GENERAL STATUTES

OF THE

STATE OF MINNESOTA

IN FORCE

JANUARY 1. 1889.

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Cited, State v. McGinnis, 30 Minn. 48, 50, 14 N. W. Rep. 256; State v. Tiner, 13 Minn. 520, (Gil. 488, 490.)

§ 162. (Sec. 153.) Judgment against defendant.

That these provisions do not apply to appeals from convictions before the recorder of the borough of St. Peter, see Borough of St. Peter v. Bauer, 19 Minn. 327, (Gil. 282.)

In a criminal proceeding, removed by *certiorari* from justice court to the district court, it is entirely proper for the district court to affirm the judgment of the justice, and also to enter judgment against the defendant and his sureties upon the recognizance for the writ for the amount of the fine and costs of both courts. Baker v. United States, 1 Minn. 207, (Gil. 181.)

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§ 166. (Sec. 157.) Prosecutions for assault, etc.

But when the assault is coupled with the intent to commit a felony, it becomes itself a felony, and, being punishable with a severity corresponding to the gravity of such an offense, the accused is entitled to a deliberate investigation by a grand jury, and a trial by his peers before the district court. Boyd v. State, 4 Minn. 321, (Gil. 240.)

§ 169. (Sec. 160.) Want of final jurisdiction—Proceedings.

That is to say, he shall proceed to examine and discharge or bind over as provided in c. 106. Smith v. Anderson, 33 Minn. 25, 21 N. W. Rep. 841.

§ 171. (Sec. 162.) Judgment on conviction—Commitment.

Under this section a justice has power to render judgment for costs as well as a fine, and the district court has, under section 162, *supra*, the same power on appeal. State v. Schmail, 25 Minn. 370.

When, upon conviction before a justice, one is adjudged to pay a fine or be imprisoned in the county jail for 30 days, or until the fine is paid, a commitment may be issued by the justice at any time while the judgment stands unexecuted, except during the pendency of an appeal. In re Shaw, 31 Minn. 44, 16 N. W. Rep. 461.

CHAPTER 66.

CIVIL ACTIONS.

TITLE I.

OF THE FORM OF CIVIL ACTIONS.

§ 1. Forms abolished—Civil action.

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

The distinction in the forms of actions, that is, in the modes of commencing them, in the number, names, and forms of the pleadings, and in those matters of practice necessary for presenting causes to the court for its determination, and for enforcing such determination, can be and has been abolished. The distinction in the mode of trial, or rather in the tribunal which may try causes, is substantially preserved by §§ 197-199. Berkey v. Judd, 14 Minn. 394, (Gil. 300, 302.)

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

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

TITLE 2.

OF THE TIME OF COMMENCING ACTIONS.

See McClung v. Capehart, 24 Minn. 17, 19.

§ 3. Limitations.

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

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

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

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

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

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

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

§ 4. Actions to recover realty.

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

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

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

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

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

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

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

See, also, O'Brien v. City of St. Paul, 18 Minn. 183, (Gil. 167.)

§ 5. Actions upon judgments.

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

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

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

§ 6. Six years' limitation.

See note to § 4, *supra*, and Brown v. Brown, 28 Minn. 501, 11 N. W. Rep. 64.

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

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

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

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

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

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

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

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

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

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

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

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

§ 7. Actions against officers or for penalties.

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

§ 8. Libel, etc.

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

§ 9. Action upon account.

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

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

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

§ 11. Mortgage foreclosure.

Every action to foreclose a mortgage heretofore or hereafter made upon real estate shall be commenced within fifteen years after the cause of action occurs, and said fifteen years shall not be enlarged or extended by reason of any nonresidence. (*As amended* 1870, *c.* 60, § 1; 1887, *c.* 69.)

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

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

The time within which an action to redeem must, as a general rule, be brought, is, in analogy to the statute limiting the time for commencing an action to foreclose, 10 years; and the time for the mortgagor to bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his

action to foreclose after the 10 years. Parsons v. Noggle, 23 Minn. 328. Until the right to foreclose expires, the right to redeem exists. When the former is barred the latter is also. King v. Meighen, 20 Minn. 264, (Gil. 237.) To same effect, Holton v. Meighen, 15 Minn. 80, (Gil. 58.)

See Ayer v. Stewart, cited in note to § 6, subd. 1, *supra*, and Whalley v. Eldridge, 24 Minn. 358.

§ 13. Action—When deemed commenced.

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

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

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

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

§ 14. Attempt to commence action.

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

An attempt to commence an action, under this section, is equivalent to a commencement by service of summons, when the attempt is, within 60 days, followed by the first publication of a summons, which is published for six consecutive weeks, as provided in § 65 of the same chapter. Auerbach v. Maynard, 26 Minn. 421, 4 N. W. Rep. 816.

§ 15. Effect of debtor's absence from state.

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

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

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

See Parsons v. Noggle, cited in note to § 11, *supra*, and Town v. Washburn, cited in note to § 3, *supra*. See, also, Wilkinson v. Winne, 15 Minn. 159, (Gil. 123;) Duke v. Balme, 16 Minn. 312, (Gil. 276;) Hoyt v. McNeil, 13 Minn. 390, (Gil. 362.)

§ 16. Cause of action accruing out of state.

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

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

See Fletcher v. Spaulding, cited in note to § 3, *supra*.

§ 17. Disability of plaintiff.

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

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

§ 18. Death of party.

See Wilkinson v. Estate of Winne, 15 Minn. 159, (Gil. 123.)

§ 24. New promise—Evidence—Part payment.

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

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

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

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

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

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

After the adoption of this section, § 4, c. 121, did not save the operation of § 24, c. 60, Comp. St., upon a payment, to take a case out of the statute of limitations, the full time not having run; but this section applied to the case. Brisbin v. Farmer, 16 Minn. 215, (Gil. 187.)

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

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

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

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

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

If any action is commenced within the time prescribed therefor, and judgment given therein for the plaintiff, and the same is arrested or reversed on error or appeal, the plaintiff may commence a new action within one year after such reversal or arrest. That all the provisions of this title as to the time of the commencement of civil actions shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons. (*As amended* 1881, *Ex. Sess. c.* 24, § 1.)

TITLE 3.

THE PARTIES TO CIVIL ACTIONS.

§ 26. Real party in interest—Assignments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See Rock County Bank v. Hollister, 21 Minn. 385.

§ 27. Set-off against assignee.

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

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

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

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

§ 28. Actions by executors, trustees, etc.

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

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

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

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

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

See Castner v. Austin, Price v. Phœnix Mut. Life Ins. Co., and Langdon v. Thompson, cited in note to § 26, *supra*, and Rock County Bank v. Hollister, 21 Minn. 385, 386.

§ 29. Married women.

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

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

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

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

§ 30. Infant plaintiffs.

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

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

*§ 32. Guardian for infant party—Appointment.

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

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

Second. When the infant is defendant, upon the application of the infant,

if he is of the age of fourteen years, and applies within twenty days after the service of the summons; if he is under the age of fourteen, or neglects so to apply, then, upon the application of any other party to the action, or of the general or testamentary guardian, or of a relative or friend of the infant, notice of such application, when made by such party, relative, or friend, first being given to such general or testamentary guardian, if the infant has one within this state; if he has none, then to the infant himself, if over fourteen years of age, and within this state; or, if under that age, and within the state, then to the person with whom such infant resides. If such infant have no general or testamentary guardian within this state, and if such infant be not within this state, notice of such application shall be given by the publication of a copy thereof once in each week, for three successive weeks, in a newspaper printed and published in the county in which the action is brought; and if there is no such newspaper in the county, then in a newspaper printed and published at the capital of the state. The return of the sheriff of the county in which the action is brought, made upon the summons, that such infant defendant cannot be found within such county, shall be *prima facie* evidence that such infant is not within this state, and that he has no general or testamentary guardian therein. (1877, *c.* 80, § 1, *as amended* 1885, *c.* 117.)

§ 34. (Sec. 33.) Injury to minors—Action.

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

§ 35. (Sec. 34.) Action, etc., by wife in husband's name.

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

§ 36. (Sec. 35.) Joinder of defendants.

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

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

§ 41. (Sec. 36.) Action does not abate, when.

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

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

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

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

Where a court of general jurisdiction has jurisdiction of the subject-matter and par-

ties in an action, and the plaintiff dies, and after his death the court renders judgment in his favor, the judgment is not void. Hayes v. Shaw, 20 Minn. 405, (Gil. 355.)

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

A continuance of an action by bringing in new parties in place of others, deceased, must be made under this section, and not under § 124, *infra*, c. 66, Gen. St. Lee v. O'Shaughnessy, 20 Minn. 173, (Gil. 157.) Where the proceeding to continue is not taken till more than a year after the death of the party, it must be taken, unless the substitution is stipulated, by supplemental complaint in the nature of a bill of revivor. Id. Until a substitution, the successors in interest of the deceased party are not affected by the action or judgment, and, such judgment being as to them a nullity, they need not apply within a year to vacate it, under § 125, *infra*. Id. Upon an application, in such case, to vacate the judgment, it is not necessary for the party to show a defense. Id.

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

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

Application to substitute the personal representative in an action, under this section, is, if made within a year, *prima facie* in time, and will be granted almost as a matter of course. After a year it is, *prima facie*, too late, and a party must excuse the delay. Stocking v. Hanson, 22 Minn. 542. After personal representatives are substituted for a deceased party, they may move to set aside a judgment entered after decease of the party for whom they are substituted, and appeal from an order denying such motion, or, if the action relates to real estate, elect to take a second trial, under § 5, c. 75, Gen. St. Id.

See Nichols v. Railroad Co., 36 Minn. 452, 32 N. W. Rep. 176; Chisholm v. Clitherall, cited in note to § 26, *supra*; Rogers v. Holyoke, 14 Minn. 220, (Gil. 158.)

§ 42. (Sec. 37.) Actions in firm name.

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

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

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

*§§ 43–46. Bringing in additional parties defendant.

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

TITLE 4.

THE PLACE OF TRIAL OF CIVIL ACTIONS.

See Janney v. Sleeper, 30 Minn. 473, 16 N. W. Rep. 365.

§ 47. (Sec. 38.) Local actions.

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

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

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

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

*§ 47*a*. Same.

All actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and

for injuries to real property, shall be brought and tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases specified in subdivisions second, third, and fourth, of section fifty-one of chapter sixty-six of General Statutes of one thousand eight hundred and seventy-eight. If the county designated in the complaint is not the proper county, the court therein shall have no jurisdiction of said action. (1885, *c.* 169.*)

§ 48. (Sec. 39.) Actions triable where cause of action arose.

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

§ 49. (Sec. 40.) Other actions — Replevin — Change of venue—Corporations.

In all other cases, except when the state of Minnesota is plaintiff, the action shall be tried in the county in which the defendants, or any of them, shall reside at the commencement of the action; or if none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by law. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial shall be thereupon changed to the proper county, by the order of the court, unless the parties consent thereto: *provided*, that in an action for the claim and delivery of personal property wrongfully taken, the action may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides. A corporation shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section. The court may change the place of trial of actions included in this section, as provided by law, as in other actions: *provided*, that where defendants reside in different counties, and appear and answer by different attorneys, the action shall, on motion, be transferred to the county agreed on by such defendants, or which is designated by the largest number of defendants who join in an answer. (*As amended* 1877, *c.* 68, § 1; 1878, *c.* 38, § 1; 1881, *Ex. Sess. c.* 25, § 1.)

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

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

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

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

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

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

*All inconsistent acts and parts of acts are repealed. § 2.

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

See Keith v. Briggs, 32 Minn. 185, 20 N. W. Rep. 91. Tullis v. Brawley, 3 Minn. 277, (Gil. 191;) Nininger v. Commissioners, 10 Minn. 133, (Gil. 106;) Gill v. Bradley, 21 Minn. 15; In re Barnard, 30 Minn. 512, 16 N. W. Rep. 403.

§ 51. (Sec. 42.) Change of venue.

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

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

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

See Chesterson v. Munson, cited in note to c. 65, § 117, *supra;* Curtis v. St. Paul, S. & T. F. R. Co., 20 Minn. 28, (Gil. 19;) Wilson v. Richards, 28 Minn. 337, 9 N. W. Rep. 872.

*§ 51*a*. Change of venue—Procedure.

In any civil action now pending, or that may be hereafter commenced, in any court of this state against one or more defendants residing in a county or counties other than that wherein such action is pending, or may hereafter be instituted, and one or more defendants residing in the county wherein such action is pending, or may be commenced, and in which any of such defendants shall have demanded that the place of trial of such action be changed to the proper county, as required by section forty-nine, chapter sixty-six, of the General Statutes one thousand eight hundred and seventy-eight, if any one or more of the defendants therein, having made such demand, shall make and file in the office of the clerk of the court of the county wherein such action has been or shall be commenced an affidavit stating that he or they have good reason to believe, and does believe, that any one or more of the parties to such action have been made defendants therein for the purpose of evading the law relating to changing place of trial, or to deprive any of the defendants therein of their right to have the place of trial of said action changed, and setting forth the reason of such belief, and shall execute and file a bond or undertaking, with one or more sureties, conditioned to pay to the other defendants, or any of them, all such additional costs and expenses as they shall incur by reason of the place of trial of said action being changed, and to pay to the plaintiff all such additional costs and expenses as he may incur in case he recover judgment against the defendant so joined with such non-resident defendants, in case such defendant in good faith defends such action, a copy of said affidavit shall be served upon the plaintiff's attorney, together with a notice that a motion will be made before the judge of the court in which said action is pending, at a time therein mentioned, for a change of place of trial to the county named in such demand. Said copy and notice shall be served at least eight days before the day of hearing, and on such hearing the said judge shall, if he deems proper, make an order changing the place of trial to the county named in said demand. (1881, c. 132, § 1.)

TITLE 5.

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

§ 53. (Sec. 44.) Requisites of summons.

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

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

The signature of the party or attorney to a summons must be written, not printed. Ames v. Schurmeier, 9 Minn. 221, (Gil. 206.)

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

§ 54. (Sec. 45.) Notice in summons.

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

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

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

§ 55. (Sec. 46.) Service of complaint.

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

§ 56. (Sec. 47.) Summons—Who may serve.

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

*§ 56*a*. Service in Washington county.

Hereafter all writs, process, summons, and subpœnas issuing out of the district court for the county of Washington shall be served by the sheriff of said county or one of his deputies, unless the court shall otherwise order, or the said sheriff or said deputies shall be personally interested as a party in the action or proceeding out of which the said process, writ, summons, or subpœna shall issue; any statute to the contrary notwithstanding. (1887, *c.* 259.)

*§ 58. Service in Ramsey county.

[Repealed Sp. Laws 1881, *c.* 371.]

* See, as to service upon municipal corporations, *ante*, *c.* 10, *§ 313.

§ 59. (Sec. 48.) Manner of serving summons.

[Service of summons on insurance companies, see *ante*, c. 34, *§ 316*a*, *§ 369*h*.]

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

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

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

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

§ 60. Service on foreign corporations.

A summons in an action against a foreign corporation may be served in this state by delivering a copy to its general or managing agent, though he do not reside in the state. Guernsey v. American Ins. Co., 13 Minn. 278, (Gil. 256.)

*§ 62. Service on railroad companies.

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

*§ 63. Service on domestic corporations without resident officers.

Whenever any corporation created by the laws of this state, or late territory of Minnesota, does not have an officer in this state upon whom legal service of process can be made, of which the return of the sheriff shall be conclusive evidence, an action or proceeding against such corporation may be commenced in any county where the cause of action or proceeding may arise, or said corporation may have property; and service may be made upon such corporation by depositing a copy of the summons, writ, or other process or citations, in any proceeding for the collection of unpaid personal property taxes, in the office of the secretary of state, which shall be taken, deemed, and treated as personal service on such corporation: *provided*, that whenever any process, writ, or citation against or affecting any corporation aforesaid is served on the secretary of state, the same shall be by duplicate copies, one of which shall be filed in the office of said secretary of state, and the other by him immediately mailed, postage prepaid, to the office of the company, or to the president, secretary, or any director or officer of said corporation, as may appear or be ascertained by said secretary from the articles of incorporation on file in his office. (1875, *c.* 43, § 1, *as amended* 1885, *c.* 62.)

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

§ 64. (Sec. 49.) Service by publication—When allowed.

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

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

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

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

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

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

Sixth. When the action is to foreclose a mortgage, or to enforce a lien of any kind, on real estate in the county where the action is brought. (*As amended* 1869, *c.* 73, § 1; 1878, *c.* 9, § 1; 1881, *c.* 28, § 1.)

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

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

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

See Auerbach v. Maynard, 26 Minn. 421, 4 N. W. Rep. 816.

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

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

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

§ 65. (Sec. 50.) Manner of publication.

See Auerbach v. Maynard, cited in note to § 14, *supra.*

§ 66. (Sec. 51.) Opening default.

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

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

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

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

§ 67. (Sec. 52.) Action against several—Proceedings when all not served.

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

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

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

§ 68. (Sec. 53.) Proof of service.

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

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

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

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

§ 69. (Sec. 54.) When jurisdiction attaches—Appearance—Effect.

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

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

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

Upon an application by a defendant, brought on by order to show cause, and made upon the records and files in the cause, and an affidavit of the defendant's attorney, which stated several alleged defects in the proceedings,—one of them going to the jurisdiction of the court over the person,—for an order setting aside a judgment entered on default, held that, as the affidavit did not particularly specify the ground of the application, it must be assumed that it was made upon all the defects alleged in the affidavit; and, as some of them called for the decision of questions other than those affecting the jurisdiction, the application was a general appearance in the action, and cured the objection to the jurisdiction. Curtis v. Jackson, 23 Minn. 268.

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

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

See Auerbach v. Maynard, cited in note to § 14, *supra*.

§ 70. (Sec. 55.) Jurisdiction of natural persons acquired, when.

Stone v. Myers, 9 Minn. 303, (Gil. 287,) and Cleland v. Tavernier, 11 Minn. 194, (Gil. 126;) doubted, Kenney v. Goergen, 36 Minn. 190, 31 N. W. Rep. 210.

§ 71. (Sec. 56.) Jurisdiction of corporation — When acquired.

See Broome v. Galena, etc., Packet Co., cited in note to § 64, *supra*, and Reynolds v. La Crosse, etc., Packet Co., cited in note to § 69, *supra;* also, Guernsey v. American Ins. Co., cited in note to § 60, *supra*.

§ 72. (Sec. 57.) Appearance—Notice of subsequent proceedings.

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

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

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

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

See, also, cases cited in note to § 69, *supra*.

§ 73. (Sec. 58.) Notices and service.

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

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

§ 74. (Sec. 59.) Same—Manner of service.

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

See In re Brown, 32 Minn. 443, 445, 21 N. W. Rep. 474, and *post*, § 76, note.

§ 76. (Sec. 61.) Manner of service by mail.

Sections 75 and 76, providing for the service of notice by mail, do not apply to notices served on the clerk of the court; so that such a service on the clerk is not good, unless the notice actually reach him within the proper time. Thorson v. St. Paul Fire & Marine Ins. Co., 32 Minn. 434, 21 N. W. Rep. 471.

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

§ 77. (Sec. 62.) Service—Upon whom made.

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

§ 79. (Sec. 64.) Sufficiency of notices—Amendment—Extension of time.

See Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79.

§ 82. (Sec. 68.) Computation of time.

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

In a claim for a mechanic's lien, which includes different items of material, delivered at different times, the account is to be treated as a unit, and the time within which the

account and affidavit must be filed for record begins to run from the date of the last item, providing they were all delivered for the same job of work; as for constructing the building, if that was the job in hand, or for doing the same job of repairing. But if some of them were delivered for some other work, as where the construction is completed, and afterwards some further thing to be done is determined on, the furnishing of such items cannot suspend the running of the time for filing as to the account for constructing. Frankoviz v. Smith, 34 Minn. 403, 26 N. W. Rep. 225.

See Coe v. Caledonia & Miss. Ry. Co., 27 Minn. 197, 202, 16 N. W. Rep. 621; Atkinson v. Duffy, 16 Minn. 45, (Gil. 30, 35.)

§ 83. (Sec. 69.) Manner of publishing notices.

The publication of legal notices, public statements, tax-lists, or official proceedings required by law, or by an order of a judge or court, to be published in a newspaper once in each week, for a specified number of weeks, shall be made on the day of each week in which such newspaper is published; and all such publications shall be made in the English language, and shall not be made or published in any newspaper unless such newspaper shall have been published weekly, and generally circulated in the county where said notice, statement, tax-list, or official proceeding are to be published for at least one year next preceding the date of the first publication thereof: *provided*, that if no newspaper has been previously published in said county for one year, as above required, then the same may be published in any newspaper of general weekly circulation. (*As amended* 1887, *c.* 42.†)

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

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

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

MOTIONS AND ORDERS.

*§ 87. Where motions to be made.

Motions must be made in the district in which the action is pending, or in an adjoining district: *provided*, that no motion shall be made in an adjoining district which shall require the hearing of such a motion at a greater distance from the county-seat, where the action is pending, in which such motion is made, than the residence of the judge of the district wherein such action is pending, from such county-seat, unless the place where such motion is made, in such adjoining district, is nearer by direct railway communication to said county-seat than said residence of the judge of the district is by such railway communication. Orders made out of court, and without notice, may be made by any judge of a district court, at any place in the state; but no order to stay proceedings for a longer time than twenty days shall be made, except upon notice to the adverse party. Motions for judgment upon demurrer, or upon the pleadings, may be made and determined in vacation; and when any motion is made in a district court other than that in which the action is pending, the order, determination, or judgment thereon is to be entered in the same manner, and have the same force and effect, as when made in and by the judge of the district, and in the county in which the action is pending: *provided*, that demurrers in civil actions may be brought on for argument by either party at any time the court may fix for that purpose, at chambers or at any regular or special term of court, in any county in the judicial district in which

† § 2 of the amendment provides that "this act shall take effect and be in force from and after the first day of October, A. D. 1887."

the action is pending. (1867, *c.* 67, § 4, *as amended* 1881, *c.* 7, § 1; 1885, *c.* 267.)

TITLE 6.

PLEADINGS IN CIVIL ACTIONS.

§ 88. (Sec. 70.) Pleadings regulated by statute.

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

THE COMPLAINT.

§ 91. (Sec. 73.) Complaint—Contents.

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

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

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

See Young v. Young, cited in notes to *c.* 62, § 11, and *c.* 64, § 69, *supra;* Stewart v. Erie & W. Transp. Co., 17 Minn. 372, (Gil. 348, 375.)

THE DEMURRER.

§ 92. (Sec. 74.) Demurrer—Time—Grounds.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 93. (Sec. 75.) Requisites of demurrer.

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

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

§ 95. (Sec. 78.) Implied waiver of objections.

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

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

Defect of parties defendant can be objected to only by answer or demurrer. Blakeley v. Le Duc, 22 Minn. 477. The objection that there is a defect of parties must be made, if it appear by the complaint, by demurrer; if it do not so appear, by answer.

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

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

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

See notes to § 92, *supra*.

THE ANSWER.

§ 96. (Sec. 79.) Answer—Contents.

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

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

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

In an action purporting to be brought by plaintiff as a foreign administrator, allegations in the complaint to the effect that plaintiff has been duly appointed such foreign administrator, and has duly filed in the proper probate court of this state a duly-authenticated copy of his appointment, are put in issue by an answer denying the complaint, and "each and every part and portion thereof." Fetz v. Clark, 7 Minn. 217, (Gil. 159,) followed. Fogle v. Schaeffer, 23 Minn. 304.

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

General denial—Negative pregnant, see Stone v. Quaal, 36 Minn. 46, 29 N. W. Rep. 326.

A general denial in an answer of a value alleged in the complaint is insufficient. Dean v. Leonard, 9 Minn. 190, (Gil. 176.) A denial of value, as alleged in the complaint, is a negative pregnant and insufficient. Lynd v. Picket, 7 Minn. 184, (Gil. 128.) A denial, in the answer, of the allegation of value of the complaint, in these words, "The defendant denies any knowledge or information thereof sufficient to form a belief as to the value of all or any of said goods," makes a good issue as to value. Ames v. First Division St. Paul & Pacific R. Co., 12 Minn. 412, (Gil. 295.)

When a complaint in an action to set aside conveyances of real estate as fraudulent as to creditors charged that the conveyances were made to cheat, delay, and defraud, and also set forth facts and circumstances from which fraud might be inferred, as that the conveyances were made without consideration, and at a different time from that at which they purported to have been executed, it is not sufficient, in an answer, to deny

the general charge of fraud, without denying the facts and circumstances alleged from which it might be inferred. Johnston v. Piper, 4 Minn. 192, (Gil. 134.)

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

An averment, in a complaint to set aside a mortgage sale, that the sale did not take place at the time specified in the notice, and that no postponement of the sale was ever given, alleges no fact upon which issue can be taken. Ramsey v. Merriam, 6 Minn. 168, (Gil. 104.)

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

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

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

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

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

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

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

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

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

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

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

SUBD. 3. In ejectment an equitable defense may be set up, but the equities should be strong, such as would entitle the defendant to a conveyance on a bill filed for that purpose. McClane v. White, 5 Minn. 178, (Gil. 140.) The owner of the legal title to real estate may bring ejectment, whatever equities may be claimed by defendant. The defendant may, in his answer, set up his equities, so far at least as they relate to the right of possession, and the action is a proper one in which to litigate them. Williams v. Murphy, 21 Minn. 534. To prevail against the plaintiff's legal right to the possession, the equities pleaded as a defense must be such that, under the former practice, a court of equity would, upon a bill filed setting up the facts, have enjoined the legal owner from proceeding at law. Id.

Plaintiffs gave their bond for the conveyance of certain real estate, on payment of purchase price, in five installments, according to five notes given by defendant, a cancellation of which was asked on the ground that defendant had failed to pay the first of said notes. Defendant averred an indebtedness due him from plaintiff, Nicholas Wallrich, to the amount of $225, which he asked to have offset against said first note, and paid the balance due into court. Held, such amount being found due, that the same was an "equity," within this section, and proper set-off to the first note; and the judg-

ment of the court below allowing the same as such, and that plaintiff take nothing by his action, that said note be surrendered up and canceled on filing same with the clerk, and that he be entitled to the money paid into court, and no costs be allowed either party, was proper. Wallrich v. Hall, 19 Minn. 383, (Gil. 329.)

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

In an action to recover the possession of leased premises, on the ground of non-payment of rent, an overdue note of the landlord, held by the tenant, is not an equity within this subdivision, unless it is shown that there is no adequate remedy at law; nor is it a counter-claim, under subdivision 1 or 2 of section 97. Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

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

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

See Young v. Young, cited in note to c. 62, § 12, *supra;* Wheaton v. Thompson, 20 Minn. 204, (Gil. 183;) Banning v. Bradford, 21 Minn. 313; Weide v. Gehl, Id. 454; Crockett v. Phinney, 33 Minn. 161, 22 N. W. Rep. 292; Schmidt v. Coulter, 6 Minn. 492, (Gil. 340;) Freeman v. Curran, 1 Minn. 169, (Gil. 144;) Wallrich v. Hall, 19 Minn. 383, (Gil. 329;) Knoblauch v. Foglesong, 33 N. W. Rep. 865; Birdsall v. Fischer, 17 Minn. 100, (Gil. 76, 80.)

§ 97. (Sec. 80.) Requisites of counter-claim.

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

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

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

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

In an action on an alleged sale and delivery of goods the answer denied that the transaction was a sale, and alleged that the goods were delivered to him, as agent for plaintiff, to be sold by him, and to be paid for by him when they were all sold; that the defendant had fully performed on his part, but had not yet sold all the goods. Held not a counter-claim, because the answer did not show any claim against defendant on account of the transaction. Steele v. Etheridge, 15 Minn. 501, (Gil. 413.)

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

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

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

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

In an action, under § 1, c. 75, Gen. St., to determine adverse claims to real estate, an answer denying plaintiff's title and right of possession, alleging title in defendant, that plaintiff's wrongfully withhold possession from defendant, and demanding judgment

for the possession and damages and mesne profits, alleges a counter-claim, and is in effect a cross-action in ejectment. Eastman v. Linn, 20 Minn. 433, (Gil. 387.)

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

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

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

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

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

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

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

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

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

See, also, Bidwell v. Madison, 10 Minn. 1, (Gil. 13;) Schmidt v. Coulter, 6 Minn. 495, (Gil. 342;) Banning v. Bradford, 21 Minn. 313.

*§ 97*a*. Pleading counter-claim not an admission.

The pleading of a set-off or counter-claim by a defendant in any action, in any of the courts of this state, shall not be held or construed to be an admission of any cause of action on the part of plaintiff against such defendant. (1883, c. 101, § 1.*)

§ 98. (Sec. 81.) Several defenses.

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

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

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

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

§ 99. (Sec. 82.) Sham and frivolous defenses, etc.

Sham, irrelevant, or frivolous answers, defenses, or replies, and frivolous demurrers, may be stricken out, or judgment rendered notwithstanding the same, on motion as for want of an answer. (*As amended* 1881, c. 49, § 1.)

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

* All inconsistent laws repealed.

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

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

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

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

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

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

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

THE REPLY.

§ 100. (Sec. 83.) When allowed—Contents—Demurrer to answer.

When the answer contains new matter, the plaintiff shall within twenty days reply to such new matter, denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer, or he may demur to an answer containing new matter, when upon its face it does not constitute a counter-claim or defense, and the plaintiff may demur to one or more of such defenses or counter-claims, and reply to the residue in the answer. (*As amended* 1879, *c.* 15, § 1.)

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

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

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

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

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

§ 101. (Sec. 84.) Judgment for want of reply.

If the answer contains new matter, and the plaintiff fails to reply or demur thereto, within the time allowed by law, the defendant may move on notice for such judgment as he may be entitled to upon such statement, and the court may thereupon render judgment, or order a reference or assessment of damages by jury, as the case requires. (*As amended* 1881, *c.* 44, § 1.)

In ejectment allegations in the answer that defendant entered under an official deed, has had no notice of any defects invalidating the deed, and has made improvements and paid taxes, are not admitted by failure to reply. Reed v. Newton, 22 Minn. 541.

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

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

§ 102. (Sec. 85.) Demurrer to reply.

If a reply to any new matter set up in the answer is insufficient, the defendant may demur thereto, stating the ground thereof. (*As amended* 1881, *c.* 44, § 2.)

GENERAL RULES OF PLEADING.

§ 103. (Sec. 86.) Subscribing and verifying pleadings.

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

§ 104. (Sec. 87.) Verification.

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

§ 105. (Sec. 88.) Pleading account—Bill of particulars.

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

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

§ 107. (Sec. 90.) Striking out and correcting allegations.

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

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

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

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

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

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

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

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

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

See Lee v. Railroad, 34 Minn. 225, 25 N. W. Rep. 399; followed, Todd v. Railroad Co., 35 N. W. Rep. 5; Lovejoy v. Morrison, 10 Minn. 136, (Gil. 108;) Morton v. Jackson, cited in note to section 99, *supra;* Spottswood v. Herrick, 22 Minn. 548; Fraker v. St. Paul, etc., Ry. Co., 30 Minn. 103, 14 N. W. Rep. 366.

§ 108. (Sec. 91.) Pleading judgments.

In pleading the judgment of another state, the jurisdiction of the court rendering it must be expressly alleged. It is not enough to allege that the judgment was duly rendered. Karns v. Kunkle, 2 Minn. 313, (Gil. 268,) followed. Smith v. Mulliken, 2 Minn. 319, (Gil. 273.)

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

§ 109. (Sec. 92.) Pleading performance of conditions precedent.

A stipulation in a contract for the delivery of personal property, to be paid for by measurement, that the measurement shall be made by a third person, is binding; and a

complaint to recover for such delivery must aver such measurement, or state facts which relieve plaintiff from the necessity of having such measurement. A general allegation of performance by plaintiff is not sufficient. Johnson v. Howard, 20 Minn. 370, (Gil. 322.)

See, also, Minneapolis, etc., Ry. Co. v. Morrison, 23 Minn. 308.

*§ 110*a*. Pleading ordinances.

It shall not be necessary, in any pleading or complaint in civil or criminal proceedings for a violation of any ordinance of any city or village in this state, to set out or recite such ordinance, or any section thereof, at large; but it shall be sufficient in all such pleadings or complaints to state that the offense set forth in such complaint was committed contrary to the form of such ordinance, or of any specified section thereof. (1881, *Ex. Sess. c.* 59.)

§ 111. (Sec. 94.) Pleading incorporation.

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

*§ 112. Proof of incorporation.

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

*§ 114. Denial of incorporation or copartnership.

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

§ 115. (Sec. 95.) Libel and slander—Complaint.

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

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

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

§ 116. (Sec. 96.) Same—Answer.

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

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

§ 118. (Sec. 98.) Joinder of causes of action.

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

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

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

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

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

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

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

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

SUBD. 7. A cause of action against a trustee, as such, may be joined with one against him personally, if they relate to the same transaction, or transactions connected with the same subject of action. Fish v. Berkey, 10 Minn. 199, (Gil. 161.)

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

Where the liability of one defendant for a wrongful act depends on a state of facts not affecting his co-defendant, a joint action cannot be maintained against them, though each may be liable. Trowbridge v. Forepaugh, 14 Minn. 133, (Gil. 100.)

§ 119. (Sec. 99.) Allegations not controverted.

Every material allegation of the complaint not specifically controverted by the answer as prescribed, and every material allegation of new matter in the answer not controverted by the reply as prescribed, shall, for the purpose of the action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the defendant, who may on the trial controvert it by proofs, either in direct denial or by way of avoidance. (*As amended* 1881, c. 44, § 3.)

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

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

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

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

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

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

See, also, Estes v. Farnham, 11 Minn. 423, (Gil. 312;) First Nat. Bank v. Rogers, 22 Minn. 232; Cummings v. Taylor, 21 Minn. 366; Matthews v. Torinus, cited in note to section 101, *supra*.

MISTAKES IN PLEADINGS AND AMENDMENTS

§ 120. (Sec. 100.) Variance.

Applied. Short v. McRea, 4 Minn. 119, (Gil. 78;) City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125.) Followed in Messerschmidt v. Baker, 22 Minn. 81; Blackman v. Wheaton, 13 Minn. 326, (Gil. 299;) Hartz v. St. Paul, etc., R. Co., 21 Minn. 358; Rogers v. Hastings, etc., Ry. Co., 22 Minn. 27; Blakeman v. Blakeman, 31 Minn. 397, 18 N. W. Rep. 103.

A variance as to an immaterial matter will not be regarded. Sonnenberg v. Riedel, 16 Minn. 83, (Gil. 72.)

A variance will not be regarded in this court, unless the party satisfy the court below that he was misled, and wherein. Washburn v. Winslow, 16 Minn. 33, (Gil. 19.)

In an action for injury to a lot described in the complaint by number, the court may allow an amendment at trial correcting a mistake in the number, if the defendant was not misled by it. Rau v. Minnesota Val. R. Co., 13 Minn. 442, (Gil. 407.)

Where a complaint alleges that defendant hired plaintiff to work, and agreed to pay him, defendant may prove, under a general denial, that he made the contract as agent for another, and disclose the agency. Scone v. Amos, 35 N. W. Rep. 575.

Under a complaint for one kind of nuisance, one of an essentially different character cannot be proved. O'Brien v. City of St. Paul, 18 Minn. 176, (Gil. 163.)

The absence of an allegation indispensable to the maintenance of an action is not cured by the provisions in regard to variance, nor can a decree be founded upon the proof of such fact without the allegation. Loomis v. Youle, 1 Minn. 175, (Gil. 150.)

See Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

§ 121. (Sec. 101.) Immaterial variances.

See cases cited *supra*, § 120.

§ 122. (Sec. 102.) Failure of proof.

The complaint disclosed a contract terminable at the pleasure of either party. On the trial the contract proved by plaintiff was one that by its terms was to continue in force for a period of time longer than one year from the making thereof. Held a fatal variance. Cowles v. Warner, 22 Minn. 449.

When the case is one of failure of proof, and not of variance, a denial of an application, on trial, for leave to amend the complaint, will not be reviewed if there be no abuse of discretion. Marks v. Culver, 10 Minn. 192, (Gil. 155.)

See Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

§ 124. (Sec. 104.) Amendment by leave.

By leave of court a complaint may be amended so as to ask equitable relief, though it originally asked for damages. Holmes v. Campbell, 12 Minn. 221, (Gil. 141.)

An entire failure of any link in a chain of facts necessary to confer jurisdiction cannot be supplied; but a slight defect, when tending to substantial justice, may always be. Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55, (Gil. 53.)

When a party asks leave to amend his pleading, unless he inform the court in what particular he desires to amend, there is nothing for the court to exercise its discretion upon. Barker v. Walbridge, 14 Minn. 469, (Gil. 351.)

Upon an application at the trial for leave to file an amended answer containing two inconsistent defenses, the court may require, as a condition of granting leave, that defendant elect on which defense he will rely, and also that a written reply should be waived. Caldwell v. Bruggerman, 8 Minn. 286, (Gil. 253.) It is in the discretion of the trial court to allow an amendment of the pleadings at any time during the trial, or to receive further testimony after a party has rested his case. Id.

We have been unable to find any authority holding that, where an amendment is asked for under this section, the denial of the motion will be error, reviewable by an appellate court, unless it is clear that the denial was a gross and palpable abuse of discretion. White v. Culver, 10 Minn. 192, (Gil. 159.) The trial court must necessarily exercise its discretion, in view of the circumstance of each particular case, and no fixed rule can be laid down by which the propriety of allowing such amendments shall be determined. So long as the court in such matters acts within the limits of its discretion, its action will not be reviewed and its propriety and expediency considered. It is only when it is claimed that the limits of discretion have been exceeded that an appellate court will look into the matter, and only when there has been a plain abuse of discretion will the action of the court below be set aside. City of Winona v. Minnesota Ry. Const. Co., 29 Minn. 68, 72, 11 N. W. Rep. 228.

A defective pleading, clearly amendable in the discretion of the trial court, cannot be taken advantage of in this court by a party who had an opportunity to make his objection to it in the court below, but omitted so to do. Merriam v. Pine City Lumber Co., 23 Minn. 315.

See Rau v. Minnesota Val. R. Co., cited in note to section 120, *supra;* also Bidwell v. Whitney, 4 Minn. 76, (Gil. 45;) Gerrish v. Pratt, 6 Minn. 61, (Gil. 17;) Davis v. Chouteau, 32 Minn. 550, 21 N. W. Rep. 748; Lee v. O'Shaughnessy, 20 Minn. 173, (Gil. 157;) Wilcox v. Railroad Co., 35 Minn. 439, 29 N. W. Rep. 148; D. M. Osborne & Co. v. Williams, 35 N. W. Rep. 371; Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79; Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

§ 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

excusable neglect; and the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered, or proceedings had, in or out of term, upon good cause shown, set aside or modify its judgments, orders, or proceedings, although the same were made or entered by the court, or under or by virtue of its authority, order, or direction, and may supply any omission in any proceeding. And, whenever any proceeding taken by a party fails to conform to the statute, the court may permit an amendment to such proceeding, so as to make it conformable thereto; but this section does not apply to a final judgment in an action for divorce: *Provided, however*, that no relief to be granted hereunder shall operate to affect any title to or estate in real estate affected by such judgment, as against a *bona fide* purchaser or incumbrancer, in any case where such judgment, or a certified copy thereof, shall have been of record in the office of the register of deeds of the county wherein such real estate is situated for a period of not less than three years prior to the date of the application for such relief; but nothing herein contained shall operate to prevent the granting of such relief as may be just and equitable against a party to such action, his heirs or devisees. (*As amended* 1876, *c.* 49, § 1; 1887, *c.* 61.*)

Application of this section to condemnation proceedings. See Minneapolis Ry. Terminal Co. v. Minneapolis Union Ry. Co , 36 N. W. Rep. 105.

It is not in the power of a party, by his own act, to extend the statutory period for appealing from an order; nor has the court power, by an order made for that purpose, to grant an extension of such period.. It may, however, result, from the exercise of the authority of the court to review, set aside, or modify its own orders, that upon an appeal from an order redetermining a matter once passed upon by a former order, made more than 30 days before such appeal was taken, there may be brought up for review the same questions involved in the former order. First Nat. Bank of Fargo v. Briggs, 34 Minn. 266, 267, 26 N. W. Rep. 6.

A proposed case was served July 22d, and proposed amendments thereto served August 3d. Nothing further was done in respect to the case till November 28th, when the judge issued an order to show cause why the proposed case should not be settled and signed. Held, that this order was granting "further time" for presenting the case for settlement, within c. 74, Laws 1870, so that the case was not to be deemed abandoned. Cook v. Finch, 19 Minn. 407, (Gil. 350.) When leave is given to make a case after the expiration of the time prescribed by Gen. St. c. 66, § 237, (no judgment having been entered,) the effect is to grant further time to make it, as authorized by this section. Volmer v. Stagerman, 25 Minn. 234.

After judgment by default, the court may correct a mistake in the date of the affidavit of no answer. Dunwell v. Warden, 6 Minn. 287, (Gil. 194.)

The power given by this section enables the court to allow, as between the parties, any correction of mistakes or omissions which justice may require. But we do not think it was intended that the power should be exercised to the prejudice of rights accrued meantime in strangers to the proceeding. For instance, a case might occur where a plaintiff in an action or proceeding would, through accident, mistake, or inadvertence, be prevented from obtaining, so early as he might desire, an entry and docketing of his judgment. And, if justice between the parties required it, no doubt the court might date back such entry and docketing. But we think no one would contend that it might be done so as to affect the rights of another creditor of the same defendant, who by due proceedings had first procured his judgment to be docketed. Wells v. Gieseke, 27 Minn. 478, 483, 8 N. W. Rep. 380.

In an action of replevin, where the defendant has a verdict, in the alternative, for a return of the replevied property, or for its value as assessed by the jury in case a return cannot be had, but the clerk erroneously enters an absolute money judgment for the defendant, the district court may, in its discretion, amend the judgment so that it shall conform to the verdict. Berthold v. Fox, 21 Minn. 51. Such amendment is inoperative to affect the rights of third persons not parties to the suit, but a clause saving such rights should be inserted in the order allowing it. Id. The application for such amendment being made by the defendant more than two years after the entry of judgment, notice of such application should be served upon the plaintiff; and service on his attorney is insufficient where the attorney's only authority to represent his client is that implied in his retainer to prosecute the action. Id.

VACATING JUDGMENTS. An application for relief from a judgment taken against a party through his mistake, etc., must be made with diligence after notice of the judg-

*The amendment of 1887 adds the proviso, and took effect from and after September 1, 1887. § 2 provides that "this act shall not be construed to affect any action or proceeding wherein an application under said section is now pending."

ment. Unreasonable delay in making it is good ground for denying it. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

A motion, under this section, to be relieved from a judgment entered against a defendant by default, made within one year from its rendition, is addressed to the discretion of the court, and will not be reviewed except for abuse of discretion. Reagan v. Madden, 17 Minn. 402, (Gil. 378.)

The year limited within which a party may have relief against a judgment taken through his mistake, inadvertence, surprise, or excusable neglect, commences to run from the time when he has actual notice of such judgment. Personal service of the summons is not personal notice of the judgment. Wieland v. Shillock, 23 Minn. 227.

An application for relief from a judgment, order, or other proceeding taken against a party through his mistake, inadvertence, surprise, or excusable neglect, must be made with diligence, and it by no means follows that because a party makes such motion within a year that he has always a year in which to make it. Gerish v. Johnson, 5 Minn. 23, (Gil. 10.)

Where a defendant, against whom a judgment had been recovered, he having made default in the action, delayed for more than 11 months, after knowledge of the hearing of the case by the court, to seek relief from his default, such delay being not sufficiently excused, the default should not be set aside, and a defense allowed. To do so is not within the limits of judicial discretion. Altmann v. Gabriel, 28 Minn. 132, 9 N. W. Rep. 633.

No one but a party to a judgment is entitled to relief on the ground that the same was entered through his inadvertence, etc., and an application to open such judgment must be made within a year after its rendition. Kern v. Chalfant, 7 Minn. 487, (Gil. 393.)

When other persons are substituted in place of a deceased party to an action under the provisions of Gen. St. c. 66, § 36, it is open to them to move to set aside a judgment entered after the decease of the party whom they succeed, on account of error in entering the same after such decease. If the motion be denied, they may appeal to the supreme court from the order of denial, as a final order affecting a substantial right, made upon a summary application in an action after judgment. If the action be one for the recovery of real property, they may elect to let the judgment stand, and take a second trial under Gen. St. c. 75, § 5. Stocking v. Hanson, 22 Minn. 543.

An understanding at the time of plaintiff's extending the time for defendant to answer, that if the answer is not served within the extended time plaintiff may take judgment, does not deprive defendant of the right to move, on the ground of surprise and excusable neglect, to set aside the judgment entered according to the understanding. Dupries v. Milwaukee & St. P. Ry. Co., 20 Minn. 156, (Gil. 139.)

Where a stipulation provided that, in consideration of an extension of time to answer, plaintiff should, if another party failed by another day to appear and apply to defend, have judgment for the amount claimed in his complaint, held, that it did not operate to waive the defendant's right to apply to have a judgment entered as by default vacated, under this section. Barker v. Keith, 11 Minn. 65, (Gil. 37.)

The proper mode of proceeding to obtain a new trial on the ground of newly-discovered evidence, or the mistake of a witness in giving his testimony, in a proper case for relief on those grounds, after judgment, and within one year after notice thereof, is by motion in the original suit, and not by the old methods. Sheffield v. Mullin, 28 Minn. 251, 9 N. W. Rep. 756. The affirmance of the judgment on appeal is not an obstacle to such relief in a case where the final judgment is in the district court, and the new evidence was discovered after such affirmance, and could not, by the use of reasonable diligence, have been discovered before. Id.

Chapter 131, Laws 1877, authorizing the vacation of a judgment procured through perjury, subornation of perjury, or fraud of prevailing party, within three years from its discovery, is in terms applicable to all judgments, whenever recovered. Wieland v. Shillock, 24 Minn. 345. The discretion vested in the district court by this section, for the opening of judgments entered on default, is a sound legal discretion, not a mere arbitrary one. Id.

Chapter 131, Laws 1877, authorizing the opening of judgments procured by fraud or perjury at any time within three years after discovery, in so far as it is applicable to judgments absolute at the time of its passage, is unconstitutional and void. Id.

An application to be relieved from a judgment, under this section, is in the discretion of the court, and no appeal lies from its decision. Merritt v. Putnam, 7 Minn. 493, (Gil. 399;) S. P. Jorgensen v. Boehmer, 9 Minn. 181, (Gil. 166;) Whitcomb v. Shafer, 11 Minn. 232, (Gil. 153.)

A motion for an order setting aside a judgment and verdict, obtained in the absence of defendant, on the ground that they were taken against him, through his mistake, inadvertence, surprise, or excusable neglect, is addressed to the discretion of the court, and the order granting it is not appealable. Myrick v. Pierce, 5 Minn. 65, (Gil. 47.)

See, as to the discretion of the court on an application to open a default, Sandberg v. Berg, 35 Minn. 212, 28 N. W. Rep. 255; Frankoviz v. Smith, 35 Minn. 278, 28 N. W. Rep. 508.

An action cannot be maintained to set aside a judgment on an award on the ground that the award was procured by means of false testimony, in a case where the court

rendering it has full power to grant adequate relief, upon proper application and showing, in the same suit. Johnston v. Paul, 23 Minn. 46.

Errors appearing upon the face of a judgment, or in the proceedings resulting in a judgment, are to be corrected either by a motion for a new trial or on appeal. Semrow v. Semrow, 23 Minn. 214.

Where, upon an application to the court in vacation for judgment for want of an answer, the court orders judgment, and the judgment is accordingly entered, the court cannot review its decision upon a motion to vacate the judgment. The only remedy of the defendant for error in the decision is by appeal from the judgment. Grant v. Schmidt, 22 Minn. 1.

An order permitting defendants to answer, made under this section more than one year after the entry of judgment, involves the merits of the action, or some part thereof, under sub. 3, § 8, c. 86, Gen. St., and is appealable. Holmes v. Campbell, 13 Minn. 66, (Gil. 58.)

See Myrick v Edmundson, cited in note to § 66, *supra;* Covert v. Clark, cited in note to § 69, *supra;* Wilcox v. Railway Co., 35 Minn. 439, 29 N. W. Rep. 148; Washburn v. Sharpe, 15 Minn. 63, (Gil. 43;) Baldwin v. Rogers, 28 Minn. 68, 9 N. W. Rep. 79; Blake v. Sherman, 12 Minn. 420, (Gil. 305;) Hildebrandt v. Robbecke, 20 Minn. 100, (Gil. 83;) Woods v. Woods, 16 Minn. 81, (Gil. 69;) Dawson v. Shillock, 29 Minn. 189, 192, 12 N. W. Rep. 526; Van Aernam v. Winslow, 35 N. W. Rep. 381; Hallam v. Doyle, 35 Minn. 337, 338, 29 N. W. Rep. 130; Webb v. Paxton, 36 Minn. 532, 32 N. W. Rep. 749; Lord v. Hawkins, 38 N. W. Rep. 689.

§ 127. (Sec. 107.) Disregarding immaterial errors.

A complaint in replevin, which alleges that the property is wrongfully detained, but does not allege a demand and refusal, is cured by a verdict for plaintiff. Hurd v. Simonton, 10 Minn. 423, (Gil. 340.)

The omission from a judgment in favor of defendant of the words that defendant go without day, or words to that effect, where the record shows defendant entitled to judgment on the merits, is only a formal defect, and must be disregarded. Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

The omission of the clerk to sign the judgment does not affect its validity. Jorgensen v. Griffin, 14 Minn. 464, (Gil. 346.)

A motion to set aside the docket of a judgment and the execution and subsequent proceedings for mere technical irregularity, after a delay of three years unexplained, is too late. Id.

§ 128. (Sec. 108.) Supplemental pleadings.

A supplemental complaint cannot be filed for the purpose of setting aside a settlement and discontinuance for mistake of facts. Such a supplemental complaint is upon a new cause of action, while the pleading should be based on the cause of action in the original complaint. Eastman v. St. Anthony Falls Water-Power Co., 17 Minn. 48, (Gil. 31.)

Though, where the original complaint is wholly defective it cannot be sustained by a supplemental complaint founded on matter subsequent to the original complaint, yet if the original complaint is sustainable, and the supplemental complaint only enlarges the extent and changes the kind of relief, it may be sustained. So in an action to quiet title to real estate, if at the commencement of the action the plaintiff has the equitable title, he may show by a supplemental complaint that he subsequently acquired the legal title. Lowry v. Harris, 12 Minn. 255, (Gil. 166.)

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

TITLE 7.

CONSOLIDATION AND INTERPLEADING.

§ 130. (Sec. 110.) Action by surety.

In view of this provision, the surety cannot require the creditor to bring suit, and enforce his debt against the principal debtor. Huey v. Pinney, 5 Minn. 310, (Gil. 246.)

Under the former statute, the maker of a promissory note, which he had paid, might sue the holder to determine a claim made by him that there was a sum still due on it. Miller v. Rouse, 8 Minn. 124, (Gil. 97.)

See, also, Metzner v. Baldwin, 11 Minn. 150, (Gil. 92.) Benedict v. Thoe, 35 N. W. Rep. 10; Wendlandt v. Sohre, 33 N. W. Rep. 700.

§ 131. (Sec. 111.) Interpleader—Intervention.

The interest which entitles a party to intervene must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment thereon. Lewis v. Harwood, 28 Minn. 428, 10 N. W. Rep. 586. The interest essential to the right of intervention, must be an interest in the matter in litigation in the action, and of such a direct and immediate character that the intervenor will either gain or suffer loss by the direct legal operation and effect of the judgment that may be rendered therein. Bennett v. Whitcomb, 25 Minn. 148. An order preventing a party from intervening, when he shows no such interest, is not an appealable order. Id.

An intervention complaint may be demurred to for its failure to state a cause of action or ground of intervention, as the case may be. Shepard v. County of Murray, 33 Minn. 519, 24 N. W. Rep. 291.

Under this section, it is the proper practice for the court, in its order of interpleader, to direct that the summons and complaint as amended, with a copy of the order, be served by plaintiff upon the substituted defendant within a specified time thereafter, or, in default thereof, that the action be dismissed. Hooper v. Balch, 31 Minn. 276, 17 N. W. Rep. 617. Such party may voluntarily appear, and move for such dismissal, upon plaintiff's default in making such service; and the court may order the property or fund in controversy, and in its custody, to be delivered over to him. Its right to make such disposition of the property is not affected by a voluntary dismissal of the action by plaintiff, under Gen. St. 1878, c. 66, § 262, pending such application. Id.

Where two defendants have properly interpleaded in an action brought by plaintiff to determine as to which he shall pay an acknowledged debt, and the money has been paid into court, upon its order, for the benefit of the successful litigant defendant, it is not competent for the plaintiff thereafter to participate in the litigation between such contesting defendants, nor to object to any ruling or decision made in the action affecting alone their rights as between themselves. St. Louis Life Ins. Co. v. Alliance Mut. Life Ins. Co., 23 Minn. 7.

The report of a referee in such an action will not be set aside or disturbed because it allows costs against the plaintiff, when the evidence before him reasonably tends to the conclusion that the action was instituted by the plaintiff in bad faith, rather with the view of delaying and prejudicing the successful defendant in obtaining his rights than of protecting himself against the risk of payment to one of two conflicting claimants. Id.

See Rohrer v. Turrill, 4 Minn. 407, (Gil. 309;) Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. Rep. 363.

TITLE 8.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 132. (Sec. 112.) Claim—When made.

Where goods are taken from the lawful possession of an administrator, under a fraudulent conveyance by the intestate, replevin will lie without previously having such conveyance set aside. Bennett v. Schuster, 24 Minn. 383.

Replevin will lie for personal property, although not in the actual possession of the defendant, if it be under his control in the hands of another, upon a demand of, and refusal by, defendant to deliver it to the party entitled to the possession. Bradley v. Gamelle, 7 Minn. 331, (Gil. 260.)

The action is properly brought against the person in the actual physical possession. Flatner v. Good, 35 Minn. 395, 29 N. W. Rep. 56.

A complaint in replevin must show that at the time of commencing the action the plaintiff has an existing legal right to have the property delivered to him. Loomis v. Youle, 1 Minn. 176, (Gil. 151.)

Pleading ownership. See Tancre v. Reynolds, 35 Minn. 476, 29 N. W. Rep. 171.

In an action in replevin the plaintiff must identify the specific property as his, and he is not relieved from this by the fact that the defendant has so mingled his own property with plaintiff's as to render its specific identification impossible. Ames v. Mississippi Boom Company, 8 Minn. 467, (Gil. 417.)

A defendant in replevin who, in his answer, justifies the taking under an execution against one person whom he alleges to have been the owner at that time, cannot prove that such person, before the taking, had assigned the property to another person. McClung v. Bergfeld, 4 Minn. 148, (Gil. 99.)

In an action of replevin, where the defendant alleges a seizure by him as United States marshal, under a writ of attachment issuing out of the United States court against a party other than plaintiff in the replevin suit, if this is admitted, it entitles defendant to a judgment for a return of the property, (it having been taken from him in the action,) or the value thereof, if a return cannot be had. Lewis v. Buck, 7 Minn. 104, (Gil. 72.)

See Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

§ 133. (Sec. 113.) Affidavit—Contents.

Replevin by the owner will lie for things which have been severed and taken away from the realty, unless the land is held in adverse possession. Washburn v. Cutter, 17 Minn. 361, (Gil. 335.)

Before foreclosure a mortgagee is not entitled to possession of the real estate, nor of logs cut thereon. Berthold v. Fox, 13 Minn. 501, (Gil. 462.)

A purchaser at foreclosure sale, not being entitled to the possession of the premises during the time allowed for redemption, is not during that time entitled to the possession of logs cut on the land after the sale, and cannot bring replevin for them. Berthold v. Holman, 12 Minn. 335, (Gil. 221.)

See In re Brown, 32 Minn. 443, 444, 21 N. W. Rep. 474; Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

§ 134. (Sec. 114.) Bond—Sheriff's duties.

Action brought against a sheriff to recover personal property was instituted under §§ 112–117, c. 66, Gen. St. 1866, after the adoption of c. 76, Laws 1868, repealing §§ 115, 116, and 117, and amending § 114, (this section,) the plaintiff being in ignorance of the change. The sureties on the bond, executed in pursuance of § 116, repealed, were excepted to, justified under § 120, and, being held insufficient, a new bond under § 120 was given, with one surety only, who justified under § 122, was accepted by the sheriff, further justification being waived. Judgment being entered in favor of the sheriff, suit was brought on the bond for amount adjudged in case property was not returned, damages, and costs. Held, that the proceedings taking the property from the sheriff were *coram non judice;* that no action lay on the bond, notwithstanding the sheriff's waiver; and that the officer so taking the same was liable as a trespasser. Hicks v. Mendenhall, 17 Minn. 475, (Gil. 453;) S. P. Castle v. Thomas, 16 Minn. 490, (Gil. 443.)

Where, in an action to recover the possession of personal property, the plaintiff, to obtain possession of the property pending the action, joins with sureties in the undertaking, upon judgment being rendered against him in the action he may be sued with the sureties upon the undertaking. Buck v. Lewis, 9 Minn. 314, (Gil. 298.)

If an action in replevin before a justice is simply dismissed with costs, there being no judgment for a return, the defendant cannot recover the value of the property in an action on the replevin bond. Clark v. Norton, 6 Minn. 412, (Gil. 278.)

§ 136. (Sec. 119.) Bond by defendant.

An officer taking property in an action of replevin in the district court should retain it three days. But if, during the three days, he deliver it to the plaintiff, and the defendant, instead of giving an undertaking for its return to him, except to the plaintiff's sureties, he waives his right to a return, and the plaintiff is entitled to the possession of the property until the rights of the parties are determined in the action; and the defendant cannot countermand his exception so as to become entitled to the possession. Vanderburgh v. Bassett, 4 Minn. 242, (Gil. 171.)

Where property taken by an officer under a writ of attachment is replevied from him, and delivered to the plaintiff in replevin, it cannot be retaken on the same attachment, pending the replevin suit. Id.

An assignment of the judgment operates as an assignment of the bond. Schlieman v. Bowlin, 36 Minn. 198, 30 N. W. Rep. 879.

TITLE 9

ATTACHMENT.

§ 145. (Sec. 128.) Right of attachment.

An attachment may issue in any action for the recovery of money, whether such action is in form *ex contractu* or *ex delicto*. Davidson v. Owens, 5 Minn. 69, (Gil. 50;) Morrison v. Lovejoy, 6 Minn. 183, (Gil. 117.)

An attachment in a civil action may issue at the time of issuing the summons. Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

See State v. Penner, 27 Minn. 269, 275, 6 N. W. Rep. 790; Heffner v. Gunz, 29 Minn. 108, 12 N. W. Rep. 342.

§ 146. (Sec. 129.) Who may allow writ.

The allowance of a writ of attachment is a judicial act, and § 142, c. 60, Comp. St., so far as it permits the clerk to allow such writ, is unconstitutional and void. Morrison v. Lovejoy, 6 Minn. 183, (Gil. 117.)

The clerk of the district court has no power to allow an attachment. Guerin v. Hunt, 8 Minn. 477, (Gil. 427;) Zimmerman v. Lamb, 7 Minn. 421, (Gil. 336.) An undertaking

executed for an attachment allowed by the clerk of the district court is void. Jacoby v. Drew, 11 Minn. 408, (Gil. 301.)

A writ of attachment signed by the judge, but not by the clerk, and without the seal of the court, is void, and no levy thereunder is of any effect. Wheaton v. Thompson, 20 Minn. 196, (Gil. 175.)

A writ of attachment need not show by what officer it was allowed. Shaubhut v. Hilton, 7 Minn. 506, (Gil. 412.)

See State v. Penner, 27 Minn. 269, 275, 6 N. W. Rep. 790.

§ 147. (Sec. 130.) When allowed—Affidavit.

An attachment procured is only a provisional remedy in an action, prosecuted, not as an independent proceeding, but in aid of the action, and "as security for the satisfaction of such judgment as the plaintiff may recover." The action is not commenced by the attachment, but by summons; and the failure to make such service of the summons, actual or constructive, as is authorized by statute, leaves the court without jurisdiction to enter a judgment against the defendant. Heffner v. Gunz, 29 Minn. 110, 12 N. W. Rep. 342.

It is not necessary that an affidavit to obtain an attachment should contain any statement as to the commencement of the action. Blake v. Sherman, 12 Minn. 420, (Gil. 305.)

The proof required to justify the issuance of a writ of attachment is legal evidence, such as would be received in the ordinary course of legal proceeding, not mere hearsay or belief. Pierse v. Smith, 1 Minn. 82, (Gil. 60.)

An affidavit for an attachment, before a justice of the peace, stating the facts justifying the issuance of an attachment, in the words of the statute, is sufficient. It need not, as is required in the district court, set forth the evidence of such facts. Curtis v. Moore, 3 Minn. 29, (Gil. 7.)

In an affidavit for attachment under this section, based upon the ground that defendant is about to assign, secrete, or dispose of his property with intent to delay and defraud his creditors, the facts must be stated positively, and not upon the belief of deponent. Murphy v. Purdy, 13 Minn. 422, (Gil. 390;) Ely v. Titus, 14 Minn. 125, (Gil. 93.) An affidavit to procure an attachment, which states merely that the defendant has assigned, or that he is about to assign, property, with intent to defraud his creditors, without setting forth any facts and circumstances to show such intent, is insufficient. Hinds v. Fagebank, 9 Minn. 68, (Gil. 57.) Such an affidavit, referring to a single item of property, and stating that the defendant is about to dispose of it, and has disposed of it, is contradictory, and bad for that reason. Id. Such an affidavit, stating that defendant, with intent to defraud his creditors, conveyed specified real estate worth three hundred and fifty dollars to his natural daughter, without any actual consideration, but upon the nominal consideration of one dollar, and that defendant has no other real estate out of which an execution can be satisfied, does not show an intent to defraud. Id. An affidavit for an attachment, stating that defendant has assigned and disposed of his property, with intent to delay and defraud his creditors, and that he is about to assign and dispose of his property with like intent, is not necessarily objectionable for inconsistency. Nelson v. Munch, 23 Minn. 229.

Upon an application for an attachment upon the ground that the plaintiff will be in danger of losing his debt, the affidavit must state facts and circumstances to establish that conclusion. Keigher v. McCormick, 11 Minn. 545, (Gil. 420.)

The affidavit for attachment against a non-resident debtor need not state that he has property in the state subject to attachment. Kenney v. Georgen, 36 Minn. 190, 31 N. W. Rep. 210.

Where a sheriff, sued in replevin by a mortgagee of personal property, for taking it on attachment against the mortgagor, attacks the mortgage as made in fraud of creditors, he must prove that the attachment debt existed. Braley v. Byrnes, 20 Minn. 435, (Gil. 389.) This may be done by any evidence which would prove it in an action against the mortgagor. But the papers in the attachment suit are not competent evidence of it. Id.

§ 148. (Sec. 131.) Bond.

Before issuing the writ, the judge or court commissioner shall require a bond on the part of the plaintiff, with sufficient sureties, conditioned that if the defendant recovers judgment, or if the writ shall be set aside or vacated, the plaintiff will pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars. (*As amended* 1885, c. 125.)

Under this section a bond is necessary upon an application for an attachment. An undertaking is not sufficient. Blake v. Sherman, 12 Minn. 420, (Gil. 305.) But the court may, under its power to allow amendments, permit, in such case, a bond to be filed *nunc pro tunc*. Id.

The condition of an attachment bond, under this section, makes the liability of the

plaintiff to pay the damages mentioned therein (as well as the costs) dependent upon the recovery of judgment by the defendant. Crandall v. Rickley, 25 Minn. 119.

§ 150. (Sec. 133.) Property subject to attachment.

The levy of an attachment on the interest of one member of a partnership in a debt due to the partnership, does not affect the right of the remaining members to sue for, in the firm name, and collect the debt. Day v. McQuillan, 13 Minn. 205, (Gil. 192.)

§ 151. (Sec. 134.) Execution of writ.

The sheriff to whom the writ is directed and delivered shall execute the same without delay, as follows:

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

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

Third. When an attachment is made of articles of personal estate, which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the writ and of the return of the attachment may, at any time within three days thereafter, be deposited in the office of the town clerk of the town, or clerk or recorder of the village or city, in which the attachment is made, and such attachment shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer. (*As amended* 1881, *c.* 63, § 1.)

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

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

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

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

Where a sheriff levies attachment on personal property, the value of his special property thereby acquired is limited to the amount of the judgments recovered in the attachment suits. And, although in an action of replevin against him for such levies, if tried before the recovery of such judgments, the judgment in his favor may assess the property at its full value, his recovery on the replevin bond will be limited to the amount of the attachment judgments. Wheaton v. Thompson, 20 Minn. 196, (Gil. 175.)

SUBD. 1. Under the Revised Statutes of 1851, an unrecorded deed of real estate took precedence of an attachment levied after its execution. The attaching creditor was not a *bona fide* purchaser within the meaning of that statute. See chapter 52, Laws of 1858. Greenleaf v. Edes, 2 Minn. 265, (Gil. 226.)

See, also, Folsom v. Carli, 5 Minn. 333, (Gil. 264;) Knox v. Randall, 24 Minn. 496.

SUBD. 2. Bonds issued by a state are personal property, within the meaning of this subdivision, providing that "personal property capable of manual delivery to the sheriff, must be attached by taking it into his custody." And to constitute a levy upon them, they must be actually taken into the custody of the sheriff. Caldwell v. Sibley, 3 Minn. 406, (Gil. 300.)

SUBD. 3. Where it appears that, in executing a writ of attachment, an officer made a valid levy upon certain piles of cord-wood, by marking the different piles levied on, taking the same into his actual control and custody, so far as manual possession under the circumstances was practicable, by then leaving the same in the charge and custody of a third person to hold for him, and by also filing in the proper town clerk's office a certified copy of the writ and return pursuant to statute, the officer exercises such dominion over the property, to the exclusion of the lawful owner of the same, (not being the defendant in the attachment,) as, being wrongful, constitutes a conversion as respects such owner. Molm v. Barton, 27 Minn. 530, 8 N. W. Rep. 765.

See, also, Ide v. Harwood, 30 Minn. 196, 14 N. W. Rep. 884.

SUBD. 5. The interest of a pledgeor of a promissory note, in the note, is subject to levy and sale under execution, if the pledgee consent to surrender possession to the sheriff. The maker cannot object that the pledgee need not have parted with the note. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

A return on an execution of a levy "upon the books" of the judgment debtor does not show a levy upon, or right to sell, the accounts and debts entered in the books. Tullis v. Brawley, 3 Minn. 277, (Gil. 191.)

§ 153. (Sec. 136.) Sale of perishable property—Collection of debts.

Whether the conversion of the goods into money arises from a sale thereof as perishable, under this section, or from the collection of a judgment for the value thereof in an action of claim and delivery, is unimportant; the sheriff in either case holding the proceeds of the goods as security, as provided by statute, and by virtue of his special property therein. Wheaton v. Thompson, 20 Minn. 196, (Gil. 180.)

If an officer has process in his hands, valid upon its face, and levies upon notes which have been assigned by the judgment debtor, for the purpose of defrauding his creditors, and upon the levy the officer takes the notes into his possession, he can, under the statute, maintain an action on them, and collect them, and the assignee cannot sue upon them. Rohrer v. Turrill, 4 Minn. 407, (Gil. 310.)

§ 154. (Sec. 137.) Claim by third person—Affidavit—Indemnity.

The notice by a third person of a claim of ownership of property levied upon is only necessary where the property is, at the time of the levy, in the possession of defendant or his agent. Barry v. McGrade, 14 Minn. 163, (Gil. 126;) Butler v. White, 25 Minn. 432. No affidavit of title by a claimant of property seized by an officer under process against another party is necessary where the property was taken from the possession of the claimant, and not of the defendant in the writ. Lampsen v. Brander, 28 Minn. 526, 11 N. W. Rep. 94.

The provisions of this section, that no claim by a stranger to the suit, against the sheriff, for property levied upon or taken by virtue of a writ of attachment or execution shall be valid unless the claimant shall serve upon the sheriff an affidavit setting up his title, and the grounds thereof, etc., apply only to cases where the property was levied upon or taken by the sheriff while in the possession of the defendant in the writ, or his agent, under circumstances which would create a presumption, *prima facie*, of ownership in him. Following and applying Barry v. McGrade, 14 Minn. 163, (Gil. 126.) Tyler v. Hanscom, 28 Minn. 1, 8 N. W. Rep. 825. Followed, Ohlson v. Manderfield, 28 Minn. 390, 10 N. W. Rep. 418.

The section does not apply to a case where an assignee under the insolvent law claims from the sheriff property of the assignor taken prior to the assignment, on attachment which has been dissolved by the insolvency proceedings. Johnson v. Bray, 35 Minn. 248, 28 N. W. Rep. 504.

The affidavit required to be made by any person other than the defendant in the writ claiming property levied on by a sheriff, may be served on the deputy who made the levy, and has the property. Williams v. McGrade, 13 Minn. 174, (Gil. 165.) The party making such affidavit need not furnish a contract, or a copy of it, under which he claims the property. If the affidavit disclose the legal effect of the contract so as to distinctly inform the officer that the execution debtor has no rights in the property, and what the general nature of the affiant's rights are, it is sufficient. Id.

No action can be maintained against a sheriff for a wrongful levy on goods of a third person, in the hands of the judgment debtor, except by defendant or his agent, unless the affidavit provided by this section is made and served before sale or other legal disposition of the property; and the fact that the owner may have been ignorant of the levy until after sale will make no difference. Barry v. McGrade, 14 Minn. 163, (Gil. 126.) Followed, Moulton v. Thompson, 26 Minn. 120, 1 N. W. Rep. 836. An attorney in an execution, who advises and directs a levy and sale of personal property which is in the possession of defendant or agent, under circumstances creating a *prima facie* presumption of ownership in him, no affidavit of claim on part of third person required by this section being served upon the sheriff, is not liable in an action brought by a third person for the conversion of such property. Id. This provision, regulating the manner

in which claims of third persons to property levied upon in the possession of defendant shall be made, affects the remedy only, and is constitutional. Id.

The "undertaking" provided for by this section (which is a transcript of Code N. Y. § 216) need not be executed by the plaintiffs in the suit personally. Schoregge v. Gordon, 29 Minn. 363, 371, 13 N. W. Rep. 194.

See, also, Livingston v. Brown, 18 Minn. 308, (Gil. 278;) Flower v. Grace, 23 Minn. 32; Lesher v. Getman, 30 Minn. 321, 15 N. W. Rep. 309; Perkins v. Zarracher, 32 Minn. 71, 19 N. W. Rep. 385; Carpenter v. Bodkin, 36 Minn. 183, 30 N. W. Rep. 453.

§ 155. (Sec. 138.) Action against sheriff—Parties.

See Lesher v. Getman, 30 Minn. 321, 324, 15 N. W. Rep. 309; Robertson v. Sibley, 10 Minn. 323, (Gil. 253;) Banning v. Sibley, 3 Minn. 405, (Gil. 299.)

§ 156. (Sec. 139.) Judgment against defendant—Satisfaction.

Where a sheriff, intending to sell, on execution, real estate previously attached by him in the action, by mistake advertises and sells by a wrong description, and the judgment creditor, ignorant of the mistake, and supposing the property sold to be that attached, bids it in for the full amount of the execution and costs, and the execution is in consequence returned satisfied in full, and satisfaction of the judgment is thereupon entered of record, the court will, even as against subsequent liens by attachment and judgment, relieve against the mistake by vacating the sale and satisfaction, restoring the judgment creditor to his rights as they were under the attachment and judgment prior to the advertisement and sale, and permitting him to issue execution, and proceed as though none had ever issued, except as against those who, relying on the apparent satisfaction of the judgment, have purchased such part of the property as was apparently released from the lien of the attachment and judgment by the entry of satisfaction on the record. Lay v. Shaubhut, 6 Minn. 273. (Gil. 182.)

§ 157. (Sec. 140.) Bond by defendant — Discharge of attachment.

It is only the defendant whose property has been attached to whom this section gives the right to procure a discharge of the attachment upon executing a bond to the plaintiff in the writ. A stranger to the suit, although he has an interest in the attached property, has not this right. Kling v. Childs, 30 Minn. 366, 15 N. W. Rep. 673.

A bond in favor of the plaintiff, specifically named as obligee, conditioned that if "said plaintiff recover judgment in the said action," etc., is a compliance with the statute providing for a bond to the plaintiff, conditioned that "if the plaintiff recovers judgment in the action," etc. Slosson v. Ferguson, 31 Minn. 448, 18 N. W. Rep. 281.

See Johnston v. Higgins, 15 Minn. 486, (Gil. 400, 402.)

§ 158. (Sec. 141.) Motion to vacate attachment.

Where a void warrant of attachment is issued and executed, the parties procuring its issuance and execution are trespassers, and the defendant does not waive the objection to it by not moving to vacate it. The parties procuring it to be issued are not protected by the fact that it was issued under a statute which is unconstitutional. Merritt v. City of St. Paul, 11 Minn. 223, (Gil. 145.)

It is no ground for vacating an attachment that an action between the same parties, relative to the same subject-matter, has been decided in favor of defendant in another court of competent jurisdiction. Davidson v. Owens, 5 Minn. 69, (Gil. 50.) Nor is it any ground to vacate an attachment that the property levied on under it is not subject to attachment. Id.

An assignor for the benefit of creditors has such an interest in the assigned estate as to entitle him to defend it when attached for his debts, and to move to vacate the attachment. Richards v. White, 7 Minn. 345, (Gil. 271.)

A motion to vacate an attachment may be made on notice, and need not be an order to show cause. Blake v. Sherman, 12 Minn. 420, (Gil. 305.) A notice of motion for the "next special or adjourned term of * * * to be held * * * on the 28th day," the opposite party not being misled, is sufficient. Id.

On a motion to vacate an attachment the court may determine the truth of the allegations in the affidavit on which it issued. Drought v. Collins, 20 Minn. 374, (Gil. 325;) Nelson v. Gibbs, 18 Minn. 541, (Gil. 485.)

Upon a motion to dissolve an attachment, a defendant may properly use his verified answer as an affidavit so far as its contents are pertinent. Nelson v. Munch, 23 Minn. 229. In the exercise of sound discretion it is competent for the court, upon the hearing of such motion, to permit the defendant to read affidavits rebutting the affidavits of the plaintiff read upon such hearing. Id.

§ 159. (Sec. 142.) Return to writ.

The return of a sheriff to a writ of attachment is conclusive upon him as to the truth of all matters stated in it, concerning which it was his duty to make a return, so far as to estop him from contradicting the same in any action between him and the attaching creditor, involving the question of his liability to such creditor in respect to property attached under the writ, or its proceeds. The legal representatives of the sheriff, in case of his decease, are affected by the same rule. State v. Penner, 27 Minn. 269, 6 N. W. Rep. 790.

§ 160. (Sec. 143.) Attachment of real estate—Lien—Release.

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

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

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

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

Fourth. By filing for record in the office of such register of deeds a satisfaction and discharge of such attachment executed by the plaintiff in said action, or by the attorney of record of the said plaintiff, in the same manner as is required by law for the execution of conveyances of real estate. (*As amended* 1868, *c.* 68, § 1; 1883, *c.* 102, § 1.)

Fifth. Whenever any attachment has been or shall be levied, and more than three years have or shall have elapsed without judgment being entered in the action, any person having any interest in the attached property, although not a party to the original action, may move for the release of any such property from the lien of such attachment, and if it shall appear to the satisfaction of the court that no proceedings have been had in said action for a period of three years, or from other evidence that said action has been abandoned, said attachment shall be vacated and the lien thereof released. (*Added* 1885, c. 110.)

TITLE 10.

GARNISHMENT.

§ 164. (Sec. 147.) Affidavit—Summons—Title of action.

Until the filing of the proper affidavit, the summons in garnishee proceedings cannot be properly issued; and when proceedings are so commenced, they do not bind the assignee of the debt from the garnishee defendant to the defendant in the action, when such assignee gives the garnishee defendant notice, before hearing, of the assignment, and of the irregularity in the garnishee proceedings. Black v. Brisbin, 3 Minn. 360, (Gil. 253.)

An affidavit as a basis for garnishee proceedings, which states that the party sought to be charged is indebted, or has property, etc., is insufficient. It may state that he is indebted, and has property, etc., or that he is indebted, or that he has property, etc., but the language must not be in the alternative. A proper affidavit is necessary to give jurisdiction over the proceedings. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

An objection to the affidavit, made after the garnishee defendant has appeared in

obedience to the summons, a referee been appointed to take the disclosure, a disclosure had before the referee, and his report filed, is in time. Id.

A garnishee summons may be issued by the parties' attorney without allowance by a judicial officer; but it must run in the name of the state. Hinkley v. St. Anthony Falls Water-Power Co., 9 Minn. 55, (Gil. 44.)

The garnishee may waive any irregularity in the summons against him, and does so by appearing without objection; but the principal defendant cannot object to any irregularity in the summons against the garnishee. Id.

Garnishment of an assignee under a fraudulent assignment is ineffectual to attach book-accounts. It can only be made by service of the proper garnishee summons upon the debtors owing such debts. Ide v. Harwood, 30 Minn. 191, 14 N. W. Rep. 884.

§ 167. (Sec. 150.) Service upon garnishee—Effect.

The garnishee cannot be held for property, money, or effects coming into his hands or possession, or under his control, or for indebtedness accrued, after the service of the summons in the proceeding against him. Nash v. Gale, 2 Minn. 310, (Gil. 265.)

See Lord v. Meachem, 32 Minn. 66, 67, 19 N. W. Rep. 346.

§ 169. (Sec. 152.) Garnishment of corporations.

Public corporations, such as counties, etc., are not liable to garnishment. McDougal v. Board of Supervisors of Hennepin County, 4 Minn. 184, (Gil. 130.)

§ 170. (Sec. 153.) When garnishment not allowed.

In case of an assignment under our insolvent act, the assignee is not garnishable in a suit against his assignor. Lord v. Meachem, 32 Minn. 66, 19 N. W. Rep. 346. Where the validity of such assignment stands admitted, a purported garnishment of the assignee may properly be dissolved upon his motion upon that ground, and without disclosure. Id.

When a policy of insurance against fire contains conditions requiring the insured, in case of loss, to give notice of the loss, and furnish a particular account of it, and other proofs, they are, unless waived, conditions precedent to the right of the insured to maintain an action. Until they are complied with or waived, the claim may never become payable, and until then it is not the subject of garnishment. Gies v. Bechtner, 12 Minn. 279, (Gil. 183.) And where there is a condition that "any fraud, or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy," till the preliminary proofs of loss are furnished, the claim is contingent. Id.

See Wheeler v. Day, 23 Minn. 545.

*§ 170*a*. Exemption—Wages.

Whenever the defendant in any action of garnishment in this state shall make it appear, to the satisfaction of the court, that the sum of money belonging to him or her, which has been garnished, was earned by him or her as a laboring man or woman, by the actual work of his or her hands, and shall make it appear that the said money is actually necessary to his or her support, it shall be the duty of the court to order the discharge of the garnishment and to render judgment in favor of said defendant without costs to said defendant. No action for garnishment shall be allowed under this act for debts contracted for intoxicating liquors. (1887, *c.* 179.*)

*§ 170*b*. Same—Police and fire department associations.

That any and all police department relief associations and fire department associations organized under the laws of this state shall not be subject to the laws relating to life insurance companies, and shall not be summoned, nor liable as garnishee or trustee, in any garnishee proceeding, nor in any action or proceeding against any person or persons who may be entitled to assistance from said association or associations under the articles of incorporation, or by-laws thereof. (1887, *c.* 136.†)

*"An act to abolish the process of garnishments as applied to workingmen." Approved March 7, 1887. § 2 repeals all inconsistent acts and parts of acts.

†"An act to exempt police department relief associations and fire department associations from insurance laws and garnishee process." Approved March 3, 1887.

§ 172. (Sec. 155.) Bills, notes, etc.

The maker of a promissory note cannot be garnished upon it, before maturity in an action against the payee. Hubbard v. Williams, 1 Minn. 54, (Gil. 37.)

A United States voucher, (property of a defendant,) which has been given to him for personal, but not official, services rendered by him to the United States, may be a proper subject of garnishment. Leighton v. Heagerty, 21 Minn. 42.

§ 173. (Sec. 156.) Examination—Notice to defendant.

Notice of garnishee proceedings, in an action against foreign corporation, may be served on the principal defendant by publication. Broome v. Galena, D. D. & Minn. Packet Co., 9 Minn. 239, (Gil. 225.)

Under *c.* 80, Comp. St., regulating garnishments, the plaintiff is bound by the answer of the garnishee, and cannot contradict him. Chase v. North, 4 Minn. 381, (Gil. 288.).

A garnishee must be tried upon his disclosure, and cannot be contradicted. If the disclosure leaves any doubt as to his indebtedness, he must be discharged. Cole v. Sater, 5 Minn. 468, (Gil. 378.)

In garnishee proceedings, although the garnishee deny any indebtedness, if the facts which he discloses clearly show that he owes the defendant a debt which is subject to the garnishee proceedings, judgment should go against him. Donnelly v. O'Connor, 22 Minn. 309.

See, also, Banning v. Sibley, 3 Minn. 389, (Gil. 282.)

§ 174. (Sec. 157.) Claimant—Appearance and joinder.

Where indebtedness from the garnishee to the defendant is disclosed by the garnishee, a third person claiming an interest in such indebtedness, existing prior to the service of the garnishee summons, may be permitted to appear and be made a party to the proceedings. This section is intended to cover a case of indebtedness as well as property or effects. Crone v. Braun, 23 Minn. 239.

The affirmative in maintaining his right to garnished property is upon the "claimant." North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381, 20 N. W. Rep. 334. Where the amount secured by a fire insurance policy upon A.'s goods, running to A., is made payable to B. as his interest may appear, (that interest being represented by a chattel mortgage,) and a loss occurs, a creditor of A. may properly garnish the insurance money in the hands of the insurer; and in the garnishment proceedings, into which B. has come as a "claimant," such creditor may properly attack and call in question B.'s mortgage as being fraudulent and void as to A.'s creditors. Id.

A claimant in such proceedings, claiming under an indorsement on a policy of insurance, making it payable to him to the extent of his interest, the character and extent of such interest not appearing, must, to protect his claim to the debt, prove what his interest is. Donnelly v. O'Connor, 22 Minn. 309.

Where the court in which the garnishee proceeding is instituted gives to a claimant full opportunity to establish his claim, and he omits to do so, and the court thereupon renders judgment upon the disclosure of the garnishee, discharging the garnishee, upon an appeal by the plaintiff upon questions of law alone, the appellate court may, upon reversing the judgment of the court below, render judgment on the disclosure against the garnishee. Id.

A stranger to a garnishee proceeding cannot sue out a writ of error in the name of the garnishee defendant. Hollinshead v. Banning, 4 Minn. 116, (Gil. 77.)

A claimant who succeeds is entitled to the same costs as a defendant in an action. Mahoney v. McLean, 28 Minn. 63, 9 N. W. Rep. 76.

See, also, Lewis v. Bush, 30 Minn. 244, 15 N. W. Rep. 113; Levy v. Miller, 38 N. W. Rep. 700; Oberteuffer v. Harwood, 6 Fed. Rep. 828.

§ 175. (Sec. 158.) Denial of debt, etc.—Supplemental complaint.

Section 1, *c.* 141, Sp. Laws 1874, provides that the municipal court of the city of Minneapolis "shall not have jurisdiction of any action where the relief asked for in the complaint is purely equitable in its nature." Held, that this provision has no reference to proceedings in garnishment under this section. Benton v. Snyder, 22 Minn. 247.

When a garnishee expresses an opinion that, at the time of the service of the summons, he had no property of defendant in his possession or control, but, upon full disclosure, develops facts showing that such opinion is incorrect, the case is not one which calls for a supplemental complaint. Farmers' & Mechanics' Bank v. Welles, 23 Minn. 475.

If, after a disclosure, the plaintiff submit the matter for decision on the disclosure, and the court decide it, it is too late for him to ask leave to file a supplemental complaint. The framing of issues in such proceedings, other than by supplemental complaint, is not a matter of right in the parties. If it can be done at all, it is in the discretion of the court. Mahoney v. McLean, 28 Minn. 63, 9 N. W. Rep. 76.

Where A., in an action against B., garnished C., and, upon C.'s denying his liability, made him a party to the suit by supplemental complaint, held, that the validity of a bill of sale to the garnishee of the property in his hands by the defendant, fraudulent as to creditors, could be determined in such action without alleging such fact by supplemental complaint, under this section. Davis v. Mendenhall, 19 Minn. 149, (Gil. 113.)

The fact that the principal defendant had deposited with the garnishee defendant money deposited by and credited on the latter's books to him, as "agent," is not conclusive that the money was his property. Ingersoll v. First Nat. Bank, 10 Minn. 396, (Gil. 315.)

An order refusing to set aside garnishee proceedings for insufficiency of the affidavit, and granting plaintiff leave to file a supplemental complaint under § 12 of the act of 1860, relating to garnishment, is not appealable. Prince v. Heenan, 5 Minn. 347, (Gil. 279.)

See Oberteuffer v. Harwood, 6 Fed. Rep. 828.

§ 176. (Sec. 159.) Default of garnishee—Relief.

An order relieving a garnishee defendant from default will not be reviewed unless there is an abuse of discretion. Goodrich v. Hopkins, 10 Minn. 162, (Gil. 130.) Such an order ought to fix a time for the garnishee defendant to make his disclosure. Id.

"Costs" in this section include "disbursements." Woolsey v. O'Brien, 23 Minn. 72.

§ 177. (Sec. 160.) Judgment against garnishee.

If the facts disclosed by a garnishee leave a reasonable doubt of his liability, judgment should be rendered in his favor. Pioneer Printing Co. v. Sanborn, 3 Minn. 413, (Gil. 304.)

A garnishee does not become charged, in respect to the debtor's property in his hands at the time of the service of the garnishee summons, until judgment is rendered against him upon disclosure and an order of the court. Prior to that time an officer holding an execution against the debtor defendant in the original action has no authority to seize such property under the execution by virtue of any inchoate lien created under the garnishee proceedings. A mere order for judgment is insufficient to give such authority. Langdon v. Thompson, 25 Minn. 509.

§ 178. (Sec. 161.) Same.

See Langdon v. Thompson, 25 Minn. 509, 513.

§ 179. (Sec. 162.) Taking disclosure and testimony.

Upon the examination of a garnishee, testimony other than that of the garnishee himself is receivable for the purpose of corroborating or explaining the testimony of the garnishee, or of developing facts additional to those disclosed by him. Leighton v. Heagerty, 21 Minn. 42.

See Langdon v. Thompson, 25 Minn. 513.

§ 181. (Sec. 164.) Delivery of property to sheriff.

See Crone v. Braun, 23 Minn. 240, 241; Langdon v. Thompson, 25 Minn. 513.

§ 183. (Sec. 166.) Garnishee's lien—Proceeding.

Under Gen. St. 1878, c. 39, § 8, and this section, where the mortgagee in a chattel mortgage has not sold the mortgaged goods or foreclosed the mortgage, the mortgagor has a subsisting right of redemption, which is subject to the claims of the mortgagor's creditors, and may be reached by garnishment. Whether it can properly be reached by a levy upon the mortgaged goods in the rightful possession of the mortgagee, *quære*. Becker v. Dunham, 27 Minn. 32, 6 N. W. Rep. 406. But where the goods are in fact seized upon writs of attachment against the mortgagor while in the rightful possession of the mortgagee, the latter, in an action against the levying officer, can recover only the value of his interest in the goods. Id.

§ 187. (Sec. 170.) Judgment against garnishee—Amount.

The word "costs," as used in this section, includes disbursements. Woolsey v. O'Brien, 23 Minn. 71.

§ 190. (Sec. 173.) Costs to garnishee.

Counsel fees and other necessary expenses, beyond costs of travel and attendance, may be allowed in a special case, in the discretion of the court, to garnishees, under this section; but such allowance must be made in the garnishee proceeding, and when

not allowed a claim therefor cannot be set off by the garnishee in an action against him by his creditor. Schwerin v. De Graff, 19 Minn. 414, (Gil. 359.)

§ 195. (Sec. 178.) Discharge of garnishee.

Payment by garnishees, without execution, of the judgment against them in an action before a justice of the peace, discharges them, though the judgment against the defendant was upon default, upon service of the summons by publication, and subsequent to the payment, within the year it was set aside, and the defendant was permitted to defend, and succeeded in his defense. Troyer v. Schweizer, 15 Minn. 241, (Gil. 187.)

§ 197. (Sec. 180.) Appeals.

An order of a district court for judgment against a garnishee is not appealable. Croft v. Miller, 26 Minn. 317, 4 N. W. Rep. 45.

See McNamara v. Minnesota Cent. Ry. Co., 12 Minn. 388, 392, (Gil. 269.)

*§ 198. Bond to discharge garnishment—Application of title 10.

A defendant, when property, money, or effects has been garnished, may at any time execute to the plaintiff a bond in double the amount claimed in the complaint, with two or more sureties, who shall justify and be approved by the judge of the district 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. All of the provisions of this title shall apply to all actions in which the defendant has or shall recover a judgment against the plaintiff, and all actions in which a counter-claim is interposed in the answer of the defendant, which counter-claim exceeds in amount the amount admitted to be due in said answer, and in all such cases the defendant may institute proceedings under this title, and conduct them to a determination with like force and effect, and in like manner, as if he was a plaintiff; and in such cases the word "plaintiff," wherever it is used in this title, shall be construed to mean "defendant," and the word "complaint" shall be construed to mean "answer." (1871, *c.* 67, § 1, *as amended* 1881, *c.* 55, §§ 1, 2.)

Where no bond for the release of the attached property is given by the defendant, under this section, the statute authorizes no interference with such property or its possession prior to judgment against the garnishee, except upon application under § 165, and order thereon, requiring it to be brought into court, or delivered to a receiver appointed by the court. Langdon v. Thompson, 25 Minn. 513.

TITLE 11.

INJUNCTIONS.

§ 199. (Sec. 181.) Issue of—Attestation and sealing.

See Pettingill v. Moss, 3 Minn. 222, (Gil. 151.)

§ 200. (Sec. 182.) Temporary injunction—Grounds for.

The unlawful establishment of a rival ferry will be restrained by injunction. McRoberts v. Washburne, 10 Minn. 23, (Gil. 8.)

An injunction will not issue to restrain a mere trespass, where the threatened injury will not be irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation. Schurmeier v. St. Paul & P. R. Co., 8. Minn. 113, (Gil. 88.) A charge in a complaint that the threatened trespass will work irreparable

injury, if the facts stated do not sustain the allegation, does not show a case for injunction. Id.

The unauthorized obstruction of a street or landing by a railroad track is such a special injury to the abutting owner as will entitle him to an injunction to restrain it. Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82, (Gil. 60.)

An execution issued more than 10 years after the entry of judgment is void, and no sale thereunder will create a cloud upon title to real estate so as to justify an injunction to restrain it. Hanson v. Johnson, 20 Minn. 194, (Gil. 172.)

A purchaser under an execution, pending an action to set aside the judgment on which it issued, will be bound by the result of the action, and therefore a sale on the execution would not work such irreparable injury to the plaintiff in the action as will justify an injunction to restrain the sale pending the action. Hart v. Marshall, 4 Minn. 294, (Gil. 211.)

The fact that the mortgagee is proceeding to foreclose under the power will not justify an injunction, pending an action by the mortgagor to have it adjudged satisfied. Montgomery v. McEwen, 9 Minn. 103, (Gil. 93.)

A sale on foreclosure, by advertisement, of a mortgage satisfied in fact, pending a suit to procure the cancellation of the same, will constitute a cloud on the title, and is an act which may be restrained, as well on general principles of equity as by the terms of this section. Conkey v. Dike, 17 Minn. 457, (Gil. 434.)

That a mortgagee proceeding to foreclose under the power proposes to make an absolute sale without right of redemption is no ground to enjoin the sale. Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.)

A temporary injunction may issue on the complaint alone if it make out a sufficient cause for it, and if it is verified, and its allegations are positive. Stees v. Kranz, 32 Minn. 313, 20 N. W. Rep. 241.

§ 201. (Sec. 183.) Affidavit.

A complaint, the averments of which are positive, verified in the usual form, satisfies the requirements of the statute in regard to applications for injunctions. McRoberts v. Washburne, 10 Minn. 23, (Gil. 8.)

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

An injunction will not be granted on facts stated on "information and belief." Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.)

See Becker v. Dunham, 27 Minn. 32, 34, 6 N. W. Rep. 406.

§ 202. (Sec. 184.) Injunction after answer.

Where the answer denies all the equities set up in the complaint, and a petition for an injunction pending the action discloses no others, it is improper to grant the injunction. Montgomery v. McEwen, 9 Minn. 103, (Gil. 93.)

§ 203. (Sec. 185.) Bond.

An action upon the bond is the sole remedy of a defendant for the recovery of his damages by reason of the issuance of the writ, if the court finally decides the plaintiff not entitled thereto, unless the writ was sued out maliciously, and without probable cause. Hayden v. Keith, 32 Minn. 277, 20 N. W. Rep. 195. If the sum named in the bond is insufficient as security, it is the duty of the court, upon defendant's motion, to set aside the writ unless additional security be given. Id.

The defendant's damages may be ascertained in the same action, by reference or otherwise, as the court may order, or in the suit upon the bond. Id.

See, also, Curtis v. Hart, 34 Minn. 329, 25 N. W. Rep. 636.

§ 205. (Sec. 187.) Motion to vacate.

Upon an answer fully and positively denying the statements on which a preliminary injunction is granted, it will be dissolved. Armstrong v. Sanford, 7 Minn. 49, (Gil. 34.) As a general rule, upon an answer fully denying and putting in issue the equities of the complaint, an injunction issued upon it will be dissolved. Moss v. Pettingill, 3 Minn. 217, (Gil. 145.) When the answer does not deny the complaint, but sets up new matter as a defense, the injunction will, unless the new matter is admitted, continue until a hearing. Id.

TITLE 12.

RECEIVERS.

§ 207. (Sec. 189.) May be appointed, when.

SUBD. 5. See Rice v. St. Paul, etc., R. Co., 24 Minn. 464.

TITLE 13.

JUDGMENT UPON FAILURE TO ANSWER.

§ 210. (Sec. 192.) When summons personally served—Actions for money only.

Judgment may be had, if the defendant fails to answer the complaint, as follows:

First. When, in an action arising on contract for the payment of money only, the summons has been personally served, and the plaintiff shall file with the clerk proof of the personal service of the summons, and that no answer has been received within the time allowed by law, the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant, or against one or more of several defendants, in the cases provided for in this chapter. In other actions for the recovery of money only, on filing the like proof, the plaintiff may apply to the court for a reference, to have his damages assessed, or the amount he is entitled to recover ascertained in any other manner, and for judgment. When the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counter-claim amounting to less than the plaintiff's claim, judgment may be entered by the clerk of court in favor of plaintiff for the excess of his said claim over the said counter-claim, with costs and disbursements, upon the plaintiff's filing with said clerk a statement signed by plaintiff, his attorney or agent, admitting such counter-claim, together with an affidavit of his costs and disbursements; which statement and affidavit shall be annexed to and be made a part of the judgment roll; all of which may be done without notice to the defendant. (*As amended* 1887, c. 90.)

Same—In other actions.

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

Service by publication, etc.—Bond for restitution.

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

suitable age and discretion then resident therein, it shall be deemed personal service; and in such cases judgment may be entered without filing the security herein provided for: *provided, further*, that in all actions involving the title to, or brought to quiet the title to, real estate, judgment may be entered without filing the security above provided. (*As amended* 1868, *c.* 84, § 1; 1881, *c.* 13, § 1; 1887, *c.* 90.)

SUBD. 1. This section, as amended by Laws 1868, *c.* 84, authorizing the clerk, in an action on contract for the payment of money only upon proof of personal service, and no answer being filed with him, to enter judgment, is not in conflict with section 1, art. 6, of the constitution, and does not confer judicial power on the clerk. Skillman v. Greenwood, 15 Minn. 102, (Gil. 77.)

Where, in a complaint, a cause of action in tort is joined with others upon contract, it is error for the clerk, upon default, to enter judgment, including the amount claimed for the tort. Reynolds v. La Crosse & Minn. Packet Co., 10 Minn. 178, (Gil. 144.)

The supreme court will not review the assessment by the clerk of the district court of damages or costs where they have not been actually passed on by the court below, unless it is quite evident that substantial error has been committed, and adequate relief cannot be had from the court below. Babcock v. Sanborn, 3 Minn. 141, (Gil. 86.)

See Exley v. Berryhill, 33 N. W. Rep. 567.

SUBD. 2. A referee may be appointed under this subdivision to take and report the evidence in an action for divorce, as well when the defendant is in default as where issue is joined. Section 14, *c.* 62, Gen. St., does not pretend to regulate the manner in which such testimony should be taken. Young v. Young, 18 Minn. 90, (Gil. 72.)

SUBD. 3. Where judgment is entered without personal service of the summons, the roll need not show that security was filed. Shaubhut v. Hilton, 7 Minn. 506, (Gil. 413.)

TITLE 14.

ISSUES.

§ 214. (Sec. 196.) "Trial" defined.

Quoted, Watson v. Ward, 27 Minn. 30, 6 N. W. Rep. 407.
"New trial," Dodge v. Bell, 34 N. W. Rep. 739.

§ 216. (Sec. 198.) Issues triable by jury.

Under this section an action of replevin, though there be in it an issue as to a secret trust to the party executing a deed of assignment, is triable by a jury. Blackman v. Wheaton, 13 Minn. 326, (Gil. 299.)

If no exception is taken in the court below to the manner in which the case is submitted to the jury, the objection cannot be raised here. Davis v. Smith, 7 Minn. 414, (Gil. 328.)

See Tancre v. Reynolds, 35 Minn. 476, 477, 29 N. W. Rep. 171; Marvin v. Dutcher, 26 Minn. 391, 407, 4 N. W. Rep. 685; Finch v. Green, 16 Minn. 355, (Gil. 315, 322;) Berkey v. Judd, 14 Minn. 394, (Gil. 300, 302.)

§ 217. (Sec. 199.) Trial of other issues.

In that class of cases which, by this section, are triable by the court, the authority of the court to try the issues itself, or send them to a jury, is the same as when law and equity were administered in separate courts. The court may, upon its own motion, or application of either party, send issues to the jury for trial. When done it should be by a formal order, made before the trial is entered upon, and stating the issues to be tried. Berkey v. Judd, 14 Minn. 394, (Gil. 300.) In cases coming within the operation of this section, the action is triable by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury. Sumner v. Jones, 27 Minn. 312; 7 N. W. Rep. 265.

An action for specific performance is triable by the court except so far as it may be specially submitted to the jury. Piper v. Packer, 20 Minn. 276, (Gil. 247.)

In an action to reform a policy of insurance and enforce it as reformed, a jury was impaneled, and, without any order or consent as to the issues they should try, the plaintiff introduced evidence upon both branches of the case. Held, there was nothing for the jury to try till the court decided that plaintiff was entitled to a reformation of the policy. Guernsey v. American Ins. Co., 17 Minn. 104, (Gil. 83.)

In an action triable by the court a jury was impaneled, and specific questions of fact submitted for their determination. The whole case was presented at the trial. The questions submitted to the jury were not sufficient to determine all of the essential

facts in the case. Upon the return by the jury of their verdict, the court made no order reserving the case for further consideration, but long afterwards made findings of fact upon essential matters not included in the findings of the jury, and, upon such findings, with those of the jury, directed judgment to be entered. Held no error. Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. Rep. 543.

An action for damages for overflow of lands, for the abatement as a nuisance of a dam causing such overflow, and an injunction against its continuance, is one of a mixed nature, and, under §§ 216 and 217, the issues of fact are triable by the court, subject to the right of parties to consent, or the court to order the whole issue, or any specific question of fact, to be tried by a jury or referred. Where, in such a case, without formal consent or settlement of issues, the cause was tried by a jury, without objection, and instruction given to bring in a general verdict as to damages, held, there was substantial consent to submit to a jury the question of the existence of a nuisance, and quantum of damages, and to authorize judgment for the amount of such verdict. Finch v. Green, 16 Minn. 355, (Gil. 315.)

Where a cause is submitted generally to the jury, and the jury return a verdict which determines in favor of plaintiff only one of several material issues, the verdict will not sustain a judgment for the plaintiff. Meighen v. Strong, 6 Minn. 177, (Gil. 111.)

A question submitted to a jury, under this section, on appeal from the probate court, was whether respondent here and appellant in the district court was the legitimate child of the deceased. She was born out of wedlock, and her mother and deceased, after her birth, intermarried. Held, as the only real question was as to whether she was the child of the deceased, the fact that the question actually submitted was broader than this, and involved a question of law, could result in no actual prejudice to appellant, and was not ground for a new trial. McArthur v. Craigie, 22 Minn. 351.

See Marvin v. Dutcher, cited in note to c. 49, § 19, *supra;* Brown v. Lawler, 21 Minn. 327. Followed, Brown v. Nagel, 21 Minn. 415; Blackman v. Wheaton, 13 Minn. 326, (Gil. 299, 302.)

§ 218. (Sec. 200.) Notice of trial.

The phrase, "the term" for which notice of trial may be given, includes a special term, at which the action might, under § 15, c. 64, Gen. St., be properly tried, as well as a general term. Colt v. Vedder, 19 Minn. 539, (Gil. 469.)

Where a cause is at issue, noticed for trial, and placed upon the calendar, an amendment of the pleadings does not render another notice of trial necessary. Stevens v. Curry, 10 Minn. 316, (Gil. 249.)

§ 220. (Sec. 202.) Either party may move the trial.

The failure of a party demurring to appear at the hearing upon it in the court below does not prevent him being heard on it here on an appeal from an order overruling it. Hall v. Williams, 13 Minn. 260, (Gil. 242.)

§ 222. (Sec. 204.) Continuance.

Where the evidence of the absent witness would be immaterial if obtained, a continuance is properly denied. McLean v. Burbank, 12 Minn. 530, (Gil. 438.) See Wright v. Levy, 22 Minn. 466.

TITLE 15.

TRIAL BY JURY.

§ 224. (Sec. 206.) Payment of jury fee.

An act of the legislature requiring, as a condition to the right of trial in a civil action by jury, the payment in advance of a reasonable jury fee, is constitutional. Adams v. Corriston, 7 Minn. 456, (Gil. 365.)

§ 226. (Sec. 208.) Challenges.

That one of the jurors was a juror on a former trial of the case, which fact was unknown to the parties, is ground for a new trial. That the clerk's minutes contained a list of the jurors on the former trial does not charge the parties with negligence in not knowing the fact. Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

The order of challenges to individual jurors is in the discretion of the trial court. St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 249.)

Where a challenge to a juror for actual bias is admitted by the opposite party, there is nothing to try on the challenge, and the challenging party has no right to examine the juror. Morrison v. Lovejoy, 6 Minn. 319, (Gil. 224.) After a challenge for actual

bias is admitted, it is discretionary with the court to allow, or refuse to allow, the challenge to be withdrawn. Id.

§ 227. (Sec. 209.) Order of trial.

SUBD. 3. Where the plaintiff, in rebuttal, offers evidence which he should have given in chief, the court may of its own motion limit the extent to which he shall give such evidence. Plummer v. Mold, 22 Minn. 15.

The admission of evidence not strictly rebutting, (after the other party had rested,) from the one who opened the proofs, is no ground for a new trial, unless actual and manifest injustice were the result. Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

SUBD. 4. Upon an appeal to the district court from the award of the commissioners, the land-owner assumes the position of plaintiff, and is entitled to open and close. Minnesota Val. R. Co. v. Doran, 17 Minn. 188, (Gil. 162.)

If a court, under a mistake as to which party has the burden of proof, so directs the order of trial as to deprive the party having the affirmative of the issue of the privilege of opening and closing, this court will not reverse unless there appears probable ground for believing that the party was injured. If the court, under such a mistake, gives the appellant the advantage of opening and closing, he cannot complain, the error not being prejudicial to him. Paine v. Smith, 33 Minn. 495, 24 N. W. Rep. 305.

§ 228. (Sec. 210.) View.

New trial granted on account of improper communications made to a jury while upon a view of the *locus in quo*. Hayward v. Knapp, 22 Minn. 5.

§ 233. (Sec. 215.) Verdict—Further deliberation—Correction.

At any time before the jury are asked if the verdict recorded is their verdict, they may be sent out to complete an incomplete verdict, as where they had been instructed to return a general verdict, and find upon specific questions, and they came in with a general verdict without the special findings. Tarbox v. Gotzian, 20 Minn. 139, (Gil. 122.)

A jury having been out about twenty-four hours were brought in and asked by the court if there was any probability that they would agree upon a verdict, when the foreman answered that they stood eleven to one. The court thereupon stated that it was a very important matter that the jury should agree, and that he thought they had better make another effort, whereupon they retired, and in about twenty-five minutes returned a verdict for defendant. *Held* no ground for a new trial. McNulty v. Stewart, 12 Minn. 434, (Gil. 319.)

A jury who had leave to bring in a sealed verdict stated to the officer in charge that they had agreed, though they had not, and they were allowed to separate, and the next morning two of them protested against the verdict, stating that they had voted for it under protest; and, one of them still adhering to his views, they were sent out again, and finally agreed to a verdict. Held such misconduct as justified granting a new trial. Ætna Ins. Co. v. Grube, 6 Minn. 82, (Gil. 32.)

§ 234. (Sec. 216.) Receiving and recording verdict.

That a verdict is read to the jury, and they asked if it is their verdict, before instead of after it is recorded in the minutes, and upon their assenting they are discharged, and the verdict entered afterwards, does not vitiate the verdict. State v. Levy, 24 Minn. 362.

After a verdict has been recorded it cannot be corrected. No statement of the court below will be received to explain or show what was intended by it. Dana v. Farrington, 4 Minn. 433, (Gil. 335.)

See McNulty v. Stewart, 12 Minn. 434, (Gil. 319, 325.)

TITLE 16.

THE VERDICT.

§ 235. (Sec. 217.) General and special verdicts defined.

A verdict in these words, "The jury in the above case return a verdict for the plaintiff in the sum of one thousand dollars. N. B. O. F. Jenkins and Joseph Moody excepted in the above action,"—the two persons named having been originally made defendants, but as there was no service on one, and a dismissal as to the other, the plaintiff claimed no verdict against them,—is regular. Desnoyer v. McDonald, 4 Minn. 515, (Gil. 402.)

The verdict of the jury in this case held insufficient, as being neither a general nor special verdict, within the definition of this section. Cummings v. Taylor, 21 Minn. 366.

§ 236. (Sec. 218.) Same—Authority to render—Directing special findings.

If the defendant desires special findings upon any of the issues, he should ask the court to instruct the jury to find specially. Commissioners of Dakota Co. v. Parker, 7 Minn. 267, (Gil. 207.)

Under this section it is in the sound discretion of the trial court to instruct or not to instruct the jury to find upon particular questions of fact. McLean v. Burbank, 12 Minn. 530, (Gil. 438.)

It is error in the trial court to refuse to submit, on request of a party, a question on the facts for the jury to answer, on the sole ground that it has no authority to do so, provided the question be material; otherwise not. Jaspers v. Lang, 17 Minn. 296, (Gil. 273.)

Where a question is put to the jury for them to find upon, a failure to find fully, if the question be immaterial, is no ground for a new trial. Finch v. Green, 16 Minn. 355, (Gil. 315.)

When, on the trial below, an interrogatory is put to the jury, to be answered by their verdict, and their answer substantially covers the interrogatory, but is objectionable in form, the objection to its form is waived, if not made on the coming in of the verdict. Manny v. Griswold, 21 Minn. 506.

Where there is a general verdict and a special finding of fact, if the court desire to reserve the case for further consideration, it must, at the coming in of the verdict, enter an order reserving the case. Unless this is done, the party in whose favor the general verdict is may have judgment entered on it, and the other party can then raise the question how far the special finding shall prevail over or modify the general verdict only on appeal. Newell v. Houlton, 22 Minn. 19.

See Riley v. Mitchell, 36 Minn. 3, 29 N. W. Rep. 588; Hallam v. Doyle, 35 Minn. 337, 29 N. W. Rep. 130.

§ 238. (Sec. 220.) Jury to assess amount of recovery.

Where the question of value is not in issue, and the amount of plaintiff's recovery is fixed by the pleadings, and follows as a conclusion of law in case the jury find in his favor upon the issue of fact submitted to them, the omission of the jury to insert the amount of such recovery in their verdict is at most a harmless irregularity. Jones v. King, 30 Minn. 369, 15 N. W. Rep. 670.

It is irregular for a jury to make up their verdict by agreeing each to specify a sum, and divide the aggregate of such sum by twelve, and accept the quotient as the verdict. Not so if such sum is finally agreed to by subsequent discussion among the jurors as to its justness and correctness. McMartin v. Desnoyer, 1 Minn. 156, (Gil. 131.)

§ 239. (Sec. 221.) Verdict in replevin.

Where, pending replevin, the plaintiff has become possessed of the property by the means given by the statute, and it is in his possession at the time of the trial, the value upon a verdict in his favor is not to be assessed, and when he comes into and is in possession by any other means, as by voluntary surrender by the defendant, or by his own act, it would seem that the same rule ought to apply, and that judgment in his favor should adjudge the title to be in him; that is, should be in terms for the possession of the property, and for damages for the detention. Leonard v. Maginnis, 34 Minn. 509, 26 N. W. Rep. 733.

See Drake v. Auerbach, 35 N. W. Rep. 367.

§ 240. (Sec. 222.) Judgment on verdict—Stay.

This section would seem to require that, where a case has been tried by a jury, a motion for a new trial should be made before judgment. Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

Where it is apparent that of two items the jury has allowed one and disallowed one, and there is sufficient evidence to justify them in disallowing one of them, the presumption is that that is the one which they disallowed. Newell v. Houlton, 22 Minn. 19.

Where there is a verdict for defendants, and the answer does not show any defense, the plaintiff is, on motion, entitled to judgment, notwithstanding the verdict. Lough v. Bragg, 18 Minn. 121, (Gil. 106.)

Where the answer, though technically defective, shows a meritorious defense, and there is a general verdict for plaintiff for less than he claims, a judgment *non obstante veredicto* in his favor is not proper Lough v. Thornton, 17 Minn. 253, (Gil. 230.)

TITLE 17.

TRIAL BY THE COURT.

§ 242. (Sec. 224.) Decision.

The provision requiring a decision in writing, stating the facts found and conclusions of law separately, is applicable to the municipal court of Minneapolis. Brackett v. Rich, 23 Minn. 485.

The provision requiring a court, where a case is submitted to it without a jury, to file its decision within twenty days, is not mandatory, but directory. Vogle v. Grace, 5 Minn. 294, (Gil. 232.)

In the decision of a demurrer the court need not state the facts. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

Where the court tries a cause without a jury it should state the facts found and conclusions of law separately. Baldwin v. Allison, 3 Minn. 83, (Gil. 41.)

In a case of trial by the court, the statement of "facts found," required by the statute, is a statement of such ultimate facts as are the legal effect of the evidence determinative of the material issues in the case, and necessary as the basis of a judgment. Butler v. Bohn, 31 Minn. 325, 17 N. W. Rep. 862.

In all actions judgment may be entered on the verdict, report, or decision, without special application to the court, or notice to the opposite party. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

After a trial by the court without a jury, a motion for a new trial for the causes mentioned in subsections 4, 5, § 59, p. 564, Comp. St., must be made at the earliest time at which it can be heard after notice that the decision has been rendered, and before judgment is perfected. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

An appeal will not lie from the statement filed (on trial by the court without a jury) of the court's findings of fact and law. The appeal should be from the judgment entered upon it. Von Glahn v. Sommer, 11 Minn. 203, (Gil. 132.)

Where a question as to the amount of damages upon a claim of excessive interest, after due, goes by default in the court below, and that court has not *actually* passed on the question, even though the judge signed the decree, the supreme court will not review such question. Hawke v. Banning, 3 Minn. 67, (Gil. 31.)

The supreme court may review a judgment upon the questions presented by the findings of fact and law of the judge or referee who tried the cause, though no case or bill of exceptions is made. Morrison v. March, 4 Minn. 422, (Gil. 325.)

§ 243. (Sec. 225.) Judgment on issue of law.

A demurrer to a complaint upon an equitable cause of action was overruled, and, the defendant having failed to answer within the time allowed, a reference was ordered to take proofs. Before the proofs were taken, the defendant, on an order to show cause, obtained an order "that judgment upon the issue of law be entered and perfected *instanter* in favor of the plaintiff, upon the demurrer aforesaid, without the report of said referee, or any proofs taken on the part of said plaintiff." *Held*, that this is an appealable order under § 12, c. 9, Laws 1853. Deuel v. Hawke, 2 Minn. 50, (Gil. 37.) In such case no final judgment could properly be ordered without taking proofs in respect to the alleged fact. Id.

§ 244. (Sec. 226.) Powers of court in vacation, etc.

The powers of a district court in vacation comprehend a great many questions which require in their determination a full exercise of the judicial functions, and can only be entertained by the court, and not by a judge at chambers. The powers of a judge at chambers are confined to such preliminary and intermediate matters as the granting of orders to show cause, extending time to plead, letting to bail, granting injunctions; and many other matters of a similar nature, which are usually *ex parte*, go of course on a *prima facie* showing, and may be allowed by a judge of a court, when out of term, and when acting as judge merely, and not as the court. Gere v. Weed, 3 Minn. 352, (Gil. 249.)

An order setting aside a stipulation for dismissal of an action cannot be made by a judge at chambers. So, when signed by the judge, although the hearing was at chambers, it will be regarded ordinarily as an order of the court. Rogers v. Greenwood, 14 Minn. 333, (Gil. 256.)

Upon a motion made in an adjoining district, under § 4, c. 67, Laws 1867, it is not necessary for the papers to show that it was proper to make it there, nor that it was made in time. The presumption is in favor of the jurisdiction exercised. Johnston v. Higgins, 15 Minn. 486, (Gil. 400.)

An application for an extension of the time to answer, though a motion be pending to set aside the summons, is a recognition of the jurisdiction of the court over the person. Yale v. Edgerton, 11 Minn. 271, (Gil. 185.)

A "decision" under this section may mean an order or merely a direction for an order that may be entered by the clerk. Ætna Ins. Co. v. Swift, 12 Minn. 437, (Gil. 326.)

The court found as conclusions of law "that the plaintiff is not entitled to recover, and that the defendant is entitled to judgment against the plaintiff for his costs and disbursements," adding the words, "Let judgment be entered accordingly." Held, that these words are not an order involving the merits, or any part thereof, but a mere direction that an act be done which does involve the merits, to-wit, that judgment be entered. Such direction is not appealable. Ryan v. Kranz, 25 Minn. 362.

See Hoffman v. Parsons, 27 Minn. 236, 238, 6 N. W. Rep. 797.

TITLE 18.

TRIAL BY REFEREES.

§ 246. (Sec. 228.) Reference by consent.

Upon the agreement of the parties to a civil action, or a proceeding of a civil nature, filed with the clerk or entered upon the minutes, a reference may be ordered:

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

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

Third. That whenever, in the opinion of the presiding judge of a district court in this state, a press of business makes the same advisable and necessary, such judge, counsel consenting thereto, may make an order referring any civil action or proceeding of a civil nature (except an action for divorce) to a referee for trial and judgment, or for any one or more of the purposes named in this title; and the fees of such a referee, after being taxed by the judge making the order of reference, shall be paid on the order of said judge out of the state treasury as salaries of state officers are now paid. Said judge shall state as a part of said order of reference that in his opinion the press of business makes such reference advisable. (*Last subd. added* 1885, *c.* 55.)

The statute authorizing the trial by referees is constitutional. Carson v. Smith, 5 Minn. 78, (Gil. 59.)

See Berkey v. Judd, 14 Minn. 394, (Gil. 300, 302.)

§ 247. (Sec. 229.) Compulsory reference.

SUBD. 1. This subdivision, authorizing a compulsory reference in actions at law where the trial of an issue requires the examination of a long account on either side, is unconstitutional and void. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

The taking and stating the accounts of a partnership are not proper matters to be referred to a jury. To refer such matters to a jury for trial is error. Berkey v. Judd, 14 Minn. 394, (Gil. 300.)

Cause of action involving complicated accounts. See Fair v. Stickney Farm Co., 35 Minn. 380, 29 N. W. Rep. 49.

§ 249. (Sec. 231.) Trial by referees—Report.

Only material issues of fact need be passed on by a referee. He need not pass on facts admitted by the pleadings. Brainard v. Hastings, 3 Minn. 45, (Gil. 17.)

Where a proper foundation is laid for it, a referee may, in his discretion, reopen a case tried before him, and hear further proofs, at any time before his report is filed or delivered. Cooper v. Stinson, 5 Minn. 201, (Gil. 160.)

A referee should, in his report, find upon all the issues of fact made by the pleadings, and state his conclusions of fact and of law separately. Bazille v. Ullman, 2 Minn. 134, (Gil. 110.) To correct an omission of the referee to do this application should, in the first instance, be made in the court below for an order sending the report back to the referee, with instructions to supply the omissions. Id. When the report of a referee omits to state his findings of fact and conclusions of law separately, if the party wishes it corrected in this respect the proper practice is by motion for an order sending the report back to the referee for correction, and not for an order vacating the report and granting a new trial. Califf v. Hillhouse, 3 Minn. 311, (Gil. 217.)

When a referee files a report merely denying defendant's motion for judgment, but reporting no judgment for either party, it is the duty of the district court to send the case back to him, with directions to report a judgment. Griffin v. Jorgenson, 22 Minn. 92.

On an appeal from an order setting aside a judgment entered on the report of a referee, this court will not consider whether the conclusions of law found by the referee are justified by his conclusions of fact. Id.

A judgment upon the report of a referee, if such as the facts found require, will not be reversed because inconsistent with some of the referee's conclusions of law. Piper v. Johnston, 12 Minn. 60, (Gil. 27.)

An appeal cannot be taken from an order denying a motion on a case made for judgment, notwithstanding the report of a referee. The appeal should be from the judgment after it is entered on the report. Ames v. Mississippi Boom Co., 8 Minn. 467, (Gil. 417.)

Where the evidence as to the facts is conflicting, this court will not disturb the findings of the referee. Kumler v. Ferguson, 7 Minn. 442, (Gil. 351.)

This court may, upon a statement of the case, review the findings of fact by a referee without any motion for a new trial in the court below. Cooper v. Breckenridge, 11 Minn. 341, (Gil. 241.)

A decision of a referee, dismissing an action for insufficiency of evidence, at the close of plaintiff's case, sustained. McCormick v. Miller, 19 Minn. 443, (Gil. 384.)

On the trial before a referee certain testimony was offered and objected to. The referee, without ruling upon the objection at the time, took the testimony with the understanding that before deciding the case he would rule upon the point, and admit or reject the testimony. He afterwards rejected it. No exception was taken to the course he took, and none reserved to such ruling as he might make upon the objection. *Held* that, there being no exception to his ruling, no point can be raised on it here. Kumler v. Ferguson, 22 Minn. 117.

TITLE 19.

EXCEPTIONS.

§ 251. (Sec. 233.) "Exception" defined—Statement and settlement.

An exception must be taken at the trial. One to an order of reference is nugatory. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

Upon the hearing of a case upon evidence taken and reported by a referee appointed for that purpose alone, a party desiring to avail himself of any objection interposed before the referee must renew it, and obtain a ruling thereon by the court, and, if adverse, take an exception. Gill v. Russell, 23 Minn. 362.

Where a cause is tried before a referee, and there are no exceptions nor statement of the case, the only question which this court can consider on writ of error is whether the facts found by the referee are sufficient to sustain the judgment. Teller v. Bishop, 8 Minn. 226, (Gil. 195.)

The rulings of a court in admitting or excluding evidence, or in its charge or refusal to charge, unless excepted to, cannot be alleged as ground of error. Roehl v. Baasen, 8 Minn. 26, (Gil. 9;) City of St. Paul v. Kuby, 8 Minn. 154, (Gil. 125;) Baldwin v. Blanchard, 15 Minn. 489, (Gil. 403.)

When a question is objected to, and the objection sustained, in taking an exception it must be made to appear that something material was proposed to be proved. State v. Staley, 14 Minn. 105, (Gil. 75.)

To subject questions arising upon the evidence to review by the supreme court upon writ of error, the evidence must be incorporated in a bill of exceptions. St. Anthony Mill Co. v. Vandall, 1 Minn. 246, (Gil. 195.)

To support a motion for a new trial on account of an alleged erroneous dismissal of an action, it is not necessary to except to the order of dismissal in a case in which the order was not granted upon the trial, but after the trial was concluded, and the case taken under advisement. Volmer v. Stagerman, 25 Minn. 235.

No question can be made in this court upon a charge of the court below not excepted to below. Commissioners of Dakota Co. v. Parker, 7 Minn. 267, (Gil. 207.)

Exceptions to instructions made after trial and verdict are ineffectual. Barker v. Todd, 34 N. W. Rep. 895.

Where different requests to charge the jury were refused, and the court also charged the jury at large, the exception, "defendant now excepts to each and every part of the charge, and also to the refusal of the court to give requests of defendant as requested," is not a good exception. Shull v. Raymond, 23 Minn. 66.

To the decision of the court upon five distinct propositions, separately numbered, the party requesting them to be given to the jury "excepted to said refusals and modifications of said instructions as given." Held sufficiently specific. Schurmeier v. Johnson, 10 Minn. 319, (Gil. 250.)

To a charge of the court covering all the main features of the case, and embracing several distinct propositions, and stating the application of the law to the facts as they might be found, an exception "to each and every part and portion of the instruction and charges," and "so far as relates to the consideration for said chattel mortgage, and

to the transfer and possession of the three promissory notes put in evidence in this cause to show a consideration for such mortgage, all and singular and severally," is too general as to the first part of it, and to the second part sufficiently specific to present the question of the correctness of the propositions therein referred to. Foster v. Berkey, 8 Minn. 351, (Gil. 310.)

TITLE 20.

NEW TRIALS.

§ 253. (Sec. 235.) Grounds for new trial.

"New trial." See Dodge v. Bell, 34 N. W. Rep. 739.

The court may properly grant a new trial in a cause which it had dismissed upon motion before the introduction of evidence. Dunham v. Byrnes, 36 Minn. 106, 30 N. W. Rep. 402.

The district court has power to grant a new trial after a trial by a referee. Thayer v. Barney, 12 Minn. 502, (Gil. 406.)

When an action is tried by a district court, without the intervention of a jury, a party may, if he chooses, move for a new trial, and from the order made upon the motion an appeal lies to this court. Chittenden v. German-American Bank, 27 Minn. 143, 6 N. W. Rep. 773.

The district court may, in its discretion, before the time to appeal from the judgment expires, allow a motion for a new trial after the judgment is entered. Conklin v. Hinds, 16 Minn. 457, (Gil. 411.)

A new trial will not be granted, even where there is error, if from the whole case it is apparent that the result will not be changed. Dorr v. Mickley, 16 Minn. 20, (Gil. 8.)

A new trial will not be granted where it is evident that the result will be the same as on the first trial. Lewis v. St. Paul & S. C. R. Co., 20 Minn. 260, (Gil. 234.)

See, also, Ashton v. Thompson, 28 Minn. 330, 333, 9 N. W. Rep. 876; Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129; Deering v. Johnson, 33 Minn. 97, 22 N. W. Rep. 174.

SUBD. 1. It is discretionary with the trial court to allow a party who has rested his cause to reopen it. Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26.)

Where the motion for a new trial is on the ground that a jury trial was denied, and that the court improperly ordered a reference, an appeal from an order denying it brings up the record relating to the denial of a jury. St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 132, (Gil. 99.)

See City of Winona v. Minnesota Ry. Const. Co., 27 Minn. 415, 423, 6 N. W. Rep. 795, 8 N. W. Rep. 148.

SUBD. 2. An attempt by a juror, while the jury is deliberating, to send a letter to his wife, by the hands of the successful party, such party knowing nothing of it, the letter not coming to his hands, is no ground for a new trial. Eich v. Taylor, 20 Minn. 378, (Gil. 330.)

An unauthorized communication made to a juror in a cause, pending the trial, is not ground for a new trial if it be apparent that it could not have influenced the mind of the juror in favor of the successful party. Chalmers v. Whittemore, 22 Minn. 305. If a juror in a cause, pending the trial, express to a stranger to the cause an opinion upon the case, it is not ground for a new trial if it be apparent that the opinion was formed upon the proceedings and evidence in the cause. Id.

New trial granted on account of improper communications made to a jury while upon a view of the *locus in quo*. Hayward v. Knapp, 22 Minn. 5.

A temporary separation of a juror from his fellows, after the withdrawal of the jury, under the charge of the court, for deliberation upon their verdict, is no ground for a new trial, when it clearly and affirmatively appears that no prejudice resulted, and that the facts and circumstances connected with the separation were such as to exclude all reasonable presumption or suspicion that the juror was tampered with, or that the verdict was or could have been in any way influenced or affected by the irregularity. State v. Conway, 23 Minn. 292.

In case of an application for a new trial for misconduct of the jury, if it does not appear that the misconduct was occasioned by the prevailing party, or any one in his behalf, and if it does not indicate any improper bias upon the jurors' minds, and the court cannot see that it had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside. If the moving party shows such misconduct that prejudice may have resulted to him from it, a new trial will be granted, unless the successful party shows that in fact such prejudice did not result. Koehler v. Cleary, 23 Minn. 325.

The granting of a new trial for misconduct of the jury is in the sound discretion of the trial court, and it requires a clear case against its action to justify this court in reversing the decision of such court. Hewitt v. Pioneer Press Co., 23 Minn. 178.

An application to set aside a verdict and grant a new trial upon the ground that the jury have been improperly and unfairly influenced by counsel, is largely addressed to

the sound discretion of the trial court. Knowles v. Van Gorder, 23 Minn. 197. An objection made by the court, of its own motion, to the improper conduct complained of, is sufficient to enable the opposite party to take advantage of such conduct. Id.

Affidavits of jurors cannot be received to show misconduct on the part of the jury. Martin v. Desnoyer, 1 Minn. 156, (Gil. 131.) Misconduct of counsel in addressing the jury is not ground of error unless excepted to at the time, and included in the bill of exceptions or case. Id.

Improper conduct of a juror, as ground for a new trial, must be clearly proved. State v. Dumphey, 4 Minn. 438, (Gil. 340.)

SUBD. 3. That a material witness, who was not subpœnaed, but, at the party's request, promised to attend and testify, was physically unable to attend, and the trial was had without him, is no ground for a new trial. Eich v. Taylor, 17 Minn. 172, (Gil. 145.)

SUBD. 4. A verdict will not be set aside for excessive damages, unless it is such as to warrant the inference, that the jury were swayed by prejudice, preference, partiality, passion, or corruption. St. Martin v. Desnoyer, 1 Minn. 156, (Gil. 132.) Followed, Beaulieu v. Parsons, 2 Minn. 37, (Gil. 26.)

To warrant a trial court to set aside a verdict for excessive damages, the damages must be not merely *more* than the court would have awarded had it tried the case, but they must (especially in an action for defamation) so greatly and grossly exceed what would be adequate in the judgment of the court that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion,—that is to say, of excited feeling, rather than of sober judgment; or of prejudice,—that is to say, of state of mind partial to the successful party, or unfair to the other. Pratt v. Pioneer Press Co., 32 Minn. 217, 18 N. W. Rep. 836, 20 N. W. Rep. 87.

A motion for a new trial on the ground of excessive damages appeals in a measure to the discretion of the trial court; that is to say, to its sound practical judgment, in view of all the relevant facts of the particular case. Id.

When the propriety of an order granting a new trial for excessive damages comes before an appellate court for review, the question is not precisely that presented to the trial court on the motion for the new trial, but rather whether it clearly appears that the trial court, in granting the order, abused its sound discretion in failing to exercise a sound, practical judgment upon all the relevant facts before it. Id.

The rule allowing exemplary or punitive damages in certain cases obtains in a case where an innkeeper, after a guest had engaged and paid for a night's lodging, refused to let him have it, and turned him out of the house, with abusive and insulting language. McCarthy v. Niskern, 22 Minn. 90.

SUBD. 5. Variance between the pleadings and proofs is not among the enumerated causes for which a new trial may be granted. Every such objection may be relieved against without driving the parties out of court. It is only when the allegation to which the proof is directed is not proved, not only in some particulars, but in its general scope and meaning, that the objection becomes fatal. Short v. McRea, 4 Minn. 119, (Gil. 83.)

The rule for determining the sufficiency of evidence to support the findings of a jury upon controverted questions of fact, applied to verdicts in civil actions of a purely legal nature, applies also to all verdicts upon specific questions of fact tried by a jury under the direction of the court, pursuant to § 217, *supra*, whether in actions of equitable cognizance only, or in cases transferred to and tried in a district court on appeal from a probate court. Marvin v. Dutcher, 26 Minn. 392, 4 N. W. Rep. 685.

Where the only evidence of the defendant's guilt in a prosecution for larceny was possession of the stolen property about a month after it was stolen, and the defendant, by three witnesses, proved that he purchased it, showing time and place and amount paid, held, that the evidence was insufficient to sustain a conviction. State v. Miller, 10 Minn. 313, (Gil. 246.)

A motion for a new trial for the causes mentioned in subdivisions 4 and 5, in an action tried by a court without a jury, must be made at the earliest time at which it can be heard after notice that the decision has been rendered, and before judgment is perfected. Groh v. Bassett, 7 Minn. 325, (Gil. 254.)

See, also, Tozer v. Hershey, 15 Minn. 257, (Gil. 197.)

SUBD. 6. Newly-discovered evidence, if merely impeaching or cumulative, is no ground for a new trial. State v. Dumphey, 4 Minn. 438, (Gil. 340.)

A new trial will not be granted for newly-discovered evidence where such evidence only discredits the evidence of the opposite party given on the trial, or is merely cumulative or corroborative of evidence introduced. Mead v. Constans, 5 Minn. 171, (Gil. 134.) A new trial will not be granted for newly-discovered evidence where such evidence will not be at all likely to change the result. Id. Same point, Fenner v. Caldwell, 7 Minn. 225, (Gil. 166.)

A motion for a new trial upon either of the grounds included in subdivisions 1, 2, 3, and 6, may be made after, as well as before, judgment is entered. Eaton v. Caldwell, 3 Minn. 134, (Gil. 80.)

When plaintiff shows sufficient diligence to entitle him to a new trial for the newly-discovered evidence, see Humphrey v. Havens, 9 Minn. 318, (Gil. 301.) See, also, Wintermute v. Stinson, 19 Minn. 394, (Gil. 340.)

Where the newly-discovered evidence is the testimony of a witness, an affidavit stating that the party making it had learned what the witness would swear to, by a conversation with one who had seen or heard taken a deposition of said witness, is not sufficient. Eddy v. Caldwell, 7 Minn. 225, (Gil. 167.)

The decision of a trial court upon an application for a new trial upon the ground of newly-discovered evidence can only be reviewed in an appellate court upon a record showing both the after-discovered evidence and that introduced upon the former trial. State v. Conway, 23 Minn. 291.

SUBD. 7. A motion to vacate the report of a referee, and for a new trial for errors of law committed during the trial, and for insufficiency of evidence, may be made on a case settled after the entry of judgment when the report has been made and filed, and judgment has been entered without notice, and when the party making the motion has been guilty of no laches or unreasonable delay in settling the case, and making the motion. When in such a case, a report is vacated, and a new trial is granted, the court may also set aside the judgment to give effectiveness to its decision. Cochrane v. Halsey, 25 Minn. 52.

The admission of immaterial evidence is no ground for a new trial if the court can see there is no reasonable ground to apprehend that it prejudiced the objecting party. Cole v. Maxfield, 13 Minn. 235, (Gil. 220.)

That a question is not strictly cross-examination is no ground for a new trial if no injury resulted. St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277, (Gil. 250.)

See Roehl v. Baasen, cited in note to § 251, *supra;* Dartnell v. Davidson, 16 Minn. 530, (Gil. 477.)

§ 254. (Sec. 236.) Motion—Case—Bill of exceptions.

A motion for a new trial, whether the trial was by the judge, a referee, or a jury, must, if the party have a reasonable opportunity, be made before judgment; but if he have no reasonable opportunity before judgment, he may make it afterwards, within the time for bringing an appeal from the judgment. In such case, however, he must use due diligence in making it, and will lose his right to make it by neglect of such diligence. The determination of the question whether he has used due diligence is in the sound discretion of the trial court. Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129.

An order denying leave to make and serve a statement of the case, after the time given by statute has expired, is not, in the absence of abuse of discretion, appealable. Irvine v. Myers, 6 Minn. 558, (Gil. 394.)

Upon the trial of a cause by the court without a jury, or by a referee, the time within which to make a case commences upon the filing of the decision. Id.

A fact occurring at a trial, and not matter of record, will not be reviewed when not presented by a case or bill of exceptions, although it is stated in the findings of fact made by the court. Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. Rep. 472.

The supreme court may review a judgment upon the questions presented by the findings of fact and law of the judge or referee who tried the cause, though no case or bill of exceptions is made. Morrison v. March, 4 Minn. 422, (Gil. 325.)

See Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. Rep. 129.

§ 255. (Sec. 237.) Preparing and settling bill of exceptions and case.

A party is not entitled to have a case or bill of exceptions settled and allowed as a basis of a motion for a new trial, after the expiration of the time to appeal from the final judgment. Richardson v. Rogers, 35 N. W. Rep. 270.

A statement of the case on which to move for a new trial or to appeal must be allowed and signed by the judge or referee. The stipulation of the parties will not dispense with such allowance and signature. Abrahams v. Sheehan, 27 Minn. 401, 7 N. W. Rep. 822.

After the lapse of fifteen days from the service of amendments to a proposed case, within which time the same is required by this section to be presented for settlement, an order to show cause why the case should not be settled was granted, and on the hearing the same was settled and signed. Held, that the effect of such order and settlement was to grant further time for presenting the case, as permitted by said chapter, and § 105, c. 66, Gen. St. Cook v. Finch, 19 Minn. 407, (Gil. 350.)

Where, after the expiration of the time limited by this section, no judgment having been entered, leave to make a case is granted by the court, such leave operates as an extension, as authorized by § 125, *supra.* Volmer v. Stagerman, 25 Minn. 234. Where an order signed by the judge provided that a proposed case as amended stand as the settled case in the action, held, sufficient as a settlement and allowance of such case, though the case itself was not signed. Id.

Failure to make and serve a proposed case, within the time limited by the court on granting an extension of time, is cured by its subsequent allowance and settlement. Id.

Where a statement of the case, to which amendments had been proposed and allowed,

had not been duly approved and certified by the district judge, but a motion for a new trial thereon had been heard and determined by him without objection, held, that it was thereby adopted and approved by him, and he might properly certify it at any time; and that, as the defect is merely formal, and the objection might have been obviated if it had been seasonably taken, it should be disregarded in this court. Sherman v. St. Paul, Minneapolis & Manitoba Ry. Co., 30 Minn. 228, 15 N. W. Rep. 239.

By admitting "due service" of a proposed case, a party waives the objection that it was not served in time, and in such case *mandamus* will issue to compel its settlement and allowance. State v. Baxter, 36 N. W. Rep. 108.

After a bill of exceptions has been settled by the judge, he cannot correct mistakes in it without calling in the parties and allowing them to be heard. State v. Laliyer, 4 Minn. 379, (Gil. 286.) The district court cannot correct a "case" settled and signed by a referee without proof that it was subsequently altered. Taylor v. Parker, 18 Minn. 79, (Gil. 63.) The "case," not being allowed and signed, sent back for correction. Phœnix v. Gardner, 13 Minn. 294, (Gil. 272.)

See Abbott v. Nash, 35 Minn. 451, 452, 29 N. W. Rep. 65.

TITLE 21.

GENERAL PROVISIONS.*

*§ 255*a*. Trials of scandalous nature—Exclusion of minors.

That when, in any court, a cause of a scandalous or obscene nature is on trial, the presiding judge or justice may, in his discretion, exclude therefrom all minors not necessarily present as parties or witnesses. (1887, *c*. 164.)

§ 257. (Sec. 239.) Requests for instructions, 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 facts which he claims to be established, or the conclusions of law which he desires to be adjudged, or both; and the court shall, upon request of either party, announce or state, before the argument of counsel to the jury, what requests or propositions so submitted will be given or refused by the court. 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 amended* 1883, *c*. 57, § 1.)

§ 259. (Sec. 241.) Offer of judgment.

In an action to recover possession of personal property, if, pending the action, the defendant deliver the property to plaintiff, the latter has still a right to have the title determined by the judgment. In such case an offer for judgment, unless it offer to allow judgment determining the title, is of no avail. Oleson v. Newell, 12 Minn. 186, (Gil. 114.)

When an offer of judgment is made and served, the plaintiff has 10 full days thereafter, excluding the day of service, in which to accept or reject the offer, and to give notice thereof in case of acceptance. In case the trial is begun before the expiration of this period, without any action by the plaintiff upon the offer, it thereby becomes ineffectual for any purpose. Mansfield v. Fleck, 23 Minn. 61.

The word "costs," as used in this section, providing that, after refusing offer of judgment, if plaintiff shall fail to recover more than offered, defendant shall be allowed costs, includes disbursements. Woolsey v. O'Brien, 23 Minn. 71.

§ 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 counter-claim made, or affirmative relief demanded in the answer: *provided*, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written

*See, as to examination of adverse party, *post*, *c*. 73, *§ 7*a*.

consent of the defendant, or an order of the court on notice and cause shown. (*As amended* 1881, *Ex. Sess. c.* 26, § 1.)

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

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

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

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

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

The entry of dismissal may be made by the plaintiff's attorney. Blandy v. Raguet, 14 Minn. 491, (Gil. 368.)

See Craver v. Christian, 34 Minn. 397, 398, 26 N. W. Rep. 8; Hooper v. Balch, 31 Minn. 276, 17 N. W. Rep. 617; Schleuder v. Corey, 30 Minn. 501, 502, 16 N. W. Rep. 401.

SUBD. 1. In an action of replevin, where the property has not been taken, there has been no provisional remedy allowed within this section. Blandy v. Raguet, 14 Minn. 491, (Gil. 368.)

In an action in replevin, where the property is taken by the plaintiff, and returned to the defendant on the proper bond, the plaintiff cannot dismiss by a notice served on the defendant's attorneys, even though they retain the notice. Williams v. McGrade, 18 Minn. 82, (Gil. 65.)

On an appeal from a justice to the district court, the plaintiff may dismiss his action. Fallman v. Gilman, 1 Minn. 179, (Gil. 153.)

The plaintiff is not entitled to dismiss, as a matter of right under subdivision 1, after the trial has actually commenced. Bettis v. Schreiber, 31 Minn. 329, 17 N. W. Rep. 863.

Where a trial has been had, and a verdict thereon has been set aside and a new trial granted, a subsequent dismissal or discontinuance upon the application of the party obtaining such verdict is a dismissal "before trial," and is no bar to another action. Phelps v. Railroad Co., 35 N. W. Rep. 273.

An appeal will not lie from an order dismissing an action before trial. Jones v. Rahilly, 16 Minn. 177, (Gil. 155.)

See Curtiss v. Livingstone, 36 Minn. 312, 30 N. W. Rep. 814.

SUBD. 2. A mere submission to arbitration, although followed by an award, is not a discontinuance of an action under this section. Hunsden v. Churchill, 20 Minn. 408, (Gil. 360.)

Upon a settlement and compromise of a cause of action, and the filing of a stipulation discontinuing the action, the cause is out of court, so that no further step can be taken in it. Eastman v. St. Anthony Falls, etc., Co., 17 Minn. 48, (Gil. 31.)

If a plaintiff neglect unreasonably to perfect judgment to which he is entitled, the defendant may have an order of dismissal. Deuel v. Hawke, 2 Minn. 50, (Gil. 37.)

The court cannot require a party to enter judgment to which he is entitled, and, upon his default, cause it to be entered for him. Sherrerd v. Frazer, 6 Minn. 572, (Gil. 407.)

See Rogers v. Greenwood, cited in note to § 244, *supra;* Jones v. Rahilly, 16 Minn. 177, (Gil. 155, 156.)

SUBD. 3. Under this subdivision an action to remove a cloud may be dismissed upon failure to comply with a conditional order requiring defendant's grantee to be made a party to the suit, although the proofs of the respective parties have been submitted to the court. Johnson v. Robinson, 20 Minn. 170, (Gil. 153.)

Where, upon a stipulation for a judgment of dismissal without costs or notice, a judgment was entered with costs, an order vacating the allowance of costs, but refusing to set aside the judgment, will not be reversed in this court because made with leave to defendant to proceed upon notice to retax such costs. Plaintiff's remedy in such case is by the proper appeal after such retaxation and allowance of costs in the judgment. Herrick v. Butler, 30 Minn. 156, 14 N. W. Rep. 794.

Upon the trial of an action of replevin involving an issue of title in the defendant, the cause was submitted to the court for decision without a jury. The court made its decision, holding that the defendant was entitled to a "judgment of dismissal," which, by order of the court, was entered. It appearing from the conclusions of the court, stated as required by statute, that the judgment of dismissal was based upon a determination of the issue of title in favor of the defendant, held, that such judgment is conclusive

as to the fact so decided. Boom v. St. Paul Foundry & Manuf'g Co., 33 Minn. 253, 22 N. W. Rep. 538.

See, also, Sloan v. Becker, 31 Minn. 414, 417, 18 N. W. Rep. 143; Andrews v. School District, 35 Minn. 70, 27 N. W. Rep. 303.

§ 263. (Sec. 243.) Judgment upon the merits.

Dismissal by the court of an action at law (while the same is on trial and before its final submission) upon the ground that the plaintiff has failed to establish his cause of action, is not a final determination on the merits, and therefore not pleadable against another action for the same cause. Craver v. Christian, 34 Minn. 397, 26 N. W. Rep. 8.

See Schleuder v. Corey, 30 Minn. 501, 502, 16 N. W. Rep. 401.

§ 264. (Sec. 244.) Judgment as between several parties.

All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance. But in such action they cannot have judgment for the damage done to the property of each. Grant v. Schmidt, 22 Minn. 1.

See Goldschmidt v. Mills, 33 N. W. Rep. 544.

§ 265. (Sec. 245.) Judgment in action against several.

In an action commenced prior to the Revised Statutes, against several defendants upon their joint promise, judgment could not be rendered against one alone upon his several promise. Carlton v. Chouteau, 1 Minn. 102, (Gil. 81.)

*§ 266. Failure to prove joint cause of action.

In an action against several defendants upon a joint contract, not joint and several, plaintiff must recover against all or none, and the rule is not changed by statute. Fetz v. Clark, 7 Minn. 217, (Gil. 159;) Fetz v. Clark, 8 Minn. 86, (Gil. 61;) Whitney v. Reese, 11 Minn. 138, (Gil. 87.)

In an action upon an account stated, by two jointly, the stating of the account being in issue, it is competent for either defendant to show that it was not stated by him, and in such case plaintiff may have judgment against the one by whom such account was stated. Reed v. Pixley, 22 Minn. 540.

Where an action is brought upon a partnership liability, against a firm alleged to consist of three persons, and upon the trial it appears that one of them is not a member of the firm, but that the other two are members of it, upon proof of the alleged partnership liability judgment may properly be entered against the firm of two members. Miles v. Wann, 27 Minn. 56, 6 N. W. Rep. 417. Criticising Fetz v. Clark, *supra*.

§ 267. (Sec. 246.) Measure of relief to plaintiff.

A plaintiff cannot, if there be no answer, have more than the specific relief prayed for in the complaint. Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. Rep. 85.

See, also, Thompson v. Bickford, 19 Minn. 25, (Gil. 1;) Washburn v. Mendenhall, 21 Minn. 333.

§ 268. (Sec. 247.) Entry of judgment on verdict.

A motion may be made in arrest of judgment after verdict. Wentworth v. Wentworth, 2 Minn. 277, (Gil. 238.)

*§ 269. Treble damages for trespass to personal property.

The term, "or other personal property," in § 269, is to be confined to things *ejusdem generis* with those previously enumerated, to-wit, "wood, timber, lumber, hay, and grass;" that is, to things which are the product of the soil. Berg v. Baldwin, 31 Minn, 541, 18 N. W. Rep. 821.

As to liability of the master for treble damages in case of trespass by the servant, see Potulni v. Saunders, 35 N. W. Rep. 379.

*§ 270*a*. Action for libel published in newspaper — Prerequisite—Damages.

Before any suit shall be brought for the publication of a libel in any newspaper in this state, the aggrieved party shall, at least three days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper, at their principal office of publication, specifying the

statements in the said articles which he or they allege to be false and defamatory. If it shall appear, on the trial of said action, that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or within three days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages: *provided, however*, that the provisions of this act shall not apply to the case of any libel against any candidate for a public office in this state, unless the retraction of the charge is made editorially, in a conspicuous manner, at least three days before the election. (1887, *c.* 191, § 1.*)

*§ 270*b*. Same—"Actual damages" defined.

The words "actual damages" in the foregoing section shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever. (*Id.* § 2.)

§ 272. (Sec. 249.) Judgment in replevin.

Where only part of the property is taken on the writ, the value of the part not taken is immaterial, and judgment cannot be rendered for such part not taken, nor for its value. Hecklin v. Ess, 16 Minn. 51, (Gil. 38.)

One who has a special property in goods, as a sheriff under a levy, can recover as against the general owner only the value of his special interest. La Crosse & Minnesota Steam Packet Co. v. Robertson, 13 Minn. 291, (Gil. 269.)

In an action in replevin for different articles of personal property, if a part only of the property can be obtained, the plaintiff should be allowed to elect to take that part, and judgment for the value of the remainder, and, if he demand it, that the jury shall assess the value of the articles separately; but the defendant has no right to object that the jury assessed the value of the property in gross. Caldwell v. Bruggerman, 4 Minn. 270, (Gil. 191.)

In an action of replevin, upon appeal from the judgment to this court, the plaintiff and defendant stipulated that judgment might be entered for the value of the property, and it was so entered. Held, that the surety in the undertaking, when sued upon it, cannot object that the judgment in replevin should have been in the alternative. Robertson v. Davidson, 14 Minn. 554, (Gil. 422.)

The judgment in replevin before a justice must be in the alternative, but on appeal upon questions of law alone the district court may correct the judgment in that particular. Kates v. Thomas, 14 Minn. 460, (Gil. 343.)

See Oleson v. Newell, cited in note to § 259, *supra;* Berthold v. Fox, cited in note to § 125, *supra.* Stevens v. McMillan, 35 N. W. Rep. 372; Leonard v. Maginnis, 34 Minn. 506, 509, 26 N. W. Rep. 733.

§ 273. (Sec. 250.) Entry and contents of judgment.

The omission of the clerk to sign a judgment does not affect its validity. Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

When the clerk of the district court keeps but one book for the registry of actions and entry of judgments, a judgment entered therein is valid. Jorgensen v. Griffin, 14 Minn. 464, (Gil. 346.)

Where the clerk kept two books for the entry of judgments, one styled "Judgment Book," and the other "Decree Book," the entry of a judgment for foreclosure in the latter is at most a mere irregularity which does not affect its validity. Thompson v. Bickford, 19 Minn. 17, (Gil. 2.)

In a book kept by the clerk of the district court, which on the outside was indorsed "Judgment Book," "Records," and "Register of Actions and Judgment Book," there were entries of the various proceedings in a cause, from time to time, commencing with the filing of the summons and complaint; and the last entry was as follows, without any date: "Judgment entered against defendants, and in favor of plaintiff, for $328.50." Held, that this was not an entry of judgment, and that the entry was not admissible to prove a judgment. Brown v. Hathaway, 10 Minn. 303, (Gil. 238.)

A transcript of the entry of judgment is sufficient evidence of the judgment without

* "An act to regulate actions for libel." Approved March 2, 1887.

producing the roll. Williams McGrade, 13 Minn. 46, (Gil. 39.) A transcript of the docket of a judgment is *prima facie* evidence of the judgment and docketing. Id.

See, also, Barton v. Drake, 21 Minn. 299, 306; Rockwood v. Davenport, 35 N. W. Rep. 377.

§ 274. (Sec. 251.) Death of party after verdict, etc.

This means that the judgment may be entered in such case without making the executor or administrator a party. When entered, it fixes the liability of the estate to pay it "in the course of administration." To make it "payable," no other court need pass upon it. The whole jurisdiction to determine the liability is retained in the court which has the action. Berkey v. Judd, 27 Minn. 477, 8 N. W. Rep. 383.

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

See Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

§ 275. (Sec. 252.) Judgment roll.

If from the petition, the case settled, and the verdict, a judgment may be entered specifying clearly the relief granted, the verdict is sufficient. St. Paul & S. C. R. Co. v. Matthews, 16 Minn. 341, (Gil. 303.)

On an appeal from a judgment, this court can review only such questions as appear upon the judgment roll. Keegan v. Peterson, 24 Minn. 1.

See Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

§ 277. (Sec. 254.) Docketing judgments — Transcripts — Lien.

To constitute a judgment for the purpose of docketing, it must be entered in the judgment book. A docketing without such entry is of no avail, even though a "judgment roll" be filed with what purports to be a copy of the judgment in it. Rockwood v. Davenport, 35 N. W. Rep. 377. In such case the clerk cannot, without an order of the court, enter judgment *nunc pro tunc*. Id.

A judgment duly rendered and docketed is a lien, as against a fraudulent grantee, notwithstanding the misspelling of the name of the judgment debtor. Fuller v. Nelson, 35 Minn. 213, 28 N. W. Rep. 511.

As to the lien of the judgment, the omission to include costs, or the insertion of costs taxed without notice, is merely an irregularity; but, for the purpose of limiting the time to appeal, the judgment is not deemed perfected until costs have been duly taxed and inserted in the judgment. Richardson v. Rogers, 35 N. W. Rep. 270.

A judgment becomes a lien on a homestead as on other real estate, and although, while it remains a homestead, it is exempt from sale on execution, it may be sold on execution as soon as it ceases to be a homestead, as where the owner sells it. Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

The homestead provided by the act of 1858, though exempt from sale while it continued a homestead, was subject to the lien of a judgment against the owner, and might be sold when it ceased to be a homestead. Tillotson v. Millard, 7 Minn. 513, (Gil. 419.) The right of the judgment creditor to sell in that contingency was a vested and valuable right, of which he could not be divested by act of the legislature. So far as it assumes to do so, the act of March 10, 1860, p. 286, Sess. Laws, is invalid. Id.

The limitation of the lien of a judgment to ten years does not apply to judgments entered and docketed at the time the provision took effect, the lien of which had been preserved under the act of 1862. Following Davidson v. Gaston, 16 Minn. 230, (Gil. 202;) and Davidson v. Barnes, 17 Minn. 69, (Gil. 47.) Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.) Same point, Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

Where, in the case of a judgment coming within the provisions of *c.* 27, Laws 1862, execution was issued and levied on real estate belonging to one or more of the defendants, the property advertised for sale, sale postponed from time to time for want of bidders, and for want of bidders no sale was had, and the execution was returned unsatisfied, all within five years from entry of judgment, held, that the provisions of *c.* 27, Laws 1862, were complied with, and the lien of the judgment preserved. Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.)

The death of a judgment debtor does not operate to extend the five-years limitation contained in *c.* 27, Laws 1862, within which, in order to preserve the lien of a judgment, an execution must be issued. Erickson v. Johnson, 22 Minn. 380.

A judgment was docketed August 22, 1862, and the lien thereof was in full force at the adoption of the General Statutes of 1866. Held, that the effect of § 7, *c.* 121, and §§ 254 and 262, *c.* 66, was to preserve the lien, and extend the right to issue execution for a period of ten years from the original docketing. Id.

Execution returned within five years, unsatisfied in part, will preserve the lien of the judgment under the act of 1862. Following Davidson v. Gaston, 16 Minn. 230, (Gil. 202,) and Lamprey v. Davidson, 16 Minn. 480, (Gil. 435.) Id.

A judgment survives, and the lien thereof continues, for the period of ten years, and no longer. The commencement within this statutory period, and the pendency of an action on the part of the judgment creditor in the nature of a creditor's bill to reach property of his judgment debtor not subject to execution, will not operate to continue the life of his judgment beyond this statutory period of ten years. Hence, if this period expires during the pendency of such action, his judgment will have ceased to exist, and his right to the relief sought will be gone. Newell v. Dart, 28 Minn. 248, 9 N. W. Rep. 732.

When a judgment which was docketed in the district court is affirmed in this court, it remains, without redocketing, a lien upon real estate, by virtue of the original docketing, for the amount of the original judgment, with accumulative interest; but to make it a lien for the damages and costs in this court it must be redocketed. Daniels v. Winslow, 4 Minn. 318, (Gil. 235.)

A formal levy of an execution upon real estate is not necessary. Bidwell v. Coleman, 11 Minn. 78, (Gil. 45.)

A sale of real estate on execution passes at once to the purchaser all the title of the execution debtor, subject to be defeated by redemption. The title so acquired will pass by quitclaim deed of the purchaser. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

Where trees standing upon land at the time of the sale thereof upon execution are cut and removed from the same before the expiration of the period of redemption, the purchaser at the execution sale, after his title becomes absolute by the expiration of the period of redemption, without redemption, may maintain an action for the conversion of the logs into which such trees have been cut, against a person in possession of such logs, who refuses to deliver them to him on proper demand. Whitney v. Huntington, 34 Minn. 458, 26 N. W. Rep. 631.

Where, pending an action against the owner of real estate to compel specific performance of a contract to convey it, judgments are rendered against him, execution issued, and the real estate sold, the purchasers at the execution sale are bound by the judgment in the action pending. Steele v. Taylor, 1 Minn. 274, (Gil. 210.) Such purchasers are voluntary purchasers, and, not receiving title by operation of law, they may or may not be brought in as parties at the election of the plaintiff. They cannot become such without his consent. Id.

The docketing of a judgment in favor of Sumner W. Farnham is proved by a transcript of the docket in which the name is given Samuel W. Farnham, the description corresponding in every other respect with the judgment rendered. Thompson v. Bickford, 19 Minn. 17, (Gil. 2.)

Williams v. McGrade, 13 Minn. 46, (Gil. 39, 45.)

*§ 285. Action to vacate judgment for fraud, etc.

This section, authorizing the opening of judgment procured by fraud or perjury at any time within three years after its discovery, is, in so far as it is applicable to a judgment absolute at the time of its passage, unconstitutional and void. Wieland v. Shillock, 24 Minn. 345.

That part of this section anterior to the proviso is constitutional as respects judgments recovered after its passage. It does not impair vested rights, nor does it deprive a party of the certain remedy in the law guarantied by § 8, art. 1, of the constitution of this state. It affords a remedy in all cases where, after its passage, judgment has been obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the party recovering the judgment, by an action to be brought as provided. The provision that the court in which the action is brought shall "possess the same powers heretofore exercised by courts of equity in like proceedings," is not a limitation or qualification of the right of the party aggrieved to bring and maintain an action to set aside the judgment, and for other relief, upon the grounds expressly mentioned in the act. This provision gives to the court in which the action is brought, the same powers, in order to make such action effectual for the purposes contemplated by the statute, which a court of equity possessed in similar proceedings. Spooner v. Spooner, 26 Minn. 138, 1 N. W. Rep. 838.

Notwithstanding the plaintiff in a divorce proceeding has again married, an aggrieved party may, under § 285, c. 66, Gen. St. 1878, maintain an action to set aside and annul a decree *a vinculo* procured by fraudulent acts or practices. Said action may also be commenced and prosecuted after the death of the party obtaining such fraudulent decree. Bomsta v. Johnson, 36 N. W. Rep. 341.

It is the duty of a sheriff, to whom an execution fair upon its face is delivered, to levy it. The fact that the judgment upon which it is issued was fraudulently obtained is no concern of his, so long as it is not reversed, stayed, or enjoined. Baker v. Sheehan, 29 Minn. 235, 12 N. W. Rep. 704.

§ 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 acknowl-

edgment 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. Unless such revocation of authority has been so previously entered upon the register, the attorney of record may, at any time within two years after the judgment, satisfy and discharge the same and the lien thereof, by a brief entry to that effect made on the register, subscribed by such attorney, and witnessed and dated by the clerk of the court or his deputy. (*As amended* 1881, *Ex. Sess. c.* 33, § 1.)

An order dismissing a motion made under this section to compel entry of satisfaction of a judgment, satisfied in fact otherwise than on execution, is an order of court, and appealable under subdivision 6, *c.* 86, § 8. Ives v. Phelps, 16 Minn. 451, (Gil. 407.)

To enable a judgment debtor to move to compel the satisfaction of a judgment satisfied in fact, it is not necessary that the consideration for the agreement constituting such satisfaction should move from him. If satisfied in fact, no matter by whom, he is entitled to have the same appear of record. Id.

See Woodford v. Reynolds, 36 Minn. 155, 30 N. W. Rep. 757.

TITLE 22.

PROCEEDINGS SUPPLEMENTARY TO THE JUDGMENT.

§ 287. (Sec. 256.) Summoning parties after judgment.

See Johnson v. Lough, cited in note to § 67, subd. 1, *supra*.

TITLE 23.

THE EXECUTION.*

See Thompson v. First Div. St. P. & P. R. Co., 26 Minn. 353, 356, 4 N. W. Rep. 603.

§ 293. (Sec. 262.) Judgment enforceable within ten years.

This section requires only that execution upon a judgment should be issued within ten years. Davidson v. Gaston, 16 Minn. 230, (Gil. 202;) Lamprey v. Davidson, 16 Minn. 480, (Gil. 435;) Davidson v. Barnes, 17 Minn. 69, (Gil. 47.) Followed, Erickson v. Johnson, 22 Minn. 380.

An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired. Ashton v. Slater, 19 Minn. 347, (Gil. 300.)

§ 295. (Sec. 264.) Execution—Form and contents.

An execution should be dated as of the day when it issued from the clerk's office, and not as of the day of its delivery to the sheriff. Mollison v. Eaton, 16 Minn. 426, (Gil. 383.)

See Butler v. White, 25 Minn. 432, 441.

§ 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; (but the judg-

*As to enforcement of judgments against municipal corporations, see *ante*, *c.* 10, *§§ 314–319.

ment creditor or his attorney may, at any time within said sixty days, demand the money received and collected by said sheriff upon execution in his hands, and the sheriff shall immediately pay the same over to said judgment creditor, or his said attorney, after deducting his proper fees thereon.) On the return of an execution unsatisfied in whole or in part, or just before the expiration of the period of sixty days, the clerk may renew the same for a further period of sixty days, on the oral or written request of the judgment creditor, or his attorney, by indorsing on said execution the words following: "Renewed sixty days from the date hereof, at the request of the judgment creditor;" to which indorsement he shall add the true date of making the same, and attest the same by his signature and the seal of the court, and shall thereupon redeliver the same, so indorsed, to the officer returning the same; and such renewal shall have the effect of extending the life of the execution for an additional period of sixty days, fully preserving all levies made and rights acquired under the execution before such renewal; and such execution may be again so renewed, from time to time, by indorsement by the clerk, as aforesaid, with the same effect as such first renewal. (*As amended* 1871, *c.* 61, § 1, *and* 1881, *Ex. Sess. c.* 4, § 1.)

Where a levy has been made before the return-day of the execution, it may be completed by a sale after such day. This section does not change the rule. Barrett v. McKenzie, 24 Minn. 20; Knox v. Randall, 24 Minn. 479.

An *alias* execution may properly be issued notwithstanding this provision. Walter v. Greenwood, 29 Minn. 87, 12 N. W. Rep. 145.

§ 299. (Sec. 268.) To what county issued.

Where the county in which a judgment debtor resides is attached to another for judicial purposes, under section 33, *c.* 64, Gen. St., the execution may, for the purpose of supplementary proceedings, be issued to the latter county. Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)

§ 300. (Sec. 269.) Property subject to levy.

It is the duty of the sheriff to execute writs of execution against the same debtor, in the order in which they come into his hands. But the liens of the respective creditors upon property not subject to the lien of the judgments take precedence according to the order in which the executions are actually levied upon it, and not in the order in which they are delivered to the sheriff. Albrecht v. Long, 25 Minn. 163.

If, under this section, a judgment can be levied upon and sold, upon execution, the sale can only be made "if the court so order," as provided in section 284. Thompson v. Sutten, 23 Minn. 50.

A mortgage, never recorded, and not accompanied by any evidence of personal liability, and which has been lost, cannot be levied upon. Gale v. Battin, 16 Minn. 148, (Gil. 133.) Nor can such a mortgage be enforced by an action in the nature of a creditors' bill. Id.

Where the purchaser of personal property gave to the seller his note for the price, the seller indorsed it to another, and he recovered judgment upon it against the maker and indorser, (the purchaser and seller,) the debt for the purchase money is merged in the judgment; and, the seller having paid the judgment, an action by him against the purchaser to recover the money so paid is not an action for the purchase money of the property within the meaning of the exemption laws. Harley v. Davis, 16 Minn. 487, (Gil. 441.)

See Hutchins v. Carver County, 16 Minn. 13, (Gil. 1, 6.)

§ 301. (Sec. 270.) Levy on property—Lien of judgment.

A formal levy on real estate is not essential to its valid sale on execution. The statute gives the minuting by an officer, upon the execution, of the time when delivered to him, and that he then levied upon the real estate subject to the lien of the judgment, the effect of a formal levy, but does not make such minuting essential to the validity of an execution sale of such property. Hutchins v. Commissioners Carver County, 16 Minn. 13, (Gil. 1.)

See State v. Penner, 27 Minn. 269, 276, 6 N. W. Rep. 790.

§ 302. (Sec. 271.) Levy on personalty.

The interest of a pledgeor of a promissory note, in the note, is subject to levy and sale under execution, if the pledgee consent to surrender possession to the sheriff. The

maker cannot object that the pledgee need not have parted with the note. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

It is not enough to take merely. He must take into his custody,—that is to say, into his keeping; or, in other words, he must keep as well as take. This requires at least such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn or taken by another without his knowing it. Wilson v. Powers, 21 Minn. 193.

Book-accounts cannot be levied upon by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence, and must be levied on in the same way. Swart v. Thomas, 26 Minn. 141, 1 N. W. Rep. 830.

§ 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 or recorder of the city, village, or town in which said articles are; and such levy shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer. (*As amended* 1881, *c.* 63, § 2.)

Where property of a bulky character, incapable of immediate manual delivery, is assumed to be sold by an officer, pursuant to levy thereon under legal process, against the protest of the owner, as the property of another, to a purchaser who is left to take possession for himself, the owner is not remitted to contest the title with the purchaser, but may acquiesce in the sale for the sake of the remedy against the officer, and hold him for a conversion. Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. Rep. 781.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

§ 305. (Sec. 274.) Levy on other property.

If the maker of a pledged note pay it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged. Mower v. Stickney, 5 Minn. 397, (Gil. 321.)

See Ide v. Harwood, 30 Minn. 191, 14 N. W. Rep. 884.

§ 306. (Sec. 275.) Service on judgment debtor.

The officer shall, at or before the time of posting of notices of sale, serve a copy of the execution and inventory, certified by him, upon the judgment debtor, if he can be found within the county. If he is a resident thereof, but cannot be found therein, the said officer shall leave such copy at the usual place of abode of the said judgment debtor, with some person of suitable age and discretion then resident therein. (*As amended* 1875, *c.* 63, § 1, *and* 1879, *c.* 22, § 1.)

§ 307. (Sec. 276.) Inventory and return.

A return of the sheriff upon an execution, that he "levied upon" property, without stating the particular facts constituting a levy, is sufficient. Folsom v. Carli, 5 Minn. 333, (Gil. 264.)

§ 309. (Sec. 278.) Levy on pledged or mortgaged chattels.

When goods or chattels are pledged or mortgaged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge or mortgage may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant or judgment debtor, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge or mortgage. (*As amended* 1883, *c.* 60, § 1.)

§ 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.

First. The family Bible.

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

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

Fourth. A lot in any burial ground.

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

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

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

Eighth. The tools and instruments of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade, including articles or goods manufactured in whole or in part by him, not exceeding four hundred dollars in value; the library and implements of any professional man; all of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be. In addition to the articles enumerated in this section, all the presses, stones, type, cases, and other tools and implements used by any copartnership, or by any printer, publisher, or editor of any newspaper, and in the printing or publication of the same, whether used personally by said copartnership, or by any such printer, publisher, or editor, or by any persons hired by him to use them, not to exceed in value the sum of two thousand dollars, together with stock in trade not exceeding four hundred dollars in value, shall be exempt from attachment or sale on any final process, issued from any court in this state. (*As amended* 1876, *c.* 43, § 1; 1881, *c.* 25, § 1.)

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

Tenth. Necessary seed grain for the actual personal use of the debtor, for one season, to be selected by him; not, however, in any case to exceed the following kinds and amounts respectively, viz., fifty bushels of wheat, fifty bushels of oats, fifteen bushels of potatoes, three bushels of corn, and thirty bushels of barley, and binding material sufficient for use in harvesting the crop raised from the seed grain above specified. (1871, *c.* 65, § 1, *as amended* 1885, *c.* 34.)

Eleventh. The wages of any laboring man or woman, or of his or her minor children, in any sum not exceeding twenty dollars, due for services rendered by him or them for any person for and during ninety days preceding the issue of process of attachment, garnishment, or execution in any action against such laborer. (*As amended* 1879, *c.* 5, § 1.)

Provided, however, that the exemptions provided for and embraced in 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; 1875, *c.* 64, § 1, *and supra.*)

[See, as to exemptions from garnishment, *ante*, *§§ 170*a*, 170*b*; exemption of ladders and fire buckets, *ante*, *c*. 10, *§ 224, subd. 10.]

An absconding debtor who has departed the state without any intention of returning, and becomes a resident of another jurisdiction, cannot avail himself of the benefits of our exemption laws in respect to personal property left behind him, and subsequently seized and sold upon execution. Orr v. Box, 22 Minn. 485.

As to a married woman's right of exemption, see Curtis v. McHugh, (Mich.) 12 N. W. Rep. 163.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63; Lynd v. Picket, 7 Minn. 184, (Gil. 128, 132.)

SUBD. 5. A silver watch and chain, though worn by a debtor, are not exempt from execution under this section, as an article of wearing apparel, nor "as household furniture," though he may have no other time-piece, and such watch is used to keep the time at his house. Rothschild v. Boelter, 18 Minn. 361, (Gil. 331.) Defendant, a cigar-maker, used a watch worn by him to keep the time of his workmen employed in the business. Held, that it was not exempt as an instrument used and kept for the purpose of carrying on his trade. Id.

A judgment recovered for the value of personal property, exempt from execution, converted by the judgment debtor, by a levy upon and sale of it, is not itself exempt, and may be set off against a judgment held by the judgment debtor against the judgment creditor in it. Temple v. Scott, 3 Minn. 419, (Gil. 306.)

A chattel mortgage upon exempt personal property, executed by a married man, a housekeeper, to secure the purchase money, given pursuant to the agreement upon which the property was purchased, is valid without the wife's signature. Barker v. Kelderhouse, 8 Minn. 207, (Gil. 178.)

SUBD. 6. A pair of two-year-old steers, "fit to be used for light work," held exempt as "a yoke of oxen," although not yet broken. Berg v. Baldwin, 31 Minn. 541, 18 N. W. Rep. 821.

A "buggy" being "a single-seated, one-horse, covered vehicle or pleasure carriage, designed and adapted for carrying persons only," and as such used by the owner, is not exempt from execution as a "wagon." Dingman v. Raymond, 27 Minn. 507, 8 N. W. Rep. 597.

SUBD. 8. This provision was intended to include only persons, to the exercise of whose trade or business tools or implements are necessary. The stock in trade of a merchant is not exempt under the second clause. Grimes v. Bryne, 2 Minn. 89, (Gil. 72.)

There is no exemption as to partnership goods. Prosser v. Hartley, 35 Minn. 340, 29 N. W. Rep. 156. Tools, to be exempt, must be held for the purpose of carrying on trade. Id. And the owner of a "stock in trade," in order that it may be exempt, must be engaged or about to engage in business in which such stock is or is to be used. Id.

Unfinished burial cases and caskets, upon which additional labor, expense, and material must be put before they can be deemed finished, or fit for sale and use, when owned and held by a manufacturer for the purpose of being so finished and made fit for use by him, constitute, in part, his "stock in trade," within the meaning of this subdivision, and they are exempt from sale on execution within the limits prescribed as to value. McAbe v. Thompson, 27 Minn. 134, 6 N. W. Rep. 479.

§ 311. (Sec. 280.) Same—Exception in action for purchase money.

This section is constitutional. Rogers v. Brackett, 34 Minn. 279, 25 N. W. Rep. 601.

An action by the vendor of personal property upon the vendee's note, received in full payment and satisfaction of the price of the property, is an action for the "purchase money" of the property, within the meaning of this section. Rogers v. Brackett, 34 Minn. 279, 25 N. W. Rep. 601.

The fact that the action is for purchase money is enough to make this section applicable, without any statement thereof in the complaint, judgment, or execution. Id.

This section is not unconstitutional as class legislation, or as discriminating between different kinds of liabilities as respects the exemption of property from legal process. Id.

D. sold H. a cook-stove and fixtures, taking H.'s note therefor, which he sold to F., who recovered judgment against the maker and indorser. D., having paid the judgment, brought suit against H. for the amount, attaching the property originally sold, which was the only cook-stove and fixtures H. had. *Held*, that H.'s original indebtedness for purchase money, as well as his contract as maker of the note given therefor, was merged in F.'s judgment, and the action brought by D. against H. could not be regarded as for purchase money, so as to render the stove and fixtures liable to attachment under this section. Harley v. Davis, 16 Minn. 487, (Gil. 441.)

Any property authorized to be acquired and held as a homestead, under Gen. St. *c*. 68, § 1, and held and occupied as such, is protected against any mortgage, except for the purchase money, given by the owner, if a married man, without the signature of his wife. Smith v. Lackor, 23 Minn. 454. A debt incurred for lumber to build a dwelling-house on a lot held under a contract of purchase, and claimed and occupied as a home-

stead, represents no part of the purchase money of such homestead. Id. One who furnishes materials for erecting or repairing a house on homestead property is not entitled to a lien. Cogel v. Mickow, 11 Minn. 475, (Gil. 354.) Followed, Coleman v. Ballandi, 22 Minn. 144.

A judgment recovered for the value of exempt property wrongfully taken and sold on execution is not itself exempt, and may be set off against a judgment held by the judgment debtor therein against the judgment creditor. Temple v. Scott, 3 Minn. 419, (Gil. 306.)

§ 314. (Sec. 282.) Levy on property in excess of exemption.

This section has no application where all the property of the debtor of a kind which is exempted, with a limit as to quantity, but without a limit as to value, does not exceed the quantity which the statute exempts. Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

§ 315. (Sec. 283.) Levy on growing crops.

Growing grain may be levied on at any period of its growth, whether the growth is going on below or above the surface of the soil. Gillitt v. Truax, 27 Minn. 528, 8 N. W. Rep. 767.

See Howard v. Rugland, 35 Minn. 388, 29 N. W. Rep. 63.

§ 316. (Sec. 284.) Sale, etc., of property levied on.

A judgment is a thing in action, and, if it can be levied upon at all, can, under this section, be sold only when the court so orders. Thompson v. Sutton, 23 Minn. 50.

As to the rights of a sheriff levying on the unpaid subscriptions of a stockholder in a corporation, see Robertson v. Sibley, 10 Minn. 323, (Gil. 253.)

§ 317. (Sec. 285.) Notice of execution sale.

Upon a sale of real estate upon execution the description of the premises contained in the notice of sale and certificate of sale was "lot 5, block 39," without stating in what village or city. Held, that it was too imperfect and incomplete to identify the property which was the subject of the sale. Herrick v. Ammerman, 32 Minn. 545, 21 N. W. Rep. 836.

See Dartnell v. Davidson, 16 Minn. 530, (Gil. 477, 480.)

§ 318. (Sec. 286.) Sale without notice.

The provision that certain irregularities of the officer shall not affect the validity of an execution sale do not extend to judgment creditors who purchase under their own judgments. Pettingill v. Moss, 3 Minn. 222, (Gil. 151.)

Under this section, failure to post notices of sale on execution will not affect the validity of the sale. McNair v. Toler, 21 Minn. 175.

§ 319. (Sec. 287.) Manner of making sale.

A sale on execution, in gross, as one parcel, of several distinct, separate, known tracts or parcels of land, not lying in one body, is not void, but it may be vacated for cause shown, as that it was the result of actual fraud, or if the owner or party interested in the land has been prejudiced by it, and there is no just ground for making the sale in that way. Lamberton v. Merchants' Nat. Bank Winona, 24 Minn. 281.

§ 321. (Sec. 289.) Sale of realty—Certificate.

When a sale on execution is regularly made, its validity is not affected by the omission of the sheriff to make or file a certificate of sale. Barnes v. Kerlinger, 7 Minn. 82, (Gil. 55.)

A description in a certificate of sale of the execution upon which the sale is made, which fairly identifies the execution, is sufficient. A false particular in such description may be disregarded, as in case of deeds and other instruments. Bartleson v. Thompson, 30 Minn. 161, 14 N. W. Rep. 795.

See Whitney v. Huntington, 34 Minn. 458, 460, 26 N. W. Rep. 631.

§ 322. (Sec. 290.) Effect of certificate.

A sale of real estate on execution passes at once to the purchaser all the title of the execution debtor, subject to be defeated by redemption. The title so acquired will pass by quitclaim deed of the purchaser. Dickinson v. Kinney, 5 Minn. 409, (Gil. 332.)

The right, during the time for redemption, acquired by the purchaser at an execution

sale, will pass by his deed whereby he "grants, bargains, sells, releases, and quitclaims all right, title, interest, claim, or demand" in or to the land; and when the time to redeem expires without redemption, the title under the execution sale will vest in the grantee in the deed. Lindley v. Crombie, 31 Minn. 232, 17 N. W. Rep. 372.
See Whitney v. Huntington, 34 Minn. 458, 460, 26 N. W. Rep. 636.

§ 323. (Sec. 291.) Redemption—By whom.

SUBD. 1. The owner of real estate sold on execution may redeem, without paying other liens that may be held by the purchaser. Warren v. Fish, 7 Minn. 432, (Gil. 347.)
A redemption by the owner terminates the sale, and restores the estate to its condition before the sale, except as to the judgment under which the sale was made. Id.
SUBD. 2. A creditor of an estate gets no lien upon the real estate of the deceased, so as to be entitled to redeem from foreclosure of a mortgage executed by him in his life-time, merely by the allowance of such creditor's claim against the estate. Whitney v. Burd, 29 Minn. 203, 12 N. W. Rep. 530.
When, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. Tinkcom v. Lewis, 21 Minn. 132. The rule is the same when such junior mortgagee has foreclosed his mortgage by advertisement, and has purchased, at the foreclosure sale, the parcel embraced in his mortgage. Id.
Rule in Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. Rep. 868, that a creditor redeeming need not pay liens held by the purchaser at an execution or mortgage sale subsequent to that on which the sale was had, and prior to that under which he redeems, if such purchaser has not, with respect to such subsequent liens, placed himself in the line of redemption by complying with the statute, followed and applied. Parke v. Hush, 29 Minn. 434, 13 N. W. Rep. 668.

§ 324. (Sec. 292.) Same—Order.

See Parke v. Hush, 29 Minn. 434, 436, 13 N. W. Rep. 668.

§ 325. (Sec. 293.) Manner of redeeming.

When a lien-holding creditor seeking to redeem from a foreclosure sale produces to the sheriff the original instrument evidencing his lien, with the certificate of record indorsed thereon, this is a sufficient compliance with the statute which requires the production of a certified copy of such instrument. Tinkcom v. Lewis, 21 Minn. 132.
A party who redeems and files with the sheriff the papers required by the statute need not give any other notice of his redemption. Warren v. Fish, 7 Minn. 432, (Gil. 347.)
See Whitney v. Burd, 29 Minn. 203, 204, 12 N. W. Rep. 530.

§ 328. (Sec. 296.) Restraining waste.

See Whitney v. Huntington, cited in note to § 277, *supra*.

§ 330. (Sec. 298.) Joint debtors and sureties—Subrogation, etc.

Subrogation of joint debtor, see Ankeny v. Moffett, 33 N. W. Rep. 320.

TITLE 24.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 337. (Sec. 299.) Order for examination of judgment debtor.

A judgment creditor, upon the return unsatisfied in whole or in part of an execution issued to the proper county, is, without any other fact, entitled to an order requiring the debtor to appear and answer concerning his property. Kay v. Vischers, 9 Minn. 270, (Gil. 254.)
Where the county in which a judgment debtor resides is attached to another for judicial purposes, under § 33, c. 64, Gen. St., the execution may, for the purpose of supplementary proceedings, be issued to the latter company. Beebe v. Fridley, 16 Minn. 518, (Gil. 467.)
See Knight v. Nash, 22 Minn. 452, 453.

§ 342. (Sec. 304.) Order for application of property upon judgment.

The scope and purpose of the proceedings is the discovery of the debtor's property, both that which is liable to execution, and equitable interests belonging to him not so liable; and to compel the application of both, if not exempt, to the satisfaction of the judgment. Flint v. Webb, 25 Minn. 263.

See Towne v. Campbell, 35 Minn. 231, 28 N. W. Rep. 254; Knight v. Nash, 22 Minn. 452, 455.

§ 343. (Sec. 305.) Appointment of receiver.

The appointment of a receiver in such proceedings is a matter resting in the sound discretion of the court before whom they are instituted. Flint v. Webb, 25 Minn. 263.

A receiver may be appointed though the only property disclosed is an interest in real estate situate in another state, and the debtor may be required to convey such interest to the receiver. Towne v. Campbell, 35 Minn. 231, 28 N. W. Rep. 254.

An order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor, and appointing a receiver to collect the same, is an appealable order under Gen. St. c. 86, § 8. Knight v. Nash, 22 Minn. 453.

The receiver may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor, although there has been no transfer of the property in question to the receiver. Dunham v. Byrnes, 36 Minn. 106, 30 N. W. Rep. 402.

§ 344. (Sec. 306.) Adverse claims—Proceedings.

A debt due from a municipal corporation to a judgment debtor, even though denied by the corporation, may be reached by a final order upon disclosure, directing the transfer of the claim, and appointing a receiver to collect it for the benefit of the creditor. The rule that a debt due from a municipal corporation cannot be reached by process of garnishment has no application to an order of this character. Knight v. Nash, 22 Minn. 453.

§ 345. (Sec. 307.) Contempt.

See State v. Becht, 23 Minn. 411; Towne v. Campbell, 35 Minn. 231, 232, 28 N. W. Rep. 254.

*§ 347. Examination of third party.

See Menage v. Lustfield, 30 Minn. 487, 16 N. W. Rep. 398.

CHAPTER 67.

COSTS.

§ 1. Compensation of attorneys—"Costs" defined.

In looking through the statutes, where the term "costs" is used, in most instances, except in c. 67, it evidently includes disbursements. Woolsey v. O'Brien, 23 Minn. 71, 72.

An attorney has no lien except such as the statute gives. He can have a lien upon a judgment only for services in the action in which it is rendered. This lien cannot affect any one but his client, unless he give notice of the lien, specifying the amount. Forbush v. Leonard, 8 Minn. 303, (Gil. 267.) An attorney has no lien on a judgment unless there is a special agreement for his compensation. Id.

By contract between a plaintiff in an action and his attorney therein, the former agreed to pay the latter for his services a certain sum if he won the cause, and nothing if he failed to do so. The contract contained this further stipulation respecting the agreed compensation: "I hereby agree that he (the attorney) shall receive said money from the Minneapolis & St. Louis Railroad out of the amount due me from said railroad company for running through my land, to be paid when said suit is settled." Held,