

# AMENDMENTS AND REPEALS.

## CHAPTER 2.

AN ACT TO REPEAL "AN ACT TO ESTABLISH A CODE OF CIVIL PROCEDURE," APPROVED MAY, 1862; ALSO TO AMEND "AN ACT TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS AND PROCEEDINGS OF THE COURTS OF THIS TERRITORY," PASSED AT THE SEVENTH SESSION, AND FOR OTHER PURPOSES.

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

Act repealed. SECTION 1. That "An act to Establish a Code of Civil Procedure," approved May, 1862, be, and the same is hereby repealed.

Amendments of civil code of 1867-68. SEC. 2. That section 188 of "An Act to simplify and abridge the practice, pleadings and proceedings of the courts of this Territory," passed at the seventh session, be, and the same is hereby amended by striking out all after the word "on," in the eighth line thereof; and section 85 of said act is so amended as to allow the plaintiff in any action to file a notice of the pendency of the action as therein provided, and thereby create a lien on real property, and no attachment of real property shall be necessary, nor shall the same be valid until said notice is filed as aforesaid.

Further amendment. SEC. 3. That said act passed at the seventh session be, and the same is, hereby amended by adding after section 196 thereof, the following:

When creditor may bring an action before claim is due. 1. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; or, 2. Is about to make sale, convey-

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

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

SEC. 4. That said act be, and the same is hereby further amended by adding after section 217 thereof, the following: Further amendments.

1. A motion for a new trial on a case, or exceptions, or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, must in the first instance be heard and decided at a general or special term, except that when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance by the supreme court, and judgment in the meantime suspended, and in that case they must there be heard in the first instance, and judgment there given. Motion for new trial, &c., to be heard and decided, where.

2. And when upon the trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the supreme court, and in that case the application for judgment must be made to the supreme court. When judge may direct verdict, &c.

SEC. 5. That said act be, and the same is hereby further amended by striking out the fifth, sixth and seventh lines of section 263, and substituting in lieu thereof, the following words, to-wit: "He shall receive no other fee for any services whatever in a civil action, except for copies of papers, at the rate of ten cents for every hundred words," and all acts in conflict with this provision are hereby repealed. Amendment respecting fees of clerks.

SEC. 6. That said act be, and the same is hereby further amended by adding after section 273, the following: Further amendments.

1. In cases in which the plaintiff is a non-resident of the county in which the action is to be brought, before commencing such action, the plaintiff must furnish a sufficient surety for costs. The surety must be a resident of the county where the action is to be brought, and approved by the clerk. His obligation shall be complete, simply by indorsing the summons, or signing his name on the complaint as security for Plaintiff to furnish surety.

**Obligation of costs.** He shall be bound for the payment of all costs, which may be adjudged against the plaintiff in the court in which the action is brought, or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtained judgment or not.

**When action shall be dismissed.** 2. 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.

**When plaintiff shall give security.** 3. If the plaintiff in an action, after its commencement, become a non-resident of the county in which it is brought, he shall give security for the costs in the manner and under the restrictions provided in the two preceding sections.

**When plaintiff to give additional security.** 4. 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.

**When judgment for costs may be entered against surety.** 5. 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.

**Execution, &c.**

**Section repealed.**

SEC. 7. That section 242, of said act be, and the same is, hereby repealed.

**Further amendment.**

SEC. 8. That said act be, and the same is hereby further amended by adding after section 241, the following:

**Lands, &c., liable on execution.**

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

2. When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases the writ of execution first delivered to the officer shall be first satisfied. And it shall be the duty of the officer to indorse on every writ of execution the time when he received the same.

Duty of officer when two or more writs are delivered on same day.

In other cases, what preferred.

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

Duty of officer on receiving writ.

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

When officer levys on goods claimed by other person than defendant, his duty.

Duty of justice.

Duty of claimant.

ney, if within the county, of the time and place of such trial; and he shall, moreover, prove to the satisfaction of said justice that such notice was given, or that the same could not be given by reason of the absence of the party, his agent or attorney.

Jury, how sworn and their duty.

Duty of justice.

Allowance of jurors.

Fees of justice.

Duty of officer in certain cases.

When claimant to give surety.

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

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

property, then the sheriff or other officer shall deliver said undertaking to claimant, and proceed to sell such property, as if no such trial of the right of property had taken place, and shall not be liable to the claimant therefor.

SEC. 7. This act and the amendments herein made shall not in any particular change the exemption laws as they now exist in this Territory. This act not to effect exemption laws.

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

2. When any writ shall issue, directing the sale of property previously taken in execution, the officer issuing said writ, at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ shall be directed, that, if the property remaining in his hands, not sold, shall, in his opinion, be insufficient to satisfy the judgment, he shall levy the same upon the lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, sufficient to satisfy the debt. Where sale cannot be made for want of bidders.

3. Lands and tenements, taken in execution, shall not be sold, until the officer cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some weekly newspaper printed in the county, or, in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement upon the court house door, if When officer shall levy on lands &c.

Lands &c. not to be sold, until public notice be given.

Notice. how given.

there be a court house in the county, and in five other public places in the county. All sales made without such advertisement, shall be set aside, on motion, by the court to which the execution is returnable.

When court shall order officer to make deed.

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

Officer shall make deed.

5. The sheriff or other officer, who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser or purchasers thereof, as good and sufficient a deed of conveyance of lands and tenements sold, as the person or persons, against whom such writ or writs of execution were issued, could have made of the same, at, or any time after, they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment. And such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of term of rendition of such judgment, by virtue whereof the said lands and tenements were sold as aforesaid; and shall be executed, acknowledged and recorded, as is or may be provided by law, to perfect the conveyance of real estate in other cases.

Deed to be evidence of legality of sale.

What deed shall recite.

When officer may refuse to publish notice.

6. The officer who levies upon such goods and chattels, or lands and tenements, or who is charged with the duty of selling the same by virtue of any writ or execution, may refuse to publish a notice of the sale thereof by advertisement in a

newspaper, until the party for whose benefit such execution 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.

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

Officer to make demand before being excused.

8. All sales of lands or tenements under execution, shall be held at the court house, if there be one in the county in which such lands and tenements are situated, and if there be no court house, then at the door of the house in which the district court was last held, and if there be no court house, and no district court has been held in the county, then at such place as the sheriff shall designate in his notice of sale. No sheriff, or other officer, making the sale of property, either personal or real, shall either directly or indirectly purchase the same; and every purchase so made, shall be considered fraudulent and void.

Where sales to be held.

Officer not allowed to be purchaser.

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

When other executions may be issued.

10. In all cases, when two or more executions shall be put into the hands of any sheriff, or other officer, and it shall be necessary to levy on real estate to satisfy the same, and either of the judgment creditors in whose favor one or more of said executions is issued, shall require the sheriff, or other officer, to make a separate levy to satisfy his execution or executions, it shall be the duty of the sheriff, or other officer, to levy said executions, or so many thereof as may be required, on separate parcels of real property of the judgment debtor or debtors, whose execution may, by the provisions of this chapter, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient to satisfy the same.

When officer shall make a separate levy.

11. If the term of service of the sheriff, or other officer, who has made, or shall hereafter make sale of any lands and tenements, shall expire; or if the sheriff or other officer shall be absent, or be rendered unable, by death, or otherwise, to make a deed of conveyance of the same, any succeeding sheriff or

When term of office shall expire; who shall make deed.

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

When a balance shall remain in hands of officer: how disposed of.

12. If on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer more money than is sufficient to satisfy the writ or writs of execution, with interests and costs, the sheriff or other officer shall, on demand, pay the balance to the defendant in execution, or his legal representatives.

When judgment shall be reversed, title not to be affected.

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

Principal debtor first liable on judgment.

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

the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution.

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

When officer shall refuse or neglect certain duties, to be amerced.

16. If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received, in his official capacity, for the use of such person, every such clerk may be amerced; and the proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties.

When clerk may be amerced

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

When officer to be amerced ten per cent. additional.

18. When execution shall be issued in any county in this Territory, and directed to the sheriff or coroner of another county, it shall be lawful for such sheriff or coroner having the execution, after having discharged all the duties required of him by law, to inclose such execution, by mail, to the clerk

When execution issued to officer of another county; his duty.

with whom the record of judgment is filed. 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.

Officer not to forward money by mail; except when.

19. 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 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.

When sureties of officer may be made parties to judgment.

20. Each and every surety of any sheriff or other officer may be made a party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases. But the goods and chattels, lands and tenements of any such surety, shall not be liable to be taken on execution, when sufficient goods and chattels, lands and tenements of the sheriff or other officer, against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer, by attachment, at his election.

Where officer may be permitted to sue out an execution.

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

Further amendment.

SEC. 9. That said act be, and the same is hereby further amended by adding after Section 320 thereof, the following:

#### CHAPTER—MEANS OF PRODUCING WITNESSES.

When certain officers shall issue subpoena.

1. The clerks of the several district courts, notaries public, justices of the peace, attorneys and judges of courts, shall, on

the application of any person having a cause or any matter pending in court, 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.

2. 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.

Subpœna, what to contain and how directed.

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

What officer may issue subpœna.

4. 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.

Subpœna, how served.

5. 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.

When witness not obliged to attend.

6. 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.

When witness may demand fees.

7. 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.

Disobedience to subpœna, how punished.

8. 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

When court may issue attachment for witness.

place to be fixed in the attachment, to give his testimony and answer for the contempt. If the attachment be not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his appearance. Such sum shall be indorsed on the back of the attachment, and if no such sum is fixed and indorsed, it shall be one hundred dollars. If the witness be not personally served, the court may, by a rule, order him to show cause why an attachment should not issue against him.

Witness may give undertaking.

Punishment for contempt, defused.

9. The punishment for the said contempt shall be as follows: When the witness fails to attend, in obedience to the subpoena (except in case of a demand and failure to pay his fees), the court or officer may fine the witness in a sum not exceeding fifty dollars. In other cases, the court or officer may fine a witness in a sum not exceeding fifty nor less than five dollars, or may imprison in the county jail, there to 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.

Fine to go to school fund.

When court may discharge witness that is imprisoned.

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

Attachment for arrest, what to specify, and to whom directed.

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

When prison may be required to attend

12. A person confined in any prison in this Territory may, by order of any court of record, be required to be produced

for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition.

13. 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. Prisoner to remain in officer's custody.

14. 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 subpoena. Witness, when not liable to be sued.

15. 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 subpoena, and if the same be not paid, he shall not be required to remain. Witness may demand fees, when.

16. Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness. Witness, how sworn.

CHAPTER—MODE OF TAKING THE TESTIMONY OF WITNESSES.

ARTICLE—1. AFFIDAVIT. 2. DEPOSITION.

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

2. An affidavit is a written declaration under oath, made without notice to the adverse party. Affidavit defined.

3. 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. Deposition defined.

4. 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. Oral examination defined.

ARTICLE I.—AFFIDAVIT.

1. 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. Affidavit, how used.

Affidavit, how made.

2. 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.

## ARTICLE II.—DEPOSITIONS.

1. When to be used.
2. Officers who may take them.
3. Manner of taking and authenticating them.
4. Exceptions to Depositions.

### SUBDIVISION 1.—WHEN TO BE USED.

Depositions, when may be used.

1. 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.

When testimony may be taken.

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

### SUBDIVISION 2.—OFFICERS WHO MAY TAKE THEM.

Depositions, before whom taken in the Territory.

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

Depositions, before whom taken out of the Territory.

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

Relatives or attorneys debarred from taking depositions.

3. 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.

Who may grant commissions to take depositions.

4. 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 is-

sued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it must be taken upon written interrogations, unless the parties otherwise agree.

SUBDIVISION 3.—MANNER OF TAKING AND AUTHENTICATING THEM.

1. 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.

Service of notice on adverse party. what to contain.

2. 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.

When notice may be given by publication.

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

Deposition to be written in presence of officer.

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

Deposition to be sealed and transmitted to clerk.

5. Depositions taken pursuant to this article shall be admitted in evidence, on the trial of any civil action or proceed-

Depositions to be admitted in evidence.

ing, pending before any justice of the peace, mayor, or other judicial officer of a city, or town corporate, or before any arbitrators or referees, and such deposition shall be sealed up, indorsed with the title of the action or proceeding, the name of the officer taking the same, and addressed and transmitted by such officer to such justice, mayor, or other judicial officer, arbitrator, or referees.

Deposition,  
when may be  
read.

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

Depositions,  
how authenti-  
cated.

7. Depositions taken pursuant to this article, by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident in this Territory or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the court of which he is an officer, or his official seal, and no other or further act or authentication shall be required. If the officer taking the same have no official seal, the deposition, if not taken in this Territory, shall be certified and signed by such officer, and shall be further authenticated, either by parol proof, adduced in court, or by the official certificate and seal of any secretary or other officer of state keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking of the same, within the meaning of this chapter, authorized to take the same. But if the deposition be taken within 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.

Deposition,  
how authenti-  
cated.

Character of  
certificate to be  
attached to  
deposition.

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

Deposition  
received in  
court, when.

9. When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court, that for any

cause specified in the first section of subdivision one of article two of this chapter, the attendance of the witness cannot be procured.

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

SUBDIVISION 4.—EXCEPTIONS TO DEPOSITIONS.

1. Exceptions to depositions shall be in writing, specifying the grounds of objections, and filed with the papers in the cause. Exceptions, how made and what to specify

2. No exception other than for incompetency or irrelevancy, shall be regarded, unless made and filed before the commencement of the trial. Certain exceptions to be disregarded.

3. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial. Exceptions, when to be read and determined

4. Errors of the court in its decisions upon exceptions to depositions are waived unless excepted to. Errors of the court, when waived.

CHAPTER—ADMISSION OF DOCUMENTS AND GENERAL PROVISIONS.

1. 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. What shall be admitted as evidence of existing law.

CHAPTER—PROCEEDINGS TO PERPETUATE TESTIMONY.

1. The testimony of a witness may be perpetuated in the following manner: Manner of perpetuating testimony of witness.

2. The applicant shall file in the office of the clerk of the district court, a petition, to be verified, in which shall be set forth, specially, the subject-matter, relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description as he can give of such persons, as heirs, devisees,

alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this Territory, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be plaintiff.

Order of court,  
what to pre-  
scribe.

3. 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.

Duty of court  
when parties  
cannot be noti-  
fied.

4. 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 one of them. The attorney filing the cross interrogatories shall be allowed a reasonable fee therefor, to be taxed in the bill of costs.

Attorney to  
be allowed fee.

Depositions  
to be taken be-  
fore competent  
authority.

5. 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.

When court  
shall approve  
deposition;  
and when it  
may be admit-  
ted in evidenc

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

Applicant to  
pay cost of pro-  
ceedings.

7. The applicant shall pay the cost of all proceedings under this chapter.

SEC. 10. No judgment shall be rendered at a special term of the district court. No attorney's fees shall be allowed the prevailing party in any case, and in all cases in the district court the defendant shall have until the morning of the second day of the next general term of said court to answer or demur after the commencement of the suit, and no notice of trial need be given in cases hereafter commenced. No fees or costs shall be allowed to any party in a civil action, except witness fees, jury fees, clerk's fees and costs of court. No civil case, which is in the jurisdiction of the courts of justices of the peace shall be commenced originally in the district courts of this Territory.

When district court debarred from rendering judgment.

Attorney's fees disallowed

Time to answer or demur.

What fees allowed.

Certain civil cases not to be commenced in district court.

SEC. 11. That Section 527 of an act to establish a civil code, approved January 12th, 1866, be and the same is hereby repealed.

Section 527 repealed.

SEC. 12. This act shall take effect and be in force from and after its passage and approval by the Governor.

When to take effect.

Approved, January 10th, 1873.

### CHAPTER 3.

AN ACT TO AMEND SECTION 233 OF "AN ACT TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS AND PROCEEDINGS OF THE COURTS OF THIS TERRITORY," PASSED AT THE SEVENTH SESSION, RELATING TO DOCKETING JUDGMENTS OF JUSTICES' OF THE PEACE IN THE DISTRICT COURT, AND THE LIEN CREATED THEREBY.

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

SECTION 1. That section 233 of "An Act to simplify and abridge the practice, pleadings and proceedings of the courts of this Territory," passed at the seventh session, be, and the same is hereby amended by adding to the same the following: A justice of the peace, on the demand of a party in

When justice of peace shall give transcript of judgment.

whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the district court of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and from that time the judgment shall be a judgment of the district court, and shall be a lien on real property in like manner. A certified transcript of such judgment may be filed and docketed in the district clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing the transcript.

Judgment, on what to be a lien.

When to take effect.

SEC. 2. This act shall take effect and be in force from and after its passage and approval by the Governor.

Approved, January 10th, 1873.

#### CHAPTER 4.

AN ACT TO AMEND CHAPTER 3 OF TITLE 4 OF THE CIVIL CODE,  
APPROVED JANUARY 12TH, 1866.

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

Amendment of law relating to interest on money.

SECTION 1. That section 972 of the third chapter of title four of the civil code, approved January 12th, 1866, be amended as follows, to-wit: Strike out the word "two" in the third line of said section, and insert the words "one and one-half;" ( $1\frac{1}{2}$ ) also the words "twenty-four," in the fourth line of said section, shall be stricken out, and the word "eighteen" inserted in lieu thereof.

Section repealed.

SEC. 2. Section 977 of said chapter and title is hereby repealed.

Not to effect existing contracts.

SEC. 3. This act shall not be construed so as to change the rates of interest in any existing contract.

When to take effect.

SEC. 4. This act shall take effect and be in force from and after its passage.

Approved, January 10th, 1873.

## CHAPTER 5.

AN ACT TO REPEAL CHAPTER FIRST OF THE LAWS OF 1868-9, ENTITLED "AN ACT TO ESTABLISH A CODE OF CRIMINAL PROCEDURE FOR DAKOTA TERRITORY," APPROVED JANUARY 12TH, 1869, AND FOR OTHER PURPOSES.

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

SECTION 1. That chapter first of the laws of 1868-9, entitled "An Act to establish a code of criminal procedure for Dakota Territory," approved January 12th, 1869, be, and the same is hereby repealed. Certain chapter of criminal code repealed.

SEC. 2. That from and after the passage and approval of this act, the proceedings, practice and pleadings in the district courts of this Territory, in criminal cases, shall be in accordance with the proceedings, practice and pleadings of the common law, except where the same is otherwise expressly regulated by law, and such proceedings, practice and pleadings shall be assimilated as near as may be with the proceedings, practice and pleadings of the United States or Federal side of said courts. *Provided*, That chapter eighteen, of the laws of 1867-8, entitled "An Act relating to the challenging of jurors in civil and criminal cases," and chapter nineteen of the laws of 1867-8, entitled "An Act respecting grand and petit jurors of the district courts," shall remain in full force and effect. Criminal procedure to be in accordance with common law.

SEC. 3. Writs of error, bills of exceptions and appeals, shall be allowed to the defendant in all criminal cases, when required by him, under such rules and regulations as the supreme court of the Territory may prescribe; and the said supreme court shall, at its first annual session, make all necessary rules and regulations to carry this section into effect. Certain remedies allowed to defendants.

SEC. 4. This act shall take effect and be in force from and after its passage and approval. Supreme court to prescribe rules.

Approved, January 8th, 1873. When to take effect.

## CHAPTER 6.

AN ACT REPEALING A PORTION OF THE CRIMINAL CODE AND  
TO RE-ENACT THE JUSTICE CODE OF 1865-1866.

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

Certain act  
repealed.

SECTION 1. That part five, titles one and two, of an act entitled "An act to establish a code of criminal procedure for Dakota Territory," approved January 12th, 1869, be, and the same is hereby repealed.

Certain act to  
remain in full  
force.

SEC. 2. That the justice code, being chapter thirty-one of the laws of 1865 and 1866, approved January 4th, 1866, as republished by order of a joint resolution, (chapter 30, laws of 1870, and 71,) be and the same is hereby re-enacted, and made of full force and effect.

Conflicting  
acts repealed.

SEC. 3. All acts and parts of acts in conflict with this act are hereby repealed.

When to take  
effect.

SEC. 4. This act shall take effect from and after its approval.

Approved, January 9, 1873.

## CHAPTER 7.

## AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH THE COURTS AND DEFINE THE JURISDICTION OF JUSTICES OF THE PEACE, APPROVED JANUARY 4TH, A. D., 1866.

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

Defendant al-  
lowed to waive  
examination.

SECTION 1. That section 315 of said act be and the same is amended by adding to said section the following, to-wit: *Provided*, That the accused may in all cases waive an examination, and be held by the justice for trial at the next term of the district court.

When to take  
effect.

SEC. 2. This act shall take effect and be in force from and after its passage and approval.

Approved, January 10, 1873.

**CHAPTER 8.**AN ACT TO AMEND CHAPTER TWENTY-FOUR OF THE SESSION  
LAWS OF 1868 AND 9.

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

SECTION 1. That chapter twenty-four of the session laws of 1868 and 9, be amended by striking out the word January where it occurs in said chapter, and inserting the word February, instead thereof. Time of assessment changed.

SEC. 2. This act shall be in force from and after its passage and approval. When to take effect.

Approved, January 6, 1873.

**CHAPTER 9.**AN ACT TO AMEND SECTION FIVE OF CHAPTER SIX OF THE  
SESSION LAWS OF 1868 AND 9.

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

SECTION 1. That section 5 of chapter 6 of the session laws of 1868 and 9, be and the same is hereby amended, by striking out the word "one" in the second line, [and] inserting in lieu thereof the word "two." By striking out the word "twenty-five," in line 8 and inserting in lieu thereof the word "fifty." By striking out the word "twenty-five" in line "13" and inserting in lieu thereof the word "fifty." By striking out the words "fifty cents" in line "16" and inserting in lieu thereof, "one dollar." By Fees of sheriff.

striking out of line "20," the word "five" and inserting in lieu thereof, "ten." By striking out of line "29," the word "six," and inserting in lieu thereof the word "sixteen." By striking out of line "45" the word "real," and add to line "46," "posting notices of sale of real property, one dollar." Add to line "53," "for first day and for each day after the first, two dollars."

Conflicting  
acts repealed.

SEC. 2. All acts and parts of acts in conflict with this act are hereby repealed.

When to take  
effect.

SEC. 3. This act shall take effect and be in force from and after its passage and approval by the Governor.

Approved, January 10th, 1873.

## CHAPTER 10.

AN ACT TO AMEND SECTION 11, OF CHAPTER 15 OF THE STATUTES OF THIS TERRITORY, APPROVED JANUARY 11TH, 1865.

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

Mortgagor to  
retain possession  
of homestead  
until time  
of redemption  
expires.

SECTION 1. At the end of section 11, chapter 15 of the statutes approved January 11th, 1865, add the following words: "Except when the premises mortgaged are the homestead or place of residence of the mortgagee or his family, in which case the mortgagor may retain peaceable possession until the time of redemption expires."

When to take  
effect.

SEC. 2. This act shall be in force from and after its passage.  
Approved, January 10th, 1873.

## CHAPTER 11.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH  
A PUBLIC SCHOOL LAW FOR THE TERRITORY OF DAKOTA."

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

SECTION 1. That an act entitled "An act to establish a public school law for the Territory of Dakota," approved January 11th, A. D. 1871, be and the same is hereby amended as follows, to-wit:

SEC. 2. That section five of said law is hereby amended in first three lines and made to read as follows: "The superintendent of public instruction shall receive for his services the sum of six hundred dollars per annum, payable quarterly."

SEC. 3. That said superintendent may in conjunction with the county superintendent, hold annually a teachers Institute in such counties as he may deem advisable, at which Institute all the teachers of such county are expected to be present; said Institutes not to continue less than three, nor more than four days, which Institutes shall be free to all teachers and those preparing to teach in this Territory.

SEC. 4. That all laws and parts of laws in conflict with this act are hereby repealed.

SEC. 5. This act shall take effect from and after its passage and approval.

Approved, January 10th, 1873.

## CHAPTER 12.

AN ACT TO AMEND SECTIONS 30 AND 51 OF "AN ACT CONCERNING REVENUE," APPROVED, JANUARY 12TH, 1869.

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

Rate of Territorial tax.

SECTION 1. That the first clause of section 30, of "An Act concerning revenue," approved January 12th, 1869, be, and the same is hereby amended so as to read as follows: "The rate of the general Territorial tax shall not be less than one-half mill, nor more than five mills on the dollar valuation.

When taxes to become delinquent.

SEC. 2. That section 51 of said act be amended so as to provide that all unpaid taxes shall become delinquent on the first Monday of March, in each year.

When to take effect.

SEC. 3. That this act shall take effect and be in force from and after its passage and approval.

Approved, January 10th, 1873.

## CHAPTER 13.

AN ACT TO REPEAL CHAPTER THREE OF THE SESSION LAWS OF 1870-71, AND THE AMENDMENT THERETO MADE AT THE EXTRA SESSION OF THE LEGISLATIVE ASSEMBLY IN 1871.

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

Repealing certain act relative to giving bonds in actions affecting real property.

SECTION 1. That chapter three of the session laws of 1870-71, and the amendment thereto made at the extra session of the Legislative Assembly in 1871, be, and the same are hereby repealed.

When to take effect.

SEC. 2. This act shall take effect and be in force from and after its passage and approval.

Approved, December 28th, 1872.