SECT. 18. No continuance under this act shall be granted to the plaintiff. No continuance to plaintiff.

SECT. 19. Sheriffs, constables, and other officers shall receive the same compensation for their services under this act, as are allowed them in cases of suits of attachment. Compensation of officers.

SECT. 20. In all cases arising under this act, if judgment shall have been rendered in favor of the plaintiff, the master, owner, or consignee of the boat or vessel, or other person interested, may appeal from the judgment, as if they or either of them had been sued. Appeals may be taken.

SECT. 21. All actions against a boat or vessel, under the provisions of this act, shall be commenced and sued within one year after the cause of such action shall have accrued. Actions commenced within one year.

SECT. 22. This act shall take effect from and after its passage and approval by the governor. Take effect, when.

Approved May 2, 1862.

W. JAYNE, *Governor.*

CIVIL PROCEDURE.

CHAPTER 8.

AN ACT TO ESTABLISH A CODE OF CIVIL PROCEDURE.

Be it enacted by the Legislative Assembly of the Territory of Dakota:

PRELIMINARY PROVISIONS.

SECTION 1. This act shall be known as the code of civil procedure of the Territory of Dakota. Style of act.

SECT. 2. The rule of the common law, that statutes in derogation thereof, are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object, and assist the parties in obtaining justice. Rule of construction.

TITLE I.

FORM OF CIVIL ACTIONS.

Form of action.

SECT. 3. There shall be but one form of action, which shall be called a civil action.

Parties, how known.

SECT. 4. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

No feigned issues. Question of fact, how tried.

SECT. 5. There can be no feigned issues; but a question of fact, not put in issue by the pleadings, may be tried by a jury, upon an order for the trial, stating, distinctly and plainly, the question of fact to be tried, and such order is the only authority necessary for a trial.

TITLE II.

TIME OF COMMENCING CIVIL ACTIONS.

CHAPTER I. *Actions for the Recovery of Real Property.* — II. *Actions other than for the Recovery of Real Property.* — III. *General Provisions.*

CHAPTER I. — ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

Actions for recovery of title brought within 21 years.

SECT. 6. An action for the recovery of the title, or the possession of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued.

If person is under age, married woman, insane, &c., when action to be brought.

SECT. 7. If a person, entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, be, at the time his right or title shall first descend, or accrue, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person may, after the expiration of twenty-one years from the time his right or title first descended, or accrued, bring such action within ten years after such disability is removed, and at no time thereafter.

Action for forcible entry and detention, when brought.

SECT. 8. An action for the forcible entry and detention, or forcible detention only, of real property, can only be brought within two years after the cause of such action shall have accrued.

CHAPTER II.—Actions other than for the Recovery of Real Property.

Civil actions for other than real property brought, when.

SECT. 9. Civil actions, rather than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued.

Same.

SECT. 10. Within fifteen years: An action upon a specialty, or any agreement, contract, or promise in writing.

Same.

SECT. 11. Within six years: An action upon a contract not in writing, express or implied. An action upon a liability created by statute, other than a forfeiture or penalty.

Same.

SECT. 12. Within four years: An action for trespass upon real property. An action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property. An action for an injury to the rights of the plaintiff not arising on contract, and not hereinafter enumerated. An action for relief on the ground of fraud; the cause of action in such case shall be deemed to have accrued, until the discovery of the fraud.

Same.

SECT. 13. Within one year: An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment. An action upon a statute for the penalty or forfeiture; but where the statute, giving such action, prescribes a different limitation, the action may be brought within the period so limited.

Same.

SECT. 14. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer; or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by statute, can only be brought within ten years after the cause of action shall have accrued; but this section shall be subject to the qualification in section six.

Same.

SECT. 15. An action for relief not hereinbefore provided for, can only be brought within ten years after the cause of action shall have accrued.

If under age, married woman, &c.

SECT. 16. If a person, entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the

respective times limited by this chapter, after such disability shall be removed.

CHAPTER III. — General Provisions.

Actions, when commenced.

SECT. 17. An action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons, which is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made. An attempt to commence an action, shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by service within sixty days.

If defendant absconds or conceals himself, time not to be computed.

SECT. 18. If when a cause of action accrues against a person, he be out of the territory, or have absconded, or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the territory, or while he is so absconded or concealed; and if after the cause of action accrues, he depart from the territory, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

Where cause of action has arisen in another state.

SECT. 19. Where the cause of action has arisen in another state or country between non-residents of this territory and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this territory.

If plaintiff fails other than upon merits, may renew action within one year.

SECT. 20. If an action be commenced within due time, and a judgment therein for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives may commence a new action within one year after such reversal or failure.

Cases founded on contract, partly acknowledged.

SECT. 21. In any case, founded on contract, when any part of the principal or interest shall have been paid, or an ac-

knowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment, or promise.

TITLE III.

PARTIES TO CIVIL ACTIONS.

Actions in name of real party.

SECT. 22. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section twenty-five.

In case of assignment of thing in action.

SECT. 23. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration, before due.

Exceptions to sect. 22.

SECT. 24. An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way.

Where a married woman is a party.

SECT. 25. Where a married woman is a party, her husband must be joined with her; except when the action concerns her separate property, she may sue without her husband, by her next friend. When the action is between herself and her husband, she may sue or be sued alone; but in every such action, other than for a divorce or alimony, she shall prosecute and defend by her next friend.

If a husband and wife together.

SECT. 26. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

If an infant.

SECT. 27. The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant; or, to substitute the guardian of the infant, or any person as the next friend.

Guardian or friend liable for costs.

SECT. 28. The guardian or the next friend is liable for the costs of the action brought by him, and, when he is insolvent, the court may require security for costs. Either may be a witness in an action brought by him.

The defence of an infant.

SECT. 29. The defence of an infant must be by a guardian for the suit, who may be appointed by the court, in which the action is prosecuted, or by a judge thereof, or by a probate or county judge. The appointment cannot be made until after service of the summons in the action, as directed by this code.

Guardian for suit, how appointed.

SECT. 30. The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen, or neglect to so apply, the appointment may be made upon the application of any friend of the infant, or on that of the plaintiff in the action.

All persons interested may join in suit as plaintiffs.

SECT. 31. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

Any person interested may be made defendant.

SECT. 32. Any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

Parties united in interest must be joined.

SECT. 33. Of the parties to the action, those who are united in interest must be joined, as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition.

When parties are numerous, one may sue or defend for all.

SECT. 34. When the question is one of a common or general interest of many persons; or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Persons severally liable included in same action.

SECT. 35. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.

Action does not abate by death, marriage, &c.

SECT. 36. An action does not abate by the death, marriage, or other disability of the party, or by the transfer of any interest therein, during its pendency, if the cause of action sur-

vive or continue. In the case of the marriage of female party, the fact being suggested on the record, the husband may be made a party with his wife; and in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action.

Court may determine, when.

SECT. 37. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

When persons interested made parties.

SECT. 38. When, in an action for the recovery of real or personal property, any person having an interest in the property, applies to be made a party, the court may order it to be done.

When court may make order for delivery, &c., of subject of action, upon claim of third person.

SECT. 39. Upon the affidavit of a defendant before answer in an action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such person as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order, by the sheriff or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, be shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of court for the payment, deposit, or delivery thereof.

Provisions of last section otherwise applicable.

SECT. 40. The provisions of the last section shall be applicable to an action brought against a sheriff, or other officer,

for the recovery of personal property taken by him under execution, or for the proceeds of such property so taken and sold by him; and the defendant in such action shall be entitled to the benefit of those provisions against the party, in whose favor execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action is brought, was taken under such process.

Change in parties, how made.

SECT. 41. In an action against a sheriff, or other officer, for the recovery of property taken under an execution, and replevied by the plaintiff in such action, the court may, upon application of the defendant and the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the costs being given.

TITLE IV.

THE COUNTY IN WHICH ACTIONS ARE TO BE BROUGHT.

Actions brought, in what county.

SECT. 42. Actions for the following causes, must be brought in the county in which the subject of the action is situated, except as provided in section forty-four: 1. For the recovery of real property, or of an estate or interest therein. 2. For the partition of real property. 3. For the sale of real property under a mortgage, lien, or other incumbrance or charge.

Same.

SECT. 43. If the real property, the subject of the action, be an entire tract and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract, or part thereof, is situated, unless it be an action to recover the possession thereof. And if the property be an entire tract, situated in two or more counties, an action, to recover the possession thereof, may be brought in either of such counties; but if it consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions brought in the counties where they are situated. An action to compel the specific performance of a contract of sale of real estate, may be brought in the county where the defendants, or any of them, reside.

Same.

SECT. 44. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute; except that, when it is imposed for an offence committed on a river, or other stream of water, or road, which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offence was committed. 2. An action against a public officer, for an act done by him in virtue, or under color of, his office, or for a neglect of official duty. 3. An act on the official bond or undertaking of a public officer.

SECT. 45. An action other than one of those mentioned in the first three sections of this chapter, against a corporation created by the laws of this territory, may be brought in the county in which it is situated, or has its principal office or place of business; but if such corporation be an insurance company, the action may be brought in the county where the cause of action, or some part thereof, arose. Same.

SECT. 46. An action against a railroad company, or an owner of a line of mail stages, or other coaches, for an injury to person or property upon the road or line, or upon a liability as a carrier, may be brought in any county, through or into which the road or line passes. Same.

SECT. 47. An action other than one of those mentioned in the first three sections of this chapter, against a turnpike-road company, may be brought in any county in which any part of the road lies. Same.

SECT. 48. The provisions of this chapter shall not apply in the case of any corporation created by a law of this territory, whose charter prescribes a place, where alone suit against such corporation may be brought. Same.

SECT. 49. An action other than one of those mentioned in the first three sections of this chapter, against a non-resident of this territory or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose. Same.

SECT. 50. Every other action must be brought in the county in which the defendant or some one of the defendants resides, or may be summoned. Same.

When and how case may be removed to another county.

SECT. 51. In all cases in which it shall be made to appear by affidavit to the satisfaction of the court, that a fair and impartial trial cannot be had in the county where the suit is pending, the court may change the place of trial to some adjoining county, wherein such impartial trial can be had; but if the objection shall be against all the counties of the district, then to the nearest county in the adjoining district.

TITLE V.

COMMENCEMENT OF A CIVIL ACTION.

CHAPTER I. *Manner of commencing Civil Actions.* — II. *Services of Summons.*

CHAPTER I. — MANNER OF COMMENCING CIVIL ACTIONS.

How commenced.

SECT. 52. A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.

Plaintiff file a precipe.

SECT. 53. The plaintiff shall also file, with the clerk of the court, a precipe, stating the names of the parties to the action, and demanding that a summons issue thereon.

The summons.

SECT. 54. The summons shall be issued by the clerk, shall be under the seal of the court from which the same shall issue, and shall be signed by the clerk. Its style shall be, "The Territory of Dakota, —— county," and it shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants named therein, that he or they have been sued and must answer the petition filed by the plaintiff, giving his name, at the time stated therein, or the petition will be taken as true, and judgment rendered accordingly. And where the action is for the recovery of money only, there shall be indorsed on the writ the amount to be furnished in the precipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

Summons to anyother county, when.

SECT. 55. Where the action is rightly brought in any county, according to the provisions of title four, a summons

shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request.

Summons, when returnable.

SECT. 56. Where the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the first day of the next term after the day of its date. It shall state the day of the month on which it is returnable.

When returned "not summoned."

SECT. 57. When a writ is returned "not summoned," other writs may be issued until the defendant or defendants shall be summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time.

CHAPTER II. — SERVICE OF SUMMONS. — ACTUAL SERVICE.

Summons, how served.

SECT. 58. The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ. When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of this territory, the return shall be verified by oath or affirmation.

Same.

SECT. 59. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day.

Return state what.

SECT. 60. In all cases the return must state the time and manner of service.

Returned at the time stated.

SECT. 61. The officer to whom the summons is directed must return the same at the time therein stated.

Acknowledgment or appearance equivalent to service.

SECT. 62. An acknowledgment on the back of the summons, or the voluntary appearance of a defendant, is equivalent to a service.

Summons against corporation, how served.

SECT. 63. A summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation.

Against an agency.

SECT. 64. Where the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency.

Against agent of foreign corporation.

SECT. 65. Where the defendant is a foreign corporation, having a managing agent in this territory, the service may be upon such agent.

Against a minor.

SECT. 66. When the defendant is a minor under the age of fourteen years, the service must be upon him, and upon his guardian or father; or, if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone shall be sufficient. The manner of service may be the same as in the case of adults.

CONSTRUCTIVE SERVICE.

Service by publication, in what cases.

SECT. 67. Service may be made by publication in either of the following cases: In actions brought under the forty-second and forty-third sections of this code, where any or all of the defendants reside out of the territory. In actions brought to establish or set aside a will, where any or all of the defendants reside out of the territory. In actions brought against a non-resident of this territory, or a foreign corporation, having in this territory property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way. In actions which relate to, or the subject of which is, real or personal property in this territory, where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the territory or a foreign corporation. And in all actions where the defendant, being a resident of the territory, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent.

Affidavit necessary that other service cannot be made.

SECT. 68. Before the service can be made by publication, an affidavit must be filed, that service of a summons cannot be made within this territory, on the defendant or defendants, to be served by publication, and that the case is one of

those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication.

Publication, how made.

SECT. 69. The publication must be made four consecutive weeks, in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be not, in some newspaper printed in this territory of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served, when they are required to answer.

Publication, when complete, and how proved.

SECT. 70. Service by publication shall be deemed complete, when it shall have been made in the manner and for the time prescribed in the preceding section; and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same.

Personal service may be made out of territory.

SECT. 71. In all cases where service may be made by publication, personal service of a copy of the summons and complaint may be made out of the territory.

When and how a case may be opened after judgment, in case of publication only.

SECT. 72. A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intentions to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action, he had no actual notice thereof, in time to appear in court and make his defence; but the title to any property, the subject of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceeding under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits, to show that during the pendency of the action, the applicant had notice thereof, in time to appear in court and make his defence.

In case of unknown heirs or devisees.

SECT. 73. In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff annexed to his petition, that the names of such heirs or devisees, or any of them, and their residence, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees, without naming them, and the court shall make such order respecting service, as may be deemed proper; if service by publication be ordered, the publication shall not be less than four weeks.

In case one only of several defendants is served.

SECT. 74. Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows: 1. If the action be against defendants jointly indebted, upon contract, he may proceed against the defendants served, unless the court otherwise direct. 2. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

Action pending, and third persons excluded, when.

SECT. 75. When the summons has been served or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title.

When part of real property is situated in another county.

SECT. 76. When any part of the real property, the subject-matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the register's office of such other county or counties, before it shall operate therein as a notice, so as to charge third persons as provided in the preceding section. It shall operate as such notice, without record, in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute now in force, which does not require such record.

TITLE VI.

JOINDER IN ACTIONS.

Plaintiff may unite several causes, when.

SECT. 77. The plaintiff may unite several causes of action in the same petition, when they are included in either one of

the following classes: 1. The same transaction or transactions connected with the same subject of action. 2. Contracts, express or implied. 3. Injuries, with or without force, to person and property, or either. 4. Injuries to character. 5. Claims to recover the possession of personal property, with or without damages for the withholding thereof. 6. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same. 7. Claims against a trustee, by virtue of a contract, or by operation of law.

Affect all parties, and same place of trial.

SECT. 78. The causes of action so united, must affect all the parties to the action, and not require different places of trial.

TITLE VII.

PLEADINGS IN CIVIL ACTIONS.

CHAPTER I. *Pleadings in General.*—II. *The Petition.*—III. *Demurrer.*—IV. *Answer.*—V. *Reply.*—VI. *General Rules of Pleading.*—VII. *Mistakes in Pleading and Amendments.*

CHAPTER I.—PLEADINGS IN GENERAL.

The pleadings.

SECT. 79. The pleadings are the written statements by the parties of the facts constituting their respective claims and defences.

Forms, as prescribed by this code.

SECT. 80. The forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code.

Only pleadings allowed.

SECT. 81. The only pleadings allowed, are: 1. The petition by the plaintiff. 2. The answer or demurrer by the defendant. 3. The demurrer or reply by the plaintiff.

CHAPTER II.—THE PETITION.

The petition contains what.

SECT. 82. The petition must contain: 1. The name of the court and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word "Petition." 2. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. 3. A demand of the relief to which the

party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated.

When more than one cause of action.

SECT. 83. Where the petition contains more than one cause of action, each shall be separately stated and numbered.

CHAPTER III.—DEMURRER.

Defendant demur, when

SECT. 84. The defendant may demur to the petition only when it appears on its face, either: 1. That the court has no jurisdiction of the person of the defendant, or the subject of the action. 2. That the plaintiff has not legal capacity to sue. 3. That there is another action pending between the same parties for the same cause. 4. That there is a defect of parties, plaintiff or defendant. 5. That several causes of action are improperly joined. 6. That the petition does not state facts sufficient to constitute a cause of action.

Shall specify, what.

SECT. 85. The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only, that the petition does not state facts sufficient to constitute a cause of action.

Objection by answer. If by neither demurrer or answer.

SECT. 86. When any of the defects enumerated in section eighty-four, do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.

When demurrer is sustained on ground of misjoinder.

SECT. 87. When a demurrer is sustained on the ground of misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service.

Defendant may demur to one or more, and answer remainder.

SECT. 88. The defendant may demur to one or more of the several causes of action stated in the petition, and answer as to the residue.

CHAPTER IV. — ANSWER.

Answer contain, what.

SECT. 89. The answer shall contain: 1. A general or specific denial of each material allegation of the petition controverted by the defendant. 2. A statement of any new matter constituting a defence, counter claim, or set-off in ordinary and concise language, and without repetition.

Same.

SECT. 90. The defendant may set forth in his answer, as many grounds of defence, counter claim, and set-off as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer.

Counter claim.

SECT. 91. The counter claim, mentioned in the last section, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

If defendant omits to set up counter claim or set-off.

SECT. 92. If the defendant omit to set up the counter claim or set-off, he cannot recover costs against the plaintiff on any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of, or withdrawn from the answer, as provided in sections ninety-three and one hundred and sixteen.

When new party is necessary to decision of counter claim.

SECT. 93. When it appears that a new party is necessary to a final decision upon the counter claim, the court may either permit the new party to be made by a summons, to reply to the counter claim, or may direct the counter claim to be stricken out of the answer, and made the subject of a separate action.

Set-off.

SECT. 94. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court.

When new party is necessary to decision of set-off.

SECT. 95. When it appears that a new party is necessary to a final decision upon the set-off, the court shall permit the new party to be made, if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off.

SECT. 96. When cross demands have existed between per-

When cross demands have existed.

sons under such circumstances, that if one had brought an action against the other, a counter claim or set-off could have been set up, neither can be deprived of the benefit thereof, by the assignment or death of the other, but the two demands must be deemed compensated, so far as they equal each other.

Guardians or attorneys shall answer.

SECT. 97. The guardian of an infant or person of an unsound mind, or attorney for a person in prison, shall deny in the answer all material allegations of the petition prejudicial to such defendant.

CHAPTER V. — REPLY.

No reply, except when.

SECT. 98. There shall be no reply, except upon the allegation of a counter claim or set-off in the answer.

Reply contain, what.

SECT. 99. When the answer contains new matter, constituting a counter claim or set-off, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language and without repetition, any new matter not inconsistent with the petition, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof; and he may demur to one or more of such defences set up in the answer, and reply to the residue.

CHAPTER VI. — GENERAL RULES OF PLEADING.

Papers filed, when.

SECT. 100. The answer or the demurrer by the defendant, and the reply or demurrer by the plaintiff, shall be filed within such times as may be required by rules to be adopted by the court in which the action is pending.

Time may be extended.

SECT. 101. The court or the judge thereof in vacation, for good cause shown, may extend the time for filing an answer or reply, upon such terms as may be just.

Pleadings must be subscribed.

SECT. 102. Every pleading in a court of record must be subscribed by the party or his attorney.

Pleading of fact must be verified by affidavit.

SECT. 103. Every pleading of fact must be verified by the affidavit of the party, his agent or attorney. A pleading verified as herein required shall not be used against a party in any criminal prosecution or action or proceeding for a penalty

or forfeiture, as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party.

Verification not required, when.

SECT. 104. The verification mentioned in the last section shall not be required to the answer of a guardian defending for an infant or person of unsound mind, or a person imprisoned; nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution.

Affidavit may be made by one of several parties.

SECT. 105. If there be several persons united in interest and pleading together, the affidavit may be made by any one of such parties.

Belief of affiant sufficient.

SECT. 106. The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleading to be true.

Affidavit by non-resident or absentee.

SECT. 107. In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he shall be absent from the county where the pleading is filed, an affidavit made before filing the pleading, stating the substance of the facts afterwards inserted in the pleading, shall be a sufficient verification. Such affidavit shall be filed with the pleading intended to be verified thereby.

Affidavit made before whom.

SECT. 108. The affidavit verifying pleadings may be made before any person before whom a deposition might be taken, and must be signed by the party making the same; and the officer before whom the same was taken, shall certify that it was sworn to or affirmed before him, and signed in his presence. The certificate of such officer, signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer.

Verification does not apply to amount claimed.

SECT. 109. The verification of the pleading does not apply to the amount claimed, except in actions founded on contracts express or implied, for the payment of money only.

When made by agent or attorney.

SECT. 110. When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only. 1. When the facts are within the personal knowledge of the agent or attorney. 2. When the plaintiff is an infant, or of unsound mind, or imprisoned. 3. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the pos-

session of the agent or attorney. 4. When the party is not a resident of or is absent from the county.

Construction of pleading liberal.

SECT. 111. In the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties.

Fictions abolished.

SECT. 112. All fictions in pleading are abolished.

Title cannot be changed.

SECT. 113. The title of a cause shall not be changed in any of its stages.

In action relating to account, note, bill, &c., copy must be attached.

SECT. 114. If the action, counter claim or set-off be founded on an account, or on a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading, excepting in actions founded upon notes issued to circulate as money. If not so attached and filed, the reason thereof must be shown in the pleading.

When pleading may be altered.

SECT. 115. If redundant, scandalous, or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby. And when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

When and how counter claim or set-off may be withdrawn and made subject of new action.

SECT. 116. The court, at any time before the final submission of the case, on motion of the defendant, may allow a counter claim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action. On motion of either party, to be made at the time such counter claim or set-off is withdrawn, an action on the same shall be docketed and proceeded in as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way.

Special jurisdiction, how established.

SECT. 117. In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall be sufficient to state that such judgment or determination was duly given or made. If such allegation be controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction.

Performance of conditions, how established.

SECT. 118. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state, that the

party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

In action upon account, promissory note, &c., copy sufficient, &c.

SECT. 119. In an action, counter claim or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts, as they may be, which fix their liability.

Pleading a private statute.

SECT. 120. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Actions for libel or slander.

SECT. 121. In an action for a libel or slander, it shall be sufficient to state generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial, the facts, showing that the defamatory matter was published or spoken of him.

Same.

SECT. 122. In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances to reduce the amount of damages, or he may prove either.

Action for recovery of real property.

SECT. 123. In an action for the recovery of real property, it shall be described with sufficient certainty, as will enable an officer holding an execution to identify it.

Material allegations not controverted, taken as true.

SECT. 124. Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer, constituting a counter claim or set-off, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the answer, not relating to a counter claim or set-off, or of new matter in reply, shall be deemed to be controverted by the adverse party, as upon a direct denial or avoidance, as

Exception.

the case may require. Allegations of value, or of amount of damage, shall not be considered as true, by failure to controvert them.

A material allegation is what.

SECT. 125. A material allegation in a pleading, is one essential to the claim or defence, which could not be stricken from the pleading, without leaving it insufficient.

What need not be stated in pleading.

SECT. 126. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the pleading.

If original pleading is lost.

SECT. 127. If an original pleading be lost, or withheld by any person, the court may allow a copy thereof to be substituted.

CHAPTER VII.—MISTAKES IN PLEADING AND AMENDMENTS.

Variance between pleading and proof.

SECT. 128. No variance between the allegation in pleading and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged, that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as may be just.

When variance not material.

SECT. 129. When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs.

When allegation in general is unproved.

SECT. 130. When, however, the allegation of the claim or defence, to which the proof is directed, is unproved, not in some particular, or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Petition may be amended, when and how.

SECT. 131. The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant, or his attorney, and the defendant shall have the same time to answer or demur thereto, as to the original petition.

Adverse party may amend within ten days.

SECT. 132. At any time within ten days after a demurrer is filed, the adverse party may amend, of course, on payment of costs since filing the defective pleading. Notice of filing

an amended pleading, shall be forthwith served upon the other party, who shall have the same time thereafter to answer, or reply thereto, as to an original pleading.

If demurrer overruled, party may answer or reply.

SECT. 133. Upon a demurrer being overruled, the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defence, and did not demur for delay.

Court may amend, what and when.

SECT. 134. The court may, before judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto, by amendment.

Court must disregard errors or defects which do not affect rights.

SECT. 135. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Demurrer sustained, adverse party may amend.

SECT. 136. If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without cost, as the court in its discretion shall direct.

In case of amendment requiring time, continuance may be granted.

SECT. 137. When either party shall amend any pleading or proceeding, and the court shall be satisfied by affidavit, or otherwise, that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted to some day in term, or to another term of the court.

When name of defendant unknown.

SECT. 138. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description; and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must

contain the words, "real name unknown," and a copy thereof must be served personally upon the defendant.

Supplemental petition, answer or reply.

SECT. 139. Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer or reply.

When two or more actions pending may be joined.

SECT. 140. Whenever two or more actions are pending in the same court, which might have been joined, the defendant may, on motion and notice to the adverse party, require him to show cause why the same shall not be consolidated; and if no such cause be shown, the said several actions shall be consolidated.

Order for consolidation, how made.

SECT. 141. The order for consolidation may be made by the court, or by a judge thereof, in vacation.

SECT. 142. * * * SECT. 143. * * * SECT. 144. * * * SECT. 145. * * * SECT. 146. * * * SECT. 147. * * * SECT. 148. * * * SECT. 149. * * * SECT. 150. * * * SECT. 151. * * * SECT. 152. * * * SECT. 153. * * * SECT. 154. * * * SECT. 155. * * * SECT. 156. * * * SECT. 157. * * * SECT. 158. * * * SECT. 159. * * * SECT. 160. * * * SECT. 161. * * * SECT. 162. * * * SECT. 163. * * * SECT. 164. * * * SECT. 165. * * * SECT. 166. * * * SECT. 167. * * * SECT. 168. * * * SECT. 169. * * * SECT. 170. * * *

[TITLE VIII.]

CHAPTER II. — REPLEVIN OF PROPERTY.

Specific personal property may be demanded, when.

SECT. 171. The plaintiff in an action to recover the possession of specific personal property, may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

Order for same, when and how made.

SECT. 172. An order for the delivery of property to the plaintiff, shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: 1. A description of the property claimed. 2. That the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he is

entitled to the immediate possession of the property. 3. That the property is wrongfully detained by the defendant. 4. That it was not taken in execution or any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued under this chapter, or any other mesne or final process issued against the plaintiff.

Same.

SECT. 173. The order for the delivery of the property to the plaintiff shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein.

Return day of order.

SECT. 174. The return day of the order of delivery, when issued at the commencement of the suit, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it issued.

Order, how executed.

SECT. 175. The sheriff shall execute the order by taking the property therein mentioned. He shall also deliver a copy of the order to the person charged with the unlawful detention of the property, or leave such copy at his usual place of residence.

Property delivered, when.

SECT. 176. The sheriff or other officer shall not deliver to the plaintiff, his agent or attorney, the property so taken, until there has been executed by one or more sufficient sureties of the plaintiff, a written undertaking to the defendant, in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him. The undertaking shall be returned with the order.

Value, how ascertained.

SECT. 177. For the purpose of fixing the amount of the undertaking, the value of the property taken shall be ascertained by the oath of two or more responsible persons, whom the sheriff or other officer shall swear truly to assess the value thereof.

If undertaking not given.

SECT. 178. If the undertaking, required by section one hundred and seventy-six, be not given within twenty-four hours from the taking of the property under said order, the sheriff or other officer shall return the property to the defendant. And if the sheriff or other officer deliver any property so taken to the plaintiff, his agent or attorney, or

keep the same from the defendant, without taking such security within the time aforesaid, or if he take insufficient security, he shall be liable to the defendant in damages.

Defendant may except to sureties.

SECT. 179. The defendant may, within twenty-four hours from the time the undertaking, referred to in the preceding section, is given by the plaintiff, give notice to the sheriff that he excepts the sufficiency of the sureties. If he fail to do so, he must be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify upon notice, as bail on arrest. The sheriff, or other officer, shall be responsible for the sufficiency of the sureties, until the objection to them is waived as above provided, or until they justify. The property shall be delivered to the plaintiff when the undertaking, required by section one hundred and seventy-six, has been given.

If judgment be then rendered against the plaintiff.

SECT. 180. If the property has been delivered to the plaintiff and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impannel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant, at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant.

Judgment for defendant in such case.

SECT. 181. In all cases when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant.

Judgment for plaintiff in such case.

SECT. 182. In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the

plaintiff for the illegal detention of the property, for which, with costs of suit, the court shall render judgment for defendant.

When property claimed has been returned.

SECT. 183. When the property claimed has not been taken, or has been returned to the defendant by the sheriff, for want of the undertaking required by section one hundred and seventy-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking required by section one hundred and seventy-six, the plaintiff shall pay all costs made by taking the same.

An order for delivery may be directed to any other county.

SECT. 184. An order may be directed to any other county than the one in which the action is brought, for the delivery of the property claimed. Several orders may issue at the same time, or successively, at the option of the plaintiff; but only one of them shall be taxed in the costs, unless otherwise ordered by the court.

Officer may break open building or inclosure.

SECT. 185. The sheriff or other officer in the execution of the order of delivery, may break open any building or inclosure, in which the property claimed, or any part thereof, is concealed; but not until he has been refused an entrance into said building or inclosure, and the delivery of the property, after having demanded the same.

No suit instituted on undertaking, except when.

SECT. 186. No suit shall be instituted on the undertaking given under section one hundred and seventy-six, before an execution issued on a judgment in favor of the defendant in the action shall have been returned, that sufficient property, whereon to levy and make the amount of such judgment, cannot be found in the county.

An order issued without affidavit to be set aside.

SECT. 187. Any order for the delivery of property issued under section one hundred and seventy-two, without the affidavit required thereby, shall be set aside at the cost of the clerk issuing the same, and such clerk, as well as the plaintiff, shall also be liable in damages to the party injured.

CHAPTER III. ATTACHMENT. — Article I. *General Attachment.* — II. *Attachment in Certain Actions.*

ARTICLE I. GENERAL ATTACHMENT. — Subdivision 1. *Grounds of Attachment.* — 2. *How Attachment obtained.* — 3. *Execution and Return thereof.* — 4. *Disposition of Attached Property.* — 5. *Proceedings upon Attachment.* — 6. *General Provisions.*

SUBDIVISION 1. — *Grounds of Attachment.*

Plaintiff may have attachment, when.

SECT. 188. The plaintiff, in a civil action for the recovery of money, may, at or after the commencement thereof, have an attachment against the property of the defendant and upon the grounds herein stated: 1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this territory; or, 2. Has absconded with the intent to defraud his creditors; or, 3. Has left the county of his residence, to avoid the service of a summons; or, 4. So conceals himself that a summons cannot be served upon him; or, 5. Is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors; or, 6. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or, 7. Has property, or rights in action, which he conceals; or, 8. Has assigned, removed, or disposed of, or is about to dispose of his property, or a part thereof, with the intent to defraud his creditors; or, 9. Fraudulently contracted the debt, or incurred the obligation for which suit is about to be, or has been brought. But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this territory, for any claim other than a debt or demand arising upon contract, judgment, or decree.

SUBDIVISION 2. — *How an Attachment is obtained.*

Order of attachment, when made.

SECT. 189. An order of attachment shall be made by the clerk of the court, in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: 1. The nature of the plaintiff's claim. 2. That it is just. 3. The amount which the affiant believes the plaintiff ought to recover; and 4. The existence of some one of the grounds for attachment, enumerated in the preceding section.

Nature of undertaking, and when necessary.

SECT. 190. When the ground of the attachment is, that the defendant is a foreign corporation, or a non-resident of this territory, the order of attachment may be issued without an undertaking. In all other cases, the order of attachment shall not be issued by the clerk, until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages, which he may sustain by reason of the attachment, if the order be wrongfully obtained.

Directed to sheriff, and its substance.

SECT. 191. The order of attachment shall be directed and delivered to the sheriff. It shall require him to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars.

Orders may be issued to different sheriffs.

SECT. 192. Orders of attachment may be issued to the sheriffs of different counties; and several of them may, at the option of the plaintiff, be issued at the same time, or in succession; but such only as have been executed, shall be taxed in the costs, unless otherwise directed by the court.

Return day.

SECT. 193. The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons; when issued afterwards, it shall be twenty days after it issued.

SUBDIVISION 3. — *Execution and Return thereof.*

If several issued, executed in order.

SECT. 194. When there are several orders of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff.

When and how executed.

SECT. 195. The order of attachment shall be executed by the sheriff without delay. He shall go to the place where the defendant's property may be found, and there, in the presence of two residents of the county, declare that by virtue of said order, he attaches said property at the suit of such plaintiff; and the officer, with the said residents, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisement of all the property attached, which shall be

signed by the officer and residents, and returned with the order. Where the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order. Where it is personal property and accessible, he shall take the same into his custody, and hold it subject to the order of the court.

Property released on execution of undertaking.

SECT. 196. The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound, in double the appraised value thereof, that the property or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person so bound.

If property cannot be reached, garnishee ordered to answer.

SECT. 197. When the plaintiff, his agent, or attorney, shall make oath in writing that he has good reason to and does believe that any person or corporation, to be named and within the county where the action is brought, has property of the defendant (describing the same) in his possession, if the officer cannot come at such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice, that he appear in court at the return of the order of attachment, and answer as provided in section two hundred and eleven.

Order on garnishee, how served.

SECT. 198. The copy of the order and the notice shall be served upon the garnishee, as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other officer of the same, or a managing agent thereof.

Different attachments may be made by same officer.

SECT. 199. Different attachments of the same property may be made by the same officer, and one inventory and appraisement shall be sufficient, and it shall not be necessary to return the same with more than one order.

If attached under subsequent orders.

SECT. 200. Where the property is under attachment, it shall be attached under subsequent orders as follows: 1. If it

be real property, it shall be attached in the manner prescribed in section one hundred and ninety-five. 2. If it be personal property, it shall be attached as in the hands of the officer, and subject to any previous attachment. 3. If the same person or corporation be made a garnishee, a copy of the order and notice shall be left with him, in the manner prescribed in section one hundred and ninety-seven.

Officer's return.

SECT. 201. The officer shall return upon every order of attachment what he has done under it. The return must show the property attached, and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall also return with the order all undertakings given under it.

Property bound from time of service, &c.

SECT. 202. An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section one hundred and ninety-seven; but where the property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment.

SUBDIVISION 4. — *Disposition of Attached Property.*

Receiver appointed; to give bond.

SECT. 203. The court, or any judge thereof during vacation, may, on the application of the plaintiff, and on good cause shown, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall give an undertaking to the Territory of Dakota, in such sum as the court or judge may direct, and with such security as shall be approved by the clerk of the court, for the faithful performance of his duty as such receiver, and to pay over all money, and account for all property, which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct.

His duties.

SECT. 204. Such receiver shall take possession of all notes, due-bills, books of account, accounts, and all other evidences of debt that have been taken by the sheriff or other officer, as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose, he may commence and maintain actions in his own name as

such receiver; but in such actions no right of defence shall be impaired or affected.

Same.

SECT. 205. Such receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in attachment. The notice shall be written or printed, and shall be served on the debtor or debtors, by copy personally, or by copy left at the residence; and from the date of such service, the debtors shall stand liable to the plaintiff in attachment for the amount of moneys and credits in their hands, or due from them to the defendant in attachment, and shall account therefor to the receiver.

Subject to order of court.

SECT. 206. Such receiver shall, when required, report his proceedings to the court, and hold all moneys collected by him, and property which may come into his hands, subject to the order of the court.

When receiver not appointed, officer to act as such.

SECT. 207. Where a receiver is not appointed by the court or a judge thereof, as provided in section two hundred and three, the sheriff or other officer attaching the property shall have all the powers and perform all the duties of a receiver appointed by the court or a judge, and may, if necessary, commence and maintain actions in his own name as such officer. He may be required to give security, other than his official undertaking.

Court may make orders for preservation of property.

SECT. 208. The court shall make proper orders for the preservation of the property, during the pendency of the suit. It may direct a sale of property, when, because of its perishable nature or the costs of keeping it, a sale will be for the benefit of the parties. In vacation, such sale may be ordered by the judge of the court. The sale shall be public, after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner, and upon such terms of credit, with security, as the court [or] judge, having regard to the probable duration of the action, may direct. The proceeds, if collected by the sheriff, with all the moneys received by him from garnishees, shall be held and paid over by him, under the same requirement and responsibilities of himself and sureties, as are provided in respect to money deposited in lieu of bail.

SUBDIVISION 5. — *Proceedings upon Attachment.*

Attachment discharged upon execution of undertaking.

SECT. 209. If the defendant, or any other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff by one or more sureties, resident in the county, to be approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged, and restitution made of any property taken under it, or the proceeds thereof. Such undertaking shall also discharge the liability of a garnishee in such action for any property of the defendant in his hands.

Undertaking, how executed.

SECT. 210. The undertaking mentioned in the last section, may, in vacation, be executed in the presence of the sheriff having the order of attachment in his hands, or, after the return of the order, before the clerk, with the same effect as if executed in court; the sureties in either case to be approved by the officer before whom the undertaking is executed.

When garnishee shall appear.

SECT. 211. The garnishee shall appear as follows: If the order of attachment be returned during a term of court, he shall appear at that term; if the order be returned during vacation, he shall appear at the term next after its return. He shall appear and answer, under oath, all the questions put to him touching the property of every description and credits of the defendant, in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant, whether due or not, and in case of a corporation, any stock therein held by or for the benefit of the defendant at or after the service of notice.

Privileges of garnishee.

SECT. 212. A garnishee may pay the money owing to the defendant by him, to the sheriff having the order of attachment, or into court. He shall be discharged from liability to the defendant, for any money so paid, not exceeding the plaintiff's claim. He shall not be subjected to costs beyond those caused by his resistance of the claim against him; and if he disclose the property in his hands or the true amount owing by him, and deliver or pay the same according to the order of the court, he shall be allowed his costs.

If garnishee do not appear.

SECT. 213. If the garnishee do not appear in court and answer, as required by section two hundred and eleven, the court may proceed against him by attachment as for a contempt.

If garnishee appear and answer.

SECT. 214. If the garnishee appear and answer, and it is discovered on his examination, that at or after the service of the order of attachment and notice upon him, he was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property and the payment of the amount owing by the garnishee, into the court; or the court may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff by one or more sufficient sureties, to the effect, that the amount shall be paid, or the property forthcoming, as the court may direct.

If he fail to appear, or if his disclosure is unsatisfactory.

SECT. 215. If the garnishee fail to appear and answer, or if he appear and answer, and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the court, to deliver the property and pay the money owing into court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, by filing a petition in his own name, as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions, and judgment may be rendered in favor of the plaintiff, for the amount of the property and credits, of every kind, of the defendant in the possession of the garnishee, and for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. If the plaintiff proceed against the garnishee by action, for the cause that his disclosure was unsatisfactory, unless it appear in the action that such disclosure was incomplete, the plaintiff shall pay the costs of such action. The judgment in this action may be enforced as judgments in other cases. When the claims of the plaintiffs in attachment are satisfied, the defendant in attachment may, on motion, be substituted as the plaintiff in the judgment.

Final judgment against garnishee postponed, when. If garnishee deliver property, &c.

SECT. 216. Final judgment shall not be rendered against the garnishee, until the action against the defendant in attachment has been determined; and if in such action judgment be rendered for the defendant in attachment, the garnishee shall be discharged and recover costs. If the plaintiff shall recover against the defendant in attachment, and the garnishee shall deliver up all the property, moneys, and credits of the defendant in his possession, and pay all the moneys

from him due, as the court may order, the garnishee shall be discharged, and the costs of the proceedings against him shall be paid out of the property and moneys so surrendered, or as the court may think right and proper.

If judgment rendered for defendant.

SECT. 217. If judgment be rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds shall be returned to him.

If judgment rendered for plaintiff, how satisfied.

SECT. 218. If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the moneys arising from the sale of perishable property, and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as may be necessary to satisfy the judgment, shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy the same, the judgment shall stand, and the execution may issue thereon for the residue, in all respects as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

Proceedings on undertaking.

SECT. 219. The court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking may have been given, and may proceed summarily on such undertaking, to enforce the delivery of the property, or the payment of such sum as may be due upon the undertaking, by rules and attachments, as in cases of contempt.

Sheriff may repossess himself of attached property.

SECT. 220. The court may order the sheriff to repossess himself, for the purpose of selling it, any of the attached property which may have passed out of his hands, without having been sold or converted into money; and the sheriff shall, under such order, have the same power to take the property as he would have under an order of attachment.

If attached personal property be claimed by another person.

SECT. 221. If personal property which has been attached be claimed by any person other than the defendant, it shall be the duty of the officer to have the validity of such claim tried, and such proceedings must be had thereon, with the like effect as in case the property had been seized upon execution, and claimed by a third person.

Where several attachments are executed on same property.

SECT. 222. Where several attachments are executed on the same property, or the same persons are made garnishees, the court, on the motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments.

SUBDIVISION 6. — *General Provisions.*

Court acquires jurisdiction, when. If defendant dies, or charter expires.

SECT. 223. From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under this chapter; and if, after the issuing of the order, the defendant being a person, should die, or a corporation, and its charter should expire by limitation, forfeiture, or otherwise, the proceeding shall be carried on; but in all such cases, other than where the defendant was a foreign corporation, his legal representatives shall be made parties to the action.

Defendant may ask for additional security, when.

SECT. 224. The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court is satisfied that the surety in the plaintiff's undertaking has removed from this territory, or is not sufficient for the amount thereof, it may vacate the order of attachment and direct restitution of any property taken under it, unless, in a reasonable time, to be fixed by the court, sufficient security is given by the plaintiff.

Defendant may move discharge of attachment.

SECT. 225. The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached.

If made on affidavits and papers.

SECT. 226. If the motion be made upon affidavits on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attachment was made.

ARTICLE II. — ATTACHMENTS IN CERTAIN ACTIONS.

Attachment in cases of fraudulent intent.

SECT. 227. 1. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or, 2. Is about to make such

sale, conveyance, or disposition of his property, with such fraudulent intent; or, 3. Is about to remove his property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts, a creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor.

Certain oath necessary before attachment is granted.

SECT. 228. The attachment authorized by the last section, may be granted by the court in which the action is brought, or by a judge thereof, but before such action shall be brought, or such attachment shall be granted, the plaintiff, his agent or attorney shall make an oath in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same shall become due, and the existence of some one of the grounds for attachment, enumerated in the preceding section.

If court refuse to grant order.

SECT. 229. If the court or judge refuse to grant an order of attachment, the action shall be dismissed, but without prejudice to a future action; and in all such actions, application for an attachment must be made.

Order to specify amount for which it is granted.

SECT. 230. The order of the court or judge granting the attachment, shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action.

Undertaking by plaintiff before order is issued.

SECT. 231. The order of attachment, as granted by the court or judge, shall not be issued by the clerk until there has been executed, in his office, such undertaking on the part of the plaintiff, as is directed by section one hundred and ninety.

No judgment before claim is due.

SECT. 232. The plaintiff in such action shall not have judgment on his claim, before it becomes due, and the proceedings on attachment may be conducted without delay.

Attachment under this article, how regulated.

SECT. 233. The proceedings in the first article of this chapter, subsequent to section one hundred and ninety, shall, so far as they are applicable, regulate the attachments authorized by this article.

CHAPTER IV. — INJUNCTION.

The injunction. Writ of, abolished.

SECT. 234. The injunction provided by this code is a command to refrain from a particular act. It may be the final

judgment in an action, or may be allowed as a provisional remedy; and when so allowed, it shall be by order. The writ of injunction is abolished.

A temporary injunction, when granted.

SECT. 235. When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff, or when, during litigation, it appears that the defendant is doing or threatens, or is about to do, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

By whom and when.

SECT. 236. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.

Parties may be heard.

SECT. 237. If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may, in the mean time, restrain such party.

Not granted against party who answers.

SECT. 238. An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction.

Not operative, unless undertaking is given.

SECT. 239. No injunction, unless provided by special statute, shall operate until the party obtaining the same shall give an undertaking, executed by one or more sufficient sureties, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure to the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to have been granted.

If "injunction allowed."

SECT. 240. The order of injunction shall be addressed to

the party enjoined, shall state the injunction, and shall be issued by the clerk. Where the injunction is allowed at the commencement of the action, the clerk shall indorse upon the summons, "injunction allowed," and it shall not be necessary to issue the order of injunction; nor shall it be necessary to issue the same, where notice of the application therefor has been given to the party enjoined. The service of the summons so indorsed, or the notice of the application for an injunction, shall be notice of its allowance.

If allowed during litigation and without notice.

SECT. 241. Where the injunction is allowed during the litigation and without notice of the application therefor, the order of injunction shall be issued, and the sheriff forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay.

When binding.

SECT. 242. An injunction binds the party, from the time he has notice thereof, and the undertaking required by the applicant therefor, is executed.

Not granted after motion is overruled.

SECT. 243. No injunction shall be granted by a judge, after a motion therefor has been overruled on the merits of the application, by his court.

Its enforcement

SECT. 244. An injunction granted by a judge may be enforced, as the act of the court. Disobedience of an injunction may be punished as a contempt, by the court or any judge, who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or in default thereof, he may be committed to close custody, until he shall fully comply with such requirement, or be otherwise legally discharged.

Party enjoined may move the court for additional security.

SECT. 245. A party enjoined may, at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court for additional security; and if it appear that the surety in the undertaking has removed from the territory, or is insufficient, the court may vacate the injunction, unless in a reasonable time sufficient security be given.

Affidavits may be read in hearing.

SECT. 246. On the hearing of an application for an injunction, each party may read affidavits. All affidavits shall be filed.

If granted without notice, defendant may move to vacate or modify.

SECT. 247. If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon notice, to the court in which the action is brought, or any judge thereof, to vacate or modify the same. The application may be made upon the petition and affidavits upon which the injunction is granted, or upon affidavits on the part of the party enjoined, with or without answer. The order of the judge allowing, dissolving, or modifying an injunction, shall be returned to the office of the clerk of the court in which the action is brought, and recorded and obeyed, as if made by the court.

If application on affidavits.

SECT. 248. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same to affidavits or other evidence, in addition to that on which the injunction was granted.

Injunction upon an answer, how.

SECT. 249. A defendant may obtain an injunction upon an answer in the nature of a counter claim. He shall proceed in the manner prescribed in this chapter.

CHAPTER V. — RECEIVERS AND OTHER PROVISIONAL REMEDIES.

Receiver may be appointed by whom and in what cases.

SECT. 250. A receiver may be appointed by the supreme court, or district court or by any judge of either: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of any party whose right to or interest in the property or fund, or the process thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. 2. In an action by a mortgagee for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgaged debt. 3. After judgment to carry the judgment into effect. 4. After the judgment, to dispose

of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply the property in satisfaction of the judgment. 5. In the cases provided in this code, and by special statutes, when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

No interested person appointed.

SECT. 251. No party or attorney or person interested in an action shall be appointed receiver therein.

Receiver to be sworn and execute undertaking.

SECT. 252. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and, with one or more sureties, approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

His powers.

SECT. 253. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers and generally to do such acts respecting the property as the court may authorize.

Funds in his hands, when invested.

SECT. 254. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order shall be made except upon the consent of all parties to the action.

When ownership admitted.

SECT. 255. When it is admitted by the pleading or examination of a party, that he has in his possession or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further discretion of the court.

When order of court is disobeyed.

SECT. 256. Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing disobedience as for a contempt, may make an order, requiring the sheriff to take the money or thing and

deposit or deliver it in conformity with the direction of the court.

TITLE IX.

TRIAL.

CHAPTER I. *Issue.* — II. *Trial.*

CHAPTER I. — ISSUE.

Issues, nature of.

SECT. 257. Issues arise on the pleadings, where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds: 1. Of law. 2. Of fact.

Issue of fact

SECT. 258. An issue of fact arises: 1. Upon a material allegation in the petition denied by the answer. 2. Upon a set-off or counter claim presented in the answer and denied by the reply. 3. Upon material new matter in the answer or reply, which shall be considered as controverted by the opposite party without further pleading.

CHAPTER II. TRIAL. — Article I. *Trial in General.* — II. *Trial by Jury.* — III. *Trial by the Court.* — IV. *Trial by Referees.* — V. *Exceptions.* — VI. *New Trials.* — VII. *General Provisions.* — VIII. *Time of Trial.*

ARTICLE I. — TRIAL IN GENERAL.

The trial.

SECT. 259. A trial is a judicial examination of the issues, whether of law or of fact, in an action.

Issues of law tried by court. Of certain facts, by jury.

SECT. 260. Issues of law must be tried by the court, unless referred as provided in section two hundred and seventy-eight. Issues of fact, arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided.

Other issues of fact.

SECT. 261. All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred, as provided in this code.

ARTICLE II. TRIALS BY JURY. — Subdivision 1. *Formation of the Jury.* — 2. *Conduct of the Trial.* — 3. *Verdict.*

SUBDIVISION 1. — *Formation of the Jury.*

Jury formed according to law.

SECT. 262. The general mode of summoning, empanneling, challenging, and swearing a jury, shall be as otherwise provided by law.

SUBDIVISION 2. — *Conduct of the Trial.*

Trial proceed, how.

SECT. 263. When the jury has been sworn, the trial shall proceed in the following order, unless the court for special reasons otherwise direct: 1. The plaintiff must briefly state his claim, and he may briefly state the evidence by which he expects to sustain it. 2. The defendant must then briefly state his defence, and may briefly state the evidence he expects to offer in support of it. 3. The party who would be defeated, if no evidence were given on either side, must first procure his evidence; the adverse party will then produce his evidence. 4. The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case. 5. When the evidence is concluded, either party may request instructions to the jury on points of law, and be heard upon the same, which shall be given or refused by the court; which instructions shall be reduced to writing, if either party require it. 6. The parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence, shall have the opening and conclusion. If several defendants, having separate defences, appear by different counsel, the court shall arrange their relative order. 7. The court may again charge the jury after the argument is concluded.

When view of property is necessary.

SECT. 264. Whenever, in the opinion of the court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed, shall speak to them on any subject connected with the trial.

The jury may decide in court or retire. If they retire.

SECT. 265. When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place, under the charge of an officer until they agree upon a verdict, or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge, shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

If jury separate.

SECT. 266. If the jury are permitted to separate either during the trial, or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express any opinion thereon, until the cause is finally submitted to them.

If jury disagree as to law or evidence.

SECT. 267. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to the parties or their counsel.

Jury may be discharged, when.

SECT. 268. The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

New trial may be had, when.

SECT. 269. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may direct.

When and how verdict is announced.

SECT. 270. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is

his verdict. If any one answers in the negative, the jury must again be sent out for further deliberation.

Verdict to be written and signed. If defective.

SECT. 271. The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court.

SUBDIVISION 3. — *Verdict.*

General and special verdicts.

SECT. 272. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court, but to draw from them conclusions of law.

In what cases rendered.

SECT. 273. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journals.

If finding facts inconsistent with general verdict.

SECT. 274. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

Jury must assess amount of money recoverable.

SECT. 275. When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery.

ARTICLE III. — TRIAL BY THE COURT.

SECT. 276. The trial by jury may be waived by the par-

Trial by jury may be waived, when.

ties in the action arising on contract, and with the assent of the court, in other actions, in the following manner: 1. By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. 2. By written consent in person, or by attorney, filed with the clerk. 3. By oral consent in open court entered on the journal.

Upon trial of questions of facts, court need not state finding, except when.

SECT. 277. Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found, separately, from the conclusions of law.

ARTICLE IV.—TRIAL BY REFEREES.

May be referred, when.

SECT. 278. All or any of the issues in the action, whether of fact or law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court entered upon the journal.

When parties do not consent, court may direct reference, in what cases.

SECT. 279. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a referee in either of the following cases: 1. Where the trial of an issue of fact shall require the examination of mutual accounts, or where the account is on one side only, and it shall be made to appear to the court, that it is necessary that the party on the other side should be examined as a witness to prove the account; in which cases the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or, 2. Where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect; or, 3. Where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise, in any stage of the action.

Trial before referees, how conducted.

SECT. 280. The trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court, upon such trial. They

must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

Parties may agree upon referees, or court may appoint.

SECT. 281. In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and, if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

Reference cannot be ordered, by what courts.

SECT. 282. A reference as provided in this chapter cannot be ordered by any court inferior to the district court, except by consent of parties to the reference and referees.

Referees sign true exceptions, and return same to court.

SECT. 283. It shall be the duty of the referees to sign any true exceptions taken to any order or decision by them made in the case, and return the same with their report to the court making the reference.

Judge may make order of reference, when and how.

SECT. 284. A judge in vacation, upon the written consent of the parties, may make any order of reference which the court, of which he is a member, could make in term time. In such case, the order of reference shall be made on the written agreement of the parties to refer, and shall be filed with the clerk of the court with the other papers in the [case].

Referees to be sworn or affirmed.

SECT. 285. The referees must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein according to the best of their understanding. The oath may be administered by any person authorized to take depositions.

Compensation of referees.

SECT. 286. The referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as a part of the costs in the case.

ARTICLE V. — EXCEPTIONS.

An exception

SECT. 287. An exception is an objection taken to a decision of the court upon a matter of law.

Exception taken at the time decision is made.

SECT. 288. The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term.

Form of exception.

SECT. 289. No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible.

When decision objected to is recorded.

SECT. 290. When the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing to be noted, at the end of the decision, that he excepts.

When not recorded.

SECT. 291. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present to the court for its allowance. If true, it shall be the duty of a majority of the judges composing the court, to allow and sign it, whereupon it shall be filed with the pleadings as part of the record, but not spread at large on the journal. If the writing is not true, the court shall correct it, or suggest the correction to be made, and it shall then be signed as aforesaid.

Not regarded, when.

SECT. 292. No exception shall be regarded, unless it is material, and prejudicial to the substantial rights of the party excepting.

Withdrawn, when.

SECT. 293. Exceptions taken to the decision of any court of record may, by leave of such court, be withdrawn from the files by the party taking the same, at any time before proceedings in error are commenced, and before the exceptions are recorded.

ARTICLE VI. — NEW TRIAL.

A new trial. May be granted, when.

SECT. 294. A new trial is a reëxamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: 1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court, or referee, or abuse of discretion, by which the party was prevented

from having a fair trial. 2. Misconduct of the jury or prevailing party. 3. Accident or surprise, which ordinary prudence could not have guarded against. 4. Excessive damages, appearing to have been given under the influence of passion or prejudice. 5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property. 6. That the verdict, report, or decision, is not sustained by sufficient evidence, or is contrary to law. 7. Newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial. 8. Error of law occurring at the trial, and excepted to by the party making the application.

New trial not granted, when.

SECT. 295. A new trial shall not be granted on account of the smallness of damages in an action for an injury in the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained.

Application for, when.

SECT. 296. The application for a new trial must be made at the term the verdict, report, or decision is rendered, and except for the cause of newly-discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

Motion upon written grounds.

SECT. 297. The application must be by motion upon written grounds, filed at the time of making the motion. The causes enumerated in subdivisions two, three, and seven, of section two hundred and ninety-four, must be sustained by affidavits showing their truth, and may be controverted by affidavits.

Where grounds for new trial are discovered after term.

SECT. 298. Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered, or made, the application may be made by petition, filed as in other cases; on which a summons shall issue, be returnable and served, or publication made as prescribed in section sixty-nine. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term. The case shall be placed on the trial docket, and the witnesses

shall be examined in open court, or their depositions taken as in other cases, but no such petition shall be filed more than one year after the final judgment was rendered.

ARTICLE VII. — GENERAL PROVISIONS.

When damages are recoverable.

SECT. 299. Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.

Provisions respecting trials by jury apply to trials by court.

SECT. 300. The provision of this title respecting trials by jury apply, so far as they are in their nature applicable, to trials by court.

ARTICLE VIII. — TIME OF TRIAL.

Books to be kept by the clerk.

SECT. 301. The clerk of the district court shall keep at least five books, to be called the "appearance docket," the "trial docket," the "journal," the "record," and "execution docket."

The appearance docket.

SECT. 302. On the appearance docket, he shall enter all actions in the order in which they were brought, the date of the summons, the time of the return thereof by the officer and his return thereon, the time of filing the petition, and all subsequent pleadings.

The trial docket.

SECT. 303. The trial docket shall be made out by the clerk of the court, at least twelve days before the first day of each term of the court; and the actions shall be set for particular days in the order in which the issues were made up, whether of law or of fact, and so arranged that the cases set for each day shall be tried as nearly as may be on that day. For the purpose of arranging said docket, an issue shall be considered as made up, when either party is in default of a pleading.

Trials, in what order. Motions.

SECT. 304. The trial of an issue of fact, and the assessment of damages in any case shall be in the order in which they are placed on the trial docket, unless by consent of the parties, or the order of the court, they are continued or placed at the heel of the docket. The time of hearing all other cases shall be in the order in which they are placed on the docket, unless the court in its discretion shall otherwise direct. The court may in its discretion hear, at any time, a motion; and may by rule prescribe the time for hearing motions.

Appearance term.

SECT. 305. In any civil action, wherein the defendant shall answer or demur on or before the first day of the term next succeeding the service of process, such first term shall be the appearance term, and such cause shall be continued, on the application of either party, to the next term, at which time the same shall be tried, unless for good cause the court shall continue the same.

In case of default, judgment rendered at first term.

SECT. 306. In actions wherein default is made, judgment shall be rendered at the first term after the service of process, provided service shall be made not less than ten days before the term.

Clerk to make out copy of trial docket.

SECT. 307. The clerk shall make out a copy of the trial docket for the use of the bar before the first day of the term of court.

TITLE X.

EVIDENCE.

CHAPTER I. *Competency of Witnesses.* — II. *Means of producing Witnesses.* — III. *Mode of taking their Testimony.* — IV. *Admission, Inspection, and Production of Documents and General Provisions.* — V. *Perpetuation of Testimony.*

CHAPTER I. — COMPETENCY OF WITNESSES.

Qualifications of witnesses.

SECT. 308. Every human being of sufficient capacity to understand the obligations of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared; and no person shall be disqualified as a witness in any civil action or proceeding, by reason of his or her interest in the result of the same, as a party or otherwise; but such interest may be shown for the purpose of affecting his or her credibility.

No party to suit can testify, when.

SECT. 309. No party to a suit shall be allowed to testify in his own behalf, by virtue of the last section, when the adverse party is the executor, administrator, or heir of a deceased person, where the facts to be proved transpired before the death of such deceased person.

Facts which have excluded testimony may lessen credibility.

SECT. 310. Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility.

Husband and wife testify, when.

SECT. 311. The husband can, in no case, be a witness for or against the wife, nor the wife for or against the husband, unless the contract or facts to be sworn to are in the exclusive knowledge of such husband or wife, as agent or otherwise, in which case but one can testify, and unless in a criminal proceeding for a crime committed by the one against the other.

Same.

SECT. 312. Neither husband or wife can be examined in any case as to any communication made by the one to the other, while married, nor as to any fact learned in consequence of the marriage relation; nor shall they, after such relation ceases, be permitted to reveal, in testimony, any such communication or fact.

Attorney, physician, minister, &c., not allowed to disclose confidential communication.

SECT. 313. No attorney, counsellor, physician, surgeon, minister of the gospel, or priest, shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

Last prohibition not applicable when waived.

SECT. 314. The prohibitions of the last section do not apply to cases where the party, in whose favor they are enacted, waives the rights thereby conferred.

Public officer cannot be examined, when.

SECT. 315. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

Witness not excused from answering, when.

SECT. 316. A witness is not excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.

Not compelled to answer, when.

SECT. 317. But when the matter sought to be elicited would tend to render him criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in the next section.

Witness may be questioned as to previous convictions of felony.

SECT. 318. A witness may be interrogated as to his previous convictions for a felony. But no other proof of such conviction is competent except the record thereof.

When parts of acts, writing, &c., are given in evidence, the remainder may be called out.

SECT. 319. When the part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a

detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing, which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

When instrument partly written and partly printed.

SECT. 320. When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent.

If terms of agreement misunderstood.

SECT. 321. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.

Books, maps, and charts presumptive evidence.

SECT. 322. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.

When witness denies his signature.

SECT. 323. When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence.

Evidence of handwriting by comparison.

SECT. 324. Evidence respecting handwriting may be given by comparisons made by experts or by the jury with writings of the same persons, which are proved to be genuine.

Entries and writings of persons deceased.

SECT. 325. The entries and other writings of a person deceased, made at or near the time of the transaction, and in a position to know the facts therein stated, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity, or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law.

Books of accounts receivable in evidence, when.

SECT. 326. Books of account, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions to their credibility: 1. The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party, in the same book. 2. It must be shown by the party's oath, or otherwise, that they are his books of original entries. 3. It must be shown, in like manner, that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for

not making such proof. 4. The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made.

Private writing, acknowledged properly, admissible evidence.

SECT. 327. Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof of acknowledgment of conveyances of real property, may be read in evidence without further proof.

Judge of court competent witness.

SECT. 328. The judge of the court is a competent witness for either party, and may be sworn upon the trial. But in such a case it is in his discretion to order the trial to be postponed or suspended, and to take place before another judge.

Protest of notary public evidence, when.

SECT. 329. The usual protest by a notary public, without proof of his signature or notarial seal, is evidence of the dishonor and notice of a bill of exchange or promissory note.

CHAPTER II. — MEANS OF PRODUCING WITNESSES.

Subpœna, how issued and served.

SECT. 330. The clerks of the several district courts, and judges of the other courts, shall, on application of any person having a cause or any matter pending in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by any person not interested in the action, or by the sheriff, coroner, or constable; but when served by any person other than a public officer, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed except when served by an officer.

Subpœna contains, what.

SECT. 331. The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness; and it may contain a clause, directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

When issued by officer taking depositions.

SECT. 332. When the attendance of the witness before any officer, authorized to take depositions, is required, the subpœna shall be issued by such officer.

How served.

SECT. 333. The subpœna shall be served either by reading or by copy, delivered to the witness, or left at his usual place

of residence; but such copy need not contain the name of any other witness.

Witness obliged to attend, where.

SECT. 334. A witness shall not be obliged to attend for examination on the trial of a civil action, except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpœna is served upon him.

Witness may demand fees before attending.

SECT. 335. A witness may demand his travelling fees, and fee for one day's attendance, when the subpœna is served upon him, and if the same be not paid, the witness shall not be obliged to obey the subpœna. The fact of such demand and non-payment shall be stated in the return.

Contempt.

SECT. 336. Disobedience of a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer, by whom his attendance or testimony is required.

When witness fails to attend in obedience to subpœna.

SECT. 337. When a witness fails to attend in obedience to a subpœna (except in case of a demand and failure to pay his fees), the court or officer before whom his attendance is required, may issue an attachment to the sheriff, coroner, or constable of the county, commanding him to arrest and bring the person therein named, before the court or officer, at a time and place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his appearance. Such sum shall be indorsed on the back of the attachment, and if no such sum is fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him.

Punishment for contempt.

SECT. 338. The punishment for the contempt mentioned in section three hundred and thirty-six, shall be as follows: When the witness fails to attend, in obedience to the subpœna (except in case of a demand and failure to pay his fees), the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases, the court or officer may fine a witness in a sum not exceeding fifty nor less than five dollars, or may imprison in the county jail, there to re-

main until he shall submit to be sworn, testify, or give his deposition. The fine imposed by the court, and that imposed by the officer, shall be paid into the common school fund of the county. The witness shall also be liable to the party injured, for any damages occasioned by his failure to attend, or his refusal to be sworn, testify, or give his deposition.

Witness discharged from imprisonment, when.

SECT. 339. A witness so imprisoned by an officer before whom his deposition is being taken, may apply to a judge of the supreme court, district court, or county court, who shall have power to discharge him, if it appear that his imprisonment is illegal.

Attachment or order must be under seal of court or officer, &c.

SECT. 340. Every attachment for the arrest or order of commitment to prison of a witness, by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify particularly the cause of the arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order. Such order of commitment may be directed to the sheriff, coroner, or any constable of the county where such witness resides or may be at the time, and shall be executed by committing him to the jail of such county; and delivering a copy of the order to the jailer.

Testimony of a person in prison.

SECT. 341. A person confined in any prison in this territory may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition.

In whose custody, while deposition is taken.

SECT. 342. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the deposition.

Witness not liable to be sued, when.

SECT. 343. A witness shall not be liable to be sued in a county in which he does not reside, by being served with a summons in such county while going, returning, or attending in obedience to a subpœna.

Witness may demand fees daily, in advance.

SECT. 344. At the commencement of each day after the first day, a witness may demand his fees, for that day's attendance, in obedience to a subpœna, and if the same be not paid, he shall not be required to remain.

Witness to be sworn, how.

SECT. 345. Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth.

The mode of administering an oath shall be such as is most binding upon the conscience of the witness.

CHAPTER III. MODE OF TAKING THE TESTIMONY OF WITNESSES. — Article 1. *Affidavit.* — 2. *Deposition.*

Testimony, how taken.

SECT. 346. The testimony of witnesses is taken in three modes: 1. By affidavit. 2. By deposition. 3. By oral examination.

An affidavit.

SECT. 347. An affidavit is a written declaration under oath, made without notice to the adverse party.

A deposition.

SECT. 348. A deposition is a written declaration under oath, made upon notice of the adverse party for the purpose of enabling him to attend and cross-examine; or upon written interrogatories.

Oral examination.

SECT. 349. An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

ARTICLE I. — AFFIDAVIT.

Affidavit may be used, how.

SECT. 350. An affidavit may be used to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings or upon a motion, and in any other case permitted by law.

How made and authenticated.

SECT. 351. An affidavit may be made in and out of this territory before any person authorized to take depositions, and must be authenticated in the same way, except as provided in section one hundred and eight.

ARTICLE II. DEPOSITIONS. — Subdivision 1. *When to be used.* — 2. *Officers who may take them.* — 3. *Manner of taking and authenticating them.* — 4. *Exceptions to Depositions.*

SUBDIVISION 1. — *When to be used.*

Depositions be used, how.

SECT. 352. The deposition of any witness may be used only in the following cases: 1. When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial, by change of venue; or is absent

therefrom. 2. When, from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead. 3. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

Commence taking, when.

SECT. 353. Either party may commence taking testimony by depositions, at any time after service upon the defendants.

SUBDIVISION 2. — *Officers who may take them.*

Taken by whom in territory.

SECT. 354. Depositions may be taken in this territory, before a judge or clerk of the supreme court, the district court or county court, before a justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, or before a master commissioner, or any person empowered by a special commission; but depositions taken in this territory, to be used therein, must be taken by an officer or person whose authority is derived within the territory.

Taken by whom out of territory.

SECT. 355. Depositions may be taken out of the territory by a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, a commissioner appointed by the governor of this territory to take depositions, or any person authorized by a special commission from this territory.

Officer taking must not be interested.

SECT. 356. The officer before whom depositions are taken, must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding.

Commissions may be granted to take deposition, by whom and how.

SECT. 357. Any court of record of this territory, or any judge thereof, is authorized to grant a commission to take depositions within or without the territory. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it must be taken upon written interrogations, unless the parties otherwise agree.

SUBDIVISION 3. — *Manner of taking and authenticating them.*

Notice of taking to be given, how.

SECT. 358. Prior to the taking of any deposition, unless taken under a special commission, a written notice, specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party, his agent, or attorney of record, or left at his usual place of abode. The notice shall be served so as to allow the adverse party suffi-

cient time, by the usual route of travel, to attend, and one day for preparation, exclusive of Sundays and the day of service, and the examination may, if so stated in the notice, be adjourned from day to day.

Notice by publication.

SECT. 359. When the party against whom the deposition is to be read, is absent from, or a non-resident of the territory, and has no agent, or attorney of record therein, he may be notified of the taking of the deposition by publication. The publication must be made three consecutive weeks, in some newpaper printed in the county where the action or proceeding is pending, if there be any printed in such county; and if not, in some newspaper printed in this territory, of general circulation in that county. The publication must contain all that is required in a written notice, and may be proved in the manner prescribed in section seventy-two.

Deposition to be written, in whose presence, and signed.

SECT. 360. The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness, or some disinterested person, and subscribed by the witness.

To be sealed and remain so, how long.

SECT. 361. The deposition so taken shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court where the action or proceeding is pending. It shall remain under seal until opened by the clerk, by order of the court, or at the request of a party to the action or proceeding, or his attorney.

Depositions thus taken, evidence in what cases, and how.

SECT. 362. Depositions taken pursuant to this article shall be admitted in evidence, on the trial of any civil action or proceeding, pending before any justice of the peace, mayor, or other judicial officer of a city, or town corporate, or before any arbitrators or referees, and such deposition shall be sealed up, indorsed with the title of the action or proceeding, the name of the officer taking the same, and addressed and transmitted by such officer to such justice, mayor, or other judicial officer, arbitrator, or referees.

May be read in any stage of action.

SECT. 363. When a deposition has once been taken, it may be read in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter, between the same parties, subject, however, to all such exceptions as may be taken thereto under the provisions of this title.

Depositions sufficiently authenticated, when.

SECT. 364. Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this territory or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal, and no other or further act or authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this territory, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by the official certificate and seal of any secretary or other officer of state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking of the same, within the meaning of this chapter, authorized to take the same. But, if the deposition be taken within this territory by an officer having no seal, or within or without this territory, under a special commission, it shall be sufficiently authenticated by the official signature of the officer or commissioner taking the same.

Officer's certificate to contain, what.

SECT. 365. The officer taking the deposition shall annex thereto a certificate showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth. That the deposition was reduced to writing by some proper person (naming him). That the deposition was written and subscribed in the presence of the officer certifying thereto. That the deposition was taken at the time and place specified in the notice.

The court must be satisfied that witness cannot be procured.

SECT. 366. When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court, that for any cause specified in section three hundred and fifty-two, the attendance of the witness cannot be procured.

Depositions filed one day before trial.

SECT. 367. Every deposition intended to be read in evidence on the trial, must be filed at least one day before the trial.

Fees for taking depositions.

SECT. 368. The following fees shall be allowed for taking depositions in the territory, namely: Swearing each witness, five cents; for each subpœna, attachment, or order of commitment, fifty cents; for each hundred words contained in such deposition and certificate, ten cents and no more; and

such officer may retain the same until such fees are paid. Such officer shall also tax the costs of the sheriff, or other officer, who shall serve the process aforesaid, and fees of the witnesses, and may also, if directed by the persons entitled thereto, retain such deposition until the said fees are paid.

SUBDIVISION 4. — *Exceptions to Depositions.*

Exceptions to depositions.

SECT. 369. Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause.

Exceptions regarded, when.

SECT. 370. No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.

Questions arising decided before trial.

SECT. 371. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.

Errors in decisions waived, when.

SECT. 372. Errors of the court in its decisions upon exceptions to depositions are waived unless excepted to.

CHAPTER IV. — ADMISSION, INSPECTION, AND PRODUCTION OF DOCUMENTS, AND GENERAL PROVISIONS.

Papers or documents in evidence, and their genuineness.

SECT. 373. Either party may exhibit to the other or to his attorney, any time before the trial, any paper or document material to the action, and request an admission of writing in genuineness. If the adverse party or his attorney fail to give the admission in writing, within four days after the request, and if the party exhibiting the paper or document be afterwards put to any cost or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such costs and expenses, to be ascertained at the trial, shall be paid by the party refusing to make the admission, unless it shall appear, to the satisfaction of the court, that there were good reasons for the refusal.

Either party may demand of the other inspection or copy of book, paper, or document.

SECT. 374. Either party, or his attorney, may demand of the adverse party, an inspection and copy, or permission to take a copy of a book, paper, or document, in his possession or under his control, containing evidence relating to the merits of the action or defence therein. Such demand shall be in writing, specifying the book, paper, or document, with sufficient particularity to enable the other party to distinguish

it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give the other, within a specified time, an inspection and copy or permission to take a copy of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such, as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness.

Either party may demand copy of deed, writing, &c.

SECT. 375. Either party, or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed, instrument, or other writing, whereon the action or defence is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence at the trial, the original, of which a copy has been refused. This section shall not apply to any paper, a copy of which is filed with the pleading.

Printed copies in volumes of statutes, code, or law admitted as evidence, when.

SECT. 376. Printed copies in volumes of statutes, code, or other written law, enacted by any other territory or state, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such territory, state, or government, shall be admitted by the courts and officers of this territory on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other territory, state, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts may also be admitted as presumptive evidence of such law.

CHAPTER V. — PROCEEDINGS TO PERPETUATE TESTIMONY.

Testimony of witness, how perpetuated.

SECT. 377. The testimony of a witness may be perpetuated in the following manner.

Petition to contain what.

SECT. 378. The applicant shall file in the office of the clerk of the district court a petition, to be verified, in which

shall be set forth, specially, the subject-matter, relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this territory, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff.

Order for examination.

SECT. 379. The court or judge thereof, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination, how long the parties interested shall be notified thereof, and the manner in which they shall be notified.

Cross interrogatories, when.

SECT. 380. When it appears satisfactorily to the court or judge that the parties interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received which is not responsive to some one of them. The attorney filing the cross interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

Such depositions, before whom.

SECT. 381. Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court in which the petition was filed.

Court approve and order them filed. May be given in evidence.

SECT. 382. The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party, where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained or required; but such depositions shall be subject to the same objections

for irrelevancy and incompetency as may be made to depositions taken pending an action.

Applicant pay costs.

SECT. 383. The applicant shall pay the costs of all proceedings under this chapter.

TITLE XI.

JUDGMENT.

CHAPTER I. *Judgment in General.* — II. *Judgment upon Failure to Answer.* — III. *Judgment by Confession.* — IV. *Manner of giving and entering Judgment.* — V. *Conveyance by Commissioners.*

CHAPTER I. — JUDGMENT IN GENERAL.

A judgment.

SECT. 384. A judgment is the final determination of the rights of the parties in action.

How given.

SECT. 385. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, at its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

Action dismissed, when.

SECT. 386. An action may be dismissed without prejudice to a future action. 1. By the plaintiff before the final submission of the case to the jury, or to the court, where the trial is by the court. 2. By the court, where the plaintiff fails to appear on the trial. 3. By the court, for want of necessary parties. 4. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence. 5. By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the action, the decision must be upon the merits.

Defendant may proceed to trial, when.

SECT. 387. In any case where a set-off or counter claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action, or failed to appear.

CHAPTER II. — JUDGMENT UPON FAILURE TO ANSWER.

Judgment upon failure to answer.

SECT. 388. If the taking of an account, or the proof of a fact, or the assessment of damages be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee or master commissioner, or may direct the same to be ascertained or assessed by a jury. If a jury be ordered, it shall be on or after the day on which the action is set for trial.

CHAPTER III. — JUDGMENT BY CONFESSION.

When permitted.

SECT. 389. Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the assent of the creditor, or person having cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly.

Debt, or cause to be stated.

SECT. 390. The debt or cause of action shall be briefly stated in the judgment, or in a writing to be filed as pleadings in other actions.

To authorize proceedings for enforcement.

SECT. 391. Such judgment shall authorize same proceedings for its enforcement, as judgments rendered in actions regularly brought and prosecuted; and the confession shall operate as a release of errors.

If attorney confess judgment.

SECT. 392. Every attorney, who shall confess judgment in any case, shall, at the time of making such confession, produce the warrant of attorney for making the same, to the court before which he makes the confession, and the original or a copy of the warrant shall be filed with the clerk of the court in which the judgment shall be entered.

Warrant of attorney of no force unless properly witnessed.

SECT. 393. If any person be in custody in a civil action at the suit of another, no warrant of attorney executed by the person in custody, to confess judgment in favor of the person

at whose suit he is in custody, shall be of any force, unless some attorney expressly named by the person in custody, be present and sign the warrant of attorney as witness.

CHAPTER IV.—MANNER OF GIVING AND ENTERING JUDGMENT.

When trial by jury, judgment how rendered.

SECT. 394. When a trial by jury has been had, judgment must be rendered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration.

When verdict is special.

SECT. 395. Where the verdict is special, or where there has been a special finding or particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered.

When judgment contrary to verdict.

SECT. 396. Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party.

If counter claim or set-off exceeds claim.

SECT. 397. If the counter claim or set-off, established at the trial, exceeds the plaintiff's claim so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any affirmative relief, judgment shall be given therefor.

Infant may show cause against order after arriving at age of 21.

SECT. 398. It shall not be necessary to reserve in a judgment or order, the right of an infant to show cause against it, after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment.

Judgment and orders to be entered on journal.

SECT. 399. All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.

Clerk make complete record, when.

SECT. 400. The clerk shall make a complete record of every cause, as soon as it is finally determined, unless such record or some part thereof be duly waived.

To be made in vacation, and signed by judge at next term.

SECT. 401. He shall make up such record in each case, in the vacation next after the term at which the same was determined, and the presiding judge of such court shall, at its next term thereafter, subscribe the same.

Made up from what.

SECT. 402. The records shall be made up from the petition, the process, return, the pleadings subsequent thereto,

reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of an account or the copies of a paper attached to the pleadings be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded.

When acts and proceedings of court have not been brought up.

SECT. 403. When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded within such time as it may direct. When they are made up, and upon examination found to be correct, the presiding judge of such court shall subscribe the same.

No complete record made, when.

SECT. 404. No complete record shall be made: 1. In criminal prosecutions where the indictment has been quashed, or where the prosecuting attorney shall have entered a nolle prosequi on the indictment. 2. In cases where an action has been dismissed without prejudice to a future action. 3. In actions in which, in open court, at the term at which the final order of judgment shall be made, both parties shall declare their agreement that no record shall be made.

Where action has been dismissed without prejudice to future action, record may be made.

SECT. 405. In cases where an action has been dismissed without prejudice to a future action, the clerk shall make a complete record of the proceedings, upon being paid for making the same by the party desiring the record to be made.

Complete record in certain case.

SECT. 406. A complete record shall be made in the case mentioned in section three hundred and eighty-seven, unless waived by the parties.

CHAPTER V. — CONVEYANCE BY COMMISSIONERS.

Real property conveyed, when.

SECT. 407. Real property may be conveyed by master commissioners as hereinafter provided: 1. When by an order or judgment in an action or proceeding, a party is ordered to convey such property to another, and he shall neglect or refuse to comply with such order or judgment. 2. When specific real property is required to be sold under an order or judgment of the court.

Sheriff as commissioner. Sales conform to law.

SECT. 408. A sheriff may act as master commissioner under the second subdivision of the preceding section. Sales

made under the same shall conform in all respects to the laws regulating sales of land upon execution.

Commissioner's deed.

SECT. 409. The deed of a master commissioner shall contain the like recital, and shall be executed, acknowledged, and recorded, as the deed of a sheriff, of real property sold under execution.

TITLE XII.

CAUSES OF ACTION WHICH SURVIVE, AND ABATEMENT OF ACTIONS.

Causes of action which survive.

SECT. 410. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same.

What actions shall abate, and when.

SECT. 411. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant.

TITLE XIII.

REVIVOR.

CHAPTER I. *Revivor of Actions.* — II. *Revivor and New Parties to Judgment.*

CHAPTER I. — REVIVOR OF ACTIONS.

In case one of several plaintiffs or defendants dies.

SECT. 412. Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as a personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed; the death of the party, or the cessation of his powers, being stated on the record.

Same.

SECT. 413. Where one of several plaintiffs or defendants dies, or his powers as a personal representative cease, if the

cause of action do not admit of a survivorship, and the court is of opinion, that the merits of the controversy can be properly determined, and the principles applicable to the case fully settled, it may proceed to try the same as between the remaining parties; but the judgment shall not prejudice any who were not parties at the time of the trial.

When one of the parties dies.

SECT. 414. When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survive in favor of, or against his representatives or successor, the action may be revived, and proceed in their names.

To be revived in names of representatives.

SECT. 415. The revivor shall be, by a conditional order of the court, if made in term, or by a judge thereof, if made in vacation, that the action be revived in the names of the representatives, or successor of the party who died, or whose powers ceased, and proceed in favor of, or against them.

Order may be made, on whose motion.

SECT. 416. The order may be made on motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death, or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order.

If by consent. If not by consent.

SECT. 417. If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor, the action shall stand revived.

If representatives of defendant are non-residents or conceal themselves.

SECT. 418. When the plaintiff shall make an affidavit, that the representatives of the defendant, or any of them in whose name the action may be ordered to be revived, are non-residents of the territory, or have left the same to avoid the service of the order, or so concealed themselves that the order cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for four consecutive weeks, as provided by section sixty-nine, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show

cause why the action should not be revived against them; and if sufficient cause be not shown to the contrary, the action shall stand revived.

Upon death of plaintiff, how revived.

SECT. 419. Upon the death of a plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names.

Upon death of defendant, revivor against representative or heirs.

SECT. 420. Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may also be against the heirs or devisees of the defendant, or both, when the right of action or any part thereof survives against them.

Same, in an action for recovery of real property.

SECT. 421. Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor may be forthwith made, in the manner directed in the preceding sections of this title.

Order within one year, if against representative of defendant.

SECT. 422. An order to revive an action against the representatives or successor of a defendant, shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made.

Order, when made in other cases.

SECT. 423. An order to revive an action in the names of the representatives or successor of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his power have ceased in the mean time, the order of revivor on both sides may be made in the period limited in the last section.

When action may be stricken from docket.

SECT. 424. When it appears to the court by affidavit, that either party to an action has been dead, or where a party sues, or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be received [revived] in the names of his representative or successor, without the consent of both parties, it shall order the action to be stricken from the docket.

Defendant may move an order to strike from the docket, when.

SECT. 425. At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant, having given to the plaintiff's proper representatives, in whose names the action might be revived, ten days' notice of the application therefor, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action is forthwith revived.

When an action stands revived, it shall proceed as if no cessation had occurred.

SECT. 426. When, by the provisions of the preceding sections, an action stands revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had no death or cessation of powers taken place.

CHAPTER II. — REVIVOR AND NEW PARTIES TO JUDGMENT.

When persons may be made parties to judgment.

SECT. 427. When a judgment is recovered against one or more persons, jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment by action.

If parties die after judgment.

SECT. 428. If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party.

If judgment become dormant.

SECT. 429. If a judgment becomes dormant, it may be revived in the same manner as prescribed for reviving actions before judgment.

TITLE XIV

EXECUTIONS.

CHAPTER I. *Executions against the Property of a Judgment Debtor.* — II. *Proceedings in aid of Execution.* — III. *Executions against the Person.* — IV. *Executions for the delivery of Real Property.* — V. *Judgment before Justices of the Peace.*

Executions, how issued and directed.

SECT. 430. Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the

sheriff of the county. They may be directed to different counties at the same time.

Kinds of executions.

SECT. 431. Executions are of three kinds: 1. Against the property of the judgment debtor. 2. For the delivery of the possession of real property, with damages for withholding the same, and costs.

CHAPTER I. — EXECUTIONS AGAINST THE PROPERTY OF THE JUDGMENT DEBTOR.

Executions against property of judgment debtor.

SECT. 432. Lands, tenements, goods, and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution, and sold as hereinafter provided.

Lands, goods, and chattels bound from time of seizure.

SECT. 433. All lands, as well as goods and chattels of the debtor, not exempt by law from levy, seizure, and sale under an execution, shall be bound from the time they shall be seized in execution.

Execution must be sued out within five years.

SECT. 434. If execution shall not be sued out within five years from the date of any judgment, that now is or may hereafter be rendered in any court of record in this territory; or if five years shall have intervened between the date of the last execution issued on such judgment and the time of sueing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor.

Contents of the writ of execution.

SECT. 435. The writ of execution against the property of the judgment debtor, issuing from any court of record in this territory, shall command the officer, to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the money specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor; and the exact amount of the debt, damages, and costs, for which the judgment is entered, shall be indorsed on the execution.

When two or more writs against same debtor shall be delivered to officer at or about same day, &c.

SECT. 436. When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum

of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the officer shall be first satisfied. And it shall be the duty of the officer to indorse on every writ of execution the time when he received the same. No judgment shall be a lien upon the lands, goods, or chattels of a judgment debtor, until said lands, goods, or chattels shall be levied upon or seized in execution.

In what order property shall be levied upon.

SECT. 437. The officer to whom a writ of execution is delivered, shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall indorse on the writ of execution, "no goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor, which may be liable to satisfy the judgment.

If officer levies upon property claimed by other than defendant, jury of disinterested men to be summoned, &c.

SECT. 438. If the officer, by virtue of any writ of execution, issued from any court of record in this territory, shall levy the same on any goods and chattels claimed by any person other than the defendant, it shall be the duty of said officer forthwith to give notice in writing to some justice of the peace in the county, in which shall be set forth the names of the plaintiff and defendant, together with the name of the claimant; and at the same time he shall furnish the said justice of the peace with a schedule of the property claimed. And it shall be the duty of such justice of the peace, immediately upon the receipt of such notice and schedule, to make an entry of the same upon his docket, and issue a writ of summons, directed to the sheriff, or any constable of the county, commanding him to summon five disinterested men, having the qualifications of electors, who shall be named in said summons, to appear before him, the said justice, at the time and place therein mentioned, which time shall not be more than three days after the date of said writ, to try and determine the right of the claimant to the property in controversy. And it shall be the duty of the claimant to give two days' notice, in writing, to the plaintiff or other party for whose benefit such execution was issued and levied as aforesaid, his agent or attorney, if within the county, of the time and place of such trial; and he shall, moreover, prove to the satisfaction of said justice that such notice was given, or that

the same could not be given by reason of the absence of the party, his agent or attorney.

Jury to be sworn, and their duties.

SECT. 439. The jury summoned as aforesaid, shall be sworn to try and determine the right of the claimant to the property in controversy, and a true verdict to give, according to the evidence. If the jury shall find the right to said goods and chattels, or any part thereof, to be in the claimant, they shall also find the value thereof, and the justice shall render judgment upon such finding of the jury, for the claimant, that he recover his costs against the plaintiff in execution, or other party to the same, for whose benefit the execution issued, and also that he have restitution of said goods and chattels, or any part thereof, according to the finding of the jury. But if the right of the said goods and chattels, and every part thereof, shall not be in the claimant according to the finding of said jury, then the said justice shall render judgment on such finding, in favor of the plaintiff in execution, or other party for whose benefit the same was issued and levied, against said claimant for costs, and award execution thereon. Such justice of the peace, in the taxation of costs accruing by reason of such claim and trial, shall allow each juror summoned and sworn, the sum of fifty cents; and for the sheriff, constable, or other officer, and witnesses, and for himself, he shall tax such fees as are allowed by law, to each, respectively, for like services rendered in other cases. Such judgment for the claimant (unless an undertaking shall be executed, as provided in the next section), shall be a justification of the officer in returning "no goods" to the writ of execution, by virtue of which the levy has been made, as to such part of the goods and chattels as were found to belong to such claimant.

Their duties.

SECT. 440. If the jury shall find the property or any part thereof to be in the claimant, and the plaintiff in execution shall, at any time within three days after such trial, tender to the sheriff or other officer having such property in his custody on execution, an undertaking with good and sufficient sureties, payable to such claimant, in double the amount of the value of such property as assessed by the jury, to the effect that they will pay all damages sustained by reason of the detention or sale of such property, then the sheriff or other officer shall deliver said undertaking to claimant, and proceed

to sell such property, as if no such trial of the right of property had taken place, and shall not be liable to the claimant therefor.

In case goods and chattels remain unsold.

SECT. 441. In all cases where a sheriff, coroner, or other officer shall, by virtue of an execution, levy upon any goods and chattels, which shall remain upon his hands unsold, for want of bidders, for the want of time to advertise and sell, or any other reasonable cause, the officer may, for his own security, take of the defendant an undertaking, with security in such sum as he may deem sufficient, to the effect that the said property shall be delivered to the officer holding an execution for the sale of the same, at the time and place appointed by said officer, either by notice given in writing to said defendant in execution, or by advertisement, published in a newspaper printed in the county, naming therein the day and place of sale. If the defendant shall fail to deliver the goods and chattels at the time and place mentioned in the notice to him given, or to pay to the officer holding the execution the full value of said goods and chattels, or the amount of said debt and costs, the undertaking, given as aforesaid, shall be considered as broken, and may be proceeded on as in other cases.

Officer to give notice of sale. Style of notice.

SECT. 442. The officer who levies upon goods and chattels, by virtue of an execution issued by a court of record, before he proceeds to sell the same, shall cause public notice to be given of the time and place of sale, for at least ten days before the day of sale. The notice shall be given by advertisement, published in some newspaper printed in the county, or, in case no newspaper be printed therein, by setting up advertisements in five public places in the county; two advertisements shall be put up in the precinct where the sale is to be held. And where goods and chattels levied upon cannot be sold for want of bidders, the officer making such return shall annex to the execution a true and perfect inventory of such goods and chattels; and the plaintiff in such execution may thereupon sue out another writ of execution directing the sale of the property levied upon as aforesaid; but such goods and chattels shall not be sold, unless the time and place of sale be advertised, as hereinbefore provided.

If property unsold be deemed insuffi-

SECT. 443. When any writ shall issue, directing the sale of property previously taken in execution, the officer issuing

cient to satisfy judgment.

said writ shall, at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ shall be directed, that, if the property remaining in his hands, not sold, shall, in his opinion, be insufficient to satisfy the judgment, he shall levy the same upon the lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, sufficient to satisfy the debt.

If execution levied upon lands and tenements, the same shall be appraised, how.

SECT. 444. If execution be levied on lands and tenements, the officer levying such execution shall call an inquest of three disinterested freeholders, who shall be resident within the county where the lands taken in execution are situate, and administer to them an oath, impartially to appraise the property so levied upon, upon actual view; and such freeholders shall forthwith return to the said officer, under their hands, an estimate of the real value, in money, of said property.

A copy of their return deposited with clerk of court.

SECT. 445. The officer receiving such return shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and immediately advertise and sell such real estate, agreeably to the provisions of this title.

If two thirds of appraised value sufficient to satisfy execution.

SECT. 446. If, upon such return, as aforesaid, it appear, by the inquisition, that two thirds of the appraised value of said lands and tenements so levied upon is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien, on the residue of the debtor's estate, to the prejudice of any other judgment creditor. But no tract of land shall be sold for less than two thirds of the value returned in the inquest: *Provided*, That nothing in this section contained shall in anywise extend to affect the sale of lands by the territory, but all lands therein the property of individuals, indebted to the territory for any debt or taxes, or in any other manner, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws for such case made and provided.

Proviso.

If property of certain public officers is levied upon on certain accounts.

SECT. 447. If the property of any clerk, sheriff, coroner, justice of the peace, constable, or any collector of territorial, county, town, or township tax, shall be levied on, for, or on account of any moneys that now are, or may hereafter be by them collected or received, in their official capacity, the property so levied on shall be sold without valuation.

Lands and tenements not to be sold without certain public notice.

SECT. 448. Lands and tenements, taken in execution, shall not be sold, until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement, in some newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement upon the court house door, and in five other public places in the county, two of which shall be in the precinct where such lands and tenements lie. All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable.

If court is satisfied of legality of sale, a deed shall be given by the officer.

SECT. 449. If the court, upon the return of any writ of execution, for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal, that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such land and tenements; and the officer, on making such sale, may retain the purchase-money in his hands, until the court shall have examined his proceedings, as aforesaid, when he shall pay the same to the person entitled thereto, agreeable to the order of the court.

Officer shall make deed in certain form.

SECT. 450. The sheriff or other officer, who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser or purchasers thereof, as good and sufficient a deed of conveyance of lands and tenements sold, as the person or persons, against whom such writ or writs of execution were issued, could have made of the same, at, or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment. And such deed of conveyance, to be made by the sheriff, or other officer, shall recite the execution or executions, or the substance thereof, and the names of

the parties, the amount and date of term of rendition of such judgment, by virtue whereof the said lands and tenements were sold as aforesaid; and shall be executed, acknowledged, and recorded, as is or may be provided by law, to perfect the conveyance of real estate in other cases.

Officer may refuse to publish notice until party to be benefited advances printer's fees.

SECT. 451. The officer who levies upon goods and chattels, or lands and tenements, or who is charged with the duty of selling the same by virtue of any writ or execution, may refuse to publish a notice of the sale thereof by advertisement in a newspaper, until the party for whose benefit such execution issued, his agent or attorney, shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice.

In such case, officer shall demand the fees.

SECT. 452. Before any officer shall be excused from giving the notification mentioned in the last section, he shall demand of the party for whose benefit the execution was issued, his agent or attorney (provided either of them reside in the county), the fees in said section specified.

Sales made at court house or other stated place.

SECT. 453. All sales of lands or tenements under execution, shall be held at the court house, if there be one in the county in which such lands and tenements are situated, and if there be no court house, then at the door of the house in which the district court was last held. No sheriff, or other officer, making the sale of property, either personal or real, nor any appraiser of such property, shall either directly or indirectly purchase the same; and every purchase so made, shall be considered fraudulent and void.

No officer making sale shall purchase property.

If lands and tenements not sold, other executions may issue.

SECT. 454. If lands and tenements, levied on as aforesaid, are not sold upon one execution, other executions may be issued to sell the lands so levied upon.

In case two or more executions shall be put into hands of sheriff, and officer is required to make separate levy.

SECT. 455. In all cases, when two or more executions shall be put into the hands of any sheriff, or other officer, and it shall be necessary to levy on real estate to satisfy the same, and either of the judgment creditors in whose favor one or more of said executions is issued, shall require the sheriff, or other officer, to make a separate levy to satisfy his execution or executions, it shall be the duty of the sheriff, or other officer, to levy said executions, or so many thereof as may be required, on separate parcels of real property, of the judgment debtor or debtors; giving to the officer making the levy on behalf of the creditor, whose execution may, by the pro-

visions of this chapter, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient, at two thirds the appraised value, to satisfy the same. And in all cases where two or more executions, which are entitled to no preference over each other, are put in the hands of the same officer, it shall be the duty of the officer when required, to levy the same on separate parcels of the real property of the judgment debtor or debtors, when in the opinion of the appraisers the same may be divided without material injury; and if the real property of said debtors will not be sufficient, at two thirds of its appraised value, to satisfy all the executions chargeable thereon, or such part of the same as shall be levied on to satify each execution, as will bear the same proportion in value to the whole, as the amount due on the execution bears to the amount of all the executions chargeable thereon, as near as may be, according to the appraised value of each separate parcel of said real property.

If term of service of officer expire, or he be absent or die before making deed.

SECT. 456. If the term of service of the sheriff, or other officer, who has made, or shall hereafter make sale of any lands and tenements, shall expire; or if the sheriff or other officer shall be absent, or be rendered unable by death, or otherwise, to make a deed of conveyance of the same, any succeeding sheriff or other officer, on receiving a certificate from the court from which the execution issued for the sale of said lands and tenements, signed by the clerk, by order of said court, setting forth that sufficient proof has been made to the court, that such sale was fairly and legally made, and, on tender of the purchase-money, or if the same, or any part thereof, be paid, then, on proof of such payment and tender of the balance, if any, may execute to the said purchaser or purchasers, or his or their legal representatives, a deed of conveyance of said lands and tenements so sold. Such deed shall be as good and valid in law, and have the same effect, as if the sheriff or other officer who made sale, had executed the same.

If there be more money than is sufficient to satisfy execution.

SECT. 457. If, on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer, more money than is sufficient to satisfy the writ or writs of execution, with interests and costs, the sheriff or other officer shall, on demand,

pay the balance to the defendant in execution, or his legal representatives.

If judgments are reversed after sale, title not to be affected.

SECT. 458. If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such case, restitution shall be made, by the judgment creditor, of the moneys, for which such lands or tenements were sold, with lawful interest from the day of sale.

In case real estate is twice offered and not sold.

SECT. 459. In all cases where real estate has been or may hereafter be taken on execution and appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the court from which such execution issued, on motion of the plaintiff, to set aside such appraisement, and order a new one to be made, or to set aside such levy and appraisement, and award a new execution to issue, as the case may require.

Writ of execution to be returned within sixty days.

SECT. 460. The sheriff or other officer, to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof.

In case judgment is rendered against two or more persons severally bound, &c.

SECT. 461. In all cases where judgment is rendered in any court of record within this territory, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound, signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk of said court, in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor, to make the same, that he cause the same to be made of the goods and chattels, lands and tenements of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution.

Fees of appraisers. If he fails to attend.

SECT. 462. Each freeholder summoned to appraise real estate under the provisions of this chapter, shall be allowed and receive for his services the sum of fifty cents for each day he may be so engaged as such appraiser, to be collected on the execution, by virtue of which the property appraised was levied on, if claimed at the time of making the return of such appraisement. And when any freeholder, summoned as aforesaid, shall fail to appear at the time and place appointed by the officer, and discharge his duty as appraiser, he shall, on complaint being made to any justice of the peace of the precinct in which such freeholder resides, forfeit and pay the sum of fifty cents for every such neglect, unless he can render a reasonable excuse. Such sum shall be collected by said justice, and paid into the county treasury for the use of the county.

If a sheriff or other officer shall refuse or neglect to execute papers directed to him, &c., he shall be subjected to certain penalty.

SECT. 463. If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands; or shall neglect or refuse to sell any goods and chattels, lands and tenements, or shall neglect to call an inquest, and return a copy thereof forthwith to the clerk's office; or shall neglect to return any writ of execution to the proper court, on or before the return day thereof; or shall neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless the said sheriff or other officer shall return that he has levied and made the amount of the debt, damages, and costs; or shall refuse or neglect on demand to pay over to the plaintiff, his agent or attorney of record, all moneys by him collected or received, for the use of said party, at any time after collecting or receiving the same, except as provided in section four hundred and forty-nine; or shall neglect or refuse, on demand made by the defendant, his agent or attorney of record, to pay over all moneys by him received for any sale made, beyond what is sufficient to satisfy the writ or writs of execution, with interest and legal costs, such sheriff or other officer shall, on motion in court and two days' notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant, as the case may be.

If clerk shall fail in his duty.

SECT. 464. If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent or

attorney of record, to pay over all money by him received, in his official capacity, for the use of such person, every such clerk may be amerced; and the proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties.

When the cause is for refusing to pay over money.

SECT. 465. When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per centum thereon.

When directed to officer of another county he may return same by mail.

SECT. 466. When execution shall be issued in any county in this territory, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to inclose such execution, by mail, to the clerk of the court who issued the same. On proof being made by such sheriff or coroner, that the execution was mailed soon enough to have reached the office where it was issued, within the time prescribed by law, the sheriff or coroner shall not be liable for any amercement or penalty, if it do not reach the office in due time.

Shall not forward money unless directed to do so.

SECT. 467. No sheriff shall forward, by mail, any money made on any such execution, unless he shall be specially instructed to do it by the plaintiff, his agent or attorney of record.

In case of amercement of officers of another county.

In all cases of a motion to amerce a sheriff or other officer of any county other than the one from which the execution issued, notice in writing shall be given to such officer, as hereinbefore required, by leaving it with him, or at his office, at least fifteen days before the first day of the term at which such motion shall be made, or by transmitting the notice by mail, at least sixty days prior to the first day of the term at which such motion shall be made. All amercements so procured shall be entered on the record of the court, and shall have the same force and effect as a judgment.

Sureties of officer to be made parties to execution. Their goods and chattels, &c., not liable, until when.

SECT. 468. Each and every surety of any sheriff or other officer may be made a party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases. But the goods and chattels, lands and tenements of any such surety, shall not be liable to be taken on execution, when sufficient goods and chattels, lands and tenements of the sheriff or other officer, against whom execution may be issued, can be found

to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer, by attachment, at his election.

In case officer amerced shall not have collected amount of original judgment.

SECT. 469. In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he shall be permitted to sue out an execution, and collect the amount of said judgment in the name of the original plaintiff, for his own use.

CHAPTER II. — PROCEEDINGS IN AID OF EXECUTION.

When there is not sufficient personal and real property.

SECT. 470. When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint-stock company, or any interest he may have in any money contracts, claims, or choses in action, due or to become due to him, or in any judgment or decree; or any money, goods, or effects which he may have in possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by proceedings in equity, or as in this chapter prescribed.

When an execution is returned unsatisfied.

SECT. 471. When an execution against the property of a judgment debtor, or one of several debtors in the same judgment, is issued to the sheriff of a county where he resides, or if he do not reside in the territory, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from a judge of the district court of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property, before such judge, or a referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued.

If court is satisfied that judgment debtor has property which he refuses to apply.

SECT. 472. After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor or otherwise, to the satisfaction of the district court, or a judge thereof, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place in said county, to answer concerning the same. And such proceed-

ings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are prescribed in this chapter.

SECT. 473.

No person excused from testifying, on ground of fraud, &c.

SECT. 474. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answer shall not be used as evidence against him in a criminal prosecution for such fraud.

How execution may be satisfied.

SECT. 475. After the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution.

When persons or corporations may be called upon to testify as to property in their hands.

SECT. 476. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place within the county in which such person or corporation may be served with the order to answer, and answer concerning the same. The judge may, also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper.

Witnesses may be required by order of judge or subpœna.

SECT. 477. Witnesses may be required, upon the order of the judge, or by a subpœna issued by the clerk of the district court, to appear and testify upon any proceedings in this chapter, in the same manner as upon the trial of an issue.

Shall attend before whom.

SECT. 478. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge. If before a referee, the examination must be taken by the referee and certified by the judge. All examinations and answers before a judge or referee, under this chapter, must be on oath; but when a corporation answers, the answer must be on the oath of an officer thereof.

What may be applied in satisfaction of judgment.

SECT. 479. The judge may order any property of the judgment debtor, not exempt by law, in the hands of either himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied, where it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

Judge may appoint receiver.

SECT. 480. The judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, in the same manner and with the like authority as if the appointment was made by the court. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, and any interference therewith.

If sheriff is appointed receiver.

SECT. 481. If the sheriff shall be appointed receiver, he and his sureties shall be liable to his official bond for the faithful discharge of his duties as such receiver. If any other person shall be appointed receiver, he shall give a written undertaking in such sum as shall be prescribed by the judge, with one or more sureties, to the effect that he will faithfully discharge his duties of receiver, and he shall also take an oath to the same effect, before acting as such receiver. The undertaking mentioned in this section shall be to the Territory of Dakota, and actions may be prosecuted for a breach thereof, by any person interested, in the same manner as upon a sheriff's official bond.

Proceedings may be continued.

SECT. 482. The judge or referee, acting under the provisions of this chapter, shall have power to continue his proceedings from time to time until they are completed.

Judge may order referee to report on facts.

SECT. 483. The judge may, in his discretion, order a reference to a referee agreed upon or appointed by him, to report the evidence of the facts.

If orders of judge or referee are disobeyed.

SECT. 484. If any person, party, or witness, disobey an order of the judge or referee, duly served, such person, party, or witness may be punished by the judge as for contempt.

Orders to be in writing and signed. To be filed.

SECT. 485. The orders to judgment debtors and witnesses, provided for in this chapter, shall be in writing and signed by

the judge making the same, and shall be served as a summons in other cases. The judge shall reduce all his orders to writing, which, together with a minute of his proceedings signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice filed, and the clerk shall enter on his execution docket the time of filing the same.

Fees to officers.

SECT. 486. The judge shall allow to clerks, sheriffs, referees, receivers, and witnesses, such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and shall enforce by order the collection thereof from such party or parties as ought to pay the same.

SECT. 487. * * * SECT. 488. * * * SECT. 489. * * * SECT. 490. * * * SECT. 491. * * * SECT. 492. * * * SECT. 493. * * * SECT. 494. * * * SECT. 495. * * *

CHAPTER IV. — EXECUTIONS FOR THE DELIVERY OF REAL PROPERTY.

If the execution is for the delivery of real property.

SECT. 496. If the execution be for the delivery of the possession of real property, it shall require the officer to deliver the same, particularly describing the property, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered in the same judgment, out of the goods and chattels of the party against whom it was rendered, and for want of such goods and chattels, then out of the lands and tenements; and in this respect it shall be deemed an execution against the property.

If not for money or real property.

SECT. 497. When the judgment is not for the recovery of money or real property, the same may be enforced by attachment by the court rendering the judgment, upon motion made, or by a rule of the court upon the defendant; but in either case, notice of the motion, or a service of a copy of the rule, shall be made on the defendant a reasonable time before the order of attachment is made.

CHAPTER V. — JUDGMENT BEFORE JUSTICES OF THE PEACE.

Judgments rendered by justices to be recorded with clerk of district court.

SECT. 498. In all cases in which judgment shall be rendered by a justice of the peace, the party in whose favor the judgment shall be rendered may file a transcript of such judg-

ment in the office of the clerk of the district court of the county in which the judgment was rendered, and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the execution docket, together with the amount of the judgment and the time of filing the transcript.

Judgment have lien from when.

SECT. 499. Such judgment, if the transcript shall be filed in term time, shall have a lien on the real estate of the judgment debtor from the first day of the term; if filed in vacation, as against the judgment debtor, said judgment shall have a lien from the day of the filing, and as against subsequent judgment creditors — at the next succeeding term, and other transcripts filed in vacation, said judgment shall have lien from the first day of the next term of the court in the same manner and to the same extent as if the judgment had been rendered in the district court.

Execution issued to sheriff same as in court.

SECT. 500. Execution may be issued thereon to the sheriff by the clerk of the court, in the same manner as if the judgment had been taken in court, and the sheriff shall execute and return the same, as other executions; and, in case of sale of real estate, his proceedings shall be examined and approved by the court, as in other cases.

Justice shall certify amount paid on judgment. Costs paid by whom.

SECT. 501. The justice of the peace shall certify, on the transcript, the amount, if any, paid on such judgment. The costs of the transcript, the filing of the same, and the entry of the case on the execution docket shall be paid by the party filing the same, and be taxed in the costs.

TITLE XV.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I. *Offer to Compromise.* — II. *Submitting a Controversy.* — III. *Offer to confess Judgment.* — IV. *Motions and Orders.*

CHAPTER I. — OFFER TO COMPROMISE.

Offer to compromise, how paid.

SECT. 502. The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney, an offer, in writing, to allow judgment to be taken against him for the sum specfied therein.

If the plaintiff accept the offer, and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the order, verified by affidavit; and, in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence, or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

Making of offer not cause for continuance or postponement.

SECT. 503. The making of an offer, pursuant to the provisions contained in the foregoing section, shall not be a cause for a continuance of an action, or a postponement of a trial.

CHAPTER II. — SUBMITTING A CONTROVERSY.

How parties may submit a controversy.

SECT. 504. Parties to a question which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment, as if an action were pending.

What constitutes the record

SECT. 505. The case, the submission, and the judgment shall constitute the record.

Judgment of same force as in an action.

SECT. 506. The judgment shall be with costs, may be enforced, and shall be subject to reversal in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.

CHAPTER III. — OFFER TO CONFESS JUDGMENT.

Proceedings in an offer to confess judgment.

SECT. 507. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action. Whereupon, if the plaintiff, being present,

refuse to accept such confession of judgment in full of his demands against the defendant in the action, or having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and, on the trial, do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

Same.

SECT. 508. Before an action for the recovery of money is brought against any person, he may go into the court of the county of his residence, or of that in which the person having the cause of action resides, which would have jurisdiction of the action, and offer to confess judgment in favor of such person for a specified sum on such cause of action. Whereupon, if such person having had such notice that the offer would be made, of its amount, and of the time and place of making it, as the court shall deem reasonable, do not attend to accept the confession, or, attending, refuse to accept it, and shall afterwards commence an action upon such cause and not recover more than the amount so offered to be confessed, he shall pay all the costs of the action; and on the trial thereof, the offer shall not be deemed to be an admission of the cause or action, or amount to which the plaintiff is entitled, nor be given in evidence.

CHAPTER IV. — MOTIONS AND ORDERS.

A motion.

SECT. 509. A motion is an application for an order addressed to the court or a judge in vacation, by any party to a suit or proceeding, or one interested therein.

Several objects may be included.

SECT. 510. Several objects may be included in the same motion if they all grow out of, or are connected with, the action or proceeding in which it is made.

If required, it must be in writing, and contain what.

SECT. 511. Where notice of a motion is required, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where, and the day on which it will be heard, the nature and terms of the order or orders to be applied for, and if affidavits are to

be used on the hearing, the notice shall state the fact. It shall be served a reasonable time before the hearing.

Notices of motions, how served.

SECT. 512. Notices of motions mentioned in this chapter may be served by a sheriff, coroner, or constable, or by any disinterested person, and the return of any such officer, or affidavit of any such person, shall be proof of service. The service shall be on the party or his attorney of record, if the said party or his attorney be resident within the county in which the motion is made, and in case there is more than one party adverse to such motion, service shall be made upon each party or his attorney.

Same as summons.

SECT. 513. The service of a notice shall be made as is required by law for the service of a summons, and when served by an officer, he shall be entitled to like fees.

Motions to strike papers from files may be with or without notice.

SECT. 514. Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct.

Every direction of a court, in writing, an order.

SECT. 515. Every direction of a court or judge made or entered in writing and not included in a judgment, is an order.

Orders, made out of court, entered in journal.

SECT. 516. Orders made out of court shall be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term.

TITLE XVI.

ERROR IN CIVIL CASES.

Judgments and orders of inferior courts may be reversed, &c., by district court.

SECT. 517. A judgment rendered, or final order made, by a justice of the peace or any other tribunal, board, or officer, exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court.

Final orders which may be vacated, &c.

SECT. 518. An order affecting a substantial right in an action, when such order in effect determines the action and prevented a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.

Judgments and orders of dis-

SECT. 519. A judgment rendered or final order made by

the district court, may be reversed, vacated, or modified by the supreme court, for errors appearing on the record.

trict court may be reversed, &c., by supreme court.

SECT. 520. A judgment rendered or final order made by any court, board, or tribunal, mentioned in the preceding sections, may be reversed, vacated, or modified, by the supreme court, for errors appearing on the record; but the petition in error, in such case, can be filed only by leave of the supreme court, or a judge thereof.

Reversals, &c., by supreme court, how petitioned for.

SECT. 521. The proceedings to obtain such reversal, vacation, or modification, shall be by petition, to be entitled, "petition in error," filed in a court having power to make such reversal, vacation, or modification, setting forth the error complained, and there upon a summons shall be issued and served or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient. The summons shall notify the adverse party, that a petition in error has been filed in a certain case, naming it, and shall be made returnable on or before the first day of the term of the court, if issued in vacation; if issued in term time, it shall be returnable on a day therein named; if the last publication or service of the summons shall be made ten days before the end of the term, the case shall stand for hearing at the term.

Proceedings on such reversals, &c.

SECT. 522. The summons mentioned in the last section, shall, upon the written precipe of the plaintiff in error or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error or his attorney of record may be; and if the writ issue to a foreign county, the sheriff thereof may return the same by mail to the clerk, and shall be entitled to the same fees as if the same had been returnable to the district court of the county in which such officer resides. The defendant in error, or his attorney, may waive in writing the issuing or service of the summons.

Summons, how issued.

SECT. 523. The plaintiff in error shall file with his petition, a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified.

Transcript of proceedings to be filed with petition.

SECT. 524. Justices of the peace, and other judicial tribunals having no clerk, and the clerks of every court of record, shall upon request and being paid the lawful fees therefor,

Justices shall furnish transcripts, when.

furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript.

No proceedings to reverse, &c., of district court shall stay execution, unless plaintiff in error executes undertaking.

SECT. 525. No proceeding to reverse, vacate, or modify any judgment or final order rendered in the county court, or district court, except as provided in the next section, and the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of said judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with one or more sufficient sureties, as follows: 1. When the judgment or final order sought to be reversed, directs the payment of money, the written undertaking shall be in double the amount of the judgment or order, to the effect that the plaintiff in error will pay the condemnation-money and costs, in case the judgment or final order shall be affirmed in whole or in part. 2. When it directs the execution of a conveyance, or other instrument, the undertaking shall be in such sum as may be prescribed by any court of record in this territory, or any judge thereof, to the effect that the plaintiff in error will abide the judgment, the same shall be affirmed, and pay the costs. 3. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by any court of record of this territory, or any judge thereof to the effect, that during the possession of such property by the plaintiff in error, he will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed, he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession, pursuant to the judgment, and all costs. [4.] When it directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered, to abide the judgment of the appellate court, or the undertaking shall be in such sum as may be prescribed as aforesaid, to abide the judgment and pay costs, if the same shall be affirmed.

Undertaking must be approved by court.

SECT. 527. Before the written undertaking herein mentioned in section five hundred and twenty-five, shall operate to stay execution of the judgment or order, the execution of

the undertaking and the sufficiency of the sureties must be approved by the court in which the judgment was rendered or order made, or by the clerk thereof; and the clerk shall indorse said approval, signed by himself, upon the undertaking, and file the same in his office, for the defendant in error.

Proceeding must be commenced within three years,— with exceptions.

SECT. 528. No proceeding for reversing, vacating, or modifying judgments or final orders, shall be commenced, unless within three years after the rendition of the judgment, or making the final order complained of; or, in case the person entitled to such proceeding be an infant, a married woman, a person of unsound mind, or imprisoned, within three years, as aforesaid, exclusive of the time of such disability.

No proceedings to reverse, &c., of justice, shall stay execution unless plaintiff execute understanding.

SECT. 529. No proceeding to reverse, vacate, or modify any judgment rendered, or final order made by a justice of the peace, shall operate as a stay of execution, unless the clerk of the district court shall take a written undertaking to the defendant, executed on the part of the plaintiff in error, by one or more sufficient sureties, to the effect that the plaintiff will pay all the costs which have accrued, or may accrue on such proceedings in error, together with the amount of any judgment that may be rendered against such plaintiff in error, either on the further trial of the case, after the judgment of the court below shall have been set aside or reversed, or upon and after the affirmance thereof in the district court. The person entitled to such proceeding shall have the same time for prosecuting the same, before he is barred, as is provided in section five hundred and twenty-eight, unless the said judgment has been paid off or satisfied prior to the commencement of such proceeding.

When judgment is reversed.

SECT. 530. When a judgment or final order shall be reversed, either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below, for such judgment; and the court reversing such judgment, or final order, shall not issue execution in causes that are removed before them on error, on which they pronounced judgment, as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the

same manner as if such judgment or final order had been rendered therein. And, on motion and good cause shown, it may suspend any execution made returnable before it, by order of the supreme court, in the same manner as if such execution had been issued from its own court, but such power shall not extend further than to stay proceedings until the matter can be further heard by the supreme court.

Same.

SECT. 531. When a judgment or final order is reversed, the plaintiff in error shall recover his costs, and when reversed in part, and affirmed in part, costs shall be equally divided between the parties.

When it is affirmed.

SECT. 532. When a judgment or final order shall be affirmed in the supreme court, the said court shall also render judgment against the plaintiff in error, for five per cent. upon the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable ground for the proceedings in error.

Mistake, &c., of clerk shall not be ground of error unless.

SECT. 533. A mistake, neglect, or omission of the clerk shall not be a ground of error, until the same has been presented and acted upon in the court in which the mistake, neglect, or omission occurred.

Rendering judgment before action stood for trial, shall be deemed clerical error.

SECT. 534. Rendering judgment before the action stood for trial, according to the provisions of this code, shall be deemed a clerical error.

Certain writs abolished, and certain powers retained.

SECT. 535. Writs of error and certiorari, to reverse, vacate, or modify judgments or final orders in civil cases, are abolished, but courts shall have the same power to compel, complete, and perfect transcripts of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and certiorari.

If judgment of justice be affirmed.

SECT. 536. If the judgment of a justice of the peace, taken on error, as herein provided, to the district court be affirmed, it shall be the duty of such court to render judgment against the plaintiff in error, for the costs of suit, and to award execution therefor; and the court shall thereupon order its clerk to certify its decision in the premises, to the justice, that the judgment affirmed may be enforced, as if such proceedings in error had not been taken; or such court may award execution to carry into effect the judgment of such justice, in the

same manner as if such judgment had been rendered in the district court.

When judgment reversed or set aside.

SECT. 537. When the proceedings of a justice of the peace are taken, on error, to the district court, in manner aforesaid, and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment, as in cases of appeal.

PROCEEDINGS TO REVERSE, VACATE, OR MODIFY JUDGMENTS AND ORDERS IN THE COURTS IN WHICH THEY ARE RENDERED.

A district court may vacate or modify its own judgments, &c., how.

SECT. 538. A district court shall have power to vacate, or modify its own judgments or orders, after the term at which such judgment or order was made: 1. By granting a new trial for the cause, within the time and in the manner prescribed in section two hundred and ninety-eight. 2. By a new trial granted in proceedings against defendants constructively summoned, as provided in section sixty-seven. 3. For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order. 4. For fraud practised by the successful party in obtaining the judgment or order. 5. For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. 6. For death of one of the parties before the judgment in the action. 7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. 8. For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section three hundred and ninety-seven. 9. For taking judgments upon warrants of attorney, for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

The proceedings.

SECT. 539. The proceedings to vacate or modify the judgment or order on the grounds mentioned in the subdivisions four, five, six, seven, eight, and nine, of the last preceding section, shall be by petition verified by affidavit, setting forth the

judgment, or order, the grounds to vacate or modify it, and the defence to the action, if the party applying was defendant. On such petition a summons shall issue and be served as in the commencement of an action: *Provided*, Such summons shall not issue in any case in which there is, upon the minutes of the court, or among the files of the case, a waiver of error by the party or his attorney, unless the court or a judge thereof shall indorse upon the petition permission to issue such summons.

Proceedings to correct mistakes and omissions of clerks.

SECT. 540. The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term.

Court may first try the grounds to vacate, &c.

SECT. 541. The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defence or cause of action.

A judgment shall not be vacated until when.

SECT. 542. A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defence to the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and sureties obtained under it, shall be preserved to the modified judgment.

Party seeking to vacate, &c., may obtain injunction.

SECT. 543. The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court, or any judge thereof, upon its being rendered probable, by affidavit or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

When the judgment was rendered before the action stood for trial.

SECT. 544. When the judgment was rendered before the action stood for trial, the suspension may be granted as provided in the last section, although no valid defence to the action is shown; and the court shall make such orders concerning the executions to be issued on the judgment, as shall give to the defendants the same rights of delay he would have had if the judgment had been rendered at the proper time.

Proceedings to vacate and modify, when commenced.

SECT. 545. Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five, and seven of section five hundred and thirty-eight, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, married woman, or person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same action, shall be within three years, and in subdivision nine within one year after the defendant has notice of the judgment.

Provisions applying to supreme court.

SECT. 546. The provisions of this title subsequent to section five hundred and thirty-seven shall apply to the supreme court, so far as the same may be applicable to the judgments or final orders of such court.

Cases pending conducted to final judgment.

SECT. 547. Cases pending in appellate courts on writs of error or otherwise, when this code takes effect, shall be conducted to final judgment, as if it had not been adopted, and the liens of judgments and decrees rendered when it takes effect shall be preserved.

TITLE XVII.

COSTS.

CHAPTER I.

Surety for costs given, when.

SECT. 548. In cases in which the plaintiff is a non-resident of the county in which the action is to be brought, before commencing such action, the plaintiff must furnish a sufficient surety for costs. The surety must be a resident of the county where the action is to be brought, and approved by the clerk. His obligation shall be complete, simply by indorsing the summons, or signing his name on the complaint as security for costs. He shall be bound for the payment [of] all costs, which may be adjudged against the plaintiff in the court, in which the action is brought, or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtained judgment, or not.

Action dismissed, when security for costs not given.

SECT. 549. An action in which security for costs is required by the last section, and has not been given, shall be

dismissed on the motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court, such security for costs be given.

If plaintiff becomes non-resident.

SECT. 550. If the plaintiff in an action, after its commencement, become a non-resident of the county in which it is brought, he shall give security for the costs in the manner and under the restrictions provided in the two preceding sections.

Defendant may move for additional security for costs, when.

SECT. 551. In an action in which security for costs has been given, the defendant may at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety has removed from this territory, or is not sufficient, the action may be dismissed, unless in a reasonable time to be fixed by the court, sufficient surety be given by the plaintiff.

After final judgment, how costs secured.

SECT. 552. After final judgment has been rendered in an action, in which security for costs has been given, as required by this chapter, the court, on motion of the defendant, or any other person having a right to such costs or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the defendant or his legal representatives, against the surety for costs, his executors or administrators, for the amount of the costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment, as in other cases, for the use and benefit of the person entitled to such costs.

If any informer, entitled to part of penalty, shall dismiss suit.

SECT. 553. If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer, whose duty it is to commence the same.

If defendants disclaim title, they shall recover costs.

SECT. 554. Where defendants disclaim having any title or interest in land or other property, the subject-matter of the action, they shall recover their costs unless for special reasons the court decide otherwise.

Other costs, how taxed and paid.

SECT. 555. Unless otherwise provided by statute, the costs of motions, continuances, amendments, and the like, shall be taxed and paid, as the court in its discretion may direct.

Where not otherwise provided, costs allowed to plaintiff.

SECT. 556. Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the

plaintiff upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.

If action brought in wrong jurisdiction, plaintiff shall not recover. Costs in certain other cases.

SECT. 557. If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs; and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation, or seduction, actions for nuisance, or against a justice of the peace for misconduct in office, if the damages assessed be under five dollars, the plaintiff shall not recover any costs.

When costs allowed to defendant.

SECT. 558. Costs shall be allowed of course, to any defendant upon a judgment in his favor in the actions mentioned in the last two sections.

In other actions court may award and tax costs.

SECT. 559. In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable.

Where several actions are brought on one bill of exchange, &c.

SECT. 560. Where several actions are brought on one bill of exchange, promissory note, or other obligation or instrument in writing against several parties, who might have been joined as defendants in the same action, as allowed by section thirty-five, no costs shall be recovered by the plaintiff in more than one of such actions, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within the territory.

When summons is issued to another county, sheriff entitled to what fees.

SECT. 561. When a summons is issued to another county than that in which the action or proceeding is pending, it may be returned by mail, and the sheriff shall be entitled to the same fees, as if the summons had issued in the county of which he is sheriff.

TITLE XVIII.

ACTIONS AND PROCEEDINGS IN PARTICULAR CASES.

CHAPTER I. *Actions concerning Real Property.* — II. *Actions on Official Securities.* — III. *Actions for the Partition of Real Property* — IV. *Proceedings upon Mandamus.*

CHAPTER I. — ACTIONS CONCERNING REAL PROPERTY.

What to be stated in petition for recovery of real property.

SECT. 562. In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition, that he has a real estate therein and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-three, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

What shall be sufficient answer.

SECT. 563. It shall be sufficient, in such action, if the defendant in his answer deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defence is made.

In an action by a tenant in common.

SECT. 564. In an action by a tenant in common of real property, against a co-tenant, the plaintiff must state in addition to what is required in the first section of this chapter, that the defendant either denies the plaintiff's right or did some act amounting to such denial.

Verdict and judgment in an action for recovery of real property.

SECT. 565. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

Defeated party may demand new trial, when.

SECT. 566. In an action for the recovery of real property, the party against whom judgment is rendered, may, at any time during the term at which the judgment is rendered, demand another trial by notice on the journal, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.

No further trial except upon appeal.

SECT. 567. No further trial can be had in such action, except upon appeal, unless for good cause shown, as in other actions.

Parties may avail themselves of statutes for relief of land claimants.

SECT. 568. The parties in an action for the recovery of property may avail themselves, if entitled thereto, of the relief of the statutes in force for the relief of occupying claimants of land.

If guardian or tenant commit waste.

SECT. 569. If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commit waste thereon, he is liable to pay three times the damages which have resulted from such waste to the person who is entitled to sue therefor.

Judgment of forfeiture and conviction rendered, when.

SECT. 570. Judgment of forfeiture and conviction may be rendered against the defendant, whenever the amount of damages so recovered is more than two thirds the value of the interest such defendant has in the property wasted, and when the action is brought by the person entitled to the reversion.

Person deemed to have committed waste, when.

SECT. 571. Any person whose duty it is to prevent waste, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it.

Treble damages in certain cases.

SECT. 572. For wilful trespass, injuring any timber, tree, or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard, or town lot, or on the public grounds of any town, or any land held by this territory, for any purpose whatever, the trespasser shall pay treble damages, at the suit of any person entitled to protect or enjoy the property aforesaid.

Not more than just value recoverable.

SECT. 573. Nothing herein contained authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge, upon the land in its immediate neighborhood.

The owner may maintain action, even if there be intervening estate.

SECT. 574. The owner of an estate in remainder or reversion, may maintain either of the aforesaid actions for injuries done to the inheritance, notwithstanding any intervening estate for life or years.

Heir may maintain actions, when.

SECT. 575. An heir, whether a minor or of full age, may maintain these actions for injuries done in the time of his ancestors, as well as in his own time, unless barred by the statute of limitations.

When lands are sold by virtue

SECT. 576. Where lands or tenements are sold by virtue

of execution, purchaser may maintain action.

of an execution, the purchaser at such sale may maintain his action against any person, for either of the causes above mentioned, occurring or existing after his purchase.

Not intended to interfere with ordinary husbandry.

SECT. 577. This provision is not intended to prevent the person who occupies the lands, in the mean time, from using them in the ordinary course of husbandry, or from using timber, for the purpose of making suitable repairs thereon.

If he use superior timber.

SECT. 578. But if, for this purpose, he employ timber superior to that required for this occasion, he will be deemed to have committed waste, and will be liable accordingly.

CHAPTER II. — ACTIONS ON OFFICIAL SECURITIES.

When an officer forfeits his bond, how to be proceeded against.

SECT. 579. When an officer, executor, or administrator within this territory, by misconduct or neglect of duty, forfeits his bond or renders his sureties, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer, executor, or administrator and his sureties, to recover the amount to which he may be entitled by reason of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond, which copy shall be furnished by the person holding the original thereof.

One judgment against security does not preclude another action on same.

SECT. 580. A judgment in favor of a party for one delinquency, does not preclude the same or another party from an action on the same security for another delinquency.

CHAPTER III. — ACTIONS FOR THE PARTITION OF REAL PROPERTY.

Actions for partition of real property.

SECT. 581. The provisions of the existing statutes relating to the partition of lands, tenements, and hereditaments, are not affected by this code, and partition may be made under the same, as heretofore, until the legislature shall otherwise provide. The provisions of such statutes shall also apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject-matter of the action, without regard to its form.

CHAPTER IV. — PROCEEDINGS UPON MANDAMUS.

Writ of mandamus issued to whom, and its effect.

SECT. 582. The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act, which the law specially enjoins as a duty resulting from an office, trust, or station. But though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

Not issued when there is other remedy.

SECT. 583. This writ may not be issued in any case, where there is a plain and adequate remedy in the ordinary course of the law. It may issue on the information of the party beneficially interested.

Alternative or peremptory writ.

SECT. 584. The writ is either alternative or peremptory. The alternative writ must state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately upon the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; and that he, then and there return the writ, with his certificate of having done as he is commanded. The peremptory writ must be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, must be omitted.

Which issues first.

SECT. 585. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases the alternative writ must be first issued.

Motion for writ, how made.

SECT. 586. The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Allowance indorsed, served personally. Contempt.

SECT. 587. The allowance of the writ must be indorsed thereon, signed by a judge of the court granting it, and the writ must be served personally upon the defendant. If the defendant duly served neglect to return the same, he shall be proceeded against, as for a contempt.

When and how answered.

SECT. 588. On the return day of the alternative writ, or such further day, as the court may allow, the party, on whom the writ shall have been served, may show cause by answer made, in the same manner as an answer to a petition in a civil action.

If no answer be made. If answer made.

SECT. 589. If no answer be made, a peremptory mandamus must be allowed against the defendant. If an answer be made containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objection to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance.

No other pleading allowed.

SECT. 590. No other pleading or written allegation is allowed, than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed, and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had in the same manner as in a civil action.

If judgment is given for plaintiff.

SECT. 591. If judgment be given for the plaintiff, he shall recover the damages which he shall have sustained, to be ascertained by the court, or a jury, or by referees, in a civil action, and costs; and a peremptory mandamus shall, also, be granted to him, without delay.

A recovery, bar to another action.

SECT. 592. A recovery of damages by virtue of this chapter, against a party who shall have made a return to a writ of mandamus, is a bar to any other action against the same party, for the making of such return.

If public officer, body or board receiving mandamus, neglect duty.

SECT. 593. Whenever a peremptory mandamus is directed to any public officer, body, or board, commanding the performance of any public duty, specially enjoined by law, if it appear to the court that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding five hundred dollars, upon every such officer or member of such body or board. Such fine, when collected, shall be paid into the treasury of the county, where the duty ought to have been performed, for the use of common schools; and the payment thereof is a bar to an action for any penalty incurred by such officer or member of such

body or board, by reason of his refusal or neglect to perform the duty so enjoined.

GENERAL PROVISIONS APPLICABLE TO THE WHOLE CODE.

CHAPTER I. *Process.* — II. *Duties of Clerks.* — III. *Duties of Sheriffs.* — IV. *Miscellaneous Provisions.* — V. *Provisions respecting existing Actions.* — VI. *Provisions as to the Operations of the Code.*

CHAPTER I. — PROCESS.

Style of all process. Sealed, signed, and dated.

SECT. 594. The style of all process shall be "The Territory of Dakota, ——— county." It shall be under the seal of court from whence the same shall issue, shall be signed by the clerk, and dated the day it issued.

If sheriff interested party, coroner acts for him.

SECT. 595. An order for the provisional remedy or any other process, in an action wherein the sheriff is a party or is interested, shall be directed to the coroner. If both these officers are interested, the process shall be directed to and executed by a person appointed by the court or judge.

If both interested.

Court may appoint special officer. Fees same as sheriff's.

SECT. 596. The court or judge, for good cause, may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the motion of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the fees allowed to the sheriff for similar services.

CHAPTER II. — DUTIES OF CLERKS.

Writs and orders for provisional remedies.

SECT. 597. All writs and orders for provisional remedies, and process of every kind, shall be issued by the clerks of the several courts. Before they shall be issued, a precipe shall be filed with the clerk demanding the same; which precipe shall be for the direction of the clerk, and not material to the papers in the case, after the issuing of such writ or process.

Shall file all papers.

SECT. 598. It is the duty of the clerk of each of the courts to file together and carefully preserve, in his office, all papers

delivered to him, for that purpose, in every action or special proceeding.

Shall indorse time of filing and return.

SECT. 599. He shall indorse upon every paper filed with him the day of filing it; and upon every order for a provisional remedy and upon every undertaking given under the same, the day of its return to his office.

Enter names of defendant summoned and day served.

SECT. 600. He shall, upon the return of every summons served, enter upon the docket the name of the defendant or defendants summoned, and the day of service upon each one. The entry shall be evidence of the service of the summons, in case of the loss thereof.

Keep records, books, &c.

SECT. 601. He shall keep the records and books and papers appertaining to the court, and record its proceedings.

Certain rules of district courts apply to other courts.

SECT. 602. The provisions of article eight, of title nine, prescribing the duties of clerks of the district court, shall, as far as they are applicable, apply to the clerks of other courts of record.

Other powers and duties.

SECT. 603. The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law. In the performance of his duties he shall be under the direction of his court.

CHAPTER III. — DUTIES OF SHERIFFS.

Shall indorse time of receipt on papers.

SECT. 604. The sheriff shall indorse upon every summons, order of arrest, or for the delivery of property, or of attachment or injunction, the day and hour it was received by him.

Shall execute summons, &c. If he fails to do so.

SECT. 605. He shall execute every summons, order, or other process, and return the same as required by law; and if he fail to do so, unless he make it appear to the satisfaction of the court, that he was prevented by inevitable accident from so doing, he shall be amerced by the court in a sum not exceeding one thousand dollars, and shall be liable to the action of any person aggrieved by such failure.

Other powers and duties.

SECT. 606. The sheriff shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this code, by other statutes, and by the common law.

CHAPTER IV.—Miscellaneous Provisions.

Duties may be performed by deputy.

Sect. 607. Any duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him may be performed by his lawful deputy.

Affirmation same effect as oath.

Sect. 608. Whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath, shall have the same effect.

Time, how computed.

Sect. 609. The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last; if the last day may be Sunday, it shall be excluded.

Right to a jury not impaired, when.

Sect. 610. Section three hundred and eighty-eight shall not be construed to impair the right of a party to a jury, if he appear at the trial by himself or attorney, and demand the same.

Officer taking undertaking may require affidavit of qualifications.

Sect. 611. The ministerial officer, whose duty it is to take security in any undertaking provided for by this code, shall have the right to require the person offered as surety, to make an affidavit of his qualifications, which affidavit may be made before such officer. The taking of such affidavit shall not exempt the officer from any liability to which he might otherwise be subject, for taking insufficient security.

Qualifications of sureties.

Sect. 612. The surety in every undertaking provided for by this code, must be a resident of this territory, and worth double the sum to be secured, beyond the amount of his debts, and have property liable to execution in this territory equal to the sum to be secured. Where there are two or more sureties in the same undertaking, they must in the aggregate have the qualifications prescribed in this section.

Judges of supreme court may revise their rules, when. Same rules apply to district courts.

Sect. 613. The judges of the supreme court shall, at the first session of the supreme court, after this code shall take effect, and every two years thereafter, revise their general rules, and make such amendments thereto as may be necessary to carry into effect the provisions of this code; and they shall make such further rules, consistent therewith, as they may deem proper. The rules so made shall apply to the supreme court and the district courts.

CHAPTER V.—PROVISIONS AS TO THE OPERATIONS OF THE CODE.

Cases arising not covered by this code.

SECT. 614. Rights of civil action, given or secured by existing laws, shall be prosecuted in the manner provided by this code. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice.

SECT. 615.

When actions shall be conducted in conformity to this code.

SECT. 616. Where, by statute, a civil action, legal or equitable, is given, and the mode of proceeding therein is prescribed, this code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but, in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this code, the proceedings shall be conducted in conformity thereto. Where the statute designates, by name or otherwise, the kind of action, but does not prescribe the mode of proceeding therein, such action shall be commenced and prosecuted in conformity to this code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this code, and proceeded in accordingly.

Take effect, when.

SECT. 617. This act shall take effect from and after its passage.

Approved May —, 1862.

W. JAYNE, *Governor.*