CODE OF CIVIL PROCEDURE.

AN ACT to Establish a Code of Civil Procedure for Dakota Territory.

GENERAL DEFINITIONS AND DIVISIONS.

§ 1. TITLE AND PARTS OF ACT.] *Be it enacted by the Legislative Assembly of the Territory of Dakota:* This act shall be known as the Code of Civil Procedure of the Territory of Dakota, and is divided into three parts, as follows:

Part 1. Of Courts of Justice.

Part 2. Of Civil Actions.

Part 3. Of Special Proceedings of a Civil Nature.

§ 2. NOT RETROACTIVE.] No part of it is retroactive unless expressly so declared.

§ 3. CODE EXCLUDES COMMON LAW.] The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this territory respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and to promote justice.

§ 4. PRIOR RIGHTS.] No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable.

§ 5. LIMITATIONS CONTINUE.] When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code.

§ 6. COMPUTATION OF TIME.] The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last is a holiday, and then it is also excluded.

§ 7. CONSTRUCTION OF LANGUAGE.] Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and

appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

§ 8. WORDS DEFINED.] The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "writ" signifies an order or precept in writing, issued in the name of the territory or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings.

2. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories.

§ 9. EFFECT UPON FORMER LAWS.] No statute, law or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws and rules heretofore in force in this territory, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it affect any private statute not expressly repealed.

§ 10. ACT HOW CITED.] This act, whenever cited, enumerated, referred to, or amended, may be designated simply as the code of civil procedure, adding, when necessary, the number of the section.

§ 11. REMEDIES CLASSIFIED.] Remedies in the courts of justice are divided into:

1. Actions.

2. Special proceedings.

§ 12. ACTION DEFINED.] An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§ 13. SPECIAL PROCEEDINGS.] Every other remedy is a special proceeding.

§ 14. ACTIONS CLASSIFIED.] Actions are of two kinds:

1. Civil.

2. Criminal.

§ 15. CRIMINAL DEFINED.] A criminal action is one prosecuted by the territory, as a party, against a person charged with a public offense, for the punishment thereof.

§ 16. CIVIL—PROCESS.] Every other is a civil action; and all process in civil actions shall run in the name of the territory of Dakota.

§ 17. NOT MERGED.] Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

PART 1.

COURTS OF JUSTICE AND THEIR JURISDICTION.

CHAPTER I.

OF THE COURTS IN GENERAL.

§ 18. COURTS.] The following are the courts of justice of this territory:

1. The supreme court.
2. The district courts.
3. The probate courts; and,
4. The courts of justices of the peace.

§ 19. JURISDICTION CONTINUED.] These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by law.

CHAPTER II.

OF THE SUPREME COURT.

§ 20. JURISDICTION CLASSIFIED.] The jurisdiction of the supreme court is of two kinds:

1. Original; and,
2. Appellate.

§ 21. ORIGINAL.] Its original jurisdiction extends to all writs which by law may issue from this court, and to all writs necessary to the exercise of its appellate jurisdiction.

§ 22. EXCLUSIVE APPELLATE JURISDICTION.] It has exclusive jurisdiction to review upon appeal every actual determination hereafter made at any regular or special terms of the district courts of this territory, in the following cases, and no other:

1. In a judgment in an action commenced therein, or brought there from another court, and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, or strikes out a pleading or any part of a pleading, or arises upon any interlocutory proceeding or any question of practice in the action and does not involve any

question of discretion, or grants or refuses a new trial, or sustains or overrules a demurrer, or grants, refuses, continues or modifies a provisional remedy; but no appeal to the supreme court from an order granting a new trial shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, if the supreme court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render the judgment effectual, may be there had, in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from.

4. Whenever the decision of any motion heretofore made, or any motion hereafter to be made, in the district court of this territory at a special term thereof, involves the constitutionality of any law of this territory or has been or shall be placed, in the opinion or reason for such decision of the justice making such decision, upon the unconstitutionality of such law, then an appeal shall lie and may be made from such decision or from the order entered, or to be entered upon such decision, to the general term of said supreme court: *Provided, however*, That the time for appealing from such decision, or from such order, shall not be extended hereby.

§ 23. SCOPE OF JUDGMENT.] The supreme court may reverse, affirm, or modify, the judgment or order appealed from in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below to be enforced according to law; and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had.

§ 24. TERMS—CALENDAR.] The times and places for holding the terms of the supreme court shall be and remain as is now or may hereafter be provided by law. The court may provide what causes shall have a preference on the calendar, and regulate the practice and proceedings therein by general rules not inconsistent with the organic act and the statutes of this territory. On a second and each subsequent appeal to the supreme court, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal; and whenever in any action or proceeding in which the territory of Dakota or any territorial officer, or any board of territorial officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them, in any court, such appeal shall have a preference in the supreme court, and may be moved by either party out of the order on the calendar.

§ 25. TWO JUDGES MUST CONCUR.] The concurrence of two judges is neces-

sary to pronounce a judgment. If two do not concur the cause must be reheard. But no more than two rehearings shall be had; and if on the second hearing two judges do not concur, the judgment shall be affirmed.

§ 26. ADJOURNMENT TO OTHER ROOMS.] The supreme court may be held in other buildings than those designated by law as places for holding courts, and at a different place in the same city from that at which it is appointed to be held. Any one or more of the justices may adjourn the court with the like effect as if all were present.

CHAPTER III.

OF THE DISTRICT COURT.

§ 27. CHANCERY AND COMMON LAW.] The district courts possess chancery as well as common law jurisdiction.

§ 28. EXCLUSIVE ORIGINAL JURISDICTION.] They have exclusive original jurisdiction in all actions or proceedings in chancery, and in all actions at law where the debt or sum claimed exceeds one hundred dollars, and in all cases in which the title to real property or the boundary thereof in any wise comes in question, except in actions for forcible entry or forcible and unlawful detainer; and in all actions for divorce and to obtain a decree of nullity of marriage; and in all such other cases as now are or may hereafter be provided by law.

§ 29. OF APPEALS.] They have jurisdiction of appeals from all final judgments of justices of the peace, and from all judgments, decrees or orders of the probate court, or other inferior officers or tribunals, in the cases prescribed by statute. They have also the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their judgments, decrees and orders, and to give them a general control over inferior courts, officers, boards, tribunals and jurisdictions.

§ 30. OTHER JURISDICTION.] They also possess all such criminal as well as civil jurisdiction as is conferred by the organic laws, and the statutes of this territory.

§ 31. ALWAYS OPEN FOR CERTAIN PURPOSES.] For the purpose of hearing and determining special proceedings of a civil nature, motions for new trials in civil actions, motions for and to dissolve or modify injunctions, motions to set aside or vacate orders of arrest and writs of attachment, and for the entry of orders and judgments, these courts are always open.

CHAPTER IV.

OF PROBATE COURTS AND COURTS OF JUSTICES OF THE PEACE.

§ 32. JURISDICTION.] The probate courts and the courts of justices of the peace possess only such jurisdiction as is conferred on them by the organic laws and the statutes of this territory.

PART 2.

CIVIL ACTIONS.

CHAPTER V.

FORM OF CIVIL ACTIONS.

§ 33. DISTINCTIONS ABOLISHED.] The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this territory, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 34. PARTIES NAMED.] In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 35. ACTIONS UPON JUDGMENTS.] No action shall be brought upon a judgment rendered in any court of this territory, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county, within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

§ 36. ISSUES MUST BE STATED.] Feigned issues are abolished, and instead thereof, in the cases where the power now exists to order a feigned issued, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

CHAPTER VI.

TIME OF COMMENCING ACTIONS.

IN GENERAL.

§ 37. LIMITATIONS.] Civil actions can only be commenced within the periods prescribed in this code, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by

statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

§ 38. BY THE TERRITORY.] The territory of Dakota will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the territory to the same, unless:

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same shall be commenced; or, unless,

2. The territory, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

§ 39. PERSONS CLAIMING UNDER.] No action shall be brought for, or in respect to, real property, by any person claiming by virtue of grants from the territory, unless the same might have been commenced, as herein specified, in case such grant had not been issued or made.

§ 40. EXTENSION OF SAME.] When grants of real property shall have been issued or made by the territory, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the territory, or by any subsequent grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

§ 41. SEIZIN WITHIN TWENTY YEARS.] No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

§ 42. SAME.] No cause of action, or defense to an action, founded upon the title to real property, or to rents or services out of the same, shall be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question, within twenty years before the committing of the act in respect to which such action is prosecuted, or defense made.

§ 43. ONE YEAR AFTER ENTRY.] No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced th ereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

§ 44. POSSESSION PRESUMED.] In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to

the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

§ 45. OCCUPATION UNDER WRITTEN INSTRUMENT.] Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

§ 46. ADVERSE POSSESSION.] For the purpose of constitut ng an adverse possession, by any person claiming a title founded upon a written instrument, or a judgment or a decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant.
4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 47. ACTUAL ADVERSE HOLDING.] Where it shall appear that there has been an actual continued occupation of premises, under a claim of title exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

§ 48. UNDER CLAIM NOT WRITTEN.] For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

§ 49. LANDLORD AND TENANT.] Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

§ 50. EFFECT OF DESCENT.] The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

§ 51. DISABILITIES EXTEND TIME.] If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either:

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

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life.

The time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defense made after that period.

TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

§ 52. OTHER PERIODS.] The periods prescribed in section 37 for the commencement of actions other than for the recovery of real property shall be as follows:

§ 53. TWENTY YEARS.] Within twenty years:

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

2. An action upon a sealed instrument.

§ 54. SIX YEARS.] Within six years:

1. An action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 53.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon real property.

4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

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

6. An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.

§ 55. THREE YEARS.] Within three years:

1. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his

office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this territory, except where the statute imposing it prescribes a different limitation.

§ 56. TWO YEARS.] Within two years:

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

2. An action upon a statute, for a forfeiture or penalty to the people of this territory.

§ 57. ONE YEAR.] Within one year:

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

§ 58. BALANCE OF OPEN ACCOUNT.] In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

§ 59. FORFEITURE BY PERSON—TERRITORY.] An action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offense; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the territory, by the district attorney where the offense was committed.

§ 60. OTHER RELIEF TEN YEARS.] An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued.

§ 61. SAME TO PUBLIC AND PERSONS.] The limitations prescribed in this chapter, shall apply to actions brought in the name of the territory, or for its benefit, in the same manner as to actions by private parties.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

§ 62. WHEN ACTION DEEMED COMMENCED.] An action is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

§ 63. EXCEPTION—ABSENTEE.] If, when the cause of auction shall accrue against any person, he shall be out of the territory, such action may be commenced within the terms herein respectively limited, after the return of such person into this territory; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this territory, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

§ 64. SAME—DISABILITIES.] If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:

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

2. Insane; or,

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

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

§ 65. DEATH.] If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

§ 66. WAR.] When a person shall be an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is part of the period limited for the commencement of the action.

§ 67. WHEN JUDGMENT REVERSED.] If an action be commenced within the time prescribed therefor, and a judgment therein be reversed on appeal, the plaintiff, or, if he die and cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

§ 68. STAY BY INJUNCTION, &C.] When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

§ 69. WHEN DISABILITY AVAILABLE.] No person can avail himself of a disability, unless it existed when his right of action accrued.

§ 70. CO-EXISTING DISABILITIES.] When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are all removed.

§ 71. BANK NOTES.] This chapter does not affect actions to enforce the payment of bills, notes or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

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

§ 73. NEW PROMISE IN WRITING.] No acknowledgment or promise is sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

CHAPTER VII.

PARTIES TO CIVIL ACTIONS.

§ 74. PARTY IN INTEREST.] Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 76; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

§ 75. ASSIGNEE—EQUITIES.] 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 defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

§ 76. EXECUTORS AND TRUSTEES.] An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

§ 77. MARRIED WOMAN.] When a married woman is a party, her appearance, the prosecution or defense of the action, and the joinder with her of any other person or party, must be governed by the same rules as if she were single.

§ 78. BY GUARDIAN FOR INFANT.] When an infant is a party, he must appear either by his general guardian, or by a guardian appointed by the court in which the action is prosecuted, or by a judge thereof. A guardian may be appointed in any case, when it is deemed by the court in

which the action is prosecuted, or by a judge thereof, expedient to represent the infant in the action, notwithstanding he may have a general guardian, and may have appeared by him.

§ 79. HOW GUARDIAN APPOINTED.] The guardian shall be appointed:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of summons. If he be under the age of fourteen, or neglects so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this territory; if he has none, then to the infant himself, if over fourteen years of age, and within the territory; or, if under that age, and within the territory, to the person with whom such infant resides. And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this territory, the plaintiff may apply to the court, or a judge thereof, in which the action is pending, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant himself, or by service upon any relation or person with whom the infant resides, and either by mail or personally upon the person so served. And in case an infant defendant, having an interest in the event of the action, shall reside in any state with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian ad litem for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian ad litem process, pleadings and notices in the action may be served, in the like manner as upon a party residing in this territory.

§ 80. GUARDIAN'S SECURITY.] No guardian appointed for an infant under the provisions of this chapter shall be permitted to receive any money or other property of the infant, except costs and expenses allowed to the guardian by the court, or recovered by the infant in the action, until he has given sufficient security, approved by the judge of the court, to account for and apply the same under the direction of the court. And no person appointed a guardian for the purpose of defending an action brought against an infant shall be liable for costs of such action, unless

specially charged by the order of the court for some personal misdemeanor therein.

§ 81. WHO TO BE PLAINTIFFS.] 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 chapter.

§ 82. DEFENDANTS.] Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such action.

§ 83. PARTIES TO BE JOINED.] Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and 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 the whole.

§ 84. BILLS AND NOTES.] Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him, and persons liable severally for the same debt or demand, although upon different obligations or instruments, may all, or any of them, be included in the same action, at the option of the plaintiff.

§ 85. ACTION DOES NOT ABATE.] No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representatives or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law. At any time after the death, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

§ 86. SUCCESSOR MAY REVIVE JUDGMENT.] Where judgment has heretofore

or shall hereafter be recovered for the possession of real property, and the party recovering such judgment shall have died subsequent to the recovery thereof, his successor in interest in said real property, whether by grant, devise, or inheritance, may revive said judgment and enforce the same by execution, on motion, within one year after said death, or afterwards on supplemental complaint.

§ 87. NON-RESIDENT INTESTATE.] When an intestate not being an inhabitant of the territory shall die out of the territory not leaving assets therein, and there shall be pending in the supreme court an appeal brought by such intestate from a judgment against him, the court in which such appeal is pending, may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on said appeal procure such action to be revived within six months after notice to perfect such appeal by the substitution of a representative in said action.

§ 88. DEATH OF ONE OF SEVERAL PARTIES.] Where one of two or more plaintiffs, or one of two or more defendants, in an action, dies, and only part of the cause of action, or of several distinct causes of action, survives to or against the others, the action may proceed without bringing in the person who has succeeded to the rights of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. But the court may order such successor of a deceased party, or any person who claims to be such successor, to be brought in as a party, either plaintiff or defendant, whenever it appears proper to do so, upon his own application or upon the application of any party to the action, and, if necessary, that supplemental pleadings be put in. The defendant, or surviving defendant, in the action, may proceed against such successor, in the same manner as a plaintiff, to bring him in and have his rights settled by judgment.

§ 89. POWER OF COURT—INTERPLEADER.] The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

§ 90. INTERVENTION WHEN.] Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.

§ 91. INTERPLEADER.] A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may in its discretion, make the order.

CHAPTER VIII.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

§ 92. WHERE SUBJECT MATTER IS.] Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by statute:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property distrained for any cause.

§ 93. WHERE THE CAUSE AROSE.] Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

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

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

§ 94. WHERE ANY PARTY RESIDES.] In all other cases the action shall be tried in the county in which the parties or any of them, shall reside at the commencement of the action, or, if none of the parties shall reside in the territory, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial in the cases provided by statute.

§ 95. DEFENDANT MUST ASK CHANGE—COURT MAY CHANGE.] If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by

consent of parties, or by order of the court, as provided in this section. The court may change the place of trial in the following cases:

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

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

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

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

CHAPTER IX.

MANNER OF COMMENCING CIVIL ACTIONS.

§ 96. BY SUMMONS.] Civil actions in the courts of this territory shall be commenced by the service of a summons.

§ 97. REQUISITES OF SAME.] The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the territory, to be therein specified, in which there is a postoffice, within thirty days after the service of the summons, exclusive of the day of service.

§ 98. NOTICES REQUIRED IN.] The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint in thirty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within thirty days after the service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

§ 99. SERVICE OF COMPLAINT.] A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will be filed; and if the defendant, within thirty days thereafter, cause notice of appearance to be given, and, in person or by attorney, demand in writing a copy of the complaint, specifying a place within the territory where it may be served, a copy thereof must, within twenty days thereafter be served accordingly, and after such service, the defendant has thirty days to answer, but only one copy need be served on the same attorney.

§ 100. NOTICE OF NO PERSONAL CLAIM.] In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real or personal property, and that no personal claim is made against such defendant, in which

case no copy of the complaint need be served on such defendant, unless within the time for answering he shall, in writing, demand the same. If a defendant on whom such notice is served unreasonably defend the action, he shall pay costs to the plaintiff.

§ 101. LIS PENDENS—EFFECT OF.] In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any other time afterwards, or whenever a warrant of attachment of property shall be issued, or at any time afterwards, the plaintiff, or a defendant when he sets up an affirmative cause of action in his answer, and demands substantive relief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property, may file with the register of deeds of each county in which the real property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the real property in that county affected thereby; but if the action be for the foreclosure of a mortgage, no such notice need be filed. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed, or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section, an action shall be deemed to be pending from the time of filing such notice: *Provided, however*, That such notice shall be of no avail unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced, may, in its discretion, at any time after the action shall be settled, discontinued or abated, as is provided in section number eighty-five, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be cancelled of record by the register of deeds of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which the register of deeds shall be entitled to a fee of twenty-five cents.

§ 102. SUMMONS—HOW SERVED.] The summons shall be served by delivering a copy thereof as follows:

1. If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein, or when such service shall be made within this territory personally upon the president, treasurer, secretary, or duly authorized agent thereof.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian; or if there be none

within the territory, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a guardian has been appointed, to such guardian and to the defendant personally.

4. In all other cases, to the defendant personally; and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house, in the presence of one or more of the members of his family over the age of fourteen years; or, if the defendant reside in the family of another, with one of the members of the family in which he resides over the age of fourteen years.

Service made in any of the modes provided in this section shall be taken and held to be personal service.

§ 103. BY WHOM SUMMONS SERVED.] The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned with proof of the service to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an indorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

§ 104. BY PUBLICATION—CASES AND MANNER.] Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this territory, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases:

1. Where the defendant is a foreign corporation, has property within the territory, or the cause of action arose therein.

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

3. Where he is not a resident of this territory, but has property therein, and the court has jurisdiction of the subject of the action.

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

5. Where the action is for divorce or for a decree annulling a marriage, the order must direct the publication to be made in some newspaper to be designated as most likely to give notice to the person to be served, and for such lengths of time as may be deemed reasonable, not less than once a

week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the territory, is equivalent to publication and deposit in the post office. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing. In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party or parties having any interest in or lien upon such mortgaged premises are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, such court or justice may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week successively, in a newspaper printed in the county where the premises are situated, provided a paper be published in such county, and if no paper be published in the county, then in a paper published nearest the county seat of such county in the territory, which publication shall be equivalent to a personal service on such unknown party or parties.

§ 105. JOINT AND SEVERAL DEBTORS.] Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

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

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

§ 106. WHEN SERVICE COMPLETE.] In the cases mentioned in section 104 the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

§ 107. PROOF OF SERVICE—ACCEPTANCE.] Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

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

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, as required by law, if the same shall have been deposited; or,

4. The written admissions of the defendant.

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

§ 108. JURISDICTION—APPEARANCE.] From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

CHAPTER X.

OF PLEADINGS IN CIVIL ACTIONS.

THE COMPLAINT.

§ 109. FORMS ABOLISHED.] All forms of pleading heretofore existing are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the efficiency of the pleadings is to be determined, are those prescribed by this act.

§ 110. COMPLAINT.] The first pleading on the part of the plaintiff is the complaint.

§ 111. WHAT TO CONTAIN.] The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of county in which the plaintiff desires the

trial to be had, and the names of the parties to the action, plaintiff and defendant.

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

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

THE DEMURRER.

§ 112. DEFENDANT MAY DEMUR OR ANSWER.] The only pleading on the part of defendant is either a demurrer or an answer. It must be served within thirty days after the service of the copy of the complaint.

§ 113. WHEN MAY DEMUR.] The defendant may demur to the complaint when it shall appear upon the face thereof, either:

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

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

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

5. That several causes of action have been improperly united; or,

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

§ 114. REQUISITES OF DEMURRER.] The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

§ 115. IF COMPLAINT BE AMENDED.] If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within thirty days, or the plaintiff, upon filing with the clerk, on due proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 199, but where an application to the court for judgment is necessary, ten day's notice thereof must be given to the defendant.

§ 116. WHEN ANSWER.] When any of the matters enumerated in section 113 do not appear upon the face of the complaint, the objection may be taken by answer.

§ 117. WHEN OBJECTION WAIVED.] If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

THE ANSWER.

§ 118. REQUISITES OF ANSWER.] The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the com-

plaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.

§ 119. REQUISITES OF COUNTER-CLAIM.] 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 one of the following causes of action:

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

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

§ 120. DEMURRER AND ANSWER.] The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

§ 121. SHAM DEFENSES.] Sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the courts may in their discretion impose.

THE REPLY.

§ 122. REPLY WHEN—DEMURRER TO ANSWER.] When the answer contains new matter constituting a counter-claim; the plaintiff may, within thirty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counter-claim or defense, and the plaintiff may demur to one or more of such defenses or counter-claims, and reply to the residue of the counter-claims. And in other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

§ 123. JUDGMENT ON ANSWER.] If the answer contain a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

§ 124. DEMURRER TO REPLY.] If a reply of the plaintiff to any defense set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

GENERAL RULES OF PLEADING.

§ 125. SUBSCRIBED—VERIFICATION.] Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

§ 126. REQUISITES OF VERIFICATION.] The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and, as to those matters, he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the territory, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

§ 127. STATEMENT OF ACCOUNT.] It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged but he shall deliver to the adverse party, within ten days after the demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, may order a "further account," when the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

§ 128. LIBERAL CONSTRUCTION.] In the construction of a pleading for the purpose of determining its effect, its allegation shall be liberally construed, with a view of substantial justice between the parties.

§ 129. MAKING PLEADING DEFINITE.] If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so in-

definite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

§ 130. PLEADING A JUDGMENT.] In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

§ 131. CONDITIONS PRECEDENT.] In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims.

§ 132. PRIVATE STATUTE.] 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.

§ 133. LIBEL OR SLANDER] In an action for libel or slander, it shall not be necessary to state in the complaint any intrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

§ 134. SAME—DEFENDANTS' ANSWER.] In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give, in evidence, the mitigating circumstances.

§ 135. ANSWER OF POSSESSION.] In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

§ 136. JOINDER OF ACTIONS—MORTGAGES.] The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all rise out of:

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

2. Contract, express or implied; or,

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

4. Injuries to character; or,

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

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

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

§ 137. ALLEGATIONS—WHEN DEEMED TRUE OR DENIED.] Every material allegation of the complaint, not controverted by the answer, as prescribed in section 118, and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 122, shall, for purposes of the action be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party upon a direct denial or avoidance, as the case may require.

MISTAKES IN PLEADING, AND AMENDMENTS.

§ 138. MATERIAL AND MISLEADING.] No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually so misled the adverse party to his prejudice, in maintaining his action of defense, upon the merits. Whenever it shall be alleged that a party has been misled, the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

§ 139. IF NOT MATERIAL.] Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

§ 140. FAILURE TO PROVE VARIANCE.] Where, however, the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

§ 141. AMENDMENTS—WHEN AND HOW.] Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires; or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is or may be noticed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 113 the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

§ 142. COURT MAY AMEND—TERMS.] The court may, before or after judgment, in furtherance of justice, and 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 a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

§ 143. PLEADING AFTER TIME.] The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this code, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, in like manner, and upon like terms, permit an amendment of such proceedings, so as to make it conformable thereto.

§ 144. UNKNOWN NAME.] When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

§ 145. TRIVIAL DEFECTS DISREGARDED.] The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party: and no judgment shall be reversed or affected by reason of such error or defect.

§ 146. SUPPLEMENTAL PLEADING.] The plaintiff and defendant, respect-

ively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.

CHAPTER XI.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

§ 147. CLASSIFIED.] The provisional remedies in civil actions are:

1. Arrest and bail.
2. Claim and delivery of personal property.
3. Injunction.
4. Attachment.
5. Receivers.
6. Deposit in court.

ARTICLE I.—ARREST AND BAIL.

§ 148. ARREST LIMITED—CONTEMPT.] No person shall be arrested in a civil action, except as prescribed by this code; but this provision shall not apply to proceedings for contempt.

§ 149. CASES WHEN DEFENDANT ARRESTED.] The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the territory, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property.

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

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

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

5. When the defendant has removed or disposed of his property, or is about to do so, with the intent to defraud his creditors. But no female shall be arrested in any action, except for a willful injury to person, character or property.

§ 150. WHERE ORDER OBTAINED.] An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought.

§ 151. BASIS OF ORDER.] The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 149. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed in the office of the clerk of the court.

§ 152. UNDERTAKING FROM PLAINTIFF.] Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the territory, and worth double the sum specified in the undertaking, over all his debts and liabilities, and exclusive of all property exempt from execution by the laws of this territory.

§ 153. WHEN ORDER ISSUED AND SERVED.] The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and return the order, at a place and time therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or indorsed. But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days, after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.

§ 154. PAPERS TO DEFENDANT.] The affidavit and order of arrest shall be delivered to the sheriff, who upon arresting the defendant, shall deliver to him a copy thereof.

§ 155. SHERIFF'S DUTIES—BAIL.] The sheriff must execute the order by arresting the defendant, and keeping him in custody until discharged by law, and may call the power of the county to his aid in the execution of the arrest, as in case of process. The defendant may give bail whenever arrested, at any hour of the day or night, and must have reasonable opportunity to procure it, before being committed to prison.

§ 156. DISCHARGE.] The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article.

§ 157. BAIL HOW GIVEN.] The defendant may give bail by causing a

written undertaking, in the sum specified in the order of arrest, to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself answerable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment thereon, or if he be arrested for the cause mentioned in the third subdivision of section 149, an undertaking to the same effect as that provided in section 181.

§ 158. SURRENDER BY BAIL.] At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

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

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision three of section 149, so as to discharge the bail from an undertaking given to the effect provided by section 181.

§ 159. BAIL MAY ARREST.] For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 160. ACTION AGAINST BAIL.] In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

§ 161. BAIL EXONERATED.] The bail may be exonerated either by the death of the defendant, or his imprisonment in a state or territorial prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

§ 162. PLAINTIFF MAY EXCEPT TO BAIL.] Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

§ 163. JUSTIFICATION.] On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, specifying the place of residence and occupation of

the latter, before a judge of the court, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section 157.

§ 164. REQUISITES OF BAIL.] The qualifications of bail must be as follows:

1. Each of them must be a resident and householder or freeholder within the territory.

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

§ 165. EXAMINATION OF BAIL.] For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the bail if required by the plaintiff.

§ 166. ALLOWANCE OF.] If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

§ 167. DEPOSIT—DISCHARGE.] The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 168. PAYMENT INTO COURT.] The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff and the other to the defendant or his attorney. For any default in making such payment the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

§ 169. REFUNDED ON APPROVED BAIL.] If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 163 any time before judgment: thereupon the judge before whom the justification is had, shall direct in the order of allowance, that the money deposited be refunded by the sheriff to defendant, and it shall be refunded accordingly.

§ 170. APPLIED ON JUDGMENT.] Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unpaid.

§ 171. SHERIFF'S LIABILITY.] If, after being arrested, when there is a jail to which the defendant may be committed, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail, as provided in sections 163, 164, 165 and 166, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

§ 172. JUDGMENT AGAINST SHERIFF.] If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 173. BAIL LIABLE TO SHERIFF.] The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

§ 174. MOTION TO VACATE ARREST.] A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

§ 175. HEARD UPON AFFIDAVITS.] If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

ARTICLE II.—CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 176. WHEN MAY CLAIM.] The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as provided in this article.

§ 177. PLAINTIFF'S AFFIDAVIT.] Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, stating:

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

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

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

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

5. The actual value of the property.

§ 178. REQUISITION TO SHERIFF.] The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

§ 179. SECURITY BY PLAINTIFF.] Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

§ 180. EXCEPTIONS BY DEFENDANT.] The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

§ 181. RE-DELIVERY TO DEFENDANT.] At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 186.

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

§ 183. SAME.] The qualifications of sureties, and their justification, shall be as are prescribed by sections 164 and 165, in respect to bail upon an order of arrest.

§ 184. CONCEALED PROPERTY.] If the property, or any part thereof, be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open. and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

§ 185. KEEPING PROPERTY.] When the sheriff shall have taken property, as in this article provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping, the same.

§ 186. CLAIM BY THIRD PERSONS.] If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

§ 187. PAPERS FILED WITH CLERK.] The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

ARTICLE III.—INJUNCTION.

§ 188. INJUNCTION BY ORDER.] The writ of injunction, as a provisional remedy, is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof in the cases provided in the next section, and, when made by a judge, may be enforced as the order of the court.

§ 189. CASES WHEN GRANTED.] An injunction may be granted in either of the following cases:

1. It shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

3. And when, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

§ 190. TIME—PAPERS SERVED.] The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactory to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

§ 191. AFTER ANSWER.] An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

§ 192. SECURITY—DAMAGES.] Where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

§ 193. ORDER TO SHOW CAUSE.] If the court or judge deem it proper that the defendant, or any of the several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

§ 194. AGAINST CORPORATION.] An injunction to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor, to the proper officer of the corporation, except when the territory is a party to the proceeding.

§ 195. APPLICATION TO VACATE.] If the injunction be granted by a judge of the court, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint, and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

§ 196. COUNTER AFFIDAVITS.] If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavit or other proofs, in addition to those on which the injunction was granted.

ARTICLE IV.—ATTACHMENT.

§ 197. PROPERTY OF NON-RESIDENTS, &C., MAY BE ATTACHED.] In an action arising on contract for the recovery of money only; or, in an action for the wrongful conversion of personal property, against a corporation created by or under the laws of any other territory, state, government or

country; or, against a defendant who is not a resident of this territory; or, against a defendant who has absconded or concealed himself; or, whenever any person or corporation is about to remove any of his or its property from this territory; or, has assigned, disposed of, secreted, or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors, as hereinafter mentioned. The plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this section an action shall be deemed commenced when the summons is issued: *Provided, however,* That personal service of such summons shall be made, or publication thereof commenced within thirty days.

§ 198. WARRANT ISSUED BY CLERK—SEAL.] A warrant of attachment must be obtained from the clerk of the court in which the action is brought; and such warrant of attachment must be attested in the name of the presiding judge and must be sealed with the seal of the court.

§ 199. AFFIDAVIT—REQUISITES.] The warrrant may issue upon affidavit, stating:

1. That a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof; and,

2. That the defendant is either a foreign corporation, or not a resident of this territory, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or,

3. That such corporation or person has removed, or is about to remove, any of his or its property from the territory with intent to defraud his or its creditors; or,

4. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with the like intent, whether such defendant be a resident of this territory or not.

§ 200. PLAINTIFF'S UNDERTAKING.] Before issuing the warrant, the clerk must require a written undertaking on the part of the plaintiff with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum named in the undertaking, which must be at least the amount of the claim specified in the affidavit, and in no case less than two hundred and fifty dollars.

§ 201. REQUISITES OF WARRANT.] The warrant must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sure-

ties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

§ 202. EXECUTION OF WARRANT.] The sheriff to whom such warrant of attachment is directed and delivered, must immediately attach all the real property of such debtor and all his personal estate, or so much thereof as may be sufficient to satisfy the plaintiff's demand, costs and expenses, and including debts, credits, money and bank notes, except property exempt from execution; and must take into his custody all books of accounts, vouchers, evidences of indebtedness, and all papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real property.

§ 203. INVENTORY—PERISHABLE PROPERTY.] Immediately upon making such seizure he shall make a just and true inventory of all the property so seized, and of the books, vouchers, and papers, taken into his custody, stating therein the estimated value of the several articles and kinds of personal property, enumerating such of them as are perishable, and giving a description of the real property so attached, which inventory must be signed by the sheriff, attached to and made a part of the return on the warrant of attachment. And any subsequent execution of the warrant of attachment upon other property of the debtor, must be made and an inventory thereof made and returned in like manner.

§ 204. CUSTODY AND COLLECTION OF PROPERTY.] The sheriff must keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action, and must, subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the debtor. The sheriff may also take such legal proceedings, either in his own name or in the name of such debtor, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

§ 205. PERISHABLE—SOLD UNDER ORDER.] If any of the property so seized shall be perishable, the sheriff must sell the same at public auction, under an order of the court, or a judge thereof, and must retain in his hands the proceeds of such sale after deducting his expenses, which proceeds must be paid into court and there abide its further order.

§ 206. CLAIMED PROPERTY—SHERIFF'S JURY.] If any property so seized be claimed by or on behalf of any person other than such defendant, the sheriff may summon a jury and try the validity of such claim in the same manner and with like effect as in case of seizure under execution.

§ 207. STOCKS AND CORPORATE INTERESTS.] The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this territory of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.

§ 208. PROPERTY INCAPABLE OF DELIVERY.] The execution of the attachment upon any such rights, shares, or any debts, or other property, inca-

pable of manual delivery to the sheriff, must be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding or occupying such property, with a notice showing the property levied on, or, if the property attached be unoccupied real property, by putting a certified copy of such warrant upon the outer door of the court house, or other building in which the district court shall be held within the county or judicial subdivision in which such unoccupied real property shall be situated.

§ 209. CERTIFICATE OF DEFENDANT'S INTEREST.] Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant. If such officer, debtor or individual refuse to do so, or if it be made to appear by affidavit or otherwise to the satisfaction of the court or judge thereof, that there is reason to suspect that any certificate given by him is untrue, or that it fails to fully set forth the facts required to be shown thereby, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

§ 210. JUDGMENT—HOW SATISFIED.] In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

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

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

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

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings and apply the proceeds thereof to the payment of the judgment. At the expiration of six months from the docketing of the judgment, the court shall have power upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to the service of notice and the time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

§ 211. PLAINTIFF MAY PROSECUTE ACTIONS—UNDERTAKING.] The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities, and exclusive of property exempt from execution.

§ 212. DELIVERY TO DEFENDANT.] If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

§ 213. DEFENDANT MAY APPLY FOR DISCHARGE.] Whenever the defendant shall have appeared in such action, he may apply to the clerk who issued the attachment, or to the court, for the discharge of the same; and, upon the discharge, all the proceeds of sales and moneys collected by him, and all property attached remaining in his hands, must be delivered or paid by him to the defendant, or his agent, and released from the attachment. And when there is more than one defendant, and several property of either of the defendants has been seized by virtue of the warrant of attachment, the defendant whose several property has been seized, may apply to the

clerk who issued the warrant, or the court, for discharge of the attachment.

§ 214. UNDERTAKING FOR DISCHARGE—PLAINTIFF'S EXCEPTIONS.] Upon such application the defendant must deliver to the court or clerk, an undertaking executed by at least two sureties, who are residents and freeholders or householders in this territory, approved by such court or clerk, to the effect that such sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which must be at least double the amount claimed by the plaintiff in his complaint. If it appear by affidavit that the property attached is worth less than the amount claimed by the plaintiff, the court, or the clerk issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And the plaintiff may, within three days after receiving written notice of the filing of such undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail so to do, he shall be deemed to have waived all objection to them. When the plaintiff excepts, the sureties must justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, and may retain possession of the property attached, and the proceeds thereof in his hands, until the objection to them be either waived, as above provided, or until they justify or new sureties are substituted and justify.

§ 215. LIENOR MAY MOVE DISCHARGE.] In all cases the defendant or any person who has acquired a lien upon or interest in the defendant's property after it was attached, may move to discharge the attachment as in the case of other provisional remedies, and when there is more than one defendant, and several property of either of the defendants has been seized by virtue of the warrant of attachment, such defendant may deliver to the court or clerk an undertaking, in accordance with the provisions of the preceding section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant; and all the provisions of the preceding section relating to such undertaking apply thereto.

§ 216. PARTNERSHIP PROPERTY—UNDERTAKING.] If a warrant of attachment be levied upon the interest of one or more partners, in personal property of a partnership, the other partners, or any of them, may, at any time before judgment, apply to the court from which the warrant of attachment issued, or a judge thereof, upon affidavit stating such fact, for an order to discharge the attachment as to the partnership property. The applicant must give an undertaking, with at least two sufficient sureties to the effect that, if judgment shall be rendered in the action in favor of the plaintiff, they will pay to the sheriff on demand the amount of defendant's interest in such partnership property, the amount of such interest to be determined by reference or otherwise, as the court may direct. The amount of such undertaking must be fixed by the court or judge thereof, and must not be less than the value of the interest of the defendant in the

goods, chattels, credits and effects of the partnership; and for the purpose of fixing the amount of the undertaking, the court or judge may hear affidavits or oral testimony, respecting the value of the defendant's interest in the attached property. If the plaintiff except to the sufficiency of the sureties they must justify, on notice, in like manner as provided by section 214.

§ 217. RETURN BY OFFICER.] When the warrant shall be fully executed or discharged, the sheriff must return the same with his proceedings thereon, to the court in which the action was brought.

§ 218. ACTION BEFORE CLAIM DUE.] 1. When 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 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 attachment against the property of the debtor; and the proceedings on such attachment shall be conducted in all respects as if the claim were due, but judgment must not be rendered in the action under the debt or claim upon which such attachment is made and shall become due and payable.

ARTICLE V.—OF RECEIVERS.

§ 219. CASES WHEN APPOINTED.] A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

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 proceeds 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 conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

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

5. In the cases where a corporation has been dissolved, or is insolvent, or is 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.

§ 220. RECEIVERS FOR CORPORATION DISSOLVED.] Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

§ 221. WHO MAY BE RECEIVER—UNDERTAKING BY APPLICANT.] No party or person interested in an action can be appointed receiver therein, without the written consent of the party, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver, and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

§ 222. QUALIFICATION OF RECEIVER.] 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, may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

§ 223. POWERS.] 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.

§ 224. INVESTMENT OF FUNDS ON CONSENT.] Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made except upon the consent of all the parties to the action.

ARTICLE VI.—OF DEPOSIT.

§ 225. WHAT SUBJECT TO ORDER OF DEPOSIT.] When it is admitted by the pleadings or the examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

§ 226. DISOBEDIENCE—CONTEMPT.] Whenever in the exercise of its authority, a court shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it in conformity with the direction of the court.

227. DEFENDANT'S ADMISSIONS.] When the answer of the defendant, expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or a provisional remedy.

CHAPTER XII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

ARTICLE I.—JUDGMENT UPON FAILURE TO ANSWER, &C.

§ 228. JUDGMENT DEFINED.] A judgment is the final determination of the rights of the parties in the action.

§ 229. ON FAILURE TO ANSWER COUNTER CLAIM—RELIEF—PUBLISHED SERVICE—RESTITUTION.] Judgment may be had if the defendant fail to answer the complaint as follows:

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint, on one or more of the defendants, or of the summons according to the provisions of section 99, and that no answer has been received. The court shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of the several defendants in the cases provided for in section 105. But if the complaint be not sworn to, and such action be on an instrument for the payment of money only, the court, on its production shall assess the amount due to the plaintiff thereon, and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action from his examination, under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment. Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter-claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment roll.

2. In other actions the plaintiff may, upon the like proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account, or of the proof of any

fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight day's notice of the time and place of application to the court for the relief demanded by the complaint.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the territory, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

§ 230. ON FRIVOLOUS PLEADING.] If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court either in or out of the court, for judgment thereon, and judgment may be given accordingly.

ARTICLE II.—ISSUES AND MODE OF TRIAL.

§ 231. ORIGIN AND CLASSES OF ISSUES.] Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and,

2. Of fact.

§ 232. ISSUES OF LAW.] An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

§ 233. OF FACT CLASSIFIED.] An issue of fact arises:

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

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

3. Upon new matter in the reply, except an issue of law is joined thereon.

§ 234. BOTH—ORDER OF TRIAL.] Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

§ 235. TRIAL DEFINED.] A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

§ 236. BY WHOM TRIABLE.] An issue of law must be tried by the court, unless it be referred as provided in sections 271 and 272. An issue of fact in an action for the recovery of money only, or of specific, real or personal property, or for a divorce from the marriage contract, must be tried by a jury, unless a jury trial be waived as provided in section 265, or a reference be ordered, as provided in section 272. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it, as provided in section 272.

§ 237. SINGLE JUDGE—WHEN ISSUES TRIED.] All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact must be tried at a regular term of the district court, when the trial is by jury, otherwise at a regular or special term, as the court may, by its rules, prescribe. Issues of law must be tried at a regular or special term of the district court.

§ 238. NOTE OF ISSUE—CONTENTS—ORDER OF TRIALS.] At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue. There need be but one notice of trial, and one note of issue from either party, and the action must then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. The issues on the calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

§ 239. EITHER PARTY PROCEEDS—SEPARATE TRIALS.] Either party, when the case is reached upon the calendar, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict, or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will be promoted.

§ 240. WHO TO FURNISH PAPERS.] When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

ARTICLE III.—FORMATION OF THE TRIAL JURY.

§ 241. JURY TICKETS.] At the opening of the court the clerk must prepare separate ballots containing the names of the persons returned as jurors, which must be folded as nearly alike as possible, and so that the names cannot be seen, and must deposit them in the trial jury box.

§ 242. CLERK TO DRAW JURY.] When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors summoned until the jury is completed or the ballots are exhausted.

§ 243. CHALLENGES CLASSED—BY WHOM.] Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to three peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

§ 244. FOR CAUSE.] Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by the political code to render a person competent as a juror.
2. Consanguinity or affinity, within the fourth degree, to either party.
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of either party, or being a partner in business with either party, or surety on any bond or obligation for either party.
4. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.
5. Interest on the part of the juror in the event of the action, or in the main question involved in the action except his interest as a member or citizen of a municipal corporation.
6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or some of them.
7. The existence of a state of mind in the juror evincing enmity against, or bias to or against, either party.
8. That he does not understand the English language as used in the courts.

§ 245. TRIAL OF SAME.] Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

§ 246. OATH TO JURORS.] As soon as the jury is completed, the following oath must be administered to the jurors:

"You, and each of you, do solemnly swear, that you will well and truly try the matters in issue between.....the plaintiff, and.....defendant, and a true verdict render according to the evidence. So help you, God."

If any person be conscientiously scrupulous of taking an oath, he shall be allowed to make affirmation, substituting for the words "So help

you God," at the end of the oath, the following: "This you do affirm under the pains and penalties of perjury."

ARTICLE IV.—OF THE CONDUCT OF THE TRIAL.

§ 247. ORDER OF TRIAL.] When the jury has been sworn, the trial must proceed in the following order, unless the judge for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part.

2. The defendant may then open his defense, and offer his evidence in support thereof.

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

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

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.

6. The court may then charge the jury.

§ 248. CHARGE WHOLLY WRITTEN—GIVING AND REFUSING.] The court, in charging the jury, shall only instruct as to the law of the case; and no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing; and when instructions are asked which the judge cannot give, he shall write on the margin thereof the word, "refused," and such as he approves, he shall write on the margin thereof the word, "given;" and he shall, in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury, otherwise than in writing; and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same.

§ 249. ORDER OF READING—BY WHOM—JURY TO HAVE—EXCEPTIONS BEFORE JUDGMENT.] All instructions given by the judge shall be read to the jury in the following order:

1. Defendant's instructions by defendant's counsel.

2. Plaintiff's instructions by plaintiff's counsel.

3. Instructions given by the judge, of his own motion, if any, by the judge giving the same; and all instructions so given and read shall be taken by the jury in their retirement, and returned into court with their verdict. Exceptions to the giving or refusing any instruction, or to its modification or change, may be taken at any time before the entry of final judgment in the case.

§ 250. VIEW BY JURY.] When, in the opinion of the court, it is proper for the jury to have a view of the 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.

§ 251. ADMONITIONS TO JURY.] 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 an opinion thereon until the case is finally submitted to them.

§ 252. PAPERS JURY MAY TAKE.] Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person.

§ 253. CONDUCT OF JURY IN RETIREMENT.] 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 charge of an officer, until they agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

§ 254. DISAGREEMENT—INFORMATION.] 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 of any point of law arising in the case, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel.

§ 255. SICK JUROR DISCHARGED.] If, after the empaneling of a jury, and before a verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, the trial may proceed with the other jurors, or another juror may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impaneled.

§ 256. PREVENTED VERDICT—NEW TRIAL.] In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

§ 257. SEALED VERDICT—ADJOURNMENT.] While the jury are absent, the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted

to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury.

§ 258. RECEIVING VERDICT.] 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 their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they 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. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict, If any one answer in the negative, the jury must again be sent out.

§ 259. CORRECTING VERDICT.] When the verdict is announced, if it be informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

ARTICLE V.—OF THE VERDICT.

§ 260. GENERAL AND SPECIAL VERDICT DEFINED.] The verdict of a jury is either general or special:

1. 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; and,

2. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and these conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

§ 261. WHEN EITHER—SPECIAL WHEN DIRECTED.] In an 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 upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

§ 262. JURY TO FIND AMOUNT—ASSESSMENT.] When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery; and, they may also, under the direction of the court, assess the amount of the recovery, when the court gives judgment for the plaintiff on the answer.

§ 263. MUST FIND VALUE AND DAMAGES.] In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

§ 264. VERDICT AND ENTRIES.] Upon receiving a verdict an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where a special verdict is found, either the judgment rendered thereon, or, if the case be reserved for argument or further consideration, the order thus reserving it.

ARTICLE VI.—OF THE TRIAL BY THE COURT.

§ 265. HOW JURY WAIVED.] Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

§ 266. WHEN COURT TO DECIDE.] Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision.

§ 267. SEPARATELY STATED.] In giving the decision the facts found and the conclusions must be separately stated. Judgment upon the decision must be entered accordingly.

§ 268. FINDINGS WAIVED.] Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial.
2. By consent in writing, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

§ 269. PREPARATION OF FINDINGS BY PARTIES.] At the time the cause is submitted the judge may direct either or both parties to prepare findings of facts, unless they have been waived, and when so directed the party must within two days prepare and serve upon his adversary, and submit to the judge such findings, and may, within two days thereafter, briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify or reject the findings so submitted. If, at the time of the submission of the cause, the judge does not direct the preparation of findings, or those prepared are rejected, then he must himself prepare the findings.

§ 270. MAKING UP JUDGMENT.] On a judgment for the plaintiff upon an issue of law he may proceed in the manner prescribed by the first two subdivisions of section 229, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account, or the proof of any fact, be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

ARTICLE VII.—OF REFERENCES AND TRIALS BY REFEREES.

§ 271. REFERENCE BY CONSENT.] A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered in the minutes:

1. To hear and determine any or all of the issues of fact in an action or proceeding, and to report a finding upon which judgment may be entered by the court.

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

§ 272. WITHOUT CONSENT.] Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in all cases formerly cognizable in chancery in which reference might be made.

§ 273. TO WHOM ORDERED.] A reference may be ordered to any person or persons not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county or subdivision in which the action or proceeding is triable, and against whom there is no legal objection.

§ 274. CHALLENGES TO REFEREE.] Either party may object to the appointment of any person as referee for the same cause for which challenges for cause may be taken to a petit juror in the trial of a civil action.

§ 275. COURT OR JUDGE HEARS.] The objections taken to the appointment of any person as referee must be heard and disposed of by the court or judge thereof. Affidavits may be read and witnesses examined as to such objections.

§ 276. REPORT BY REFEREES.] The referees must report their findings in writing to the court within twenty days after the testimony is closed; but the time may be extended by consent of the parties, or by order of the court or judge.

§ 277. FINDING ONLY OF FACTS—SPECIAL VERDICT.] The reference in all cases shall be to find the facts, and the finding reported has the effect of a special verdict, and may be excepted to and set aside in like manner.

§ 278. OATH OF REFEREES.] The referees, before proceeding to hear any testimony must be sworn, to well and truly hear and determine the facts referred to them, and true findings render according to the evidence, and they have power to administer oaths to all witnesses produced before them.

ARTICLE VIII.—EXCEPTIONS.

§ 279. HOW STATED.] No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter, as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

§ 280. SETTLED AT TIME OR AFTER.] A bill containing the exceptions to any ruling may be presented to the judge at the time the ruling is made, or the exception may be entered on the judge's minutes, and afterwards settled. The bill must be conformable to the truth, or be at the time corrected until it be so, and signed by the judge and filed with the clerk.

§ 281. SETTLED IN TEN DAYS ON THREE DAYS' NOTICE.] If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may upon three days' notice to the adverse party, at any time after such ruling is made, and within ten days after the entry of judgment, or such other time as may be fixed by the court, be presented to the judge and settled.

§ 282. EXCEPTIONS AFTER JUDGMENT.] Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and may be settled or noted as provided in section 280, and a bill thereof may be presented and settled afterwards, as provided in section 281, and within like periods after entry of the order, upon appeal from which such decision is reviewable.

§ 283. APPLICATION TO SUPREME COURT.] If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as that court may prescribe, and the bill, when proven, must be certified by a justice thereof as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

§ 284. IN CASE OF VACANCY.] If the judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in the preceding section, apply to the supreme court to prove the same.

ARTICLE IX.—OF NEW TRIALS.

§ 285. DEFINITION.] A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

§ 286. CAUSES FOR—WHO APPLIES.] The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material to the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

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

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

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

§ 287. UPON AFFIDAVITS OR RECORD.] When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the preceding section, it must be made upon affidavits; for any other cause it may be made, at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, ~~prepared as hereinafter provided~~.

§ 288. NOTICE—CONTENTS—WHEN HEARD.] The party intending to move for a new trial must serve upon the adverse party a notice of his intention, designating therein generally the grounds upon which the motion will be made. Such motion must be made and determined during the term at which the cause was tried, unless for good cause further time be given by the court; and, except in cases of newly discovered evidence, the application must be made within three days after the verdict or decision is rendered. Motions for new trial on the ground of newly discovered evidence may be made at the term at which the cause is tried or at the next succeeding term.

§ 289. VERDICT VACATED BY COURT.] The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice.

§ 290. HEARING AT CHAMBERS OR IN OTHER COURT.] When the action is tried by a district judge in his district, out of the county of his residence, the motion for a new trial may, upon the consent of parties, be brought to a hearing before such judge at chambers, or in open court, in the county of his residence, or in any other county.

ARTICLE X.—MANNER OF GIVING, ENTERING, AND SATISFYING JUDGMENTS.

§ 291. ENTERED BY CLERK ON ORDER.] Judgment upon an issue of law, or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or the judge thereof.

§ 292. AGAINST WHOM—COUNTER CLAIM.] 1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and the court may determine the ultimate rights of the parties on each side as between themselves.

2. If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant must be given for the excess; and the court may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate and not otherwise.

§ 293. RELIEF LIMITED BY COMPLAINT.] The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him relief consistent with the case made by the complaint and embraced within the issue.

§ 294. DEATH BEFORE JUDGMENT.] If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

§ 295. TO RECOVER PERSONALTY.] In an action to recover the possession of personal property, the judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

§ 296. PUTTING IN POSSESSION.] Every judgment that contains a direction for the sale of any specific real property may also direct the delivery of the possession of such property to the purchaser; and the officer receiving the execution or order of sale, may enforce such judgment by putting the purchaser in possession of the premises, in like manner and with like authority, as if special execution had been directed to him for that purpose.

§ 297. JUDGMENT BOOK.] The clerk shall keep, among the records of the court, a book, for the entry of the judgments, to be called the "judgment book."

§ 298. ENTRIES.] The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

§ 299. JUDGMENT ROLL—CONTENTS.] Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment-roll:

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

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders or papers in any way involving the merits and necessarily affecting the judgment.

§ 300. DOCKETING IN OTHER COUNTIES—SECURED ON APPEAL—EFFECT.] On filing a judgment-roll, upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court in which it was rendered, in a book to be known as the judgment docket, and in any other county or subdivision, upon filing with the clerk of the district court for said county or subdivision, a transcript of the original docket; and it shall be a lien on all the real property, except the homestead, in the county or subdivision where the same is so docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county or subdivision in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county or subdivision where it was rendered. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in this code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, direct the clerk to make an entry on the judgment docket that the same is "secured on appeal," and thereupon it shall cease, during the pendancy of the appeal, to be a lien on the real property of the judgment debtor as against purchasers and mortgagees in good faith.

§ 301. FORM OF JUDGMENT DOCKET.] The clerk shall docket the judgment by entering alphabetically in the judgment docket the names of the judgment debtor or debtors, the names of the party or parties in whose favor the judgment was rendered, the sum recovered or directed to be paid, in figures, the date of the judgment, the year, day, hour and minute when the judgment roll or transcript was filed, the year, day, hour, and minute when the judgment was docketed in his office, and the page in the judgment book where the same is entered; the name of the court in which the judgment was rendered; the name of the attorney or attorneys for the party

recovering the judgment, and, if there are two or more judgment debtors, such entries must be repeated under the initial letter of the surname of each.

§ 302. ASSIGNMENT OF JUDGMENT — FORMALITIES — ENTRIES.] Every clerk of the district court, upon the presentation to him of an assignment of any judgment rendered or docketed therein, signed by the party in whose favor the judgment is rendered, his executor or administrator, and acknowledged in the manner prescribed by law for the acknowledgment of deeds, must immediately enter the same in the judgment book, and must note the fact of such assignment, the date thereof, and the name of the assignee, in the margin of the entry of such judgment, in such judgment book, and also upon the docket of such judgment. And the clerk of the district court of any other county or subdivision where such judgment is docketed, must note the fact of such assignment, the date thereof, and the name of the assignee, upon the presentation to and filing with him, a certified copy of the original judgment docket with the said facts of such assignment noted thereon.

§ 303. CANCELLATION AND DISCHARGE.] Any judgment rendered or docketed in the district courts of the territory, may be cancelled and discharged by the clerk thereof:

1. Upon the filing with him of an acknowledgment of the satisfaction thereof, signed by the party in whose favor the judgment was obtained, his attorney of record, his executor, administrator or assignee, and duly acknowledged in the manner required to admit a deed of real property to record.

2. Upon the return of any execution, issued upon such judgment, wholly satisfied, or the presentation of a satisfaction piece duly executed and acknowledged as hereinbefore provided, to the clerk of any district court, he must immediately note upon the judgment docket and in the margin of the judgment book where such judgment is entered, the date of such cancellation and the manner thereof, by satisfaction piece filed, execution returned satisfied, or otherwise.

3. And any partial satisfaction of the judgment may be made and noted upon the records in like manner; and thereupon all judgments and liens thereby created, must be taken and deemed to be canceled and discharged, to the extent of the entries so made upon the judgment docket, and no more.

4. And the clerk of any other district court, or the district court of any other county or subdivision, wherein a transcript of any such judgment docket shall have been filed and judgment docketed accordingly, must cancel the same in like manner upon his judgment docket, upon the filing in his office of a certified copy of the original judgment docket entry duly canceled as hereinbefore provided.

§ 304. JUSTICE'S JUDGMENT DOCKETED BY CLERK—LIEN.] A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, must give a certified transcript thereof which may be filed in the office of the clerk of the district court of the county or subdivision, in

which the judgment was rendered, and such clerk must thereupon enter such judgment in the judgment book, and upon the judgment docket; and, from the time of the docketing thereof, it becomes a judgment of such district court and a lien upon real property, and a certified transcript of the docket of such judgment may be filed, and the judgment docketed accordingly, in any other county or subdivision, with the like effect in every respect as if the judgment had been rendered in the district court where such judgment is filed.

§ 305. SET-OFF OF JUDGMENTS.] Mutual final judgments may be set off, pro tanto, the one against the other, by the court upon proper application and notice.

CHAPTER XIII.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

THE EXECUTION AND LEVY.

§ 306. WITHIN FIVE YEARS.] The party in whose favor judgment has heretofore been, or shall hereafter be given, and, in case of his death, his personal representatives, duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same by writ of execution as provided in this chapter.

§ 307. AFTER FIVE YEARS BY LEAVE.] After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part.

§ 308. FOR DELIVERY OR SALE.] Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material points thereof, and directing the proper officer to execute the judgment, by making the sale and applying the funds in conformity therewith. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

§ 309. KINDS OF EXECUTION.] There shall be three kinds of execution; one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

§ 310. AGAINST PROPERTY—TO DIFFERENT COUNTIES.] When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of such county, or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a certificate of sale to the purchaser as hereinafter provided. An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

§ 311. AGAINST PERSON—WHEN.] If the action be one in which the defendant might have been arrested, as provided in section 149 and section 151, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this code provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 149.

§ 312. ISSUE AND CONTENTS OF EXECUTION.] The writ of execution must be issued in the name of the territory of Dakota, attested in the name of the judge, sealed with the seal of the court, and subscribed by the clerk, and directed to the sheriff, or to the coroner when the sheriff is a party or interested; and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, to satisfy the judgment with interest and accruing costs out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, or tenants of real property, or trustees, to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents or profits recovered by the same judgment, out of the personal property of the party against whom it was ren-

dered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

§ 313. TIME OF RETURN.] The execution shall be returnable within sixty days, after its receipt by the officer, to the clerk with whom the record of judgment is filed.

§ 314. WHAT PROPERTY TAKEN.] All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in real or personal property, and all other property not capable of manual delivery, shall be liable to be taken on execution and sold as hereinafter provided.

§ 315. OFFICER'S PROCEEDINGS ON.] When an execution is delivered to any officer, he must indorse thereon the day and hour when he received it, and must proceed to execute the same with diligence; and, if executed, an exact description of the property at length, with the date of the levy, sale, or other act done by virtue thereof, must be indorsed upon or appended to the execution; and if the writ was not executed, or executed in part only, the reason in such case must be stated in the return. If no personal property be found, an indorsement to that effect must be made on the writ, before levy is made on real property.

§ 316. LEVY ANY SALE.] The officer must execute the writ by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

§ 317. AMOUNT LEVIED—LIEN ON PERSONALTY.] The officer must in all cases select such property, and in such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may, at any time thereafter, make other levies if he deem it necessary. But no writ of execution shall be a lien on personal property before the actual levy thereof.

§ 318. THINGS IN ACTION.] Judgments, bank bills, and other things in action, may be sold, or appropriated, as provided in the next following section, and assignment thereof by the officer shall have the same effect as if made by the defendant.

§ 319. PROPERTY NOT TO BE SOLD.] Money levied may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value.

§ 320. PAYMENT TO SHERIFF.] After the rendition of the judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

§ 321. CLAIM BY THIRD PERSON—SHERIFF'S JURY.] If the property levied on be claimed by a third person as his property, the sheriff may summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff; and if their verdict be in favor of the claimant the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses must be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. Each party must deposit with the sheriff, before the trial, the amount of his fees, and the fees of the jury, and the sheriff must return to the prevailing party the amount so deposited by him.

EXEMPTIONS.

§ 322. EXEMPT FROM ALL PROCESS.] Except as hereinafter provided, the property mentioned under this heading, is exempt from attachment or mesne process, and from levy and sale on execution, and from any other final process issued from any court.

§ 323. ABSOLUTE EXEMPTIONS.] The property mentioned in this section is absolutely exempt from all such process, levy or sale:

1. All family pictures.
2. A pew or other sitting in any house of worship.
3. A lot or lots in any burial ground.
4. The family bible, and all school books used by the family, and all other books used as a part of the family library not exceeding in value one hundred dollars.
5. All wearing apparel and clothing of the debtor, and his family.
6. The provisions for the debtor, and his family, necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year.
7. The homestead, as created, defined and limited by law.

§ 324. ADDITIONAL EXEMPTIONS.] In addition to the property mentioned in the preceding section, the debtor may, by himself or his agent, select from all other of his personal property, not absolutely exempt, goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided.

§ 325. SPECIFIC ALTERNATIVE EXEMPTIONS.] Instead of the exemption granted in the preceding section the debtor may select and choose the following property, which shall then be exempt, namely:

1. All miscellaneous books and musicial instruments for the use of the family, not exceeding five hundred dollars in value.

2. All household and kitchen furniture, including beds, bedsteads and bedding, used by the debtor, and his family, not exceeding five hundred dollars in value; and in case the debtor shall own more than five hundred dollars worth of such property, he must select therefrom such articles to the value of five hundred dollars, leaving the remainder subject to legal process.

3. Three cows, ten swine, one yoke of cattle and two horses or mules or two yoke of cattle, or two span of horses or mules, one hundred sheep and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned for one year, either provided or growing, or both, as the debtor may choose; also one wagon, one sleigh, two plows, one harrow, and farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

4. The tools and implements of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding two hundred dollars in value. The library and instruments of any professional person, not exceeding six hundred dollars in value.

§ 326. THOSE BY NUMBER CHOSEN; BY VALUE APPRAISED.] All the articles enumerated in the preceding section which are exempt by limitation of number, must be chosen by the debtor, his agent or attorney; so, also, all property exempt by limitation of value must be determined by an appraisement made under the direction of the sheriff or other officer.

§ 327. APPRAISERS SELECTED.] To make the appraisement, the debtor, his agent or attorney must select one person, and the creditor, his agent or attorney, another person, and these two, so selected, a third person, who must all be disinterested citizens of the county not related to either party nearer than the fourth degree. If the two fail to agree upon the third person, the sheriff or other officer must select the third person; and, in like manner, if either the debtor or creditor fail or refuse, upon notice, to select a person to act as one of the appraisers, the sheriff or other officer must select one for them.

§ 328. OATH AND DUTIES OF APPRAISERS] The three appraisers so selected, must take and subscribe an oath before the sheriff or other officer, to be attached to the inventory of appraisement, that they will truly, honestly, and impartially appraise the property of the debtor. The property must be appraised at the usual price of such articles at sheriff's sales, as near as can be determined, and must be set down in an inventory by articles or by lots when definitely descriptive, with the value opposite. From the appraisement so made, if over the limitation in value, the debtor, his agent or attorney, may select the amount in value of fifteen hundred dollars, or the alternative amounts in value, of each class, leaving the remainder, if any, in either case, subject to legal process.

§ 329. WIFE, OR CHILD OVER SIXTEEN, MAY ACT.] If, in any case, the debtor

neglect, or refuse, or for any cause, fail to claim the whole or any of the aforesaid exemptions, his wife is entitled to make such claim or demand, and to select and choose the property, to select and designate one of the appraisers, and to do all other acts necessary in the premises, the same and with like effect as the debtor himself might do; and if she neglect, refuse, or for any cause fail so to do, in whole or in part, then one of their children, of sixteen years of age and upwards, being a member of the family, may do so in like manner and with like effect.

§ 330. SHERIFF TO RETURN EXEMPTIONS.] The sheriff or other officer having any process of levy or sale, must make return with his writ or warrant, of any inventory and appraisement of any such exempted or other personal property.

§ 331. NOTICE BY SHERIFF TO DEBTOR—HIS CLAIM.] In all cases of a levy upon personal property by a sheriff, constable, or other officer, he must give notice thereof to the debtor, his attorney, agent, or wife, or failing conveniently to find either, to such child as is described in section 329; and the debtor, or such other person for him, must claim or demand the benefit of these exemptions within three days after such notice from the officer; and said notice of levy may be by copy or by reading.

§ 332. LABORER'S OR MECHANIC'S WAGES.] Nothing in this chapter shall be so construed as to exempt any personal property from execution for laborers' or mechanics' wages, except that absolutely exempt.

§ 333. PERSONS HAVING NO EXEMPTIONS—PARTNERSHIPS.] Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons, namely:

1. To a corporation for profit.
2. To a non-resident.
3. To a debtor who is in the act of removing with his family from the territory; or,
4. Who has absconded, taking with him his family.
5. A partnership firm can claim but one exemption of fifteen hundred dollars in value, or the alternative property, when so applicable, instead thereof, out of the partnership property, and not a several exemption for each partner.

§ 334. FOR FINES, PENALTIES AND COSTS—FORFEITURES OF RECOGNIZANCES.] No property, either real or personal, except the homestead and other exemptions made absolute, shall be exempt from levy, seizure and sale, by virtue of any final writ or process issued on a judgment for fines, penalties, or costs of criminal prosecutions; and no property, except the homestead and other exemptions made absolute, and personal property of any kind in addition thereto to the value of five hundred dollars, shall be exempt from levy, seizure or sale, by virtue of any final writ or process issued on a judgment for forfeitures of undertakings and bonds, or of recognizance taken and entered in criminal cases.

SALES.

§ 335. PUBLISHED NOTICE—PERISHABLE PROPERTY.] The officer who levies

upon personal property by virtue of an execution, must, before he proceeds to sell the same, cause public notice to be given of the time and place of such sale, for at least ten days before the day of sale. The notice must be given by advertisement, published in some newspaper printed in the county or subdivision, or, in case no newspaper be printed therein, by posting up advertisements in five public places in the county. Perishable property may be sold by order of the court or a judge thereof, prescribing such notice, time, and manner of sale as may be reasonable, considering the character and condition of the property.

§ 336. REAL PROPERTY.] Before any real property or interest therein, taken in execution, shall be sold, the officer making such sale must cause public notice of the time and place thereof to be given by advertisement published in some newspaper printed in the county or subdivision where the real property to be sold is situated, once a week for at least thirty days, and in case there be no newspaper printed therein, then the officer making such sale must cause such advertisement to be made in some newspaper having a general circulation in such county or subdivision, and in addition thereto must post a copy of such advertisement on the outer door of the court house or building wherein the district court of the county or subdivision was last held, and in five other public places in the county. All sales made without notice as herein provided must be set aside by the court to which the execution is returnable, upon motion to confirm the sale.

§ 337. SALE AT COURT HOUSE DOOR.] All sales of real property, or any interest therein, under execution, must be held at the court house, if there be one in the county or subdivision in which such real property is situated, and if there be no court house, then at the door of the house in which the district court was last held, and if there be no court house, and no district court have been held in the county or subdivision, then at such place, within the county or subdivision, as the sheriff shall designate in his notice of sale.

§ 338. MANNER AND TIME OF SALE.] All sales of property under execution must be made at public auction, to the highest bidder, between the hours of nine in the morning and four in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. No sheriff or other officer, nor his deputy, holding the execution or making the sale of property, either personal or real, can become a purchaser, or be interested, directly or indirectly, in any purchase, at such sale, and every purchase so made shall be considered fraudulent and void. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price: and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff or other officer must follow such directions.

§ 339. POSTPONEMENTS.] When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may postpone the sale for not less than three days, without being required to give any further notice thereof; but he shall not make more than two such postponements, and such postponement must be publicly announced when and where the sale should have taken place.

§ 340. OVERPLUS.] When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands on which said overplus may be rightfully applied.

§ 341. NEW SALE—ADDITIONAL LEVY—ALIAS WRIT.] When property is unsold for want of bidders, the levy still holds good; and if there be sufficient time it may again be advertised or the execution returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added, that if such property do not produce a sum sufficient to satisfy such execution, the officer must proceed to make an additional levy, on which he shall proceed as on other executions, or the plaintiff may, in writing filed with the clerk, abandon such levy upon paying the costs thereof; in which case execution may issue with the same effect as if none had ever been issued.

§ 342. PURCHASER'S RIGHT—SHERIFF'S CERTIFICATE.] Upon a sale of real property the purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the real property is subject to redemption as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption it must be so stated.

Such certificate must be executed by the officer and acknowledged or proved, as is or may be required by law for deeds of real property, and may be recorded in the office of the register of deeds of the county wherein the real property is situated; and the same, or a certified copy thereof, certified by such register, shall be taken and deemed evidence of the facts therein recited and contained.

CONFIRMATION.

§ 343. PROCEEDINGS UPON CONFIRMATION.] If the court, upon the return of any writ of execution, for the satisfaction of which any real property or interest therein has 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 chapter, the court must make an order confirming the sale and directing 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 of such real property, or interest therein, at the expiration of one year from the day of sale unless the same be redeemed as herein provided. And the officer, after making such sale, may retain the purchase money in his hands, until the court shall have examined his proceedings, as aforesaid, when he must pay the same to the person entitled thereto by order of the court.

REDEMPTION.

§ 344. WHO MAY REDEEM—REDEMPTIONER.] Property sold subject to redemption, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest.

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

§ 345. PAYMENT ON AND PERIOD FOR.] The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase with twelve per cent. interest thereon, together with the amount of any assessment of taxes which the purchaser may have paid thereon after the purchase, and interest at the same rate on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

§ 346. SUCCESSIVE REDEMPTIONS—PAYMENTS.] If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with the like interest thereon in addition as provided by the preceding section, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with interest at the same rate as provided for the first redemption in section 345, in addition, and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest.

§ 347. RECORD OF REDEMPTION.] Written notice of redemption must be given to the sheriff, and a duplicate filed with the register of deeds of the county; and if any taxes or assessments are paid by the redemptioner, or

if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff, and filed with the register of deeds; and if such notice be not filed, the property may be redeemed without paying such tax, assessment or lien.

§ 348. PERIOD FOR DEED—DEBTOR'S RIGHT.] If no redemption be made within one year after the sale, the purchaser or his assignee is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property.

§ 349. DEBTOR'S REDEMPTION.] If the debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale.

§ 350. PAYMENTS TO WHOM.] The payments mentioned in the last five sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale.

§ 351. REQUISITE PAPERS.] A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the district court of the county where the judgment is docketed, or, if he redeem upon a mortgage or other lien, a note of the record thereof certified by the register of deeds.

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

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

§ 352. USE OF PREMISES—WASTE.] Until the expiration of the time for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

§ 353. RENTS—ACCOUNT FOR.] The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold, preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If the purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in the district court of the county where the real property is situated to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

THE SHERIFF'S DEED.

§ 354. EFFECT OF—CONTENTS.] Upon the expiration of the period for redemption, the proper officer must make the purchaser, or the party entitled thereto, a deed of the real property sold. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein until the contrary is proved, and shall vest in the purchaser, or other party as aforesaid, as good and as perfect title in the premises therein mentioned and described, as was vested in the debtor at or after the time when such real property became liable to the satisfaction of the judgment. And such deed or conveyance, to be made by the sheriff or other officer, must recite the execution or executions, or the substance thereof, and the names of the parties, the amount, and date of rendition of such judgment, by virtue whereof the said real property was sold as aforesaid, and must be executed, acknowledged, or proved, and recorded, as is or may be provided by law, to perfect the conveyance of real property in other cases.

§ 355. SUCCESSORS, SAME POWER.] If the term of service of the sheriff, or other officer, who has made, or shall hereafter make sale of any real property, shall expire; or, if the sheriff or other officer shall be absent, or be rendered unable, by death, or otherwise, to make a deed or conveyance of the same, any succeeding sheriff or other officer may execute to the purchaser or person entitled thereto, or his legal representatives, a deed of conveyance of said real property so sold; and such deed shall be as good and valid in law, and have the same effect, as if the sheriff or other officer, who made the sale, had executed the same.

GENERAL PROVISIONS.

§ 356. PRINTER'S FEES IN ADVANCE.] The officer who levies upon personal

property or real property, or who is charged with the duty of selling the same by virtue of any writ of execution, may refuse to publish a notice of the sale thereof by advertisement in a newspaper, until the party for whose benefit such execution is 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. Before any officer shall be excused from publishing the notice, as aforesaid, he must demand of the party for whose benefit the execution was issued, his agent or attorney, provided either of them reside in the county, the amount of money for such fees.

§ 357. EFFECT OF REVERSAL.] If any judgment, in satisfaction of which any real property be sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser; but in such case, restitution must be made by the judgment creditor, of the money for which such real property was sold, with lawful interest thereon from the day of sale.

§ 358. PRINCIPAL AND SURETY.] In all cases where judgment is rendered upon any instrument in writing, in which two or more persons are 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 co-defendant, the court must, in entering judgment thereon, state which of the defendants is principal debtor, and which are sureties or bail. And execution issued on such judgment must command the sheriff or other officer to cause the money to be made of the personal property, and real property of the principal debtor, but, for want of sufficient property of the principal debtor to make the same, to cause the same to be made of the personal and real property of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, must be exhausted before any of the property of the surety or bail shall be taken in execution.

§ 359. AMERCEMENT OF SHERIFF.] 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, to sell any personal or real property; or, to return any writ of execution to the proper court, on or before the return day; or, 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 otherwise provided; or, on demand made by the defendant, his agent or attorney of record, to pay all overplus received from any sale; 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.

§ 360. OF CLERK—SAME.] 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.

§ 361. MEASURE OF SAME.] When the cause of amercement is for refusing to pay over money collected as aforesoid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per centum thereon.

§ 362. RETURN OF WRIT BY MAIL.] When execution shall be issued in any county, 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 who issued the same. On proof being made by such sheriff or coroner, that the execution was mailed soon enough to have reached the said clerk 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.

§ 363. PROCEEDINGS AGAINST OFFICER.] 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 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 by 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.

§ 364. SURETY MADE PARTY.] 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 property, personal or real, of any such surety, shall not be liable to be taken on execution when sufficient property 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 or other proceeding, at his election.

§ 365. OFFICERS REIMBURSEMENT.] In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he must be permitted to take out executions and collect the amount of said judgment in the name of the original plaintiff, for his own use.

CHAPTER XIV.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

§ 366. DISCOVERY—DEBTOR'S APPEARANCE—EXAMINATION—ARREST OF DEBTOR—ANSWERS NOT EXCUSED.] 1. When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the territory, to the sheriff of the county where a judgment roll, or a transcript of a justice's judgment for twenty-

five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued.

2. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof; that any judgment debtor, residing in the district where such judge resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution.

3. On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

4. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise to his satisfaction, that there is danger of the debtor leaving the territory, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and if it then appears that there is danger of the debtor leaving the territory, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, as for contempt.

5. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

§ 367. DEBTOR'S DEBTOR.] 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 shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

§ 368. EXAMINATION OF SAME.] 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 an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action in such manner as may seem to him proper. The proceedings mentioned in this section, and in section 366, may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

§ 369. WITNESSES.] Witnesses may be required to appear and testify on any proceeding under this chapter, in the same manner as upon the trial of an issue.

§ 370. REFEREE—ANSWERS ON OATH.] 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 shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

§ 371. PROPERTY APPLIED—WAGES EXEMPT.] The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

§ 372. RECEIVER—RESTRAINT OF PROPERTY TRANSFERS—RECORD.] The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 219. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property

of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the court where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "Book of orders appointing receivers of judgment debtors," and shall note the time of filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the register of deeds of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the register of deeds of the county in which such judgment debtor resides.

§ 373. ADVERSE CLAIMS—PROCEEDINGS ON.] If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

§ 374. REFEREE—APPOINTMENT] The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and, may in his discretion, appoint such referee in the first order, or at any time.

§ 375. WITNESS FEES—DISBURSEMENTS.] The judge may allow to the judgment creditor, or any party so examined, whether a party to the action or not, witness' fees and disbursements.

§ 376. DISOBEDIENCE—CONTEMPT.] 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 a contempt. And in all cases of commitment under this chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

CHAPTER XV.

OF THE COSTS AND DISBURSEMENTS IN CIVIL ACTIONS.

§ 377. FEES BY AGREEMENT.] The amount of fees of attorneys, solicitors and counsel, in civil and criminal actions must be left to the agreement, express or implied, of the parties.

§ 378. SAME IN WRITTEN INSTRUMENT.] When by the terms of any written instrument, it appears that the debtor has made a written contract for the allowance of attorneys fees, the same must be allowed by the court, in conformity to the instrument, and must form a part of the judgment and be incorporated therein.

§ 379. COSTS TAXED IN JUDGMENT.] In all actions and special proceedings, the clerk must tax as a part of the judgment, in favor of the prevailing party, the allowance of his witnesses, the jury, officers' and printers' fees, the compensation of referees, and the necessary expenses of taking depositions, and procuring necessary evidence.

§ 380. APPEAL FROM SAME.] Any person aggrieved by the taxation of costs may appeal therefrom to the court or a judge thereof.

§ 381. COSTS LIMITED BY DAMAGES—SEVERAL ACTIONS.] In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages And in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars; such value must be determined by the jury, court, or referee, by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which must be at his election: *Provided*, That the party or parties proceeded against in such action or actions, shall at the time of the commencement of the previous action or actions, have been openly within this territory, and not secreted.

§ 382. COSTS TO CERTAIN DEFENDANTS.] In all actions where there are several defendants, not united in interests, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor.

§ 383. DISCRETION OF COURT.] In the following cases the costs of an appeal must be in the discretion of the court:

1. When a new trial shall be ordered.
2. When a judgment shall be affirmed in part and reversed in part.

§ 384. AGAINST ATTEMPTING PARTY.] When an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs must be adjudged against the party attempting to institute or bring up the action.

§ 385. ON APPEALS.] Costs must be allowed to the prevailing party in judgments rendered on appeal from justices' courts, in all cases, including his costs taxed in the court below.

§ 386. INTEREST.] When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment be finally entered, must be computed by the clerk and added to the costs of the party entitled thereto.

§ 387. NOTICE OF TAXING COSTS—VERIFICATION—ITEMS.] The clerk must insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village or town, and then upon two days' notice, the sum of the allowances for costs as provided by this code. The costs must be stated in detail and verified by affidavit of the party or his attorney, stating in substance that the items of costs have been, or will necessarily be, incurred in the action or proceeding. A copy of the items of the costs and affidavit must be served with a notice of adjustment. Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceeding, the same shall be adjusted by the judge before whom the same be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.

§ 388. REFEREES FEES.] The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

§ 389. COSTS OF POSTPONEMENT.] When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement, may be imposed, in the discretion of the court or referee, as a condition of granting the same.

§ 390. OF INFANT PLAINTIFF BY GUARDIAN.] When costs are adjudged against an infant plaintiff, the guardian, by whom he appeared in the action, must be responsible therefor, and payment thereof may be enforced by attachment.

§ 391. OF TRUSTEE FROM TRUST FUNDS.] In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be chargeable only upon, or collected of, the estate, fund, or party, represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defense.

§ 392. AGAINST TERRITORY—EXCEPTION.] In all civil actions, prosecuted in the name of the territory, by an officer duly authorized for that purpose, the territory shall be liable for the costs in the same cases and to the

same extent as private parties. If a private person be joined with the territory as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the territory until after execution be issued therefor against such private party and returned unsatisfied.

§ 393. TO PARTY IN INTEREST.] In an action prosecuted in the name of the territory, for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the party plaintiff shall be charged against the party for whose benefit the action was prosecuted, and not against the territory.

§ 394. COSTS TAXED TO ASSIGNEE.] In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

§ 395. ON CHANGE OF VENUE.] Whenever a change of venue is granted in any case pending in the district courts, all the costs and fees paid by the county to which the case is ordered for trial shall be charged to the county from which such case is sent.

§ 396. ACCOUNT FOR SAME.] The board of county commissioners of the county to which any case is ordered for trial, as provided by this code, must make out and present for payment to the county from which such case is sent, an itemized bill of all the costs and fees of the trial of such case, paid by the county according to law; said bill must be sworn to by the county clerk, and the board of county commissioners receiving such bill or account must examine the same and pay the whole thereof, or so much as is legal, proper and correct.

§ 397. SURETY FOR BY NON RESIDENT.] In cases in which the plaintiff is a non-resident of the territory or a foreign corporation, before commencing such action, the plaintiff must furnish a sufficient surety for costs. The surety must be a resident of the county or subdivision where the action is to be brought, and must be approved by the clerk. His obligation shall be complete by simply endorsing the summons, or signing his name on the complaint as security for costs.

§ 398. RESPONSIBILITY OF.] 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 obtain judgment or not.

§ 399. DISMISSAL.] 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.

§ 400. PLAINTIFF BECOMING NON-RESIDENT.] If the plaintiff in an action, after its commencement, become a non-resident of the territory, he shall

give security for costs in the manner and under the restrictions provided in the two preceding sections.

§ 401. ADDITIONAL SECURITY.] 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.

§ 402. JUDGMENT AGAINST SURETY.] 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.

CHAPTER XVI.

OF APPEALS IN CIVIL ACTIONS.

§ 403. CHAPTER GOVERNS.] The modes of reviewing a judgment or order in a civil action, shall be those prescribed by this chapter.

§ 404. ORDER WITHOUT NOTICE.] An order made out of court without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice in the manner in which other motions are made.

§ 405. APPEALS ALLOWED.] Any party aggrieved may appeal in the cases prescribed in section 22 of this code.

§ 406. PARTIES—HOW TERMED.] The party appealing is known as the appellant, and the adverse party as the respondent, but the title of the action must not be changed in consequence of the appeal.

§ 407. NOTICE OF APPEAL—AMENDMENT—SERVICE OF NOTICE.] An appeal must be made:

1. By the service of a notice in writing on the adverse party or his attorney, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof.

2. When a party shall, in good faith, give notice of an appeal from a judgment or order, and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

3. If service of the notice of appeal upon the attorney for the adverse party cannot, with due diligence, be made within the territory in the manner prescribed by this code, the notice of appeal may be served, and

notice of the subsequent proceedings may be given to him, in such manner as the court or a judge thereof shall direct.

§ 408. TRANSMISSION OF PAPERS.] If the appellant do not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or if the appeal be from an order or any part thereof, a certified copy of such order and the papers upon which the order was granted, to be transmitted to the supreme court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be transmitted by such clerk to the supreme court, and recover the expenses thereof as costs on such appeal, in case the judgment or order appealed from be in whole or in part affirmed.

§ 409. DISMISSAL UPON FAILURE.] If the appellant fail to cause the requisite papers to be transmitted to the supreme court, as required by the preceding section and the rules of the court, the appeal may be dismissed.

§ 410. EFFECT OF.] The dismissal of an appeal is, in effect, an affirmance of the judgment or order appealed from, unless the dismissal be expressly made without prejudice to another appeal.

§ 411. WHAT REVIEWABLE ON APPEAL.] Upon an appeal from a judgment the supreme court may review any verdict, decision, or intermediate order, involving the merits and necessarily affecting the judgment.

§ 412. POWER OF SUPREME COURT.] Upon an appeal from a judgment or order, the supreme court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment so far as such restitution is consistent with any rights of purchasers at sheriff's sale.

§ 413. TIME FOR APPEALS.] The appeal to the supreme court under subdivision 2 of section 22 of this code, must be taken within sixty days after written notice of the order shall have been given to the party appealing; every other appeal allowed must be taken within two years after the judgment shall be perfected by filing the judgment roll.

§ 414. UNDERTAKING REQUIRED.] To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

§ 415. STAY OF EXECUTION—ADDITIONAL SECURITY—DEPOSIT.] If an appeal be from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking be executed on the part of the appellant by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal

be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. Whenever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file, and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking, with surety or sureties, he may, in lieu thereof, deposit with the officer or into court, as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this section, the money is so deposited with an officer, a judge of the court, at special term or at chambers, upon the application of either party, may, before such deposit if made, order it to be deposited in court instead of with such officer; and a deposit made, pursuant to such order, shall be of the same effect as if made with such officer.

§ 416. JUDGMENT TO ASSIGN OR DELIVER DOCUMENTS.] If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or judge thereof, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

§ 417. TO EXECUTE CONVEYANCE.] If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 418. TO SELL AND DELIVER REALTY.] If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same must not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal be dismissed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which must be specified in the undertaking. When the judgment is for the sale of

mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

§ 419. EFFECT OF PERFECTED APPEAL—SECURITY LIMITED.] Whenever an appeal is perfected, as provided in sections 415, 416, 417, and 418, it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not effected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by sections 415, 416 and 418, when the appellant is an executor, administrator, trustee or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections 416, 417 and 418, where it would otherwise, according to those sections, exceed that sum.

§ 420. SERVICE OF UNDERTAKINGS.] The undertakings prescribed by sections 414, 415, 416 and 418 may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit be made as provided in section 414, and notice thereof given.

§ 421. JUSTIFICATION—NOTICE—EXCEPTIONS.] An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after the notice of the appeal; and unless they or other sureties justify before a judge of the court below, as prescribed by sections 165 and 166, within ten days thereafter, the appeal must be disregarded as if no undertaking had been given. The justification must be upon a notice of not less than five days.

§ 422. OTHER CASES—PERISHABLE PROPERTY.] In the cases not provided for in sections 415, 416, 417 and 418, the perfecting of an appeal, by giving the undertaking mentioned in section 414 shall stay proceedings in the court below upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

§ 423. FILING.] The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered.

§ 424. SPECIAL AND SUMMARY PROCEEDINGS.] The provisions of this chapter as to the security to be given upon appeals, and as to the stay of proceedings shall apply to appeals taken under subdivision 3 of section 22 of this code.

§ 425. OTHER APPEALS.] In addition to the appeals provided for in this chapter, and section 22 of this code, writs of error shall be allowed on all final decisions of the district courts to the supreme court under such regulations as may be prescribed by the rules or practice of the supreme court.

CHAPTER XVII.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES, AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

§ 426. SUMMONS AFTER JUDGMENT.] When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 105, those who were not originally summoned to answer the complaint, and did not appear in the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

§ 427. REQUISITES OF SAME.] The summons provided in the preceding section must be subscribed by the judgment creditor or his attorney, must describe the judgment and require the person summoned to show cause within thirty days after the service of the summons; and must be served in like manner as the original summons. It is not necessary to file a new complaint.

§ 428. AFFIDAVIT.] The summons must be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and must specify the amount due thereon.

§ 429. DEFENSE.] Upon such summons, the party summoned may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently; and he may make the same defense which he might have originally made to the action, except the statute of limitations.

§ 430. FURTHER PLEADINGS.] The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution; or the application of the property charged to the payment of the judgment, may be compelled by attachment, if necessary.

§ 431. PLEADINGS VERIFIED.] The answer and reply must be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

CHAPTER XVIII.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

§ 432. JUDGMENT OFFERED—EFFECT.] The defendant may at any time before the trial or verdict, serve upon the plaintiff, an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the court or judge thereof must, thereupon, order judgment accordingly. If

the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

§ 433. BY PLAINTIFF TO COUNTER-CLAIM] If the defendant set up a counter-claim in his answer, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing, to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified with costs. If the defendant accept the offer, and give notice thereof in writing, within ten days, he may enter judgment as above, for the amount specified, if the offer entitle him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed to be withdrawn, and cannot be given in evidence, and if the defendant fail to recover a more favorable judgment, or to establish his counter-claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay plaintiff's costs from the time of the offer.

§ 434. PROFFER OF FIXED DAMAGES.] In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defense, the damages be assessed at a special sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages must be assessed accordingly.

§ 435. PLAINTIFF REFUSING—PROOF—COSTS.] If the plaintiff do not accept the offer, he must prove his damages as if it had not been made, and shall not be permitted to give it in evidence. And if the damages in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in consequence of any necessary preparations or defense in respect to the question of damages.

CHAPTER XIX.

ADMISSION OR INSPECTION OF WRITINGS.

§ 436. EXHIBIT AND REFUSAL—COSTS.] Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper, material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request; and if the party exhibiting the paper be afterwards put to costs in order to prove its genuineness, and the same be finally proved or admitted on the trial, such costs must be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal.

§ 437. COPY OF DOCUMENTS—PENALTY.] The court before which an action is pending, or a judge thereof, may, in its or his discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers

and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may, on motion, exclude the paper from being given in evidence, or punish the party refusing, or both.

CHAPTER XX.

EXAMINATION OF PARTIES.

§ 438. ACTION FOR DISCOVERY.] No action to obtain discovery under oath in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

§ 439. ADVERSARY A WITNESS.] A party to an action may be examined as a witness, at the instance of the adverse party, or any of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 440. EXAMINATION BEFORE TRIAL.] The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

§ 441. ATTENDANCE—EXAMINATION FILED.] The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

§ 442. REBUTTAL.] The examination of the party, thus taken, may be rebutted by adverse testimony.

§ 443. REFUSAL TO TESTIFY CONTEMPT.] If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply, may be stricken out.

§ 444. SAME ON OWN BEHALF.] A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses.

§ 445. BENEFICIARY EXAMINED.] A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination, as if he were named as a party.

CHAPTER XXI.

WITNESSES AND EVIDENCE.

§ 446. NOT EXCLUDED EXCEPT—HUSBAND AND WIFE—DECEDENT'S STATEMENT.]

No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed or defended, except as hereinafter provided:

1. A husband cannot be examined for or against his wife without her consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this section does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered, or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party.

But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness, as to any and all matters to which the testimony so taken relates.

MEANS OF PRODUCING WITNESSES.

§ 447. SUBPOENAS ISSUE BY WHOM.] Clerks of the supreme and district courts, the judges thereof, notaries public, justices of the peace and referees shall, on the application of any person having a cause or any matter pending in court, or before any such officer or tribunal, issue a subpœna for witnesses, 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.

§ 448. REQUISITES OF.] 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.

§ 449. DEPOSITIONS.] When the attendance of the witness before any officer, authorized to take depositions, is required, the subpœna may be issued by such officer.

§ 450. HOW SERVED.] 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.

§ 451. WHERE WITNESS NOT REQUIRED TO ATTEND.] 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.

§ 452. FEES WITNESS MAY DEMAND.] A witness may demand his traveling 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.

§ 453. DISOBEDIENCE CONTEMPT.] 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.

§ 454. ATTACHMENT FOR.] 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, as a rule, order him to show cause why an attachment should not issue against him.

§ 455. PUNISHMENT FOR DISOBEDIENCE.] The punishment for the said contempt 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 him in the county jail, there to remain 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.

§ 456. JUDGE MAY DISCHARGE.] A witness so imprisoned by an officer before whom his deposition is being taken, may apply to a judge of the district court, who shall have power to discharge him, if it appear that his imprisonment is illegal.

§ 457. REQUISITES OF WRIT AND COMMITMENT.] Every attachment for the arrest or order of commitment to prison of a witness, by a court or offi-

cer, 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 jailor.

§ 458. EXAMINATION OF PRISONER.] A person confined in any prison in this territory may, by order of any court, 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.

§ 459. REMAINS IN CUSTODY.] 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.

§ 460. WITNESS FREE FROM SUIT IN OTHER COUNTY.] 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.

§ 461. DAILY FEES.] 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.

§ 462. OATH OF WITNESS.] Before testifying, the witness must be sworn to testify as follows:

You do solemnly swear that the evidence you shall give relative to the matter in difference now in hearing, between ....., plaintiff, and ....., defendant, shall be the truth, the whole truth and nothing but the truth. So help you God.

Any witness who is conscientiously scrupulous of taking the oath above described, shall be allowed to make affirmation, substituting for the words "So help you God," at the end of the oath, the following: "This you do affirm under the pains and penalties of perjury."

MODE OF TAKING THE TESTIMONY OF WITNESSES.

§ 463. THREE MODES.] The testimony of witnesses is taken in three modes:

1. By affidavit.
2. By deposition.
3. By oral examination.

§ 464. AFFIDAVIT.] An affidavit is a written declaration under oath, made without notice to the adverse party.

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

§ 466. ORAL EXAMINATION.] 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.

AFFIDAVIT.

§ 467. USE OF AFFIDAVIT.] 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.

§ 468. WHERE AND HOW MADE.] 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.

DEPOSITIONS.

§ 469. CASES WHEN DEPOSITION USED.] 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.

§ 470. WHEN TAKEN.] Either party may commence taking testimony by depositions at any time after service upon the defendants.

OFFICERS WHO MAY TAKE THEM.

§ 471. BEFORE WHOM.] Depositions may be taken in this territory before a judge or clerk of the supreme court, or district court, or before a justice of the peace, notary public, or any person empowered by a special commission.

§ 472. OUT OF TERRITORY.] Depositions may be taken out of the territory by a judge, justice, or chancellor, or clerk 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 any court of this territory.

§ 473. NOT INTERESTED OR OF KIN.] 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.

§ 474. COMMISSION TO TAKE.] 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 interrogatories, unless the parties otherwise agree.

MANNER OF TAKING AND AUTHENTICATING THEM.

§ 475. NOTICE TO ADVERSE PARTY.] 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 sufficient 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.

§ 476. SAME BY PUBLICATION.] 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 newspaper 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 publication of summons.

§ 477. WRITTEN AND SUBSCRIBED.] The deposition must be written by the officer, or, in his presence, by the witness, or some disinterested person; and must be subscribed by the witness.

§ 478. HOW RETURNED—OPENING—MAY BE TAKEN AND USED IN OTHER TRIBUNALS.] 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 district 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 taken pursuant to this chapter, shall be admitted in evidence, on the trial of any civil action or proceeding, pending before any other court, officer or tribunal, and such deposition must 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 court, officer or tribunal.

§ 479. READ IN ACTION BETWEEN SAME PARTIES.] 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 chapter.

§ 480. HOW AUTHENTICATED.] Depositions taken pursuant to this chapter 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 the same, within the meaning of this chapter, authorized to take the same. But if the deposition be taken 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.

§ 481. CERTIFICATE TO DEPOSITION.] The officer taking the deposition shall annex thereto a certificate showing the following facts:

1. That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth.

2. That the deposition was reduced to writing by some proper person, naming him.

3. That the deposition was written and subscribed in the presence of the officer certifying thereto.

4. That the deposition was taken at the time and place specified in the notice.

§ 482. REQUISITE TO READING.] When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for some cause, specified in section 469 of this code, the attendance of the witness cannot be procured.

§ 483. WHEN DEPOSITION FILED.] Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial.

EXCEPTIONS TO DEPOSITIONS.

§ 484. IN WRITING.] Exceptions to depositions shall be in writing, specifying the grounds of objections, and filed with the papers in the cause.

§ 485. WHEN FILED.] No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.

§ 486. HEARD BEFORE TRIAL.] The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.

§ 487. ERRORS WAIVED.] Errors of the court in its decisions upon exceptions to depositions are waived unless excepted to.

OF PUBLIC DOCUMENTS, RECORDS, ETC.

§ 488. STATUTES, DECISIONS, MAPS AND BOOKS.] 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. The term "public document" is defined to be all the publications and maps printed by order of the legislative assembly, or congress, or either house thereof; and all such documents are admissible in evidence.

§ 489. JUDICIAL RECORDS, ETC.] Copies of the records and judicial proceedings of any court of any state or territory of the United States, shall be admissible in evidence in all cases in this territory, when attested by the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within this territory as they have by law or usage in the courts of the state or territory from which they are taken.

§ 490. PROOF OF PUBLICATION.] The affidavit of any printer, foreman of any printer, or publisher of any newspaper published in this territory, of the publication of any notice, order, or advertisement which, by any law of this territory, shall be required or authorized to be published in such newspaper, shall be entitled to be read in evidence in all courts of justice, and in all proceedings before any officer, board, or body, and shall be prima facie evidence of such publication and of the facts stated therein.

§ 491. CERTIFIED JUSTICE'S RECORD.] A transcript from the docket of any justice of the peace, of any judgment had before him, of the proceedings in the action, of the execution issued thereon, if any, and of the return to such execution if any, when certified by such justice, shall be evidence to prove the facts contained in such transcript, in any court or legal proceedings in the county or subdivision wherein such judgment was rendered.

§ 492. EVIDENCE IN OTHER COUNTY.] And such transcript may be read in evidence in any other county or subdivision, when there shall be attached thereto a certificate of the clerk of the district court, of the county or subdivision in which such judgment was rendered, under the seal of the court, to the effect that the person subscribing such transcript was, at the date of the judgment therein mentioned, a justice of the peace of such county.

§ 493. ACKNOWLEDGED INSTRUMENTS.] Every instrument in writing, which is acknowledged or proved, and duly recorded, is admissable as evidence without further proof.

§ 494. RECORD OR COPY HOW EVIDENCE.] The record of such instrument, or a duly authenticated copy thereof, is admissable in evidence whenever, by the party's own oath, or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, and not within his control.

§ 495. OFFICIAL RECORDS.] Entries in public or other official books or records, made in the performance of his duty by a public officer of this territory, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein.

§ 496. SAME.] An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

§ 497. CERTIFICATE TO COPY—CONTENTS.] Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or, if he be the clerk of a court, having a seal, under the seal of such court.

§ 498. DEEMED NATURALLY DEAD.] If any person, upon whose life any estate in real property depends, remains without the United States, or absents himself in the territory or elsewhere, for seven years together, such person must be accounted naturally dead, in any action or special proceeding concerning such property, in which his death shall come in question, unless sufficient proof be made in such case of the life of such person.

§ 499. CONFIDENTIAL RELATIONS INVIOLATE.] There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.

2. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined in the church to which he belongs.

3. A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

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

§ 500. HOW WAIVED.] If a person offer himself as a witness, that is to be deemed a consent to the examination, also, of an attorney, clergyman, priest, physician, or surgeon on the same subject, within the meaning of the first three subdivisions of the preceding section.

§ 501. WHEN JUDGE OR JUROR WITNESS.] The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed, and to take place before another judge or jury.

§ 502. INTERPRETERS—SUBPOENA—OATH.] When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county may be subpœnaed by any court or judge to appear before such court or judge to act as an interpreter in any action or proceeding. The subpœna must be served and returned in like manner as a subpœna for a witness. Any person so subpœnaed who fails to attend at the time and place named in the

subpœna, is guilty of contempt. The oath of the interpreter shall be as follows:

You do solemnly swear that you will justly, truly, and impartially interpret to ..... the oath about to be administered to him; and the questions which may be asked him, and the answers that he shall give to such questions, relative to the cause now under consideration before this court [or officer.] So help you God.

If the interpreter have conscientious scruples as to taking an oath, he may affirm in form as heretofore provided in case of witnesses.

PROCEEDINGS TO PERPETUATE TESTIMONY.

§ 503. STATEMENTS IN VERIFIED PETITION.] The testimony of a witness may be perpetuated in the following manner: 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 in 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.

§ 504. ORDER FOR EXAMINATION.] 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.

§ 505. ATTORNEY WHEN—EXAMINATION.] When it appears satisfactory to the court or judge that the parties interested cannot be 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 of them. The attorney filing the cross interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

§ 506. BEFORE WHOM—RETURN.] 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.

§ 507. APPROVAL, FILING AND USE.] 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 at-

tendance for oral examination cannot be obtained or required; but such depositions shall be subject tothe same objections for irrelevancy and incompetency as may be made to depositions taken pending an action.

§ 508. COSTS.] The applicant shall pay the costs of all such proceedings.

CHAPTER XXII.

MOTIONS AND ORDERS.

§ 509. ORDER DEFINED.] Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 510. MOTIONS—NOTICE—PREFERENCE—STAY—REFEREE.] 1. An application for an order is a motion.

2. Orders made out of court, without notice, may be made by any judge of the court, in any part of the territory.

3. Motions upon notice must be made within the district in which the action is triable.

4. In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

5. No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except to stay proceedings under an order or judgment appealed from, or upon previous notice to the adverse party.

When any party intends to make or oppose a motion in any court, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue, and the fees of such referee, for such service, shall be three dollars per day.

§ 511. SERVICE OF NOTICE.] When a notice of a motion is necessary, it must be served three days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

§ 512. EXTENSION OF TIME.] The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court. The affidavit, or a copy thereof, must be served, with a copy of the order, or the order may be disregarded.

CHAPTER XXIII.

NOTICES, AND FILINGS AND SERVICE OF PAPERS.

§ 513. NOTICES IN WRITING.] Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner

prescribed in the next three sections, where not otherwise provided by this code.

§ 514. MANNER OF SERVICE.] The service may be personal, or by delivery to the party or attorney, on whom the service is required to be made; or it may be as follows:

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

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

§ 515. BY MAIL.] Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail.

§ 516. METHOD OF SAME.] In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 517. SAME—DOUBLE TIME.] When the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

§ 518. PERSONAL—THREE DAYS.] Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least three days before the time appointed therefor.

§ 519. WHEN NOTICE UNNECESSARY.] Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon him unless he be imprisoned for want of bail, but shall be made upon him or his attorney, if notice of appearance in the action has been given.

§ 520. NON-RESIDENT PARTY.] Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the territory, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk of the court for the party.

§ 521. SUMMONS AND PLEADINGS WHEN FILED.] The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

§ 522. SERVICE UPON ATTORNEY.] Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

§ 523. CERTAIN PROCESS NOT INCLUDED.] The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

CHAPTER XXIV.

DUTIES OF SHERIFFS AND CORONERS.

§ 524. SERVICE OF PAPERS—IN SUBDIVISION.] Whenever, pursuant to this code the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and the provisions of this code relating to the sheriff shall apply to coroners when the sheriff is a party. The sheriffs and coroners of the several counties in which the district courts are held, shall have and exercise the same power and authority in the service of papers, and the execution of writs and process of such courts in any county or place within the subdivision of which this county forms a part, as they have or can exercise in their own county.

CHAPTER XXV.

MISCELLANEOUS PROVISIONS.

§ 525. COPY OF LOST PAPER.] If any process, original pleadings, or any other paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

§ 526. UNDERTAKINGS WHERE FILED.] The various undertakings required to be given by this code, must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for in this code for the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken.

§ 527. TITLE OF AFFIDAVITS.] It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled if it intelligibly refer to the action or proceeding in which it is made.

§ 528. CONSOLIDATING ACTIONS.] When two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

§ 529. ACTION WHEN PENDING.] An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied.

§ 530. CLERK'S REGISTER OF ACTIONS.] The clerk must keep among the records of the court a register of actions. He must enter therein the title

of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

CHAPTER XXVI.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO AND OF INFORMATION IN THE NATURE OF QUO WARRANTO.

§ 531. BY CIVIL ACTION.] The remedies formerly attainable by the writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto may be obtained by civil actions under the provisions of this chapter.

§ 532. TERRITORY AGAINST CORPORATION.] An action may be brought by any district attorney in the name of the territory, on leave granted by the district court, or judge thereof, for the purpose of vacating the charter or the articles of incorporation, or for annulling the existence of a corporation other than municipal, whenever such corporation shall:

1. Offend against any of the laws creating, altering, or renewing, such corporation; or,

2. Violating the provisions of any law, by which such corporation shall have forfeited its charter or articles of incorporation, by abuse of its power; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of any district attorney, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the territory against the costs and expenses to be incurred thereby.

§ 533 LEAVE TO BRING SUCH ACTION.] Leave to bring the action may be granted upon the application of any district attorney; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

§ 534. TERRITORY AGAINST PERSON USURPING — OFFICER—ILLEGAL CORPORATION.] An action may be brought by any district attorney in the name of the territory, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this territory, or any office in a corporation created by the authority of this territory; or,

2. When any public officer, civil or military, shall have done or suffered

an act which, by the provisions of law, shall make a forfeiture of his office; or,

3. When any association or number of persons shall act within this territory as a corporation, without being duly incorporated.

§ 535. PERSON JOINED WITH TERRITORY.] When an action shall be brought by the district attorney by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the territory as plaintiff. And in every such case the district attorney may require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the territory against costs and expenses to be incurred thereby.

§ 536. PROCEEDINGS FOR USURPING OFFICE.] Whenever such action shall be brought against a person for usurping an office, the district attorney, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the court for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail, in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

§ 537. JUDGMENT INCLUDES CLAIMANT.] In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

§ 538. CLAIMANT TAKES OFFICE WHEN.] If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

§ 539. REFUSAL TO DELIVER.] If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as are or may hereafter be prescribed by law.

§ 540. DAMAGES FOR USURPATION.] If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

§ 541. JOINDER OF SEVERAL CLAIMANT.] Where several persons claim to be entitled to the same office or franchise, one action may be brought

against all such persons, in order to try their respective rights to such office or franchise.

§ 542. JUDGMENT AGAINST INTRUDER.] When a defendant, whether a natural person or a corporation, against whom such action shall have been brought shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding five hundred dollars, which fine, when collected, shall be paid into the treasury of the territory.

§ 543. AGAINST CORPORATION.] If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this chapter, has by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchise, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

§ 544. COSTS, HOW COLLECTED.] If judgment be rendered in such action against a corporation, or against a person claiming to be a corporation, the court may cause the costs therein to be collected by execution against the person claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

§ 545. CLOSING CORPORATE AFFAIRS.] When such judgment shall be rendered against a corporation the court has power to restrain the corporation, to appoint a receiver of its property, and to take an account and make distribution thereof among its creditors; and the district attorney must, immediately after the rendition of such judgment, institute proceedings for that purpose.

§ 546. JUDGMENT FILED WITH SECRETARY.] Upon the rendition of such judgment against a corporation, the district attorney must cause a copy of the judgment to be forthwith filed in the office of the secretary of the territory, whose duty it shall be to record the same.

§ 547. FORFEITURES TO TERRITORY.] Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the territory, or to any officer for its use, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the district attorney, in the district court of the county or subdivision where the property is situated.

CHAPTER XXVII.

ACTION FOR THE PARTITION OF REAL PROPERTY.

§ 548. WHEN ACTION BROUGHT.] When several co-tenants hold and are in possession of real property as parceners, joint-tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of

the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

§ 549. REQUISITES OF COMPLAINT.] The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain, or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

§ 550. LIENORS OF RECORD.] No person having a conveyance of or claiming a lien on the property, or some part of it need be made a party to the action, unless such conveyance or lien appear of record.

§ 551. LIS PENDENS REQUIRED.] Immediately after filing the complaint in the district court, the plaintiff must record in the office of the register of deeds of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

§ 552. SUMMONS TO WHOM.] The summons must be directed to all the joint-tenants and tenants in common, and all persons having an interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

§ 553. SERVICE BY PUBLICATION.] If the party having a share or interest be unknown, or any one of the unknown parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property, which is the subject of the action.

§ 554. REQUISITES OF ANSWERS.] The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly the origin, nature and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way, or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

§ 555. TITLE, PROOFS AND JUDGMENT.] The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined, in such action; and when a sale of the premises is necessary, the title

must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, as not between themselves.

§ 556. PART PARTITION AND SUBDIVISION.] Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties, and sole parties, in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained or allotted as between those claiming under the original tenant to whom the same shall have been so set apart or may allow them to remain tenants in common thereof, as they may desire.

§ 557. OUTSTANDING LIENS—REFEREE.] If it appear to the court by the certificate of the register of deeds, or clerk of the district court, or by the sworn or verified statement of any person who may have examined or searched the records that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or, if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

§ 558. APPEARANCE BEFORE REFEREE—SERVICE—REPORT.] The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed as provided in the preceding section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication or notice to his agent, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

§ 559. SALE OR PARTITION.] If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation

in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise upon the requisite proof being made, it must order a partition according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

§ 560. METHOD AND RULES OF PARTITION.] In making the partition, referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper land-marks, and may employ a surveyor, with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road or street, and the portion so set apart shall not be assigned to any of the parties, or sold, but shall remain an open and public way, road or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way.

§ 561. REFEREES' REPORT.] The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the share allotted to each party, with a particular description of each share.

§ 562. JUDGMENT ON REPORT—EFFECT OF.] The court may confirm, change, modify, or set aside, the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial in the property, or who have an interest in any undivided share thereof as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns, of such decedent as if it had been entered before his death.

§ 563. TENANTS NOT AFFECTED.] The judgment does not affect tenants

for years, less than ten, to the whole of the property which is the subject of the partition.

§ 564. PAYMENT OF EXPENSES.] The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

§ 565. LIENS FOLLOW OWNER'S SHARE] When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien.

§ 566. CERTAIN ESTATES SET OFF.] When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property, not ordered to be sold.

§ 567. PROCEEDS OF INCUMBERED PROPERTY APPLIED.] The proceeds of the sale of incumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action.
2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

§ 568. LIENOR HAVING OTHER SECURITY.] Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such security to be exhausted before distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

§ 569. DISTRIBUTION BY REFEREE.] The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

§ 570. PART ACTION CONTINUED.] When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in an original action.

§ 571. SALES HOW MADE.] All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder,

upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge or lien, that must be stated in the notice.

§ 572. TERMS OF SALE.] The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the real property of which it may direct a sale on credit, and for that portion of which the purchase money is required, to be invested for the benefit of unknown owners, infants or parties out of the territory.

§ 573. SECURITY FOR PURCHASE MONEY.] The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, or such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares in the name of clerk of the district court, and his successors in office.

§ 574. ESTATE FOR LIFE OR YEARS.] The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum, as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

§ 575. COMPENSATION FOR.] If such consent be not given, filed and entered as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in court for him, as the case may require.

§ 576. SAME UNKNOWN.] If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

§ 577. FUTURE ESTATES.] In all cases of sales, where it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate, and must direct such proportion of the proceeds, of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

§ 578. ANNOUNCEMENTS AT SALE.] In all cases of sales of property, the terms must be made known at the time, and if the premises consist of distinct farms or lots, they must be sold separately.

§ 579. INTEREST EXCLUDES BUYERS.] Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

§ 580. REPORT OF SALE.] After completing a sale of the property, or any part thereof, ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the district court where the property is situated.

§ 581. ORDER TO CONVEY.] If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 582. LIENOR OR PARTY A PURCHASER.] When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 583. RECORD AND BAR OF CONVEYANCE.] The conveyance must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens, at the commencement of the action.

§ 584. PROCEEDS DUE UNKNOWN.] When there are proceeds of a sale belonging to an unknown owner, or to a person without the territory who has no legal representative within it, the same must be invested in bonds of the United States for the benefit of the persons entitled thereto.

§ 585. SECURITIES RUN TO CLERK.] When the security of the proceeds of the sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

§ 586. SECURITY TO PARTIES.] When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipts therefor. Such agreement and receipt must be returned and filed with the clerk.

§ 587. CLERK'S DUTY.] The clerk of the district court, in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with

the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

§ 588. COMPENSATION FOR INEQUALITY.] When it appears that the partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity.

§ 589. INFANT'S SHARE.] When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the especial guardian appointed for him in the action, upon giving the security required by law, or directed by order of the court.

§ 590. INSANE AND INCOMPETENT.] The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will faithfully discharge the trust imposed in him, and will render a true and just account to the person entitled, or to his legal representative.

§ 591. GUARDIAN'S POWERS.] The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, who is interested in real property held in joint tenancy, or in common, or in any other manner, so as to authorize his being made a party to an action for the partition of, may consent to a partition without action, and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

§ 592. FEES AND DISBURSEMENTS.] The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may

require the expense of such litigation to be paid by the parties there, or any of them.

§ 593. SINGLE REFEREE.] The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under this chapter; and the single referee, when thus appointed, has all the powers, and may perform all the duties required of the three referees.

§ 594. ABSTRACT OF TITLE—COST OF SAME.] If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties, must be allowed and taxed. Whenever such abstract is produced by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same, and where it will be kept when finished. The court, or the judge thereof, may direct from time to time, during the progress of the action, who shall have the custody of the abstract.

§ 595. WHO MAKE ABSTRACTS.] The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the register of deeds or other officer, but instead thereof it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time if found incorrect, under the direction of the court.

§ 596. INTEREST ON DISBUSEMENTS.] Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements.

CHAPTER XXVIII.

FORECLOSURE OF MORTGAGES.

FORECLOSURE BY ADVERTISEMENT.

§ 597. POWER OF SALE.] Every mortgage of real property containing therein a power of sale, upon default being made in the condition of such mortgage, may be foreclosed by advertisement in the cases and manner hereinafter specified.

§ 598. REQUISITES OF PROCEEDING.] To entitle any party to give notice as hereinafter prescribed, and, to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have accrued by which the power to sell has become operative.

2. That no action or proceedings shall have been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof, or, if any action or proceeding has been instituted, that the same has been discontinued, or, that an execution, upon the judgment rendered therein, has been returned unsatisfied, in whole or in part; and,

3. That the mortgage containing such power of sale has been duly recorded, and, if it shall have been assigned, that all the assignments thereon have been duly recorded in the county where such mortgaged premises are situated.

§ 599. INSTALLMENTS TAKEN SEPARATE.] In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage, after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage, for each of such installments, may be foreclosed in the same manner and with like effect, as if such separate mortgage were given for each such subsequent installment; and a redemption of any such sale, shall have the like effect as if the sale for such installment had been made upon a prior, independent mortgage.

§ 600. PUBLISHING NOTICE.] Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, must be given by publishing the same for six successive weeks, at least once in each week, in a newspaper of the county where the premises intended to be sold, or some of them, are situated, if there be one, and, if not, then in the nearest newspaper published in the territory.

§ 601. CONTENTS OF SAME.] Every notice must specify:

1. The names of the mortgagor and mortgagee, and the assignee, if any.

2. The date of the mortgage.

3. The amount claimed to be due thereon at the date of the notice.

4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage; and,

5. The time and place of sale.

§ 602. MANNER OF SALE.] The sale must be at public auction between the hours of nine o'clock in the forenoon and the setting of the sun on that day, in the county in which the premises to be sold, or some part of them, are situated, and must be made by the person appointed for that purpose in the mortgage, or by the sheriff or his deputy of the county, to the highest bidder.

§ 603. POSTPONEMENT OF SALE.] Such sale may be postponed, from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until such time to which the sale shall be postponed, at the expense of the party requesting such postponement.

§ 604. SEPARATE SALES OF TRACTS.] If the mortgaged premises consist of distinct farms, tracts, or lots, they must be sold separately, and no more farms, tracts, or lots, must be sold than shall be necessary to satisfy the

amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law.

§ 605. MORTGAGEE MAY PURCHASE.] The mortgagee, his assigns, or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof at such sale.

§ 606. CERTIFICATE OF SALE.] Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer or person making the sale shall immediately give to the purchaser a certificate of sale containing:

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.

And such officer or person shall file in the office of the register of deeds, where the mortgage is recorded, within ten days from the day of sale, a duplicate of such certificate; which certificate must be executed and acknowledged, and may be recorded as provided in case of a certificate of sale of real property upon execution, and shall have the same validity and effect.

§ 607. REDEMPTION—BY WHOM—RIGHTS.] The property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter XIII of this code for redemption of real property sold upon execution, so far as the same may be applicable, by:

1. The mortgagor or his successor in interest in the whole or any part of the property.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Such creditor is termed a redemptioner, and has all the rights of a redemptioner under that chapter.

And the mortgagor and his successor in interest, has all the rights of the judgment debtor and his successor in interest as provided therein.

§ 608. NOTICE TO OFFICER.] The notice of redemption required to be given to the sheriff under that chapter, may, in foreclosure by advertisement, be given to the officer or person making the sale.

§ 609. DEED.] If such mortgaged premises be not redeemed, it shall be the duty of the officer, or his successor in office, or other person, who sold the same, or his executors or administrators, or some other person appointed by the district court for that purpose, to complete such sale, by executing a deed of the premises, so sold, to the original purchaser, his heirs or assigns, or to any person who may have acquired the title and interest of such purchaser by redemption or otherwise.

§ 610. OVERPLUS.] If after any such sale, there remain in the hands of the officer or other person making the sale, any surplus money, after satisfying the mortgage on such real property sold, and payment of the costs and expenses of such foreclosure and sale, the surplus must be paid over by such officer or other person, on demand, to the mortgagee, his legal representatives or assigns.

§ 611. RECORD EVIDENCE OF SALE.] Any party desiring to perpetuate the evidence of any such sale, made in pursuance of these provisions, may proceed:

1. An affidavit of the publication of the notice of the sale, and of any notice of postponement may be made by the printer or publisher of a newspaper in which such notice was published, or some person in his employ knowing the facts.

2. An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place, the sum bid, and the name of the purchaser.

The affidavits specified in this section may be taken and certified by any officer authorized to administer oaths.

§ 612. AFFIDAVITS RECORDED.] Such affidavits must be recorded at length by the register of deeds of the county in which the real property is situated, in a book kept for the record of mortgages, and such original affidavits, the record thereof, and certified copies of such record, shall be prima facie evidence of the facts therein contained.

§ 613. REFERENCE NOTE.] A note referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence in the margin of the record of such mortgage.

§ 614. EFFECT OF RECORD AND DEED.] A record of the affidavits aforesaid, and the deed executed, upon the sale of the real property shall vest in the purchaser or person acquiring title thereto by redemption or otherwise, the same force and validity as the deed upon foreclosure by action provided for in section 623 of this code.

§ 615. COSTS AND ATTORNEY'S FEE.] The party foreclosing a mortgage by advertisement shall be entitled to his costs and disbursements, out of the proceeds of the sale, in addition to any attorney fee agreed upon in the mortgage.

FORECLOSURE BY ACTION.

§ 616. WHERE REALTY SITUATE—SERVICE OF PROCESS] Actions for the foreclosure or satisfaction of mortgages may be brought in the district court of the county or judicial subdivision where the mortgaged real property, or some portion thereof, is situated, and in case any defendant be not a resident of the county or subdivision, process may be served on him in any other county or subdivision within the territory; or, if he be a non-resident of the territory, or absent, or concealed, the same proceedings may thereupon be had as are provided by this code in such cases.

§ 617. JUDGMENT INCLUDES] Whenever an action shall be brought for the foreclosure or satisfaction of a mortgage, the court shall have power to render a judgment against the mortgagor for the amount of the mortgage debt due at the time of the rendition of such judgment, and the costs of the action, and to order and decree a sale of the mortgaged premises, or such part thereof as may be sufficient to pay the amount so adjudged to be due, and costs of sale, and shall have power to order and compel the

delivery of the possession of the premises to the purchaser; but in no case under this chapter shall the possession of the premises so sold, be delivered to the purchaser, or person entitled thereto until after the expiration of one year from such sale; and the court may direct the issuing of an execution for the balance that may remain unsatisfied after applying the proceeds of such sale.

§ 618. ACTION EXCLUSIVE.] After such action shall be commenced while the same is pending, no proceedings at law shall be had for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.

§ 619. OTHER PARTY.] If the mortgage debt be secured by the obligation, or other evidence of debt, of any other person than the mortgagor, the plaintiff may make such other person a party to the action, and the court may render judgment for the balance of such debt remaining unsatisfied, after a sale of the mortgaged premises, as well against such other person as against the mortgagor, and may enforce such judgment as in other cases, by execution or other process.

§ 620. COMPLAINT TO STATE.] In an action for the foreclosure or satisfaction of a mortgage, the complaint shall state whether any proceedings have been had at law or otherwise for the recovery of the debt secured by such mortgage, or any part thereof; and if there has, whether any and what part thereof has been collected.

§ 621. JUDGMENT AT LAW.] If it appear that any judgment has been obtained in an action at law for the moneys demanded by such complaint, or any part thereof, no proceedings shall be had in such case unless an execution against the property of the defendant in such judgment has been issued and the sheriff or other officer shall have made return that the execution is unsatisfied in whole or in part, and that the defendant has no property whereon to satisfy such execution.

§ 622. SALES BY WHOM AND WHERE.] All sales of mortgaged premises under an order and decree of foreclosure must be made by a referee, sheriff, or his deputy, of the county or subdivision where the court, in which the judgment or decree is rendered, is held, or other person appointed by the court for that purpose, and must be made in the county or subdivision where the premises, or some part of them, are situated, and shall be made upon the like notice and in the same manner as provided by law for the sale of real property upon execution.

§ 623. CERTIFICATE OF SALE—DEED AND EFFECT.] Whenever any real property shall be sold under an order, decree or judgment of foreclosure, under the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale as provided by section 606 of this code; and at the expiration of the time for the redemption of such mortgaged premises, if the same be not redeemed, the person or officer making the sale, or his successor in office or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of such purchaser, by redemption or otherwise, a deed or deeds to such premises which shall vest in the

purchaser, or other party entitled thereto, the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter; and such deed shall be as valid as if executed by the mortgagor and mortgagee, and shall be a complete bar against each of them, and against all the parties to the action in which the judgment for such sale was rendered, and against their heirs respectively, and all persons claiming under such heirs.

§ 624. PROCEEDS—OVERPLUS.] The proceeds of every such sale must be applied to the discharge of the debt adjudged by the court to be due, and of the costs; and, if there be any overplus, it must be brought into court for the use of the defendant or of the person entitled thereto, subject to the order of the court.

§ 625. SAME.] If such overplus, or any part thereof, shall remain in court, for the term of three months, without being applied for, the judge of the district court may direct the same to be put out at interest, for the benefit of the defendant, his representatives or assigns, subject to the order of the court.

§ 626. PART PAYMENT.] Whenever an action shall be commenced for the foreclosure of a mortgage upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the complaint shall be dismissed upon the defendants bringing into court at any time before decree of sale, the principal and interest due, with costs and disbursements.

§ 627. SAME BEFORE SALE.] If at any time before sale, the defendant shall bring into court the principal and interest due, with cost, the proceedings in such action shall be stayed until a further default, and in case of a subsequent default in the judgment of any of the installments, or any part thereof, of such mortgage, the court may enforce by order or other process the collection of such subsequent installment.

§ 628. REFEREE VIEW PREMISES.] If the defendant shall not bring into court the amount due, with costs, or if for any other cause, a judgment or decree shall be entered for the plaintiff, the court may appoint a referee to ascertain and report the situation of the mortgaged premises, or may determine the same on oral or other testimony, and if it shall appear that the same can be sold in parcels, without injury to the interests of the parties, the decree must direct so much of the mortgaged premises to be sold as will be sufficient to pay the amount then due on such mortgage, with costs, and such judgment or decree shall remain as security for any subsequent default.

§ 629. SUCCESSIVE JUDGMENTS AND SALES.] If, in the case mentioned in the preceding section, there shall be any default subsequent to such judgment or decree, in the payment of any portion or installment of the principal or of any interest, due upon such mortgage, the court may, upon the application of the plaintiff, by a further order founded upon such first judgment or decree, direct a sale of so much of the mortgaged premises to be made, under such decree, as will be sufficient to satisfy the amount so due,

with costs of the application and the subsequent proceedings thereon; and the same proceedings may be had as often as a default happen.

§ 630. SALE OF WHOLE ON FIRST DEFAULT.] If, in any of the foregoing cases, it shall appear to the court that the mortgaged premises are so situated that a sale of the whole will be most beneficial to the parties, the judgment or decree must, in the first instance, be entered for the sale of the whole premises accordingly.

§ 631. REBATE ON UNDUE PART.] In such case the proceeds of such sale must be applied as well to the interest or portion or installment of the principal due, as towards the whole or residue of the sum secured by such mortgage and not due and payable at the time of such sale, and if such residue do not bear interest, then the court may direct the same to be paid with a rebate of the legal interest for the time during which residue shall not be due and payable, or the court may direct the balance of the proceeds of such sale, after paying the sum due, with costs, to be put out at interest for the benefit of the plaintiff, to be paid to him as the installments or portions of the principal or interest, may become due, and the surplus for the benefit of the defendant, his representatives or assigns, to be paid to them by order of the court.

§ 632. APPEALS.] Appeals to the supreme court may be taken in actions for the foreclosure of mortgages in the same manner as in other civil actions.

§ 633. REDEMPTION.] All real property sold upon foreclosure of mortgages, by order, judgment, or decree of court, may be redeemed at any time within one year after such sale, as prescribed by section 635 of this chapter upon foreclosure by advertisement.

§ 634. RESTRAINT OF INJURY.] The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the existence of the lien or forclosure of a mortgage thereon and until the expiration of the time allowed for redemption.

CHAPTER XXIX.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER ACTIONS CONCERNING REAL ESTATE.

§ 635. EJECTMENT.] An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

§ 636. DEFAULT—NO COSTS.] If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

§ 637. DESCRIPTION.] In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution to identify it.

§ 638. JOINDER OF DEFENDANTS.] In an action brought by a person out of possession of real property, to determine an adverse claim of an in-

terest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed.

§ 639. OF PLAINTIFFS.] Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint-tenants, co-parceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same.

§ 640. RIGHT FAILING AFTER ACTION.] 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 damages for withholding the property.

§ 641. IMPROVEMENTS IN GOOD FAITH.] In an action for the recovery of real property, upon which permanent improvements have been made by a defendant or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith the value of such improvements must be allowed as a counter claim by such defendant.

§ 642. SAME—HOW PLEADED.] The counter-claim in such action must set forth among other things, the value of the land aside from the improvements thereon, and also as accurately as practicable the improvements upon the land and the value thereof.

§ 643. SPECIFIC FINDINGS.] Issues may be joined and tried as in other actions and the value of the land aside from the value of the improvements thereon, and the separate value of the improvements must be specifically found by the verdict of the jury, the report of the referee, or the findings of the court.

§ 644. CROSS JUDGMENTS—ADJUSTMENT.] The judgment of the court upon such finding, if in favor of the plaintiff, for the recovery of the real property, and in favor of the defendant for the counter-claim, shall require such defendant to pay to the plaintiff the value of the land as determined by such finding, and the damages, if any, recovered, for withholding the same and for waste committed upon such land by the defendant within sixty days from the rendition of such judgment, and in default of such payment by the defendant, that the plaintiff shall pay to the defendant the value of the improvements as determined by such finding, less the amount of any damages so recovered by plaintiff for withholding the property, and for any waste committed upon such land by the defendant, and until such payment or tender and deposit in the office of the clerk of the court, in which such action is pending, no execution or other process shall issue in such action to dispossess such defendant, his heirs or assigns.

§ 645. RIGHT OF ENTRY.] The court in which an action is pending for

the recovery of real property, or for damages for an injury thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property, and make survey and measurement thereof, and of any tunnels, shafts or drifts thereon, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

§ 646. ORDER FOR—SERVICE.] The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.

§ 647. PURCHASER UNDER EXECUTION.] When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale, and before possession is delivered under the conveyances.

§ 648. ALIENATION NOT TO AFFECT ACTION.] An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

§ 649. MINING CUSTOMS.] In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this territory and of the United States, must govern the decision of the action.

§ 650. OCCUPYING CLAIMANTS.] Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by congress, or some department of the general government, may maintain an action for any injuries done the same, also an action to recover the possession thereof, in the same manner as if he possessed a fee-simple title to said lands.

CHAPTER XXX.

ACTION FOR NUISANCE, WASTE, AND WILLFUL TRESPASS ON REAL PROPERTY.

§ 651. NUISANCE DEFINED—WHO MAY BRING ACTION.] Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comforable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

§ 652. WASTE—WHEN ACTIONABLE.] If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him there-

for, in which action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the premises.

§ 653. TO WHOM JUDGMENT GIVEN.] Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice.

CHAPTER XXXI.

ACTION TO ENFORCE MECHANICS' LIENS.

§ 654. NO LIEN.] No person is entitled to a mechanics' lien who takes collateral security on the same contract.

§ 655. LIEN TO WHOM AND FOR WHAT.] Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery, or fixtures for any building, erection or other improvements upon land, including those engaged in the construction or repair of any work of internal improvement, by virtue of any contract with the owner, his agent, trustee, contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building erection or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished.

§ 656. PROCEEDINGS BY SUBCONTRACTOR.] Every subcontractor wishing to avail himself of the benefits of this chapter, shall give notice to the owner, his agent or trustee, before or at the time he furnishes any of the things aforesaid or performs any labor, of his intention to perform the same, and the probable value thereof; and if afterwards the things are furnished or labor done, the subcontractor shall settle with the contractor therefor, and the settlement in writing, signed by the contractor and certified by him to be just, shall be given to the owner, his agent or trustee; within thirty days from the time the things shall have been furnished or the labor performed, the subcontractor shall file with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement is situated, a copy of such settlement, which shall be a lien on such building, erection or other improvement for which the things were furnished or the labor performed; and shall at the time file a correct description of the property to be charged with the lien, the correctness of which shall be verified by affidavit.

§ 657. NOTICE PRESUMED—LIEN FILED IN SIXTY DAYS—LIMITATION.] Every railway owner, company, or contractor, and subcontractor upon any railway, shall be deemed to have the notice provided for by the preceding section for a period of sixty days from the last day of the month in which such labor was done, or material furnished, during which period any person who has performed such labor or furnished such material, may file a lien with the clerk of the district court as provided in the preceding sec-

tion, which lien shall be binding upon the erection, excavation, embankment, bridge, road bed or right of way, and upon all land upon which the same may be situated, to the full value of such labor or material, in the county or judicial subdivision in which the same is filed. In case the lien is sought to be enforced against the owner, the liability shall not be greater than his liability would have been to the owner at the time the labor was performed or material furnished; but the liability of the owner in case actual notice shall be given after the sixty days, shall be the same as provided in this chapter.

§ 658. LIEN IN SIX MONTHS—AFFIDAVIT—STATEMENT.] Every subcontractor may, at at any time within six months after his labor is performed or materials furnished, make a statement thereof in writing, supported by affidavit that the same is just and true, and file the same with the clerk of the district court of the proper county or judicial subdivision, and give notice thereof, with a copy of such statement to the owner, his agent or trustee, and to the contractor; and from and after the service of such notice, his lien therefor, shall have the same force and effect, and be prosecuted in like manner as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor at the time of the service of such notice upon the owner, his agent or trustee.

§ 659. IF SETTLEMENT REFUSED.] In case the contractor shall refuse to make and sign such settlement, then the subcontractor may make a just and true statement of the labor done, or things furnished, giving all credits, which he shall present to the owner, his agent or trustee, and shall also within said thirty days file a copy of the same, verified by affidavit, with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement is situated, together with a correct description of the property to be charged with the lien.

§ 660. EFFECT OF CERTIFICATE.] The certificate of settlement or statement of the sub-contractor, shall be a justification to the owner in withholding from the contractor the amount appearing thereby to be due the subcontractor until the same has been paid and the owner shall become the surety of the contractor to the subcontractor for the amount due to the extent before provided.

§ 661. SERVICE OF NOTICES.] The notices mentioned in this chapter may be served by any sheriff or constable, and the return thereon shall be received in evidence without further proof.

§ 662. LIENS OF OTHER PERSONS.] Every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk of the district court of the county or judicial subdivision in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the

time aforesaid shall not defeat the lien, except against purchasers or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed.

§ 663. CLERK'S RECORD—ENTRIES.] The clerk of the district court shall indorse upon every account the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indorsed, containing the date of its filing, the name of the person filing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

§ 664. PRIORITY OF LIENS.] The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon said building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement.

§ 665. EXTENT OF LIENS—ON LEASED LAND.] The entire land upon which any such building, erection or other improvement is situated, including that portion of the same not covered therewith shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in said land by such owner of such building, erection or other improvement, is only a lease-hold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy said lien, and be removed within thirty days after the sale thereof by the purchaser.

§ 666. LIEN SUPERIOR TO MORTGAGE WHEN.] The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or done, in preference to any prior lien or incumbrance, or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien, may have such bilding, erection or other improvement, sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

§ 667. ACTION TO ENFORCE.] Any person having a lien by virtue of this chapter may bring an action to enforce the same in the district court of thecounty or judicial subdivision wherein the property is situated.

§ 668. DEMAND UPON LIENOR.] Upon the written demand of the owner, his agent or contractor, served on the person holding the lien, requiring him to commence suit to enforce such lien; such suit shall be commenced in thirty days thereafter or the lien shall be forfeited.

§ 669. OWNER DEFINED.] Every person for whose immediate use and benefit any building, erection or improvement is made, having the capacity to contract, including guardians of minors or other persons shall be included in the word owner thereof.

§ 670. SATISFACTION OF LIENS—PENALTY.] Whenever a lien has been claimed by filing the same in the clerk's office, and it is afterwards paid, the creditor shall acknowledge the satisfaction thereof on the proper book in such office, or otherwise in writing, and if he neglects to do so for ten days after demand, he shall forfeit and pay twenty-five dollars to the owner or contractor, and be liable to any person injured to the extent of the injury.

§ 671. SUBCONTRACTOR DEFINED.] All persons furnishing things or doing work provided for by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

LIENS FOR KEEPING AND PASTURING STOCK.

§ 672. WHO HAVE LIEN.] Any farmer, ranchman or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle or sheep, shall be entrusted for the purpose of feeding, herding, pasturing or ranching, shall have a lien upon said horses, mules, cattle or sheep, for the amount that may be due for such feeding, herding, pasturing or ranching, and shall be authorized to retain possession of such horses, mules, cattle or sheep, until the said amount is paid: *Provided*, That these provisions shall not be construed to apply to stolen stock.

§ 673. LIEN ONLY AGAINST OWNER.] The provisions of this act shall not be construed to give any farmer, ranchman or herder of cattle, tavern keeper or livery stable keeper, any lien upon horses, mules, cattle or sheep, put into their keeping, for the purposes mentioned in the previous section, when said property was not owned by the person entrusting the same at the time of delivering them into the possession of said farmer, ranchman, herder, tavern keeper or livery stable keeper.

CHAPTER XXXII.

ACTION TO FORECLOSE LIENS ON CHATTELS.

§ 674. WHO MAY MAINTAIN—REQUISITES OF JUDGMENT.] An action to foreclose a lien upon a chattel may be maintained by an innkeeper, boarding house keeper, mechanic, workman, bailee, or other person having a lien at common law or under the statutes of this territory. A judgment in favor of the plaintiff must specify the amount of the lien and direct a sale of the chattel, to satisfy the same and costs, by the sheriff or other officer of the court in like manner as when the sheriff sells personal property under execution, and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the judgment and costs. The judgment must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of such surplus if necessary, until it is claimed by him.

§ 675. JUSTICE'S JURISDICTION.] A justice of the peace has jurisdiction of such action, in all cases to enforce liens upon personal property where the amount of the lien claimed is less than one hundred dollars, concurrent

with the district court: *Provided*, This chapter shall not be construed to affect any other existing right or remedy to foreclose or enforce a lien upon a chattel.

CHAPTER XXXIII.

DAMAGES FOR INJURIES TO PERSONS AND PROPERTY.

§ 676. LOSS OF LIFE BY RAILROAD.] If the life of any person, not in the employment of a railroad corporation, shall be lost, in this territory, by the reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness, or negligence, or carelessness of their employees or agents, the personal representatives of the person whose life is so lost, may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue.

§ 677. WHO MAY SUE—PUNITIVE DAMAGES.] If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants or employes, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.

§ 678. FOR STOCK INJURED.] All railroad corporations in this territory shall pay full damages to the owner or owners of horses and other stock and cattle that they may negligently or carelessly kill or damage by their cars, locomotives, agents or employes, along said railroad or its branches, within the territory of Dakota.

§ 679. PRESUMPTION.] The killing or damaging of any horses, cattle, or other stock, by the cars or locomotive along said railroad or branches, shall be prima facie evidence of carelessness and negligence of said corporation.

§ 680. PROCEEDINGS.] Whenever any horses, cattle, or stock, may be killed or crippled by any train of cars or locomotives upon any railway within this territory, it shall be lawful for the owner of the horses, stock or cattle so killed or crippled, after first giving a station agent of the corporation to which said railway shall belong, written notice of his intention, to apply to a justice of the peace within the county in which said stock may have been killed or crippled, to appoint appraisers to affix a value upon the horses, cattle or stock so killed or crippled, and said justice of the peace shall appoint three discreet and disinterested citizens of the county a board of appraisers, who, after having been duly sworn, shall examine the horses, cattle or stock so killed or crippled, and affix a value upon the same if killed, or assess the damages to the same if crippled, and return to said justice of the peace a written report, describing the horses, cattle or stock, stating whether they were killed or crippled, and also setting out the valuation or assessment of damage made by them;

which report said justice shall preserve as a part of the records of his office.

§ 681. ACTION IF CORPORATION FAIL.] In case the corporation shall fail, for the space of sixty days, to pay to the owner of the horses, cattle or stock so killed or crippled, the full amount assessed by said board of appraisers, and one-half the costs attending the assessment, the owner shall have the right to institute an action, in any court in the county of competent jurisdiction, on the original cause of action; and if upon the trial of this action the owner recovers a verdict, it shall be the duty of the court to render judgment in the owner's favor for the amount of said verdict, and all costs incurred subsequent to the killing or crippling; but if the owner fails to recover a verdict, the costs of the action shall be taxed against him.

§ 682. FEES.] The justice of the peace and the three appraisers shall receive for their services under this act, each, the sum of one dollar, to be paid equally by the railroad corporation, owner or owners of the horses, cattle or stock, killed or crippled.

PART III.

SPECIAL PROCEEDINGS OF A CIVIL NATURE.

CHAPTER XXXIV.

PRELIMINARY PROVISIONS.

§ 683. PARTIES.] The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant.

§ 684. DEFINITIONS.] A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

WRIT OF CERTIORARI.

§ 685. WHEN AND BY WHOM GRANTED.] A writ of certiorari may be granted by the supreme and district courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction, and there is no writ of error or appeal, nor in the judgment of the court, any other plain, speedy and adequate remedy.

§ 686. HOW COMMENCED.] The application must be made on affidavit by the party beneficially interested, 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.

§ 687. TO WHOM WRIT DIRECTED.] The writ may be directed to the inferior court, tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified.

§ 688. REQUISITES OF WRIT.] The writ of certiorari shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them, with convenient certainty, that the same may be reviewed by the court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

§ 689. STAY OF PROCEEDINGS.] If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the court, but if

omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

§ 690. SERVICE.] The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

§ 691. EXTENT OF REVIEW.] The review upon this writ cannot be extended further than to determine whether the inferior court, tribunal, board or officer, has regularly pursued the authority of such court, tribunal, board or officer.

§ 692. RETURN AND HEARING.] If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment either affirming or annulling, or modifying the proceedings below.

§ 693. JUDGMENT SENT BELOW.] A copy of the judgment, signed by the clerk, must be transmitted to the inferior court, tribunal, board or officer, having the custody of the record or proceedings certified up.

§ 694. JUDGMENT ROLL.] A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

WRIT OF MANDAMUS.

§ 695. BY AND TO WHOM ISSUED.] The writ of mandamus may be issued by the supreme and district courts, 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; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

§ 696. WHEN ISSUED.] The writ must be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested.

§ 697. ALTERNATIVE OR PEREMPTORY.] The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately upon the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done the command, must be omitted, and a return day inserted.

§ 698. WHEN EACH MAY ISSUE.] When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative writ must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory writ may be issued in the

first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

§ 699. ANSWER.] On the return of the alternative writ, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

§ 700. JURY MAY ASSESS DAMAGES.] If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which allegation the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county or subdivision must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

§ 701. LATITUDE OF PROOF.] On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.

§ 702. NEW TRIAL.] The motion for new trial must be made in the court in which the issue of fact is made.

§ 703. TRANSMISSION OF VERDICT.] If no notice of a motion for a new trial be given, or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial, after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

§ 704. HEARING.] If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue only immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case.

§ 705. DAMAGES—PEREMPTORY WRIT.] If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs execution may issue; and a peremptory mandamus must also be awarded without delay.

§ 706. SERVICE UPON MAJORITY OF BOARD.] The writ must be served in the same manner as summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board was in session or not.

§ 707. DISOBEDIENCE—PUNISHMENT.] When a peremptory mandamus has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation, board or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

WRIT OF PROHIBITION.

§ 708. DEFINITION OF WRIT.] The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

§ 709. BY WHOM AND WHEN ISSUED.] It may be issued by the supreme and district courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

§ 710. ALTERNATIVE OR PEREMPTORY.] The writ must be alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

§ 711. PROCEEDINGS.] The provisions for the proceeding under the writ of mandamus, except the first three sections thereof, apply to this proceeding.

MISCELLANEOUS PROVISIONS.

§ 712. SUPREME OR DISTRICT JUDGES.] Writs of certiorari, mandamus and prohibition may be issued by any two justices of the supreme court or by a judge of the district court, in vacation, and when issued by a judge of the district court, may be made returnable, and a hearing thereon be had in vacation.

§ 713. RULES OF PRACTICE.] Except as otherwise provided in this chapter, the provisions of part 2, of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

§ 714. NEW TRIALS AND APPEALS.] The provisions of part 2, relative to new trials and appeals, except in so far as they are inconsistent herewith apply to the proceedings mentioned in this chapter.

CHAPTER XXXV.

OF SUMMARY PROCEEDINGS.

CONFESSION OF JUDGMENT WITHOUT ACTION.

§ 715. FOR WHAT CONFESSED.] A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

§ 716. VERIFIED STATEMENT—CONTENTS.] A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed be for money due or to become due, it must state concisely the facts out of which the debt arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the amount of such liability.

§ 717. PROCEEDINGS IN COURT—EXECUTION.] The statement must be presented to the district court or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk, whereupon it may be filed in the office of the clerk who shall enter in the judgment book a judgment for the amount confessed with costs. The statement and affidavit, with the judgment, shall thenceforth become the judgment roll. Execution may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due, and whenever any further installments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ 718. REQUISITES OF THE CASE.] Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction

if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were pending.

§ 719. JUDGMENT AND ROLL.] Judgment shall be entered in the judgment book, as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

§ 720. WHEN ON CIVIL JUDGMENT.] The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

RELIEF OF PERSONS CONFINED IN JAIL ON CIVIL PROCESS.

§ 721. DISCHARGE AUTHORIZED.] Every person confined in jail on execution issued on judgment recovered in a civil action, shall be discharged therefrom at the end of ten days from his first confinement therein, upon the conditions hereinafter specified.

§ 722. NOTICE OF APPLICATION.] Such person must cause notice in writing to be given to the plaintiff when and where he will apply to the judge of the district court in which the judgment was submitted, for the purpose of obtaining a discharge from his imprisonment.

§ 723. SERVICE OF NOTICE.] Such notice must be served by delivering to and leaving with the plaintiff, his agent or attorney, a copy thereof, at least one day before the hearing of the application, when the plaintiff, his agent or attorney served, live in the town or city where the application is to be heard, to which time of service one day must be added for every twenty miles or fraction thereof, the plaintiff, his agent or attorney served shall reside distant from the place of hearing.

§ 724. HEARING.] At the time and place specified in the notice, such person must be taken under the custody of the sheriff before such district judge and examined on oath concerning his property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such district judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or creditor; and such examination must, at the election of the creditor, be reduced to writing and subscribed and sworn to by the debtor and other witnesses.

§ 725. OATH BY PRISONER.] If, upon such examination, the judge before whom the same is had, shall be satisfied that the prisoner is entitled to his discharge, he shall administer to him the following oath, to-wit:

I.....do solemnly swear [or affirm] that I have not any estate real or personal, to the amount of ten dollars, except such as is by law exempt from levy and sale on execution, and that I have not any other estate, nor have I conveyed, concealed or in any way disposed of any of my property, real or personal, with design to secure the same to my use, to hinder or delay or defraud my creditors. So help me God. [Signed A B.]

§ 726. CERTIFICATE OF DISCHARGE.] After administering the oath, the judge must make a certificate under his hand as follows:

To the sheriff of the county of...., I do hereby certify that ....., confined in your jail upon an execution at the suit of ...., is entitled to be discharged from imprisonment, if he be imprisoned from no other cause.

§ 727. FOREVER EXEMPT.] The jailor, upon receiving such certificate, must forthwith discharge the prisoner, if he be imprisoned from no other cause. The prisoner, after being so discharged, shall be forever exempt from arrest or imprisonment for the same debt, unless he shall have been convicted of having sworn falsely upon his examination, or, in taking the oath herein prescribed.

§ 728. JUDGMENT AGAINST ESTATE.] The judgment against any prisoner who is discharged as herein provided for shall remain in full force against the estate which may then, or at any time after, belong to him. And the plaintiff may take out a new execution against the goods and estate of the debtor, in like manuer and with like effect as if he had never been committed in execution.

§ 729. PRISON COSTS.] If the debtor shall undertake to satisfy the execution he shall not be entitled to his discharge from imprisonment until he has paid all the charges for his commitment, and support in prison, in addition to the sum due on the execution and the costs and charges thereon.

§ 730. DISCHARGE BY PLAINTIFF.] The prisoner may at any time be discharged upon the order of the plaintiff in the action, and when so discharged such debtor shall not thereafter be liable to imprisonment again for the same cause of action.

§ 731. EXPENSES ADVANCED.] Whenever a debtor is committed to jail on execution in a civil action, the creditor, or some one in his behalf, must advance to the sheriff or jailor sufficient money to pay for the support of such prisoner from time to time; and in case such creditor shall neglect or refuse to so advance the money for such prisoner's support, upon the sheriff's or jailor's demand, the jailor must, at the expiration of twenty-four hours after such demand, discharge such prisoner from custody, and such discharge shall have the same effect as a discharge by order of the creditor.

§ 732. RECOMMITMENT.] If upon the examination the prisoner shall not be discharged he must be recommitted to jail under the execution, and shall not be again entitled to apply for his discharge from imprisonment as herein provided except upon the ground of newly discovered evidence, or for other good cause shown to the district judge granting the application.

§ 733. APPEALS.] Either party may appeal to the supreme court from the order of the district judge, granting or refusing a discharge from imprisonment, under these provisions, in the same manner as from an order granting, refusing, continuing, or modifying, a provisional remedy.

CHAPTER XXXVI.

CHANGE OF NAMES OF PERSONS AND PLACES.

§ 734. DISTRICT COURT POWER.] The district court shall have the author-

ity to change the names of persons, towns, villages and cities within this territory.

§ 735. PETITION—CONTENTS.] Any person desiring to change his or her name may file a petition in the district court of the county or subdivision in which such person may be a resident, setting forth:

1. That the petitioner has been a bona fide citizen of such county or subdivision for at least six months prior to the filing of the petition.
2. The cause for which the change of the petitioner's name is sought.
3. The name asked for.

And it shall be the duty of the judge of the district court, at any term thereof after the filing of such petition, upon being duly satisfied by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that thirty days previous notice of the intended application has been given in some newspaper printed in such district, to order and direct a change of the name of such petitioner, and to direct that such order be entered by the clerk in the journal of the court.

§ 736. TOWN, VILLAGE OR CITY.] Whenever it may be desirable to change the name of any town, village or city, in any county of the territory, a petition for that purpose may in like manner be filed in the district court of the county or subdivision in which such town, village or city is situated, setting forth the cause why such change of name is desirable, and the name asked to be substituted, and the court being satisfied by proof that the prayer of the petitioners is just, proper and reasonable, and that notice, as in case of the change of names of persons, provided for in the preceding section, has been given, and that two-thirds of the legal voters of such town, village or city, desire such change of name, and that there is no other town, village or city, in the territory of the name asked for, may order and direct such change of name, and direct the clerk to enter such order upon the journal of the court.

§ 737. COSTS—LIMITATION.] All proceedings under this chapter shall be at the cost of the petitioner or petitioners, and judgment may be entered against him or them for costs as in other civil actions: *Provided always*, That any change of name under the provisions of this chapter shall in no manner affect or alter any action or legal proceedings then pending, or any right, title or interest, whatsoever.

CHAPTER XXXVII.

OF BASTARDS.

§ 738. COMPLAINT.] When any woman residing in any county in this territory is delivered of a bastard child, or is pregnant with a child which, if born alive, will be a bastard, a sworn complaint may be made in writing by any person to the district court of the county or judicial subdivision where she resides, stating that fact, and charging the proper person with being the father thereof. The proceedings shall be entitled in the name of the people of the territory against the accused as defendant.

§ 739. SUMMONS.] Upon the filing of the complaint the clerk shall issue a summons against the person so charged, which shall be served as in civil actions.

§ 740. LIEN UPON REALTY.] From the time of the filing of such complaint a lien shall be created upon the real property of the accused in the county or judicial subdivision where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.

§ 741. ATTACHMENT.] The judge of the district court may order an attachment to issue on such complaint without undertaking, which order shall specify the amount in value of property to be seized under the attachment, and may be revoked at any time by such judge or by the district court on a showing made for the revocation of the same, and on such terms as may be deemed proper in the premises.

§ 742. DISTRICT ATTORNEY PROSECUTES.] The district attorney, on being notified of the facts justifying a complaint as contemplated in the first section of this subdivision, or of the filing of such complaint, shall prosecute the action on behalf of the complainant.

§ 743. ISSUE—HOW TRIED.] The issue on the trial shall be "guilty" or "not guilty," and shall be tried as a civil action at law.

§ 744. JUDGMENT.] If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court may direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered to be immediately paid, and afterwards, from time to time, as it shall be required and necessary to compel compliance with the order of the court.

§ 745. MODIFICATION OF SAME.] The court may at any time, enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated, on either party and notice to the other.

§ 746. COUNTY MAY PROSECUTE.] In case any bastard becomes a county charge, for the support of which no proceedings have been instituted under the provisions of this subdivision, it shall be the duty of the board of county commissioners to proceed against the father of such bastard, if known, as herein directed.

CHAPTER XXXVIII.

HERD LAW.

§ 747. LIABILITY FOR TRESPASS OF ANIMALS.] Any person owning, or having in his or their charge, or possession, any horses, mules, cattle, goats, sheep or swine, or any such animals, which shall trespass upon any cultivated land, cultivated or uncultivated meadow lands, or young timber, either fenced in or not fenced, belonging to any person or persons other than the owners of such animals, such person or persons owning or having in charge or possession such trespassing animal or animals, shall be liable to any party or parties sustaining such injury for all damages he, she or they, may have sustained by reason of such trespassing

aforesaid, to be recovered in a civil action, before any court having jurisdiction thereof, in the county where such damage may have occurred, and the proceedings shall be the same in all respects as in other civil actions, except as herein modified: *Provided*, That no property shall be exempt, except those exemptions made absolute, from seizure and sale under executions issued upon judgments obtained under or by virtue of this chapter.

§ 748. OWNER DEFINED.] Any person occupying or cultivating lands shall be considered the owner thereof in any action under the provisions of the last section.

§ 749. NOTICE OF DAMAGES.] The parties sustaining damage done by animals as mentioned in section 747, before commencing an action thereon shall notify the owner or person having in charge such offending animal or animals, of such damage, the probable amount thereof: *Provided*, He knows to whom such animal or animals belong.

§ 750. CUSTODY OF ANIMALS.] The person suffering damage done by animals as mentioned in section 747, may retain and keep in custody such offending animals until the damage and costs are paid, or until good and sufficient security be given for the same; and whenever any animal or animals are restrained under this chapter, the person restraining the same shall forthwith notify the owner or person in whose custody the same was at the time the tresspass was committed, of the seizure of said animals, providing the owner or person who had the same in charge is known to the person making said seizure.

§ 751. TRIAL—LIEN UPON ANIMALS.] Upon trial of an action under the provisions of section 747, of this chapter, the plaintiff shall prove the amount of damage sustained, and if he has restrained and kept in custody the animals committing such damage, the amount of expense incurred for keeping the offending animals, and any judgment rendered for damages, costs and expenses against the defendant shall be a lien upon the animals committing the damage, and they may be sold and the proceeds applied to the satisfaction of the judgment as in other cases of sale of personal property on execution; but if it shall appear upon the trial that no damage was sustained, judgment shall be rendered against the plaintiff for cost of suit, and damage sustained by defendant.

§ 752. UNKNOWN OWNER—SERVICE.] If upon the trial it appears that the defendant is not the owner or person in charge of such offending animals, he shall be discharged and the action and the suit may proceed as against a defendant whose name is unknown, and if at the commencement of the action, the plaintiff does not know the name of the owner, or keeper of such offending animals, he may bring suit against a defendant unknown. In such case service shall be made by publishing a copy of the summons with a notice, stating the nature of the action, in a weeekly newspaper, if there be one published in the county; and if not, by posting copies of the summons and notice in three of the most public places within the county, in either case not less than ten days previous to the day of trial.

§ 753. OVERPLUS.] After judgment shall have been rendered against

the defendant, unknown as aforesaid, the offending animals shall be sold, as in other civil actions, and after the said judgment and costs have been satisfied, if there is a surplus of money, it shall be placed in the hands of the county treasurer, and if the defendant does not appear and call for the same, within six months from the day of sale, it shall be paid into the school fund for the use of the public schools of said county.

§ 754. JUSTICE'S JURISDICTION.] Justices of the peace shall have concurrent jurisdiction with the district court of all actions and proceedings under this chapter, when the damages claimed do not exceed one hundred dollars.

Approved, February 17, 1877.

CHAPTER XXXIX.

MILL DAMS AND MILLS.

AN ACT to Encourage the Erection of Mill Dams and Mills. [Chapter LI. laws of 1862-3.]

§ 1. RIGHT STATED.] *Be it enacted by the Legislative Assembly of the Territory of Dakota:* When any person may be desirous of erecting and maintaining a mill dam upon his own land, across any watercourse not navigable, and shall deem it necessary to raise the water by means of such dam, or occupy ground for mill yard, so as to damage by overflowing or otherwise, real estate not owned by him, nor damaged by consent, he may obtain the right to erect and maintain said dam, by proceeding as in this act provided.

§ 2. PETITION—CONTENTS.] He shall present to the judge of any court of record in which jury trials are had in the county, or, if there be no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition setting forth the place as near as may be, where said dam is to be located, the height to which it will be raised, the purposes to which the water power will be applied, and such other facts as may be necessary to show the objects of the petition.

§ 3. COMMISSIONERS APPOINTED.] Upon the presentation of such petition, the judge shall appoint three disinterested residents of the county, in which said dam or a part of it is to be erected, commissioners to meet at the place of its proposed erection, on a day specified by such judge, and to inquire, touching the matters contained in said petition, and the judge shall fix the fees of said commissioners.

§ 4. OATH.] Before entering upon their duties, the commissioners shall severally take and subscribe an oath before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment.

§ 5. NOTICE OF MEETING.] At the request of the petitioner, the commissioners shall give, or cause to be given, notice of the time, place, and object of their meeting to every person named by said petitioner.

§ 6. TIME AND MANNER OF NOTICE.] At least five days notice shall be given in all cases, and in cases of infants, such notice shall be served on their guardians, or on persons with whom they reside; in case of idiots, lunatics, or distracted persons, or their guardians, if they have any, and if not, then on the person under whose care or charge they may be found; in cases of femmes covert on the husband as well as the femme covert; but notices to non-residents of the county or counties where said dam or a part of it is to be located, shall be published in some newspaper in the county aforesaid, or the one nearest thereto, for three weeks in succession, previous to the meeting of said commissioners.

§ 7. EXAMINATION AND ASSESSMENT.] The commissioners shall meet at the time and place specified in the notice, and shall proceed to examine the point at which said dam is proposed to be erected, and the lands and real estate above and below, which will probably be injured by the erection of said dam; shall hear the allegations and testimony of all parties interested, and shall proceed to make a separate assessment of damages which will result to any person by the erection of said mill dam and its maintenance forever.

§ 8. REPORT.] Within thirty days after completing their examination, the commissioners shall file the petition, their appointment, jurats (oaths), and a report of their proceedings, in the office of the clerk of the court in the first section of this act mentioned, and shall give notice of the filing of said report as of their meeting.

§ 9. DAMAGES—HOW PAID.] Upon the filing of said report the petitioners may make payment of the damages assessed to the parties entitled to the same in the manner following, to-wit:

First—To parties laboring under no disability.

Second—To guardians of infants, husbands or trustees of femmes covert.

Third—To guardians or conservators of insane persons.

And receipts for such payment filed in the office of the clerk aforesaid, shall stop the parties receipting from all further claim or proceeding in the premises. Payments to parties residing in the territory, but not in the county or counties where said dam or part of it is to be erected, as well as to the infants who have no guardian, and insane persons who have no guardians or conservators, and payments to parties residing out of the territory, and to persons whose names are unknown, and to persons who shall refuse to receive the payments when tendered, shall be made by depositing the money with the treasurer of the county or counties aforesaid, who shall pay out the same upon the order of the commissioners or court, take receipts for all payments, and file the same with the order, in the office of the clerk of the court aforesaid, and such deposit shall have the same effect as the first mentioned receipts unless an appeal be taken by the party entitled thereto.

§ 10. APPEALS, BY WHOM.] Appeals from the assessments made by the commissioners may be taken and prosecuted in the court aforesaid, by any party interested, (the petitioner excepted) not under legal disability, by husbands or trustees of femmes covert, guardians of infants, guard-

ians or trustees of insane persons, and in cases where infants or insane persons have no guardians or conservators, appeals may be taken by the friend of such parties, and a written notice of such appeal be served upon the appellee, as a summons in ordinary civil actions: *Provided*, That no appeal shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

§ 11. BOND BY PETITIONER.] The erection of said dam shall not be hindered, delayed or prevented, by the prosecution of any appeal: *Provided*, The petitioner shall execute and file with the clerk of the court in which the appeal is pending, a bond to be approved by said clerk with surety or sureties, conditioned that the person executing the same shall pay whatever amount is required by the judgment of the court, and abide any rule or order of the court in relation to the matter in controversy.

§ 12. BOND BY APPELLANT.] The appellant shall file with the clerk aforesaid a bond with security, to be approved by said clerk, in double the amount of the assessment appealed from, payable to the people of the territory, for the use of all persons interested, in the condition in which bond the proceeding appealed from shall be recited, with condition for the due and speedy prosecution of the appeal, and that he or they will satisfy the judgment that may be rendered in the premises and pay the costs of the appeal, if adjudged to do so by the court in reference to the matter in controversy.

§ 13. TRIAL OF APPEAL.] Appeal shall bring before the court the propriety of the amount of damages reported by the commissioners in respect to the parties to the appeal, and unless the parties otherwise agree, the matter shall be submitted to and tried by a jury as other appeal cases, and the court or jury as the case may be, shall assess the damages aforesaid, making the verdict conform to the question and facts in the case.

§ 14. ACTUAL DAMAGE ONLY.] No exemplary or vindictive damages shall be allowed by the commissioners, court or jury.

§ 15. JUDGMENT.] Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered, declaring that upon payment of the damages assessed by the court or jury, as the case may be, and costs, if any, the right to erect and maintain the mill dam aforesaid, according to the petition, shall, as against the parties interested in such verdict, be and remain in the petitioner, his heirs and assigns forever, subject to be lost as hereinafter provided, and payments of such judgments made as payments of assessments, by the commissioners, as hereinbefore provided.

§ 16. OTHER IMPROVED POWERS.] No mill dam shall be erected or maintained under the provisions of this act to the injury of any water power previously improved.

§ 17. LIMITATION OF ACTIONS.] No action for damages, occasioned by the erection and maintenance of a mill dam, shall be hereafter sustained unless such action be brought within two years after the erection of said dam: *Provided*, That such limitation shall not run against or apply to persons living on and holding government land under the pre-emption

laws, until a patent for the land damaged or overflown shall have been issued.

§ 18. DAMS PREVIOUSLY BUILT.] Any person may obtain a right to maintain or raise a dam heretofore erected upon his own land, across any watercourse not navigable, by complying with the provisions of this act, adapting his petition to the nature of the case.

§ 19. PROCEEDINGS SUSPEND SUITS.] Upon the evidence of the commencement of proceedings, as provided in the second and eighteenth sections of this act, the court before which any suit for damages occasioned by such mill dam shall be instituted after the commencement aforesaid, shall have power to suspend any such suit until the result of such proceedings shall be known.

§ 20. PETITIONER PAYS COSTS.] The costs of all proceedings under this act, except such as arise or grow out of appeals, shall be paid by the petitioner, and costs of appeal shall be paid as the court may direct.

§ 21. ENTRY AUTHORIZED.] For the purpose of making surveys and examinations relating to any proceedings under the provisions of this act, it shall be lawful to enter upon any land, doing no unnecessary injury.

§ 22. LOSS OF RIGHT.] Any person having obtained right to erect and maintain, or to maintain or raise any dam, under the provisions of this chapter, who shall not within one year thereafter begin to build, if he has not previously built said dam, and finish the same, and apply the water power thereby created to the purposes stated in his petition, within three years; or in case the said dam and mills connected therewith shall be destroyed, shall not begin to rebuild in one year after such destruction, and finish in three years, or having erected such mills shall fail to keep them in operation for one year at any one time, shall forfeit all rights acquired by virtue of the provisions of this act, unless at the time of such destruction the owner be an infant, or otherwise disabled in law, in which case the same time shall be allowed after the removal of such disability.

§ 23. EFFECT.] This act shall take effect and be in force from and after its passage and approval by the governor.

Approved January 7, 1863.