)

1 M. 150 (175); 7 M. 176 (234); 8 M. 221 (254); 9 M. 231 (246); 10 M. 352 (439); 11 M. 219 (314); 12 M. 98, 137; 13 M. 390; 17 M. 24.

§ 93. (SEC. 75.) **Requisites of demurrer—to what it may be taken.** The demurrer shall distinctly specify the grounds of objection to the complaint; unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the causes of action stated therein.

13 M. 264.

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

§ 95. (SEC. 78.) **Objections waived, when.** If no such objection is taken, either by demurrer or answer, the defendant is deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

7 M. 409 (502); 10 M. 151 (187); 10 M. 360 (448); 12 M. 124, 255; 15 M. 81, 472; 17 M. 372; 18 M. 108; 23 M. 463.

THE ANSWER.

§ 96. (SEC. 79.) **Contents of answer—denials—new matter—equities.** The answer of the defendant shall contain:

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

1 M. 144 (169); 2 M. 201 (241); 4 M. 133 (192), 190 (270); 5 M. 321 (397); 7 M. 128 (184); 159 (217); 9 M. 176 (190); 10 M. 136 (168); *Montour* v. *Purdy*, 11 M. (384); 12 M. 412, 515; 15 M. 288; 16 M. 38, 51, 204; 22 M. 538; 23 M. 304.

Second. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition.

1 M. 191 (241); 5 M. 119 (155); 6 M. 224 (319), 340 (492); 13 M. 488; 17 M. 24, 292; 21 M. 409; 22 M. 92, 267.

Third. All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action. And if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise.

1 M. 243 (311); 5 M. 139 (178); 6 M. 45 (95); 14 M. 469; 17 M. 100; 19 M. 383; 20 M. 196, 234; 21 M. 534.

§ 97. (SEC. 80.) **Requisites of counterclaim.** The counterclaim mentioned in the last section must be an existing one in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

5 M. 119 (155); 6 M. 386 (550); 8 M. 209 (243); 10 M. 1 (13); 14 M. 140; 17 M. 100, 403; 19 M. 181; 22 M. 541.

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

3 M. 116 (182); 6 M. 224 (319); 11 M. 168 (243); 13 M. 488; 14 M. 469; 15 M. 501; 19 M. 315; 20 M. 433; 21 M. 225, 366; 22 M. 132.

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

6 M. 224 (319,) 284 (420); 14 M. 469; 20 M. 102; 21 M. 431.

§ 98. (SEC. 81.) **Several defences, etc.—how stated—demurrer and answer.** The defendant may set forth by answer as many defences and counterclaims as he has; they shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished; the defendant may also demur to one or more of several causes of action in the complaint, and answer the residue.

1 M. 292 (408); 3 M. 116 (182); 12 M. 426; 13 M. 158.

§ 99. (SEC. 82.) **What answers and demurrers may be stricken out, etc.** Sham and irrelevant answers or defences, and frivolous demurrers may be stricken out, or judgment rendered notwithstanding the same, on motion, as for want of an answer.

2 M. 180 (219), 273 (319); 13 M. 55, 158, 165; 17 M. 22.

§§ 99 to 102, incl. See 1881 Sup't, p. 99.

THE REPLY.

§ 100. (SEC. 83.) **Plaintiff may reply, when—contents of reply.** When the answer contains new matter constituting a counterclaim, the plaintiff may, within thirty days, reply to such new matter, denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to an answer containing new matter, when, upon its face, it does not constitute a counterclaim or defence; and the plaintiff may demur to one or more of such defences or counterclaims, and reply to the residue of the counterclaims.

1 M. 292 (408.)

Amd 1877. See 1881 Sup't, p. 78.

§ 101. (SEC. 84.) **Judgment for want of reply.** If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto within the time allowed by law, the defendant may move, on notice, for such judgment as he may be entitled to upon such statement; and the court may thereupon render judgment, order a reference, or assessment of damages by a jury, as the case may require.

20 M. 234; 22 M. 132.

§ 102. (SEC. 85.) **Demurrer to reply.** If a reply to any counterclaim is insufficient, the defendant may demur thereto, stating the grounds thereof.

GENERAL RULES OF PLEADING.

§ 103. (SEC. 86.) **Pleadings, how subscribed—when to be verified.** Every pleading in a court of record shall be subscribed by the attorney of the party; and when

any pleading in a case is verified, all subsequent pleadings, except demurrers, shall be verified also.

2 M. 273 (319); 13 M. 165.

§ 104. (SEC. 87.) **Verification, how made and by whom.** The verification shall be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on his information and belief, and as to those matters that he believes it to be true, and shall be made by the party, or, if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party is within the county where the attorney resides, and capable of making the affidavit. The verification may also be made by the agent or attorney, if the party making such pleading is absent from the county where the attorney resides, or for some cause is unable to verify it; and shall be to the effect that the same is true to the best of his knowledge, information and belief. When a corporation is a party, the verification may be made by any officer thereof; and when the state or any officer thereof in its behalf is a party, the verification may be made by the attorney general. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony.

§ 105. (SEC. 88.) **Account, how pleaded—bill of particulars.** It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further or more particular bill.

22 M. 97.

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

§ 107. (SEC. 90.) **Correcting irrelevant, redundant and indefinite pleadings.** If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion; and when a pleading is double, or does not conform to the statute, or when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may strike it out on motion, or require it to be amended.

1 M. 169 (195); 3 M. 74 (126); 8 M. 37 (59); 10 M. 108 (136); 13 M. 165; 18 M. 525.

§ 108. (SEC. 91.) **Judgment, how pleaded—proof of jurisdiction.** In pleading a judgment or other determination of a court or officer of special or general jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. In cases of special jurisdiction, if such allegation is controverted, the party pleading is bound to establish on the trial the facts conferring jurisdiction. (*As amended 1868, c. 83, § 1.*)

2 M. 268 (313), 273 (319).

§ 109. (SEC. 92.) **Pleading performance of conditions precedent.** In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated, generally, that the party duly performed all the conditions on his part; and if such allegation is controverted, the party pleading is bound to establish, on the trial, the facts showing such performance.

20 M. 370; 23 M. 308.

§ 110. (SEC. 93.) **Private statute, how pleaded.** In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title, and the day of its approval, and the court shall thereupon take judicial notice thereof.

§ 111. (SEC. 94.) **Pleading existence of corporation.** In actions by or against corporations,

domestic or foreign, it shall in any pleading be a sufficient allegation that the plaintiff or defendant is a corporation, to aver substantially that the plaintiff or defendant, as the case may be, is a corporation duly organized and created under the laws of the state, territory or government by which it may have been incorporated. (*As amended 1877, c. 25, § 1.*)

14 M. 49.

*§ 112. **Proof of existence of corporation, when unnecessary.** In all actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall in his answer expressly aver that the plaintiff or defendant is not a corporation. (*1876, c. 32, § 1.*)

*§ 113. **Proof of partnership.** In all actions brought by any persons as copartners, upon any contract, verbal or written, made or entered into by or between the defendant and the plaintiff as copartners, it shall not be necessary to prove on the trial of the cause that the persons named as plaintiffs were, at the time of making such contract, or any time subsequent thereto, the persons composing such copartnership, unless the defendant shall in his answer expressly deny that the persons named as plaintiffs are or were such copartners. (*Id. § 2.*)

*§ 114. **Same—denial must be positive.** In all actions herein named, an averment in the answer, upon information and belief, shall not be construed as an express averment that the plaintiff or defendant is not a corporation, or that the plaintiffs are or were not copartners. (*Id. § 4.*)

§ 115. (SEC. 95.) **Complaint for slander or libel.** In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish, on trial, that it was so published or spoken.

1 M. 131 (156); 4 M. 166 (233); 9. M. 123 (133.)

§ 116. (SEC. 96.) **Same—answer—justification—mitigating circumstances.** In the action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

§ 117. (SEC. 97.) **Answer in action to recover property distrained.** In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was, at the time, doing damage thereon, shall be good, without setting forth the title to such real property.

§ 118. (SEC. 98.) **Joinder of causes of action.** The plaintiff may unite several causes of action in the same complaint, whether legal or equitable, when they are included in either of the following classes:

First. The same transaction, or transactions connected with the same subject of action;

5 M. 240 (304); 7 M. 276 (351); 8 M. 221 (254); 10 M. 161 (199).

Second. Contracts express or implied;

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

Fourth. Injuries to character; or,

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

8 M. 221 (254); 16 M. 164; 22 M. 376.

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

Seventh. Claims against a trustee by virtue of a contract, or by operation of law. But the causes of action so united shall belong to one only of these

classes, and affect all the parties to the action, and not require different places of trial, and shall be separately stated.

10 M. 161 (199); 14 M. 133; 15 M. 106.

§ 119. (SEC. 99.) **What allegations admitted by failure to answer or reply.** Every material allegation of the complaint not specifically controverted by the answer, as prescribed, and every material allegation of new matter in the answer constituting a counterclaim, not controverted by the reply as prescribed, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the answer not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.

2 M. 209 (248); 10 M. 108 (136); 15 M. 288; 20 M. 234; 21 M. 366, 431; 22 M. 132, 541.

MISTAKES IN PLEADINGS, AND AMENDMENTS.

§ 120. (SEC. 100.) **Variances to be disregarded—exceptions.** No variance between the allegation in the pleading and the proof is material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and it shall be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just.

1 M. 150 (175); 4 M. 78 (119); 13 M. 442; 16 M. 33, 83; 18 M. 176; 21 M. 358; 22 M. 25, 81.

§ 121. (SEC. 101.) **Proceedings where variance is immaterial.** When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 122. (SEC. 102.) **Failure of proof.** When, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particulars only, but in its entire scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

10 M. 155 (192); 22 M. 449.

§ 123. (SEC. 103.) **Amendments of course—after decision of demurrer.** Any pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or, if it does not delay the trial, it may be so amended at any time within twenty days after service of the answer, demurrer or reply to such pleading; in such case the amended pleading shall be served on the adverse party, who shall have twenty days to answer the same. After the decision of the demurrer, the court may, in its discretion, if it appears that the demurrer was interposed in good faith, allow the party demurring to withdraw the same and plead over, or, if the demurrer is sustained, may allow the pleading demurred to to be amended, on such terms as may be just. (*As amended 1867, c. 62, § 6.*)

18 M. 176.

§ 124. (SEC. 104.) **Amendment by order.** The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the fact proved.

8 M. 252 (286), 12 M. 221; 13 M. 422; 14 M. 469; 20 M. 173; 23 M. 314.

§ 125. (SEC. 105.) **Extensions of time—relief against mistakes—opening judgments, etc.** The court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by this chapter, or by an order enlarge such time; and may also, in its discretion, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, suspense, or ex-

See 1881 Supt, p. 93.
§ 119.

cusable neglect; and the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered, or proceedings had, in or out of term, upon good cause shown, set aside or modify its judgments, orders or proceedings, although the same were made or entered by the court, or under or by virtue of its authority, order or direction, and may supply any omission in any proceeding. And whenever any proceeding taken by a party fails to conform to the statute, the court may permit an amendment to such proceeding, so as to make it conformable thereto; but this section does not apply to a final judgment in an action for divorce. (*As amended 1876, c. 49, § 1.*)

2 M. 221 (259); 5 M. 10 (23), 47 (65); 6 M. 194 (287); 7 M. 254 (325), 399 (493); 9 M. 166 (181); 11 M. 37 (65); *Whitcomb* v. *Shaffer* 11 M. (232); 12 M. 420; 13 M. 66; 16 M. 81, 490; 17 M. 402; 19 M. 407; 20 M. 100, 156, 173; 21 M. 51; 22 M. 1; 23 M. 46, 214, 227, 539.

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

§ 127. (SEC. 107.) **Court shall disregard errors not affecting substantial rights.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect.

10 M. 340 (423); 12 M. 437, 522; 14 M. 464.

§ 128. (SEC. 108.) **Supplemental pleadings allowed, when.** The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply.

12 M. 255; 17 M. 48, 215.

TITLE 7.

CONSOLIDATION AND INTERPLEADING.

§ 129. (SEC. 109.) **Two or more actions consolidated, when.** Whenever two or more actions are pending at any time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

§ 130. (SEC. 110.) **Surety may bring action, when.** An action may be brought against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as surety.

5 M. 246 (310); 8 M. 97 (124); 11 M. 92 (150.)

§ 131. (SEC. 111.) **Interpleader.** A defendant against whom an action is pending, upon contract, or for money, or specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes a demand against him for the same money, debt, or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge the defendant from liability to either party, on his depositing in court the amount of the debt or money, or delivering the property or its value to such person as the court may direct; and the court may thereupon make the order; and thereafter the action shall proceed between the plaintiff and person so substituted; and the court may compel them to interplead.

Intervention. Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything

adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the issues made by the intervention at the same time that the issue in the main action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all the costs of the intervention. The intervention shall be by complaint, which must set forth the facts on which the intervention rests; and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings. But if such complaint is filed during term, the court shall direct a time in which an answer shall be filed thereto. (*As amended 1876, c. 50, § 1.*)

4 M. 309 (407); 23 M. 7.

TITLE 8.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 132. (SEC. 112.) **Possession of personal property claimed, when.** The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, in the manner following:

1 M. 150 (175); 4 M. 99 (148); 7 M. 71 (104), 260 (331); 8 M. 417 (467); 10 M. 340 (423).

§ 133. (SEC. 113.) **Affidavit to be made—contents thereof.** When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

First. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

12 M. 335; 13 M. 501; 17 M. 361.

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

Third. That the same has not been taken for a tax, assessment or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure; and,

Fourth. The actual value of the property.

§ 134. (SEC. 114.) **Requisition to sheriff—bond—duty of sheriff.** The plaintiff or his attorney may thereupon, by endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff; and upon the receipt of the affidavit, with the endorsement thereon, together with a bond executed to the defendant by the plaintiff, or some one in his behalf, with one or more sureties, to be approved by the sheriff, in an amount double the value of the property, conditioned that the property shall be returned to the defendant, if a return shall be adjudged, and for the payment to him of such sum as for any cause may be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody until delivered, as hereinafter provided. He must also serve on the defendant, without delay, a copy of the affidavit, endorsement and bond, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken, or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (*As amended 1868, c. 76, § 1.*)

6 M. 412; 9 M. 297 (314); 17 M. 475.

§ 135. (SEC. 118.) **Defendant may except to sufficiency of sureties.** The defendant may, within three days after the service of a copy of the writ and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fails to

do so, he shall be deemed to have waived all objections to them; if the defendant excepts to the sureties, he cannot reclaim the property as provided in the next section.

§ 136. (SEC. 119.) **Defendant may give bond and retain property.** Within three days after service of the writ and bond as aforesaid, the defendant may, if he does not except to the sureties of the plaintiff, require a return of the property, upon executing to the plaintiff a bond, in the same amount as the bond of the plaintiff, conditioned that the property shall be delivered to the plaintiff, if delivery is adjudged, and for the payment to him of such sum as for any cause may be recovered against the defendant. Such bond shall be executed by the defendant, or by some one in his behalf, with two or more sufficient sureties. If a return of the property is not required, or the sureties of the plaintiff excepted to, within three days after the taking and service of the writ and bond upon the defendant, then the property shall be delivered to the plaintiff, except as provided in section one hundred and twenty-one.

4 M. 171 (242.)

§ 137. (SEC. 120.) **Notice and justification of sureties.** Notice shall be given of the justification of sureties, of not less than two nor more than six days, which notice shall be served within two days after exception taken to the plaintiff's sureties, or after the execution of the bond by the defendant, as the case may be. If any surety fails to justify at the time appointed, another may be offered and substituted within such time, not exceeding three days, as the judge or officer shall appoint; but there shall be only one adjournment for such purpose, and, in case of substitution, a new bond shall be executed by all the parties to be bound.

§ 138. (SEC. 121.) **Delivery to plaintiff—waiver of justification.** Upon due justification of the plaintiff's sureties, the sheriff shall deliver the property to the plaintiff, except as prescribed in section one hundred and thirty-eight; and upon like justification of the defendant's sureties, the property shall be delivered to the defendant. When sureties fail to justify as aforesaid, or when justification is waived as herein provided, the sheriff shall forthwith deliver the property to the party entitled thereto. The sheriff shall retain the property until the justification is completed or waived, and he shall be liable for the sufficiency of the sureties until such justification or waiver is made, or there is a failure to justify. Either party may, in writing, waive the justification of sureties, as well after as before notice.

§ 139. (SEC. 122.) **Qualification of sureties.** The qualification of sureties is as follows:

First.—Each shall be a resident and freeholder of the state.

Second.—Each shall be worth the amount specified in the bond, above his debts and liabilities, and exclusive of his property exempt from execution; but the judge or officer taking the justification may allow more than the number of sureties required to justify severally in amounts less than the penalty of the bond, if the aggregate amount is equivalent thereto.

§ 140. (SEC. 123.) **Sureties shall justify, how.** For the purpose of justification, each surety shall attend before a judge, court commissioner, or a justice of the peace, at the time and place specified, and may be examined on oath touching his sufficiency, in such manner as the judge or officer may think proper; the examination shall be reduced to writing, and filed in the cause.

§ 141. (SEC 124.) **Approval of sureties to be indorsed on bond.** If the judge or officer deems the sureties sufficient, he shall indorse his approval upon the bond, which shall be delivered to the party entitled thereto, and the sheriff shall thereupon be exonerated from liability.

§ 142. (SEC. 125.) **Proceedings when property is concealed.** If the property or any part thereof is concealed in a building or inclosure, the sheriff shall publicly demand its delivery; if it is not delivered, he shall cause the building or inclosure to be

broken open, and take the property into his possession, and, if necessary, he may call to his aid the power of his county.

Whenever, by the return of the officer, or by the affidavit of the plaintiff, his agent or attorney, it shall appear that any of the property described in the affidavit for the claim and delivery of any personal property required by said chapter to be made has been concealed by the defendant, or cannot, after diligent search, be found, the court, or a judge thereof, shall require the defendant, and such other persons as to the said court or judge may seem proper, to attend and be examined on oath touching any disposition of such property, to the end that the same may be made subject to seizure by the officer in said action; and the court or judge may enforce said order, and any subsequent orders in said matter, as in the case of contempt. (*As amended 1877, c. 26, § 1.*)

§ 143. (SEC. 126.) **Sheriff to keep and deliver property.** When the sheriff has taken property, as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

§ 144. (SEC. 127.) **To file affidavit, etc., and return.** He shall file the affidavit and endorsement with his return thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein. (*As amended 1868, c. 76, § 2.*)

TITLE 9.

ATTACHMENT.

§ 145. (SEC. 128.) **Attachment of property allowed.** In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover.

5 M. 50 (69); 7 M. 336 (421); 12 M. 420; 13 M. 326.

§ 146. (SEC. 129.) **Who may allow writ.** A writ of attachment shall be obtained from a judge of the court in which the action is brought, or a court commissioner of the county.

6 M. 117 (183); 7 M. 412 (506); 8 M. 427 (477); *Jacoby* v. *Drew* 11 M. (408); 20 M. 196.

§ 147. (SEC. 130.) **Writ when allowed—affidavit.** The writ of attachment shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof; and that the plaintiff's debt was fraudulently contracted; or that the defendant is either a foreign corporation, or not a resident of this state; or has departed therefrom, as deponent verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons; or keeps himself concealed therein with like intent; or has assigned, secreted or disposed of, or is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors: *provided*, that the writ of attachment shall not be allowed in actions for libel, slander, seduction, breach of promise of marriage, false imprisonment or assault and battery. (*As amended 1867, c. 66, § 1.*)

1 M. 60 (82); 3 M. 7 (29); 9 M. 57 (68); *Keigher* v. *McCormick* 11 M. (545;) 13 M. 422; 14 M. 125, 520; 20 M. 435; 23 M. 229.

§ 148. (SEC. 131.) **Same—bond to be given.** Before issuing the writ, the judge or court commissioner shall require a bond on the part of the plaintiff, with sufficient sureties, conditioned that if the defendant recovers judgment, 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 penalty of the bond, which shall be at least two hundred and fifty dollars.

12 M. 420.

§ 149. (SEC. 132.) **Form of writ.** The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, and not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, with costs and expenses, the amount of which demand shall be stated in conformity with the complaint. Several writs may be issued at the same time to the sheriffs of different counties.

20 M. 196.

§ 150. (SEC. 133.) **Property subject to attachment.** All goods and chattels, real and personal, all property, real, personal and mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book-accounts, debts, credits, and all other evidences of indebtedness, belonging to the defendant, are subject to attachment.

§ 151. (SEC. 134.) **Different kinds of property, how attached—service of copy—inventory.** The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows:

First. Real estate shall be attached by the officer leaving a certified copy of the writ, and of his return of such attachment thereon, at the office of the register of deeds of the county in which such real estate is situated, or, if there is no register of deeds, with the clerk of the district court of the county, and serving a copy of the same upon the defendant in the action, if he can be found in his county, without any other act or ceremony.

1 M. 310 (427); 2 M. 226 (264); 5 M. 264 (333).

Second. Personal property capable of manual delivery to the sheriff shall be attached by taking it into his custody;

Third. When an attachment is made of articles of personal estate which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the writ and of the return of the attachment may, at any time within three days thereafter, be deposited in the office of the town clerk of the town or city in which the attachment is made; and such attachment shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer;

Fourth. The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof, in the order in which they are received, in books kept for noting mortgages of personal property; which entry shall contain the names of the parties to the action, and the date of the entry. The clerk's fee for this service shall be twenty-five cents, to be paid by the officer, and included in his charge for the service of the writ;

Fifth. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with a person holding the same; or if a debt, with the debtor; or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof;

3 M. 191 (277), 300 (406); 5 M. 321 (397).

Sixth. The sheriff shall serve a copy of the writ of attachment, and inventory served by him, upon the defendant, if he can be found within the county; and if he is a resident thereof, but cannot be found therein, the said sheriff shall leave such copy at the last usual place of abode of the said defendant;

Seventh. He shall make a full inventory of the property attached, and return the same with the writ of attachment.

§ 152. (SEC. 135.) **Certificate to be furnished sheriff in certain cases.** Whenever the sheriff, with a writ of attachment or an execution against the defendant, applies to any person mentioned in the fifth subdivision of section one hundred and thirty-four, for the purpose of attaching or levying upon the property mentioned therein, such person shall furnish him with a certificate designating the number of rights or shares of the defendant in the stock of the cor-

151. See 1st Sup't, p. 93.

poration, with any dividend or incumbrance thereon, on the amount and description of the property, held by such corporation or person for the defendant, or the debt owing to the defendant; if such person refuses to do so, he may be required by the court or judge to attend before him and be examined on oath concerning the same; and disobedience to the order may be punished as a contempt.

§ 153. (SEC. 136.) **Sheriff to sell perishable property, collect debts, etc.** If any of the property attached is perishable, the sheriff shall sell the same, in the manner in which property is sold on execution. He may also take such legal proceedings, either in his own name, or in the name of the defendant, as are necessary to collect all debts, credits and effects of said defendant, and discontinue the same at such times, or on such terms, as the court or judge may direct.

4 M. 309 (407.)

§ 154. (SEC. 137.) **Claim of property by third person—affidavit—indemnity by plaintiff.** If any property levied upon or taken by a sheriff, by virtue of a writ of execution, attachment, or other process, is claimed by any other person than the defendant or his agent, and such person, his agent or attorney, makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof, and the ground of such title or right, the sheriff may release such levy or taking, unless the plaintiff, on demand, indemnify the sheriff against such claim, by bond executed by two sufficient sureties, accompanied by their affidavit that they are each worth double the value of the property as specified in the affidavit of the claimant of such property, and are freeholders and residents of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made, he may retain such property under levy a reasonable time to demand such indemnity. (*As amended 1877, c. 27, § 1.*)

13 M. 174; 14 M. 163, 228; 18 M. 308.

§ 155. (SEC. 138.) **Plaintiff to be impleaded with sheriff in action against him.** If, in such case, the person claiming the ownership of such property commences an action against the sheriff for the taking thereof, the obligors in the bond provided for in the preceding section, and the plaintiff in such execution, attachment, or other process, shall, on motion of such sheriff, be impleaded with him in such action. When, in such case, a judgment is rendered against the sheriff and his codefendants, an execution shall be immediately issued thereon, and the property of such codefendants shall be first exhausted before that of the sheriff is sold to satisfy such execution.

§ 156. (SEC. 139.) **Judgment against defendant, how satisfied.** If judgment is recovered by the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it is sufficient for that purpose.

First.—By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of all debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

Second.—If any balance remains due, and an execution has been issued on the judgment, he shall sell, under the execution, so much of the attached property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands; and in case of the sale of any rights or shares in the stock of a corporation, the sheriff shall execute to the purchaser a certificate of the sale, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by the defendant.

6 M. 182 (273). 10 M. 253 (323.)

Third.—If any of the attached property belonging to the defendant has passed out of the hands of the sheriff, without having been sold or converted into money, the sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such prop-

erty from the sheriff, shall be liable to double damages, at the suit of the party injured.

§ 157. (SEC. 140.) **Discharge of attachment on defendant giving bond, A** defendant whose property has been attached, may, at any time before trial, execute to the plaintiff a bond, in double the amount claimed in the complaint, or, if the value of the property attached be less than the amount claimed, then in double the value of the property, with two or more sureties, to be approved by the officer allowing the writ of attachment, or by the court commissioner of the county in which the defendant resides, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereof equal to the value of the property attached; and the officer approving such bond shall make an order discharging such attachment. (*As amended 1868, c. 69, § 1.*)

5 M. 50 (69); 7 M. 271 (345); 12 M. 420; 18 M. 541; 20 M. 374; 23 M. 229.

§ 158. (SEC. 141.) **Motion to vacate writ of attachment.** The defendant may, at any time before the time for answering expires, or at any time thereafter when he has answered, and before trial, apply to the court, on notice, to vacate the writ of attachment. If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits in addition to those on which the writ of attachment was allowed. (*As amended 1867, c. 66, § 3.*)

§ 159. (SEC. 142.) **Return to be made by sheriff.** When the writ of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

§ 160. (SEC. 143.) **Attachment of real estate—lien—release of lien.** Whenever any real estate has been attached by virtue of any writ of attachment, such real estate shall be bound, and the attachment shall be a lien thereon, from the time that a certified copy of the attachment, with the description of the real estate, has been delivered for record in the office of the register of deeds in the county where the same is situated, and not otherwise. Each register of deeds shall note the day, hour and minute when he receives such certified copy, and shall record and index the same in the books kept for the recording and indexing of mortgages. Such real estate may be discharged and released of record from such attachment, in the following manner, to wit:

§ 160, subd. 4. See 1883 Sup't, p. 78.

First—By filing for record, in the office of the register of deeds of the county wherein such real estate is situated, a certified copy of the order discharging or vacating said attachment.

Second—By filing for record, with such register of deeds, satisfaction of judgment rendered in such action.

Third—By judgment being rendered in the action in favor of the defendant against whom the attachment is issued, upon filing for record, in the office of said register of deeds, a transcript of such judgment.

Fourth—By filing for record, in the office of such register of deeds, a satisfaction and discharge of such attachment, executed by the plaintiff in said action, in the same manner as is required by law for the execution of conveyances of real estate. (*As amended 1868, c. 68, § 1.*)

§ 161. (SEC. 144.) **Release by plaintiff of real estate attached.** The plaintiff in such action may, at any time before the final discharge of such attachment, release and discharge from such attachment any part or portion of such real estate imcumbered by said attachment, by executing, in the same manner as conveyances of real estate are required by law to be executed, a release and discharge of such parts or portions of said real estate so designated to be discharged and released, and particularly describing the same, and filing such release in the office of the register of deeds of the county wherein the lands are situated; and such release or discharge shall in nowise affect the lien and incumbrance

of said writ of attachment upon the remainder of the real estate or property covered by said attachment, and not included in such release.

§ 162. (SEC. 145.) **Release of attachment to be recorded.** The register of deeds shall enter such discharge, release or satisfaction, in the same manner and in the same book provided for the filing and entry of writs of attachments, except that the names of the plaintiffs shall be alphabetically arranged in said index; and he shall receive the same fees as are allowed him for the filing and entry of attachments in his office.

§ 163. (SEC. 146.) **Attachment of personal property, how released.** Any attachment of personal property, under subdivision three of section one hundred and thirty-four, may be discharged or released of record, by filing, in the proper office, an order, release, transcript or satisfaction-piece, as provided in section one hundred and forty-three aforesaid.

TITLE 10.

GARNISHMENT.

§ 164. (SEC. 147.) **Affidavit—garnishee summons—title of action.** In any action in a court of record or justice's court, for the recovery of money, if the plaintiff, his agent or attorney, at the time of filing the complaint or issuing the summons therein, or at any time during the pendency of the action, or after judgment therein against the defendant, makes and files, with the clerk of the court, or, if the action is in a justice's court, with the justice, an affidavit stating that he believes that any person (naming him) has property, money or effects in his hands, or under his control, belonging to the defendant in such action, or that such person is indebted to the defendant, and that the value of such property or effects, or the amount of such money or indebtedness, if the action is in the district court, exceeds the sum of twenty-five dollars, or, if the action is in a justice's court, ten dollars, a summons may be issued against such person, as hereinafter provided; in which summons and all subsequent proceedings the plaintiff in the action shall be known and designated as plaintiff, the defendant as defendant, and the person against whom the summons is issued as garnishee. (*As amended 1867, c. 65, § 1.*)

3 M. 253 (360); 5 M. 279 (347); 9 M. 44 (55.)

§ 165. (SEC. 148.) **Proceedings in justice's court.** If the action is in a justice's court, the summons shall be issued by the justice, and shall require the garnishee to appear before him, at a time and place mentioned in such summons, not less than six nor more than twelve days from the date thereof, and answer under oath such questions as may be put to him touching his indebtedness to the defendant, and any property, money or effects of the defendant in his possession or under his control; which summons shall be served and returned in the same manner as a summons issued against a defendant in other causes in such court, except that no other than personal service shall be sufficient. A copy of such summons, together with a notice to the defendant stating the time, place and manner of service upon the garnishee, and signed by the justice of the peace or officer who served the same, and requiring such defendant to appear and take part in the examination, shall be served upon the defendant at least three days before the time specified in the summons for the appearance of the garnishee.

§ 166. (SEC. 149.) **Proceedings in district court—summons—service—notice to defendant—fees, etc.** In actions in a district court, such summons may be issued by the plaintiff or his attorney in the action, and shall be served and returned in the same manner as a summons issued against a defendant in other cases in said court, ex-

cept that the service shall in all cases be personal. It shall require the garnishee to appear before the court in which the action is pending, or the judge or the clerk thereof, or the court commissioner in the county in which the action is pending, at a time and place mentioned therein, not less than twenty days from the service thereof, and answer touching his indebtedness to the defendant, and any property, money or effects of the defendant in his possession or under his control. A copy of the summons, together with a notice to the defendant stating the time, place and manner of service thereof upon the garnishee, and signed by the plaintiff or his attorney, or the person or officer who served the summons upon the garnishee, and requiring such defendant to appear and take part in such examination, shall be served upon the defendant at least ten days before the time specified in the same for the appearance of the garnishee. Such notice and copy of the summons may be served in the manner provided by law for the service of a summons in ordinary cases. The garnishee shall be entitled in all cases, whether the action is in a district court or before a justice of the peace, to the same fees as if he were subpœnaed as a witness in such action, and may be compelled to testify and disclose respecting any matters contained in the affidavit, in the same manner as if he were a witness duly subpœnaed for that purpose. But no person shall be obliged to appear as garnishee, unless his fees for one day's attendance, and mileage according to law, is paid or tendered in advance. (*As amended 1871, c. 66, § 1.*)

§ 167. (SEC. 150.) **Effect of service of summons on garnishee.** The service of the summons upon the garnishee shall attach and bind all the property, money or effects in his hands, or under his control, belonging to the defendant, and any and all indebtedness owing by him to the defendant, at the date of such service, to respond to final judgment in the action.

2 M. 265 (310.)

§ 168. (SEC. 151.) **Legacies, etc., subject to garnishment.** Any debt or legacy due from an executor or administrator, and any other property, money or effects in the hands of an executor or administrator, may be attached by this process.

§ 169. (SEC. 152.) **Garnishment of corporations.** Corporations may be summoned as garnishees, and may appear by their cashier, treasurer, secretary, or such officer as they may appoint, and the disclosure of such person or officer shall be considered the disclosure of the corporation, *provided*, that if it appears to the court that some other member or officer of the corporation is better acquainted with the subject-matter than the one making disclosure, the court may cite in such person to make answer in the premises; and in case such person neglects or refuses to attend, judgment may be entered as hereinafter provided upon default; and service of the summons upon the agent of any corporation not located in this state, but doing business therein through such agent, shall be a valid service upon said corporation.

4 M. 130 (184.)

§ 170. (SEC. 153.) **In what cases garnishment not allowed.** No person or corporation shall be adjudged a garnishee in either of the following cases, viz:—

First. By reason of any money or any other thing due to the defendant, unless, at the time of the service of the summons, the same is due absolutely, and without depending on any contingency;

12 M, 279. 23 M. 545.

Second. By reason of any debt due from said garnishee on a judgment, so long as he is liable to an execution thereon;

Third. By reason of any liability incurred, as maker or otherwise, upon any draft, bill of exchange or promissory note.

§ 171. (SEC. 154.) **Money, etc., may be attached before due, when.** Any money or other thing due or belonging to the defendant may be attached by this process, before it has become payable, provided it is due or owing absolutely, and without depending on any contingency, as aforesaid; but the garnishee shall not be

compelled to pay or deliver the same before the time appointed therefor by the contract.

1 M. 37 (54); 12 M. 279.

§ 172. (SEC. 155.) **What shall be deemed "effects."** Bills of exchange and promissory notes, whether under or over due, drafts, bonds, certificates of deposit, bank-notes, money, contracts for the payment of money, and other written evidence of indebtedness, in the hands of the garnishee at the time of the service of the summons, shall be deemed "effects" under the provisions of this section.

21 M. 42.

§ 173. (SEC. 156.) **Examination of garnishee—proof of service on defendant—non-resident defendant.** After the appearance of the garnishee before the court or officer named in the summons, on the day specified therein, or on the day to which an adjournment may be had, the said garnishee shall be examined on oath touching the matters alleged in the affidavit, and the examining officer shall take full minutes of such examination, and file the same with the other papers in the cause: *provided*, that, unless the defendant in the action appears at the time and place specified in the summons for the appearance of the garnishee, such officer or court shall not proceed to the examination of such garnishee, or to the taking of any evidence whatever therein, until the plaintiff produces and files an affidavit, or return of an officer, showing the service of the summons and notice upon the defendant as prescribed in sections one hundred and forty-eight and one hundred and forty-nine aforesaid; but in case the plaintiff is unable so to notify such defendant, the said court or officer may postpone the examination for such reasonable time as may be necessary to enable the plaintiff to notify such defendant, and he may then be notified of the day to which such postponement is had in the manner provided by law for the service of a summons in ordinary cases, except that it shall be a notice of ten days in a district court, and of four days in a justice court: *provided*, that when the defendant does not appear at the time and place specified in the summons for the appearance of the garnishee, and the plaintiff, or his agent or attorney, files an affidavit stating that the defendant is not a resident of this state, and is not within the same, as the affiant verily believes, it shall not be necessary to serve upon the defendant a copy of such garnishee summons, or any notice to the defendant in such action, in any court; and the examination shall proceed in the same manner as if the defendant had been duly served with such copy and notice, or had appeared at the time and place specified in the summons for the appearance of the garnishee. *(As amended 1871, c. 66, § 1.)*

3 M. 282 (389); 4 M. 288 (381); 5 M. 378 (468); 9 M. 225 (239); 21 M. 42.

§ 174. (SEC. 157.) **Claimant may appear and be joined as party.** If it appears from the evidence taken, or otherwise, that any person, not a party to the action, is interested or claims any interest in any of the property or effects in the hands of the garnishee, by virtue of any agreement or matter which existed prior to the service of the summons, the examining officer, upon application, may permit such person to appear in the action and maintain his right; and if he does not voluntarily appear, notice may be given him to appear or be barred of his claims, which notice may be served as such officer shall direct. In case such person voluntarily appears, or notice is given as aforesaid, he shall be joined as a party to the action, and judgment therein shall bind him in the same manner as if he had been an original party.

4 M. 77 (116); 22 M. 309; 23 M. 239.

§ 175. (SEC. 158.) **Proceedings when garnishee denies debt or title to property is disputed.** If any person has in his possession any property or effects of the defendant, which he holds by a conveyance or title that is void as to creditors of said defendant, he may be charged therefor, although the defendant could not have maintained an action against him for the same; but in such cases, and in all cases where the garnishee, upon full disclosure, denies any indebtedness to, or the possession or control of any property, money or effects of the defendant,

there shall be no further proceeding, except in the manner following: if the plaintiff in such case believes that such garnishee does not answer truly in response to the questions put to him upon such examination, or that the conveyance under which he claims title to property is void as against the creditors of the defendant, he may, on notice to such garnishee and to the defendant, at any time before the garnishee has been discharged by the court or officer, of not less than six days, apply to the court in which the action is pending, or a judge thereof, for permission to file a supplemental complaint in the action, making the garnishee a party thereto, and setting forth the facts upon which he claims to charge such garnishee; and if probable cause is shown by the plaintiff, permission shall be granted, and such supplemental complaint shall be filed and served upon both the defendant and garnishee, either or both of whom may answer the same, and the plaintiff may reply if necessary; and the issues thus made up shall then be brought to trial, and tried, in the same manner, in all respects, as civil actions. The provisions of this section shall not apply to proceedings in justices' courts.

1 M. 205 (270); 5 M. 279 (347); 10 M. 315 (396); 22 M. 247; 23 M. 475.

§ 176. (SEC. 159.) **Default of garnishee—removing default.** When any person duly summoned as a garnishee neglects to appear at the time specified in the summons, or within two hours thereafter, he shall be defaulted, and judgment shall be rendered against him for the amount of damages and costs recovered by the plaintiff in the action against the defendant, payable in money; and execution may issue directly against the goods and chattels and estate of said garnishee therefor: *provided*, the court may, upon good cause shown, remove such default, and permit the garnishee to appear and answer, on such terms as may be just.

10 M. 130 (162.)

§ 177. (SEC. 160.) **Judgment against garnishee—transfer of action.** No judgment shall be rendered against any garnishee until after judgment is rendered against the defendant; but a garnishee may be discharged after examination and disclosure, if it appears that he ought not to be held; whenever a garnishee is not discharged as aforesaid, the cause shall be continued to abide the result of the original action. And in case such original action pending in any court not a court of record shall, under the provisions of law, be transferred to any other court, except by appeal, any garnishee action, the judgment in which is conditioned on the judgment in such original action, shall be also transferred with such original action; and written notice of such transfer shall be served on the garnishee defendant or defendants, by the plaintiff in such action, specifying the court to which such transfer is made, and the time when such garnishee action will be heard, which shall be not less than two days from the service of such notice; and such garnishee action, so transferred, shall carry with it all proceedings already had, and any disclosure already made therein. (*As amended 1875, c. 59, § 1.*)

3 M. 304 (413.)

§ 178. (SEC. 161.) **Same—order of court necessary.** No judgment shall be rendered upon the disclosure of a garnishee, except by order of the judge of the court in which the action is pending, or, in case of his absence or inability to act, by order of a judge of another district.

§ 179. (SEC. 162.) **Who may take disclosure, etc.** Court commissioners, clerks of the district court, or any referee appointed by the court for that purpose, are hereby authorized and required to take the disclosure of any garnishee in writing, together with any other testimony offered by the parties to the action, and report the same to the court; all testimony offered by the parties to be taken subject to any objection seasonably interposed thereto. (*As amended 1871, c. 66, § 1.*)

21 M. 42.

§ 180. (SEC. 163.) **Fees of officers taking disclosure.** Any court commissioner, clerk or referee shall receive from the plaintiff ten cents per folio for all evidence taken

and reduced to writing; and the fees so paid by the plaintiff may be taxed in the judgment against the garnishee. (*As amended 1871, c. 66, § 1.*)

§ 181. (SEC. 164.) **Duty of person charged as garnishee of property, etc.** When any person is charged as garnishee by reason of any property or effects, other than an indebtedness payable in money, which he holds, or is bound to deliver to the defendant, such garnishee shall deliver the same, or so much thereof as may be necessary, to the officer holding the execution, and the said property shall be sold by the officer, and the proceeds accounted for, in the same manner as if it had been taken on execution against the defendant: *provided*, the garnishee shall not be compelled to deliver any specific articles at any other time or place than as stipulated in the contract between him and the defendant.

§ 182. (SEC. 165.) **Court may determine value of property, make orders, etc.** Upon application and notice to the parties, the court may determine the value of any property or effects so in the hands of the garnishee for delivery, and may make any order relative to the keeping, delivery and sale of the same, that is necessary to protect the rights of those interested, and may make any order touching the property attached, that is necessary for the protection of all parties interested, upon the application of any party in interest; and may require, at any time after the service of such garnishee summons, the property, money or effects so attached to be brought into court, or delivered to a receiver appointed by the court.

§ 183. (SEC. 166.) **Proceedings when garnishee has lien on property.** Whenever it appears that any property or effects in the hands of the garnishee, belonging to the defendant, are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed, under a special order of court, to pay or tender the amount due; and the garnishee shall thereupon deliver the property or effects, as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects, with legal interest thereon, and apply the balance upon the execution.

§ 184. (SEC. 167.) **Garnishee liable for contempt, when.** If any garnishee refuses or neglects to deliver any property or effects as provided in the preceding section, he may be punished for contempt of court, and shall, in addition, be liable to the plaintiff for the value of such property or effects, less the amount of the lien, if any, to be recovered by action.

§ 185. (SEC. 168.) **Garnishee may sell property mortgaged.** Nothing herein shall prevent the garnishee from selling such property or effects so in his hands, for the payment of the demand for which they are mortgaged, pledged, or otherwise liable, at any time before payment or tender of the amount due to him: *provided*, such sale is authorized by the terms of the contract between said garnishee and the defendant.

§ 186. (SEC. 169.) **Garnishee not liable for destruction of property, when.** If any such property or effects are destroyed, without any negligence or default of the garnishee, after judgment and before demand by the officer holding the execution, such garnishee shall be discharged from all liability to the plaintiff for the non-delivery of such property or effects.

§ 187. (SEC. 170.) **Judgment, for what amount rendered.** Judgment against a garnishee shall be rendered, if at all, for the amount due the defendant, or so much thereof as may be necessary to satisfy the plaintiff's judgment against said defendant, with costs taxed and allowed in the proceeding against the garnishee.

§ 188. (SEC. 171.) **Disclosure before return-day, by consent of plaintiff.** Whenever any person is summoned as a garnishee in the district court, he may, at any time before the return-day of the summons, appear before the officer named there-

in, or any justice of the peace competent to try causes between the parties, and, with the consent of the plaintiff, to be certified by said officer or justice, make his disclosure upon oath, with the like effect as if made on the day named in the summons; in case such disclosure is taken by a justice, he shall receive the same fees as are allowed by section one hundred and sixty-three aforesaid.

§ 189. (SEC. 172.) **Same—when plaintiff does not consent.** If the plaintiff will not consent to such examination and disclosure, the garnishee, in case he is compelled to be absent from the county until after the return-day of the summons, may make affidavit to that effect, which, with a notice of time, place, and the officer or justice, he shall serve upon the plaintiff or his attorney, at least twenty-four hours previous to the time specified in it for the disclosure; and upon due proof of such service, his disclosure shall be taken as provided in the preceding section, and with like effect.

§ 190. (SEC. 173.) **Fees and expenses of garnishees.** If any person summoned as a garnishee appears and submits himself to an examination upon oath, as herein provided, he shall be allowed his costs for travel and attendance, and, in special and extraordinary cases, such further sum as the court shall deem reasonable for his counsel fees and other necessary expenses.

19 M. 414.

§ 191. (SEC. 174.) **Costs, etc., to be deducted from property garnished.** If any such person is adjudged chargeable as garnishee, his said costs and allowance shall be deducted and retained out of the property, money or effects in his hands, and he shall be accountable only for the balance, to be paid on the execution.

§ 192. (SEC. 175.) **Same—specific articles—judgment against plaintiff.** If such person is charged on account of any specific articles or personal property, he shall not be obliged to deliver the same to the officer serving the execution, until his costs allowed and taxed are fully paid or tendered; and if he is discharged for any cause, he shall recover judgment against the plaintiff for his costs, and have execution therefor.

§ 193. (SEC. 176.) **Costs of plaintiff, how limited.** The plaintiff, under the provisions of this section, shall in no cases, except in cases provided for in section one hundred and fifty-nine aforesaid, recover a greater sum for costs, including the costs allowed to the garnishee, than the amount of damages recovered.

§ 194. (SEC. 177.) **Minimum judgment in justice's court—in district court.** No judgment shall be rendered against a garnishee in a justice's court, where the judgment against the defendant is less than ten dollars, exclusive of costs, nor where the indebtedness of the garnishee to the defendant, or the value of the property, money or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than ten dollars. If the action is in a district court, no judgment shall be rendered against the garnishee, where the indebtedness proved against him, or the value of the money, property or effects of the defendant in his hands or under his control, shall be less than twenty-five dollars; but in all such cases the garnishee shall be discharged, and shall recover his costs, and have execution therefor against the plaintiff.

§ 195. (SEC. 178.) **Effect of judgment against garnishee.** The judgment against a garnishee shall acquit and discharge him from all claims of all parties to the process, in and to the property, money or effects paid, delivered or accounted for by such garnishee by force of such judgment.

15 M. 241.

§ 196. (SEC. 179.) **Discharge of garnishee not a bar, when.** If any person summoned as a garnishee is discharged, the judgment shall be no bar to an action brought against him by the defendant or other claimants for the same demand.

§ 197. (SEC. 180.) **Appeals.** Any party to a proceeding under this title, deeming himself aggrieved by any order or final judgment therein, may remove the same from a justice's court to the district court, or from a district court to the su-

preme court, by appeal, in the same cases, in like manner, and with like effect, as in a civil action.

*§ 198. **Discharge of garnishment, on defendant giving bond.** A defendant, when property, money, or effects has been garnished, may, at any time before the trial of the action in which he is defendant, execute to the plaintiff a bond, in double the amount claimed in the complaint, with two or more sureties, who shall justify and be approved by the judge of the district, or court commissioner of the county, in which the garnishee proceedings [were] instituted, conditioned that if the plaintiff recover judgment in the action, he will pay such judgment, or an amount thereon equal to the value of the money, property or effects so garnished. And the officer approving such bond shall make an order discharging such garnishment, and releasing such money, property or effects therefrom, upon filing such bond with the court in which the garnishee proceedings were entitled, and serving upon the garnishee a copy of the order discharging such proceedings. The defendant shall have the same power to receive or collect the money, property and effects so garnished, in the same manner as if such garnishee proceedings had never been instituted. (*1871, c. 67, § 1.*)

TITLE 11.[1]

INJUNCTIONS.

See 1881 Supp't, p. 93.

§ 199. (SEC. 181.) **Writs to be attested and sealed.** Writs of injunction, attested and sealed as other process of the court, may issue, upon the order of the court, or a judge thereof, as hereinafter provided.

3 M. 145 (217), 151 (222); 4 M. 211 (294); 7 M. 34 (49); 8 M. 88 (113); 9 M. 93 (103); 10 M. 8 (23), 59 (82).

*§ 198. § 200. (SEC. 182.) **Temporary injunction granted, when.** When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when, during the litigation, it appears that the defendant is about to do, or is doing, or threatening, or procuring, or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

17 M. 457.

§ 201. (SEC. 183.) **Affidavit—service.** The injunction may be granted at the time of commencing the action, or at any time afterward before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

14 M. 482.

§ 202. (SEC. 184.) **Injunction after answer—restraining order.** An injunction shall not be allowed after answer unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

§ 203. (SEC. 185.) **Bond to be given—damages, how ascertained.** When no special provision is made by law as to security upon injunction, the court or judge allowing the writ shall require a bond on behalf of the party applying for such writ, in a sum not less than two hundred and fifty dollars, executed by him or

some person for him, as principal, together with one or more sufficient sureties, to be approved by said court or judge, to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he sustains by reason of the writ, if the court finally decide that the party was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.

§ 204. (SEC. 186.) **Injunction only allowed on notice when.** In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party, either by motion or order to show cause. The application shall be made immediately on receiving notice of the publication of the notice of sale; and no injunction in such cases shall be allowed ex parte, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory excuse is furnished, showing why the application was not made in time to allow the same to be heard and determined, upon notice, before the day of sale. In all other cases, if the court or judge deems it proper that the defendant, or any of several defendants, shall be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted.

9 M. 93 (103.)

§ 205. (SEC. 187.) **Motion to vacate or modify injunction.** If the injunction is granted without notice, the defendant, at any time before trial, may apply, upon notice, to the judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint, and the affidavits on which the injunction was granted, or upon the answer, or affidavits on the part of the defendant, with or without the answer.

§ 206. (SEC. 188.) **Same—affidavits to oppose motion.** If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted.

TITLE 12.

RECEIVERS.

§ 207. (SEC. 189.) **Receiver may be appointed, when. A receiver may be appointed:**

First. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court;

Second. After judgment, to carry the judgment into effect;

Third. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment;

Fourth. In the cases provided by law, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property, within this state, of foreign corporations;

Fifth. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided herein.

§ 208. (SEC. 190.) **Court may order deposit of money, etc., when.** When it is admitted by the pleading or examination of a party that he has in his possession, or un-

der 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.

§ 209. (SEC. 191.) **Same—proceedings to compel deposit, etc.** Whenever, in the exercise of its authority, a court orders the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff or other proper officer to take the money or property, and deposit, deliver or convey it in conformity with the direction of the court.

TITLE 13.

JUDGMENT UPON FAILURE TO ANSWER.

§ 210. (SEC. 192.) **When summons is personally served—actions for money only.** Judgment may be had, if the defendant fails to answer the complaint, as follows:

First.—When, in an action arising on contract for the payment of money only, the summons has been personally served, and the plaintiff shall file with the clerk, proof of the personal service of the summons, and that no answer has been received within the time allowed by law, the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant, or against one or more of several defendants, in the cases provided for in this chapter. In other actions for the recovery of money only, on filing the like proof, the plaintiff may apply to the court for a reference, to have his damages assessed, or the amount he is entitled to recover ascertained in any other manner, and for judgment.

§ 210. See 1881 Sup't, p. 100.

10 M. 144 (178); 15 M. 102.

Second.—**Same—in other actions.** In other actions, the plaintiff may, upon like service and proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose.

18 M. 90.

Third.—**When service was by publication, etc.—bond for restitution.** When the service of the summons was by publication, or by leaving a copy thereof at the house of the usual abode of the defendant, in actions arising on contract for the payment of money only, the plaintiff, upon filing with the clerk proof of such service, and that no answer has been received within the time allowed by law, together with the security hereinafter mentioned, shall be entitled to judgment in the same manner as if the summons had been served upon the defendant personally; in other actions, upon filing the like proof, the plaintiff may apply for judgment, and the court shall thereupon require proof to be made of the demand set forth in the complaint, and may render judgment for the plaintiff for such amount, or such relief, as he is entitled to recover. In all cases where the summons has not been served personally, the plaintiff, before judgment is entered, must file, or cause to be filed, satisfactory security to abide the order of the court touching the restitution of any money or property collected or received under or by virtue of the judgment, in case the defendant or his representatives shall thereafter apply and be admitted to defend the action, and shall succeed in the defence: *provided*, that when service of the summons is made by leaving a copy thereof at the house of the usual abode of the defend-

ant, and the officer or person making such service shall return that he left such copy with some person of suitable age and discretion, then resident therein, it shall be deemed personal service; and in such cases judgment may be entered without filing the security herein provided for. *(As amended 1868, c. 84, § 1.)*

7 M. 412 (506).

TITLE 14.

ISSUES.

§ 211. (SEC. 193.) **Issues arise, when.** Issues arise upon the pleadings, when a fact or conclusion of law is maintained by one party and controverted by the other; they are of two kinds:

First.—Of law; and,

Second.—Of fact.

§ 212. (SEC. 194.) **Issues of law.** An issue of law arises upon a demurrer to the complaint, answer or reply.

§ 213. (SEC. 195.) **Issues of fact.** An issue of fact arises:

First.—Upon a material allegation in the complaint, controverted by the answer; or,

Second.—Upon new matter in the answer, controverted by the reply; or,

Third.—Upon new matter in the reply, except when an issue of law is joined thereon; issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action.

§ 214. (SEC. 196.) **"Trial" defined.** A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

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

§ 216. (SEC. 198.) **What issues of fact to be tried by jury.** An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, shall be tried by a jury, unless a jury trial is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.

7 M. 328 (414); 13 M. 326.

§ 217. (SEC. 199.) **Other issues of fact to be tried by the court.** Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred.

6 M. 111 (177); 14 M. 394; 16 M. 355; 17 M. 104; 20 M. 91, 274; 21 M. 327, 366, 415.

§ 218. (SEC. 200.) **Notice of trial—note of issue.** At any time after issue, and at least eight days before the term, either party may give notice of trial; and the party giving the notice shall furnish the clerk, at least seven days before the term, with a note of issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. The cause once placed upon the calendar of a term, if not tried at the term for which the notice was given, need not be noticed for a subsequent term, but shall remain upon the calendar from term to term, until finally disposed of or stricken off by the court. The party upon whom notice of trial is served may also file the note of issue, and cause the action to be placed upon the calendar, without further notice on his part. *(As amended 1877, c. 28, § 1.)*

10 M. 249 (316); 19 M. 539.

§ 219. (SEC. 201.) **Issues on calendar—order of disposition.** The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties, or the dispatch of business, the court otherwise directs.

First. Issues of fact, to be tried by a jury;

Second. Issues of fact, to be tried by the court;

Third. Issues of law.

§ 220. (SEC. 202.) **Either party may bring issues to trial.** Either party, after the notice of trial, whether given by himself or by the adverse party, may bring the issue to trial, and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

6 M. 406 (572).

§ 221. (SEC. 203.) **Separate trial in case of several defendants.** A separate trial between the plaintiff and any of several defendants may be allowed by the court, whenever, in its opinion, justice will be thereby promoted.

§ 222. (SEC. 204.) **Continuance, how applied for—when refused.** A motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, and showing its materiality, and that due diligence has been used to procure it. And if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. (*As amended 1868, c. 78, § 1.*)

12 M. 530; 22 M. 466.

TITLE 15.

TRIAL BY JURY.

§ 223. (SEC. 205.) **Jury, how impannelled.** When the action is called for trial by jury, the clerk shall draw from the jury-box the ballots containing the names of jurors, until the jury is completed, or the ballots are exhausted; if the ballots become exhausted before the jury is completed, the sheriff, under the direction of the court, shall summon from the bystanders or the body of the county so many qualified persons as are necessary to complete the jury.

§ 224. (SEC. 206.) **Plaintiff to pay jury fee.** Before the jury is sworn, the plaintiff shall pay to the clerk three dollars as a jury fee, which shall be immediately paid by the clerk to the treasurer of the county.

7 M. 365 (456.)

§ 225. (SEC. 207.) **Ballots, how kept.** When the jury is completed and sworn, the ballots containing the names of the jurors sworn shall be laid aside till the jury so sworn is discharged, and then they shall be returned to the box; and every ballot drawn, containing the name of a juror not so sworn, shall be returned to the box as soon as the jury is completed.

§ 226. (SEC. 208.) **Challenge of jurors.** Either party may challenge the jurors; but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges are to the panel and individual jurors as in criminal actions, and the causes for challenges shall be the same as in criminal actions: *provided*, however, that there can be but three peremptory challenges on each side. (*As amended 1878, c. 21, § 1.*)

6 M. 224 (319); 20 M. 277, 313.

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

17 M. 188, 241.

First. The plaintiff, after stating the issue, shall open the case, and produce the evidence on his part;

Second. The defendant may then open his defence, and offer his evidence in support thereof;

Third. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

12 M. 502; 22 M. 15.

Fourth. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant shall commence, and the plaintiff conclude, the argument to the jury.

Fifth. If several defendants, having separate defences, appear by different counsel, the court shall determine their relative order in the evidence and argument.

Sixth. The court may then charge the jury.

§ 228. (SEC. 210.) **Court may order view, when—proceedings.** Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose; while the jury are thus absent, no person, other than the judge or person so appointed, shall speak to them on any subject connected with the trial.

22 M. 5.

§ 229. (SEC. 211.) **Proceedings when juror falls sick.** If, after the impanelling of the jury, and before a verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged; in that case, a new juror may be sworn, and the trial begin anew, or the juror may be discharged, and a new jury then or afterward impanelled.

§ 230. (SEC. 212.) **Sheriff to provide food for jury, when.** If, while the jury are kept together, either during the progress of the trial, or after their retirement for deliberation, the court orders them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

§ 231. (SEC. 213.) **What papers jury may take.** Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

§ 232. (SEC. 214.) **Court always open to receive verdict—adjournment.** While the jury are absent, the court may adjourn from time to time, in respect to other business; but it is, nevertheless, to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury.

§ 233. (SEC. 215.) **Polling the jury—insufficient verdict.** When a verdict is rendered, and before it is recorded, the jury may be polled, on the request of either party, for which purpose each juror must be asked whether it is his verdict; if any one answers in the negative, the jury shall be sent out for further deliberation. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

4 M. 335 (433); 6 M. 32 (82); 20 M. 139.

§ 234. (SEC. 216.) **Record of verdict—duty of clerk—disagreeing juror.** When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes, and read it to the jury, and inquire of them whether it is their verdict; if any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case.

20 M. 139.

TITLE 16.

THE VERDICT.

§ 235. (SEC. 217.) **Verdict, general and special, defined.** The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court; it shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing remains to the court, but to draw from them conclusions of law.

4 M. 402 (515); 7 M 207 (267); 21 M. 366.

§ 236. (SEC. 218.) **What verdict jury may render—direction of court as to verdict.** In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict; in all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

12 M. 530; 16 M. 355; 17 M. 296; 20 M. 139; 21 M. 506; 22 M. 19.

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

§ 238. (SEC. 220.) **Jury to assess amount of recovery.** When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery.

§ 239. (SEC. 221.) **Verdict in action to recover specific personal property.** In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, and the jury find that he is entitled to a recovery thereof, or if the property is not in the possession of the defendant, and by his answer he claims a return thereof, and the verdict is in his favor, the jury shall assess the value of the property, and the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property. Whenever the verdict is in favor of the party having possession of the property, the value thereof shall not be found.

16 M. 51.

§ 240. (SEC. 222.) **Entries on receiving verdict—judgment—reserving case—stay.** Upon receiving a verdict, an entry shall be made in the minutes of the court, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration; or the judge trying the cause may, in his discretion, and upon such terms as shall be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion for a new trial, or in arrest of judgment, or for judgment notwithstanding the verdict, or to set aside the verdict, or dismiss the action.

1 M. 131 (156); 2 M. 191 (277); 17 M. 253; 22 M. 19.

TITLE 17.

TRIAL BY THE COURT.

§ 241. (SEC. 223.) **Trial by jury, how waived.** Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, and with the assent of the court in other actions, in the manner following:

First.—By failing to appear at the trial.

Second.—By written consent, in person or by attorney, filed with the clerk.

Third.—By oral consent in open court, entered in the minutes.

§ 242. (SEC. 224.) **Decision of court, when and how given.** Upon the trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk within twenty days after the term at which the trial took place; in giving the decision, the facts found and the conclusions of law shall be separately stated; judgment upon the decision shall be entered accordingly.

3 M. 30 (67), 41 (83); 5 M. 232 (294), 332 (409); 11 M. 132 (203).

§ 243. (SEC. 225.) **Proceedings and judgment on issue of law.** On a judgment for the plaintiff, upon an issue of law, the plaintiff may proceed in the manner prescribed by the statute upon the failure of the defendant to answer where the summons was personally served. If judgment is for the defendant, upon an issue of law, and the taking of an account, or the proof of any fact, is necessary to enable the court to complete the judgment, a reference may be ordered as by statute provided.

10 M. 144 (178).

§ 244. (SEC. 226.) **Court always open—special terms—decisions filed out of term.** In addition to the general terms, the district court is always open for the transaction of all business; for the entry of judgments, of decrees, of orders of course, and all such other orders as have been granted by the court or judges, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact. The judges of the several district courts may, by order, appoint such special terms in the counties of their respective districts as may be deemed necessary or convenient, and at such terms all business hereinbefore mentioned may be transacted. When any matter is heard by the court or judge, the decision may be made out of term; and such decision may be an order, or a direction that an order or judgment or decree be entered; and upon filing in the office of the clerk in the county where the action or proceeding is pending, the decision in writing, signed by the judge, an order or judgment or decree, as the case may require, if any, shall be entered by such clerk, in conformity with such decision. (*As amended 1868, c. 90, § 1.*)

11 M. 184 (271); 12 M. 437; 14 M. 333; 15 M. 486.

*§ 245. **Trials in vacation, by consent of parties.** The judges of the several district courts of this state may, with consent of parties, try issues of law and fact in vacation, and decide such issues either in or out of term; and thereupon judgment may be rendered, with the same effect as upon issues tried and determined in term time. (*1872, c. 70, § 1.*)

TITLE 18.

TRIAL BY REFEREES.

§ 246. (SEC. 228.) **Reference by consent—for what purposes.** Upon the agreement of the parties to a civil action, or a proceeding of a civil nature, filed with the clerk or entered upon the minutes, a reference may be ordered:

5 M. 58. (78); 160 (201.)

First. To try any or all the issues in such action or proceeding, whether of fact or law, (except an action for divorce,) and to report a judgment thereon;

Second. To ascertain and report any fact in such action or special proceeding, or to take and report the evidence therein.

§ 247. (SEC. 229.) **Compulsory reference, in what cases.** When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

First. When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear

and decide the whole issue, or to report upon any specific question of fact involved therein;

19 M. 132.

Second. When the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect;

Third. When a question of fact, other than upon the pleadings, arises, upon motion or otherwise, in any stage of the action; or,

Fourth. When it is necessary for the information of the court in a special proceeding of a civil nature.

§ 248. (SEC. 230.) **Number and qualifications of referees.** A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties; or, if the parties do not agree, the court or judge shall appoint one or more persons, not exceeding three, residents of any county in this state, and having the qualification of electors.

§ 249. (SEC. 231.) **Trial by referees—their powers—effect of report—proceedings when report is set aside.** The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. They shall have the same power to grant adjournments, and to allow amendments to any pleadings, as the court upon such trial, upon the same terms and with like effect. They shall have the same power to administer oaths and enforce the attendance of witnesses as is possessed by the court. They shall state the facts found and the conclusions of law separately, and their decision shall be given, and may be excepted to and reviewed, in like manner, but not otherwise; and they may in like manner settle a case or exceptions. The report of referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict: *provided*, that whenever a finding has been made, or a decision or a judgment rendered upon the finding of the referee or referees, and the said finding or decision shall be set aside, or a new trial granted in the action, the cause referred shall be placed upon the calendar for trial by the court or a jury, as the case may be, the same as though no reference had ever been made, subject, nevertheless, to the same right of reference as in the first instance. (*As amended 1877, c. 29, § 1.*)

2 M. 110 (134); 3 M. 17 (45), 217 (311); 7 M. 351 (442); 8 M. 417 (467); 11 M. 241 (341); 12 M. 61; 22 M. 92, 117.

§ 250. (SEC. 232.) **Powers of majority at a meeting of all.** When there are three referees, all shall meet, but two of them may do any act which might be done by all; and whenever any authority is conferred on three or more persons, it may be exercised by a majority upon the meeting of all, unless expressly otherwise provided by statute.

TITLE 19.

EXCEPTIONS.

§ 251. (SEC. 233.) **"Exception" defined—how stated and settled.** An exception is an objection, taken at the trial, to a decision upon a matter of law. The point of the exception shall be particularly stated, and either delivered in writing to the judge, or entered in his minutes, and immediately corrected or added to until made conformable to the truth, or it may afterward be settled in a statement of the case.

1 M. 195 (246); 7 M. 207 (267); 8 M. 9 (26), 125 (154), 195 (226), 310 (351); 10 M. 250 (319); 14 M. 105; 15 M. 489; 16 M. 431; 19 M. 132; 23 M. 66, 362.

§ 252. (SEC. 234.) **Form of exception.** No particular form of exception is required; the objection shall be stated, with so much of the evidence as is necessary to explain it, but no more, and the whole as briefly as possible.

TITLE 20.

NEW TRIALS.

§ 253. (SEC. 235.) **For what causes granted.** A verdict, report or decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party.

12 M. 502; 16 M. 25, 457; 20 M. 139, 260.

First. Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court or referee, or abuse of discretion, by which the moving party was prevented from having a fair trial;

1 M. 131 (156); 2 M. 26 (37); 3 M. 80 (134); 19 M. 132.

Second. Misconduct of the jury or prevailing party;

1 M. 131 (156); 4 M. 340 (438); 20 M. 378; 22 M. 5, 305; 23 M. 178, 197, 291, 325.

Third. Accident or surprise which ordinary prudence could not have guarded against;

17 M. 172.

Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice;

1 M. 131 (156); 2 M. 26 (37); 22 M. 90.

Fifth. That the verdict, report or decision is not justified by the evidence, or is contrary to law;

3 M. 80 (134); 7 M. 254 (325); 10 M. 246 (313); 11 M. 204 (296); 13 M. 235; 15 M. 257; 20 M. 277.

Sixth. Newly-discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

4 M. 340 (438); 5 M. 134 (171); 7 M. 166 (225); 9 M. 301 (318); 19 M. 394.

Seventh. Error in law, occurring at the trial, and excepted to by the party making the application.

8 M. 9 (26); 16 M. 536.

§ 254. (SEC. 236.) **Motion, how made—case—bill of exceptions—judge's or stenographer's minutes.** When the application is made for a cause mentioned in the fourth, fifth and seventh subdivisions of the last section, it is made either upon a bill of exceptions or a statement of the case, prepared as prescribed in the next section; for any other cause, it is made upon affidavit: *provided,* however, that the judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes, or upon the minutes of the stenographic reporter where there is such a reporter, to set aside a verdict and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or court at which the trial is heard. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had: *and provided,* if, during the trial, any exception is taken to the ruling of the court, such exception may be forthwith taken and reduced to writing, and allowed and signed by the judge, together with so much of the testimony or charge as to make the ruling and exception intelligible, which shall be made a part of the record, so as to obviate a case or other bill of exception; and on appeal the court shall not infer that any other evidence was introduced to obviate the exceptions. *(As amended 1875, c. 60, § 1.)*

4 M. 325 (422); 6 M. 394 (558); 8 M. 9 (26).

§ 255. (SEC. 237.) **Bill of exceptions or case, how prepared and settled.** The party preparing a bill of exceptions or case shall, within twenty days after the trial, serve it upon the adverse party, who may, within ten days after such service, propose amendments thereto; and within fifteen days after service of such amendments, the same, with the amendments proposed thereto, shall be presented to the judge or referee who tried the cause, for allowance or settlement

and signature, upon a notice of five days; if not presented within the time aforesaid, or such further time as may be stipulated or granted, the same shall be deemed abandoned: *provided*, that whenever the judge who tried the cause shall die, or become incapable from acting from sickness or other cause, before a bill of exceptions is allowed or case made, or shall depart from and remain without the state at the time limited for the same allowance or settlement, the said bill may be allowed, or case settled, by or before the judge of an adjoining judicial district in which the action is pending; or in case a referee shall so die, or become incapacitated, or remain absent, as herein set forth, such bill may be allowed, or case settled, by the judge of the district court in which such action is pending; and, in either case, such allowance or settlement shall be made upon the files in the cause, the minutes of the judge or referee, if attainable, and upon such proof of what transpired at the trial as may be presented by affidavit on behalf of the parties to the action, with like effect in all respects as if such bill was allowed, or case settled, by the judge or referee who tried the cause. The case or bill, being examined, and found or made conformable to the truth, shall be allowed and signed by the judge, referee, or other officer acting instead of such judge or referee, as provided herein. *(As amended 1870, c. 74, § 1.)*

4 M. 286 (379); 18 M. 79; 19 M. 407.

TITLE 21.

GENERAL PROVISIONS.

See 1883 Sup't, p. 78.

§ 256. (SEC. 238.) **Rate of damages recoverable.** Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

§ 257. (SEC. 239.) **Requests for instructions to jury, etc.** Any party may, and, if required by the court, shall, when the evidence is closed, submit, in distinct and concise propositions, the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both; they may be written and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes; but in either case, they shall be entered, with any exceptions that may be taken, if either party requires it.

As to treble damages in certain cases, see *post*, § 269; and *c.* 75, § 47.

§ 258. (SEC. 240.) **Trials by court or referees.** The provisions of this chapter respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court or referees.

§ 259. (SEC. 241.) **Offer of judgment—proceedings—costs.** The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof, within ten days, he may file the offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly; if the notice of acceptance is not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay costs to the defendant.

12 M. 186; 23 M. 61, 71.

*§ 260. **Tender in actions for torts.** When, in an action to recover damages for the commission of a tort, the defendant shall, at any time before the trial of such action, tender to the plaintiff a sum of money as damages or compensation for such tort, and, if such tender be made after the commencement of the action, in addition to such tender for damages or compensation, he shall also tender the costs and disbursements of the plaintiff then accrued, and the

plaintiff in such action shall not recover a greater sum than the amount so tendered, the plaintiff shall recover no costs or disbursements, but shall pay the defendant's costs and disbursements. The fact of such tender having been made shall not be pleaded, nor given in evidence to the court or jury. (*1877, c. 119, § 1.*)

*§ 261. **Same—award of costs.** In all such actions, when such tender shall be made, and the plaintiff fails to recover a greater sum than the amount of such tender, if the amount of such recovery, and the costs and disbursements accrued and tendered, exceed the amount of the defendant's costs and disbursements, the court shall enter judgment against the defendant for such excess. If the amount of the defendant's costs and disbursements exceed the amount recovered by the plaintiff, and his costs and disbursements accrued and tendered, the court shall enter judgment against the plaintiff for such excess. (*Id. 2.*)

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

First. By the plaintiff, at any time before trial, if a provisional remedy has not been allowed, or counterclaim made, or affirmative relief demanded in the answer.

1 M. 153 (179); 14 M. 491: 22 M. 92.

Second. By either party, with the written consent of the other; or by the court, upon the application of either party, after notice to the other, and sufficient cause shown, at any time before the trial;

2 M. 37 (50); 6 M. 386 (550), 406 (572).

Third. By the court, where, upon the trial, and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover; § 252.

20 M. 170.

Fourth. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal; See 1883 Supt, p. 78.

Fifth. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action, by nonsuit or otherwise, are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register, and a notice served on the adverse party; judgment may thereupon be entered accordingly. (*As amended 1878, c. 22, § 1.*)

14 M. 491; 20 M. 408.

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

§ 264. (SEC. 244.) **Judgment as between several parties.** Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

22 M. 1.

§ 265. (SEC. 245.) **Judgment as against one or more of several defendants.** In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

1 M. 81 (102).

*§ 266. **Judgment against defendants sued jointly with others.** Whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against all, but proves a cause of action against one or more of the defendants, judgment may be rendered against him or them against whom the cause of action is proved. (*1873, c. 67, § 1.*)

22 M. 540.

§ 267. (SEC. 246.) **Measure of relief to be granted plaintiff.** The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

9 M. 93 (103).

§ 268. (SEC. 247.) **Clerk to enter judgment on verdict, when.** When a trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict, unless the court orders the case to be reserved for argument or further consideration, or grants a stay of proceedings.

2 M. 238 (277); 12 M. 61; 14 M. 170; 22 M. 19.

See *ante*, § 240.

*§ 269. **Damages trebled for trespass to personal property.** Whoever shall carry off, use or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable to the owner thereof for treble the amount of damages which may be assessed therefor in a civil action in any court having jurisdiction, except as provided in the next section. (*1868, c. 75, § 1.*)

*§ 270. **Same—judgment for single damages only.** If, upon the trial of such action, it appears that the defendant had probable cause to believe that the property so taken or carried off was his own, or that of another person under whose direction the act was done, judgment shall be given for single damages only, and costs of the action. (*Id. § 2.*)

§ 271. (SEC. 248.) **Judgment on counterclaim.** If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

§ 272. (SEC. 249.) **Judgment in action to recover possession of personal property.** In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant in the same action, or for either of them. Judgment for either party, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession, or the value thereof in case possession cannot be obtained, and damages for the detention, or taking and withholding the same. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. It the property has been delivered to the plaintiff, and the action is dismissed before answer, or if the answer so claims, the defendant shall have judgment for a return of the property and damages, if any, for the detention, or taking and withholding such property, but such judgment shall not be a bar to another action for the same property or any part thereof.

4 M. 190 (270); 12 M. 186; 13 M. 291; 14 M. 554; 16 M. 51; 21 M. 51.

§ 273. (SEC. 250.) **Entry and contents of judgment.** The judgment shall be entered in the judgment-book, and specify clearly the relief granted, or other determination of the action.

10 M. 238 (303); 13 M. 46; 14 M. 464, 537; 15 M. 63, 185; 19 M. 17.

§ 274. (SEC. 251.) **Judgment, after decease of party, not a lien on real estate.** If a party dies after verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon; such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

20 M. 405.

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

First.—In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

Second.—In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, decision or report, the offer of the defendant, exceptions, and all orders in any way involving the merits, and necessarily affecting the judgment. If a statement of the case is made, the same may be attached to the judgment-roll, on the request of either party.

§ 276. (SEC. 253.) **Copies may be filed, when.** If an original pleading or paper is lost, or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

§ 277. (SEC. 254.) **Docketing judgments—transcripts—lien on real estate.** On filing a judgment-roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment, from the time of docketing the same, becomes a lien on all the real property of the debtor in the county, owned by him at the time of the docketing of the judgment, or afterward acquired; said judgment shall survive, and the lien thereof continue, for the period of ten years, and no longer. (*As amended 1870, c. 67, § 1.*)

1 M. 210 (274); 4 M. 235 (318); 5 M. 264 (333), 332 (409); 7 M. 419 (513); 10 M. 238 (303); 11 M. 45 (78); 16 M. 230, 480; 17 M. 69; 22 M. 380.

*§ 278. **Security on appeal—discharge of lien.** That whenever judgment has been entered in any suit or action, and a motion has been made and is pending for a new trial, or an appeal has been taken to the supreme court, the judgment shall cease to be a lien on the real estate of the defendant, upon payment into court, as security of such judgment, the amount thereof, and such further sum as the court may by order direct and determine to be sufficient to secure all interest and costs that will probably accrue pending such appeal. (*1876, c. 75, § 1.*)

*§ 279. **Lien of judgments in United States courts.** Judgments for the payment of money that have been heretofore or shall be hereafter duly docketed, either in the district or circuit court of the United States in and for the state of Minnesota, from the time of docketing the same become a lien on all the real property of the debtor in the county wherein said judgment was rendered, and in any other county in the state, upon filing, in the office of the clerk of the district court of such county, a duly certified transcript of such docket. (*1877, c. 141, § 1.*)

*§ 280. **Same—docketing transcripts.** Whenever any such transcript shall be delivered to the clerk of the district court in and for any county in the state of Minnesota, the same shall be docketed in like manner, and have like effect, as if such judgment had been rendered in one of the district courts in and for the state of Minnesota. (*Id. § 2.*)

*§ 281. **Same—authority to attorney general.** The attorney general of this state is hereby authorized to procure and publish a transcript of the docket of all judgments in the United States district and circuit courts for this state now in force, and furnish a copy thereof to the several clerks of the district courts of this state: *provided*, the expense of the same shall not exceed the sum of two hundred and fifty dollars. (*Id. § 3.*)

*§ 282. **Assignment of judgments, how made.** Whenever a judgment is assigned, the assignment thereof shall be in writing, under the hand and seal of the assignor, and shall by him be acknowledged before a justice of the peace, or any other officer authorized to take the acknowledgment of deeds. (*1877, c. 99, § 1.*)

*§ 283. **Filing of assignment—entry on docket.** The instrument of assignment of any such judgment shall be filed in the court rendering the judgment, with the files in the action, and an entry thereof shall be made upon the docket; and until so filed, any such assignment shall be void as against creditors levying upon or attaching the same, and as against subsequent purchasers in good faith for value. (*Id. § 2.*)

*§ 284. **Rights of assignee—attorney's lien saved.** After a judgment has been assigned, and the assignment filed, as in this act provided, none but the assignee, his agent or attorney, shall have authority to receive or collect the amount due on such judgment, or to take out execution to enforce the collection of such judgment: *provided*, that no assignment shall be construed or allowed to deprive attorneys of their lien or interest in any judgment, for their fees, costs and disbursements. (*Id. § 3.*)

*§ 285. **Actions to set aside judgment for fraud, etc.** That in all cases where judgment heretofore has been or hereafter may be obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment, at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice or representation. Such action shall be commenced in the judicial district where such judgment was rendered, and in such action the court shall have and possess the same powers heretofore exercised by courts of equity in like proceedings, and may perpetually enjoin the enforcement of such judgment, or command the satisfaction thereof, and may also compel the prevailing party to make restitution of any money or other property received by virtue thereof, and may also make such other or further order or judgment as may be just or equitable: *provided*, that no rights or interests under any judgment obtained by means of such wrongful or fraudulent acts or practice of the prevailing party, acquired by third parties in good faith and without actual knowledge of such wrongful or fraudulent acts or practice, shall be affected by any such order or judgment made in the action herein provided for: *and provided further*, that when in any such action, pending the final determination thereof, the statute of limitation shall become a bar to the enforcement of such judgment, or to the commencement of an action thereon, and, in the action herein provided for, the validity of such judgment shall be established, such judgment may be enforced, or an action commenced thereon, at any time within one year after the final determination of the action herein provided for. (*1877, c. 131, § 1.*)

§ 286. (SEC. 255.) **Satisfaction of judgment.** Satisfaction of a judgment shall be entered in the judgment-book, and noted upon the docket, upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or, within two years after the judgment, by the attorney, unless a revocation of his authority is previously entered upon the register. And whenever a judgment is satisfied in fact, as to any one of several defendants, an entry to that effect may be made in the judgment-book and docket. Whenever a judgment is satisfied in fact, otherwise than upon an execution, it is the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. Satisfaction of a judgment docketed upon transcript shall be noted on such docket, upon filing in the office of the clerk of the district court of the county where such transcript is filed, a certified copy of the instrument of satisfaction on file in the office of the clerk of the district court of the county where the judgment was recovered. Whenever a judgment is satisfied, it is the duty of the clerk of the district court to give certified copies of instruments of satisfaction.

16 M. 451.

§ 286. See 1883 Sup't, p. 78.

TITLE 22.

PROCEEDINGS SUPPLEMENTARY TO THE JUDGMENT.

§ 287. (SEC. 256.) **Summoning of parties after judgment.** When a judgment is recovered against one or more of several persons jointly indebted upon an obligation, by proceeding as provided by statute, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

§ 288. (SEC. 257.) **Heirs, devisees, etc., may be summoned, when—proceedings.** In case of the death of a judgment debtor, after judgment, the heirs, devisees, legatees, or personal representatives of the judgment debtor, or the tenants of real property owned by him, and affected by the judgment, may be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor, in their hands respectively. The proceedings thereon are subject to the provisions of the chapter upon actions by or against executors, administrators, legatees, heirs and devisees.

§ 289. (SEC. 258.) **Summons, what to contain—service.** Said summons shall be subscribed by the attorney of the judgment creditor, describe the judgment, and require the person summoned to show cause within thirty days after the service of the summons, and shall be served in the same manner as an ordinary summons.

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

§ 291. (SEC. 260.) **Party summoned may answer—defences allowed.** Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which has arisen subsequent to the rendition thereof; if he is proceeded against according to section two hundred and fifty-six, he may make the same defence which might have been made originally to the action, except the statute of limitations; if he is proceeded against according to section two hundred and fifty-seven, he may make the same defence which he might have made to an action upon the judgment.

§ 292. (SEC. 261.) **Pleadings—trial—judgment.** The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply, and the issue may be tried, and judgment and costs may be given, in the same manner as in an action, and enforced by execution, or the application of property charged with the payment of the judgment, may, if necessary, be compelled by attachment.

TITLE 23.

THE EXECUTION.

§ 293. (SEC. 262.) Judgment may be enforced within ten years. The party in whose favor judgment is given, may, at any time within ten years after the entry thereof, proceed to enforce the same, as prescribed by statute.

16 M. 230; 17 M. 69; 19 M. 347; 20 M. 194; 22 M. 380.

§ 294. (SEC. 263.) **Kinds of execution.** There are two kinds of writs of execution: one against the property of the judgment debtor, and the other for the delivery of the possession of real or personal property, or such delivery with damages for the detention, or taking and withholding the same.

§ 295. (SEC. 264.) **Form and contents of writ.** The writ of execution shall be under the seal of the court, subscribed by the clerk, tested in the name of the district judge, indorsed by the attorney of the party applying therefor, and directed to the sheriff, or coroner when the sheriff is a party or interested; it shall intelligibly refer to the judgment, stating the court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

First. **Execution against property—taxes on real estate.** If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment, with

interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter not exceeding ten years. And in case real property has been levied upon by virtue of a writ of attachment, in favor of the judgment creditor, in the same action in which the judgment was rendered, and the judgment creditor has, subsequently to such levy, paid the taxes upon the real property so attached, and filed in the office of the clerk of the court the receipt of the proper officer for such taxes, the said receipt shall be attached to and become a part of the judgment-roll, and the execution shall also specify the filing of such receipt, with the date of filing, date of receipt, and amount thereof; and in case of the sale under execution of any such real estate, the proceeds of such sale, after deducting the costs and expenses thereof, shall be first applied to the payment of the amount so paid for taxes, with the interest accrued thereon,

Second. **Against property held by heirs, etc.** If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment, with interest, out of such property;

Third. **Against joint defendants.** If it is against defendants jointly indebted upon a contract, a part of whom only have been summoned in the action, it shall issue in form against all the defendants, but the attorney of the party causing it to be issued shall indorse thereon the names of those defendants who were not summoned, and such execution shall not be levied upon the sole property of any such defendant; but it may be collected out of the personal property of any such defendant owned by him as a partner with the other defendants summoned, or any of them;

See 1883 Sup't, p. 73. § 296.

Fourth. **For delivery of property.** If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, charges, damages, rents or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof can not be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it shall be deemed an execution against property. (*As amended 1877, c. 17, § 1.*)

16 M. 426.

§ 296. (SEC. 265.) **When returnable—renewals.** The execution shall be made returnable, within sixty days after its receipt by the officer, to the clerk with whom the judgment-roll is filed. On the return of an execution unsatisfied in whole or in part, or just before the expiration of the period of sixty days, the clerk may renew the same for a further period of sixty days, on the oral or written request of the judgment creditor, or his attorney, by endorsing on said execution the words following: "Renewed for sixty days from the date hereof at request of the judgment creditor;" to which endorsement he shall add the true date of making the same, and attest the same by his signature and the seal of the court, and shall thereupon redeliver the same, so endorsed, to the officer returning the same; and such renewal shall have the effect of extending the life of the execution for an additional period of sixty days, fully preserving all levies made and rights acquired under the execution before such renewal; and such execution may be again so renewed from time to time, by endorsement by the clerk as aforesaid, with the same effect as such first renewal. (*As amended 1871, c. 61, § 1.*)

§ 297. (SEC. 266.) **Judgments, how enforced in different cases.** Where a judgment requires the payment of money, or the delivery of real or personal property, the

same is enforced in these respects by execution, as provided in the last three sections. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.

§ 298. (SEC. 267.) **Execution after death of party.** Notwithstanding the death of a party after judgment, execution thereon against his property may be issued and executed in the same manner and with the same effect as if he was still living; except that such execution cannot be issued within a year after his death.

§ 299. (SEC. 268.) **To what officer issued—to different counties.** When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

§ 300. (SEC. 269.) **What may be levied on and sold—lien of execution.** All goods, chattels, real or personal, and all property, real, personal or mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book-accounts, debts, credits, and other evidences of indebtedness, belonging to the judgment debtor, may be levied upon and sold on execution. Until a levy, property not subject to the lien of the judgment is not affected by the execution. (*As amended 1875, c. 62, § 1.*) § 303

16 M. 148.

§ 301. (SEC. 270.) **Levy on property subject to lien of judgment—release.** Upon property subject to the lien of the judgment, a minute by the officer on the execution of the time when said execution was delivered to him, stating that at such time he levied upon such property (describing it,) shall be deemed a sufficient levy. And the officer, at the request of the judgment creditor, may, at any time before or at the time of the execution sale, or during the progress of sale, release such property, or such part thereof as may not have been actually sold, from such levy, before satisfaction in full of the judgment; and the judgment, or such part thereof as shall not have been actually satisfied by a payment or sale, and the lien thereof, shall not be in any way affected by such levy and release, but the same shall remain in full force and effect to the same extent as if no levy had been made. (*As amended 1871, c. 62, § 1.*) See 1881 Sup't, p. 100.

16 M. 13.

§ 302. (SEC. 271.) **Levy on personal property.** Personal property, capable of manual delivery, shall be levied upon by the officer taking it into his custody.

5 M. 321 (397); 21 M. 193

§ 303. (SEC. 272.) **Levy on bulky articles.** When an execution is levied upon articles of personal estate, which, by reason of their bulk, or other cause, cannot be immediately removed, a certified copy of the execution and return may, within three days thereafter, be deposited in the office of the clerk of the city or town in which said articles are; and such levy shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer.

§ 304. (SEC. 273.) **Same—duty of clerk—fees.** The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof, in the order in which they are received, in the books kept for making entries of mortgages of personal property; which entry shall contain the names of parties to the suit and the date of the entry. The clerk's fee for this service shall be twenty-five cents, to be paid by the officer, and included in his charge for the service of the execution.

§ 305. (SEC. 274.) **Levy on debts, stock, etc.** Other personal property shall be levied on by leaving a certified copy of the execution, and a notice specifying the prop-

erty levied on, with a person holding the same; or if a debt, with the debtor; or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof.

5 M. 321 (397.)

§ 306. (SEC. 275.) **Service on judgment debtor.** The officer shall serve a copy of the execution and inventory, certified by him, upon the judgment debtor, if he can be found within the county; if he is a resident thereof, but cannot be found therein, the said officer shall leave such copy at the usual place of abode of the said judgment debtor, with some person of suitable age and discretion, then resident therein. (*As amended 1875, c. 63, § 1.*)

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

5 M. 264 (333).

§ 308. (SEC. 277.) **Levy on coin or other money.** Whenever any gold, silver or copper coin, or any bills or other evidence of debt issued by any moneyed corporation, or by the government of the United States, and circulated as money, is seized upon execution, the officer shall pay and return the same as so much money collected; but if the same does not, at the time and place of such seizure, circulate at par, the officer shall make sale thereof as in other cases.

§ 309. (SEC. 278.) **Levy on goods or chattels under pledge.** When goods or chattels are pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

§ 310. (SEC. 279.) **Property exempt from execution.** No property hereinafter mentioned or represented shall be liable to attachment, or sale on any final process, issued from any court in this state.

3 M. 306 (419); 22 M. 485.

First. The family bible;

Second. Family pictures, school-books or library, and musical instruments for use of family.

Third. A seat or pew in any house or place of public worship;

Fourth. A lot in any burial-ground;

Fifth. All wearing apparel of the debtor and his family; all beds, bedsteads and bedding, kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; and all other household furniture not herein enumerated, not exceeding five hundred dollars in value; also all moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire. (*As amended 1878, c. 12, § 1.*)

8 M. 178 (207); 18 M. 361.

Sixth. Three cows, ten swine, one yoke of oxen and a horse, or, in lieu of one yoke of oxen and a horse, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also, one wagon, cart or dray, one sleigh, two plows, one drag, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value;

7 M. 128 (184).

Seventh. The provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year;

Eighth. The tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade not exceeding four hundred dollars in value; the library

§§ 306, 310. See 1851 Sup't, p. 100. And § 309. See 1853 Sup't, p. 79.

and implements of any professional man; all of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be. In addition to the articles enumerated in this section, all the presses, stones, type, cases, and other tools and implements used by any copartnership, or by any printer, publisher or editor of any newspaper, and in the printing or publication of the same, whether used personally by said copartnership, or by any such printer, publisher or editor, or by any persons hired by him to use them, not to exceed in value the sum of two thousand dollars, together with stock in trade not exceeding four hundred dollars in value, shall be exempt from attachment, or sale on any final process, issued from any court in this state. (*As amended 1876, c. 43, § 1.*)

2 M. 72 (89); 18 M. 361.

Ninth. One sewing machine. (*1868, c. 72, § 1.*)

Tenth. Necessary seed-grain for the actual personal use of the debtor for one season, to be selected by him: not however, in any case to exceed the following kinds and amounts respectively, viz: fifty bushels of wheat, fifty bushels of oats, fifteen bushels of potatoes, three bushels of corn, and thirty bushels of barley. (*1871, c. 65, § 1.*)

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

Provided, however, that the exemptions provided for and embraced in subdivisions six, seven, eight, nine, ten and eleven, of section two hundred and seventy-nine, shall extend only to debtors having an actual residence in this state. (*1872, c. 71, § 1, as amended 1873, c. 69, § 1, and 1875, c. 64, § 1.*)

NOTE.—And moneys received from benevolent societies by the families of deceased members are exempt by c. 34, § 369, *ante*.

§ 311. (SEC. 280.) **No exemption from attachment or execution—when.** The property hereinbefore mentioned is not exempt from any attachment issued in an action for the purchase-money of the same property, or from an execution issued upon any judgment rendered therein.

11 M. 475; 16 M. 487; 22 M. 144; 23 M. 454.

*§ 312. **Earnings of minor children exempt, when.** The earnings of any minor child of any debtor within this state, or the proceeds thereof, shall not be liable to attachment, garnishment, or sale on any final process of a court, in any action against such debtor, by reason of any debt or liability of such debtor not contracted for the especial benefit of such minor child. (*1867, c. 80, § 1.*)

§ 313. (SEC. 281.) **Judgment for taking exempt property, exempt.** Whenever any personal property, exempt as aforesaid, is levied upon, seized or sold by virtue of any execution, or wrongfully and unlawfully taken or detained by any person, the damages sustained by the owner thereof, by reason of such levy, seizure or sale, or such unlawful detention or taking, and any judgment recovered therefor, shall be exempt from attachment, execution, or other proceeding whereby any creditor of such owner seeks to apply the same to the payment of his debts. (*As amended 1877, c. 30, § 1.*)

3 M. 306 (419.)

§ 314. (SEC. 282.) **Levy on property in excess of exemption allowed—proceedings.** When the officer holding an execution against any person is of the opinion that such person has more property of the classes specified in section two hundred and seventy-nine than is by law exempt, he may levy on the whole of any one class, and forthwith make an inventory thereof, and cause the same to be appraised at its cash value by two disinterested freeholders of the precinct where such property may be, on oath to be administered by him to such appraisers. If such appraisal exceeds the amount by law exempt of that class, the debtor may thereupon forthwith select of such property an amount not exceeding in

value, as so appraised, the amount exempt, and the balance shall be held and applied by said officer as in other cases. If neither the debtor nor his agent appears and makes such selection, the officer shall make the same. If one or more indivisible articles of any such class is of greater value than the whole amount exempt of that class, the officer shall sell the same, and, after paying to the debtor the amount exempt of that class, shall apply the residue in discharge of his said process.

§ 315. (SEC. 283.) **Levy on growing crops—sale, when to be made.** A levy may be made upon grain or grass while growing, and upon any other unharvested crops; but no sale thereof shall be made, under such levy, until the same is ripe, or fit to be harvested; and any levy thereon, by virtue of an execution issued by a justice of the peace, or any court of record, shall be continued beyond the return-day thereof, if necessary, and remain in life; and the execution thereof may be completed at any time within thirty days after such grain, grass, or other unharvested crop is ripe, or fit to be harvested. (*As amended 1871, c. 63, § 1.*)

§ 316. (SEC. 284.) **Sale of property levied on—collection of debts—payment to plaintiff.** The sheriff shall execute the writ against the property of the judgment debtor, by levying on the property, collecting the things in action, or selling the same, if the court so orders, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

10 M. 253 (323); 23 M. 50.

§ 317. (SEC. 285.) **Notice of sale of personal property on execution.** Before the sale of personal property on execution, notice thereof shall be given as follows:

First.—By posting written or printed notice of the time and place of sale, in three public places of the county where the sale is to take place, ten days successively.

Second.—When real property is sold upon judgment, decree or execution, a similar notice describing the property with sufficient certainty to enable a person of common understanding to identify it, shall be posted for six weeks successively in three public places of the county where the property or some part thereof is situated, and a copy thereof shall be published once a week for the same period in a newspaper printed and published in the county, if there is one, or if there is none, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper, then in a newspaper printed and published at the capital of the state. (*As amended 1867, c. 68, § 2.*)

§ 318. (SEC. 286.) **Officer selling without notice—penalty.** An officer selling without the notice prescribed by the last section shall forfeit one hundred dollars to the aggrieved party, in addition to his actual damages; and a person taking down or defacing the notice posted, if done before the sale, or the satisfaction of the execution, and without the consent of the parties, shall forfeit fifty dollars; but the validity of the sale is not affected by either act, either as to third persons, or parties to the action.

3 M. 151 (222); 21 M. 175.

§ 319. (SEC. 287.) **Sale, when and how made.** A sale shall be made by auction, between nine o'clock in the morning and sunset, in the county where the premises or some part thereof is situate; after sufficient property has been sold to satisfy the execution, no more shall be sold; neither the officer holding the execution nor his deputy can purchase; when the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known tracts or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold.

320. (SEC. 288.) **Sale of real estate, when absolute.** Upon the sale of real property

where the estate sold is less than a leasehold of two years unexpired term, the sale is absolute; in all other cases the property sold is subject to redemption as provided by law.

§ 321. (SEC. 289.) **Sale of real property—certificate and its contents.** Whenever any sale of real property is made upon any execution, or pursuant to any judgment, decree or order of a court, (except when otherwise specified in such judgment, decree or order,) the officer shall make and deliver to the purchaser a certificate, under his hand and seal, containing—

First.—A description of the execution, judgment, decree or order under which such sale is made.

Second.—A description of the real property sold.

Third.—The price paid for each parcel sold separately.

Fourth.—The date of the sale, and the name of the purchaser.

Fifth.—When subject to redemption, it shall be so stated.

Said certificate shall be executed, proved or acknowledged, and recorded, as required by law for the conveyance of real estate, and shall be *prima facie* evidence of the facts therein stated:

Certificates on sales heretofore made. And in case of any such sale heretofore made, upon which no certificate has been made or delivered by the officer, such officer or his successor in office may make and deliver to the purchaser such certificate, at any time within six months after the passage of this act; and any certificate upon any such sale heretofore made, whether such certificate has heretofore been or shall hereafter be made and delivered by such officer, may hereafter be recorded with like force and effect as if recorded within the time originally provided therefor. (*As amended 1876, c. 45, § 1, and 1877, c. 31, § 1, and 1877, c. 32, § 1.*)

1 M. 310 (427); 7 M. 55 (82).

§ 322. (SEC. 290.) **Certificate to operate as a conveyance, when.** Such certificate, so proved or acknowledged and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance, to the purchaser or his assigns, of all the right, title and interest of the person whose property is sold, in and to the same, at the date of the lien upon which the same was sold, without any other conveyance whatever.

5 M. 332 (409).

§ 323. (SEC. 291.) **Redemption of real estate sold—by whom.** Real estate sold upon execution, judgment or decree, may be redeemed—

First. By the judgment debtor, his heirs or assigns;

7 M. 347 (432).

Second. By a creditor having a lien, legal or equitable, on the real estate or some part thereof, subsequent to that on which the same was sold. Creditors hall redeem in the order of their respective liens.

21 M. 132.

§ 324. (SEC. 292.) **Same—in what order.** The judgment debtor, his heirs and assigns, may redeem within one year after the day of sale, by paying to the purchaser the amount of his bid, with interest thereon at the rate of seven per cent. per annum, and if the purchaser is a creditor having a prior lien, the amount thereof with interest. If no such redemption is made, the senior creditor may redeem within five days after the expiration of said year, and each subsequent creditor within five days after the time allowed all prior lien-holders as aforesaid, by paying the amount aforesaid, and all liens prior to his own held by the party from whom such redemption is made: *provided*, that no creditor can redeem unless, within the year aforesaid, he files notice of his intention to redeem in the office of the clerk of the court where the judgment is entered.

§ 325. (SEC. 293.) **Redemption, how made.** The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff or clerk of the district court of the county in which such real property

is situated, the amount required by law for such redemption, and shall produce to such person or officer:

First. A certified copy of the docket of the judgment, or deed of conveyance or mortgage, or of the record or files evidencing any other lien, under which he claims the right to redeem, certified by the officer in whose custody such docket, record, file or files shall be;

21 M. 132.

Second. Any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto, or of some person acquainted with the signature of the assignor;

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

7 M. 347 (432(; 21 M. 132.

§ 326. (SEC. 294.) **Certificate of redemption, its contents.** The person or officer from whom such redemption is made, shall make, and deliver to the person redeeming, a certificate under his hand and seal, containing:

First. The name of the person redeeming, and the amount paid by him on such redemption;

Second. A description of the sale from which such redemption is made, and of the property redeemed;

Third. Stating upon what claim such redemption is made, and if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificate shall be executed, and proved or acknowledged, and recorded, as provided by law for conveyance of real estate; and if not so recorded within ten days after such redemption, such redemption and certificate is void, as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, or his heirs or assigns, such redemption annuls such sale; if by a creditor holding a lien on the property, or some part thereof, said certificate, so executed, and proved or acknowledged, and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law.

§ 327. (SEC. 295.) **Interest of purchaser subject to attachment or judgment.** The interest acquired upon any sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in case of real property; and may be attached or sold upon execution, in the same manner.

§ 328. (SEC. 296.) **Waste may be restrained—waste defined.** Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on application of the purchaser or judgment creditor; but it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family, while he occupies the property.

§ 329. (SEC. 297.) **Proceedings where sale is irregular, or judgment reversed.** If the purchaser of real property sold on execution, or his successor in interest, is evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or of the reversal or the discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor; such judgment creditor, if the recovery was in consequence of the irregularity, shall thereupon be entitled to a new execution on the judgment, at any time within ten years after such eviction, for the price paid on the sale, with interest; and for that purpose the judgment shall be deemed valid against the judgment

debtor, his personal representatives, heirs or devisees; but not against a purchaser in good faith as an incumbrancer where title or incumbrance has accrued before a levy on such new execution. (*As amended 1868, c. 82, § 1.*)

§ 330. (SEC. 298.) **Joint debtors and sureties—contribution and subrogation.** When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property, or before sale, he may compel repayment from the principal. In such cases, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he files with the clerk of the court where the judgment was rendered, notice of his payment, and claim to contribution or repayment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket.

STAY OF EXECUTION.*

*§ 331. **For how long—bond to be filed.** Execution upon any judgment, rendered for the recovery of money only, in any district court of this state, may be stayed for the period of six months: *provided*, that, in order to obtain such stay, the party applying therefor shall, within ten days after judgment is rendered and docketed, file a bond, with two or more responsible freeholders of this state as sureties, with the clerk of the court in which said judgment was rendered, in double the amount of the judgment and costs, which bond shall first be approved by the judge of said court, or the court commissioner of such county, conditioned that the judgment debtor will pay the amount of such judgment, interest and costs, within the time for which said stay is granted, and for the authorizing and empowering the issuing of an execution for such amount against the judgment debtor and sureties, upon default of such payment: *provided*, that the interest to be allowed shall be at the rate of twelve per cent. per annum on the amount of the judgment, including the costs. (*1877, c. 76, § 1.*)

*§ 332. **Execution against debtor and sureties.** If the judgment, interest and costs be not paid at the expiration of the time for which the same may have been stayed, the judgment creditor may have execution issued against the judgment debtor and his sureties, for the amount of such judgment, costs and interest as aforesaid. (*Id. § 2.*)

*§ 333. **Justification of sureties.** Each surety must justify, by affidavit, that he is a resident and freeholder of this state, and worth the amount specified in the undertaking, above his debts and liabilities, and exclusive of his property exempt from execution. (*Id. § 3.*)

*§ 334. **Obligee in bond—service on creditor—exceptions to bond—proceedings.** The bond herein prescribed shall run to the judgment creditor, his executors, administrators or assigns, a copy of which shall be served on the judgment creditor, his agent or attorney, if resident of the county wherein the judgment was rendered, within ten days from such rendition; and the judgment creditor may, except to the bond or the sufficiency of the sureties, and upon notice, or by order to show cause, the court may, in its discretion, order the execution to issue at once, notwithstanding such bond, unless the judgment debtor give such further bond and sureties as shall be deemed sufficient by the court; and the court may require the proposed sureties to justify orally, if required by the judgment creditor; and for cause shown, the court may require a still further

**An act providing for a stay of execution on judgments rendered in the district courts of this state, for the recovery of money only.* Approved February 24, 1877. (Laws 1877, c. 76.)

bond and sureties at any time, and, in default thereof, may order execution to issue. (*1877, c. 76, § 4.*)

*§ 335. **Duty of officer returning execution against sureties.** Every officer to whom an execution shall issue against sureties, as provided in the preceding sections, shall certify, in his return thereon, whether the same, and what amount, if any, was collected from the sureties, and the true date of such collection. (*Id. § 5.*)

*§ 336. **Stay granted after levy made.** If the stay herein provided shall be granted after an execution shall have issued, or after levy made, then and in that case the levy shall be released, and the execution returned, with the cause of such return thereon noted by the officer. (*Id. § 6.*)

TITLE 24.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 337. (SEC. 299.) **Order for examination of judgment debtor.** When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he does not reside in this state, to the sheriff of the county where the judgment-roll, or a transcript of a justice's judgment, is filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from a judge of the district court from which the execution was issued, requiring such judgment debtor, or, if a corporation, any officer thereof, to appear and answer concerning his or its property, before such judge, or a referee appointed by him, at a time and place specified in the order.

9 M. 254 (270); 16 M. 518.[1]

§ 338. (SEC. 300.) **Warrant may be issued—proceedings on arrest of defendant.** Instead of the order requiring the attendance of the judgment debtor, as provided in the last section, the judge may, upon proof by affidavit that there is danger that the debtor will leave the state, or conceal himself, issue a warrant requiring the sheriff of any county where such debtor is, to arrest him and bring him before such judge; upon being brought before the judge, he may be examined on oath, and ordered to give bond, with sureties, that he will attend from time to time before the judge or referee, as he shall direct, during the pendency of the proceeding, and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution; in default of giving such bond, he may be committed to jail, by warrant of the judge, as for a contempt.

§ 339. (SEC. 301.) **Persons indebted to judgment debtor may pay sheriff.** After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt is a sufficient discharge for the amount so paid.

§ 340. (SEC. 302.) **Witnesses may be required to appear.** Witnesses may be required to appear and testify upon any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 341. (SEC. 303.) **Reference—examination to be under oath.** If the examination is before a referee, the testimony and proceedings shall be certified by him to the judge; all examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

§ 342. (SEC. 304.) **Order for application of property to pay judgment—exemption.** The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except

that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, cannot be so applied, when it appears, by the debtor's affidavit, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

§ 343. (SEC. 305.) **Appointment of receiver—transfers forbidden.** The judge may also, by order, appoint a receiver of the property of the judgment debtor not exempt from execution, or forbid a transfer or other disposition thereof, or any interference therewith.

22 M. 452.

§ 344. (SEC. 306.) **Proceedings in case of adverse claimants of property, etc.** If it appears that a person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation, by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity is given to the receiver to commence the action, and prosecute the same to judgment and execution; such order may be modified or vacated by the judge granting the same, at any time, on such security as he may direct.

22 M. 452.

§ 345. (SEC. 307.) **Disobedience of order a contempt.** If any person, party or witness disobeys an order of the judge or referee, duly served, such person, party or witness may be punished by the judge, as for a contempt; the proceedings therefor are prescribed in chapter eighty-seven of these statutes, respecting the punishment of contempt.

23 M. 411.

§ 346. (SEC. 308.) **Questions to be answered—criminating answers.** No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution,

*§ 347. **Debtor of judgment debtor may be examined.** After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concern- the same; the judge may also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper. *(1867, c. 61, § 1.)*