CODE

—OF—

CIVIL PROCEDURE

—OF THE—

STATE OF COLORADO,

AS AMENDED BY

ACTS OF GENERAL ASSEMBLY

—OF—

1879, 1881 & 1883.

PUBLISHED BY AUTHORITY.

CONTAINING

Procedure in Condemnation and Partition.

STATE OF COLORADO, }
Office of the SECRETARY OF STATE. }

I, Melvin Edwards, Secretary of State of the State of Colorado, do hereby certify that, by virtue of the authority vested in me by an act of the Fourth General Assembly of the State of Colorado, entitled "An act to provide for the printing of the Declaration of Independence, the Constitution of the United States, the Enabling Acts, the Constitution of the State, including the Ordinances of the Convention which framed the Constitution; the President's Proclamation of August 1st, 1876, proclaiming the admission of Colorado as a State into the Union, together with all the General Laws of this State, and an index to the same," approved February 28th, 1883, I have prepared and caused to be printed the same, together with "An act providing a system of procedure in civil actions in the courts of justice of the State of Colorado," approved March 17th, 1877. I further certify that I have carefully compared the said printed volume with the original manuscript thereof, and that the same is correctly printed.

In testimony whereof, I have hereunto subscribed my name and affixed the Great Seal of the State of Colorado. Done at the city of Denver, this 1st day of November, A. D. 1883.

MELVIN EDWARDS,

Secretary of State.

CIVIL PROCEDURE.

AN ACT PROVIDING A SYSTEM OF PROCEDURE IN CIVIL ACTIONS IN THE COURTS OF JUSTICE OF THE STATE OF COLORADO.

[All sections unrepealed of original act, with sections from the General Laws, and Acts of 1879-1881, including the laws concerning eminent domain, injunction and partition.]

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[One form of civil action only.]

SECTION 1. That the distinction between actions at law and suits in equity, and the distinct forms of actions, and suits heretofore existing, are abolished, and there shall be in this State but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be the same at law and in equity, and which shall be denominated a civil action, and which shall be prosecuted and defended as prescribed in this act.

See Chapters Eminent Domain, Partition, Injunction, Mandamus and other special proceedings, post.

[Parties, how designated.]

SEC. 2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

[Real party in interest prosecute, except, etc.]

SEC. 3. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act.

What actions survive against executors and administrators, 3635, s. 155, ch. 115, Gen. Stat., wills, etc.

[Action by assignee without prejudice to set off, except.]

SEC. 4. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of 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.

For rights of assignee in case of mechanics' lien, see ch. 65, Gen. Stat., liens.
See ss. 4, 5, 6, 7, 8, 9, ch. 9, Gen. Stat., bonds, bills, etc.

[Administrator, executor or trustee sue alone—Trustee of express trust—Defined.]

SEC. 5. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons 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.

Suit by joint tenant or tenant in common against co-tenant, s. 2, ch. 59, Gen. Stat., joint rights, etc.

[Married woman sue and be sued.]

SEC. 6. A married woman may sue and be sued in all matters the same as if she were sole. [Sec. 1, p. 53, acts 1881, sub. for secs. 6–7, p. 4, orig. act.

Same in Gen. Stat., s. 14, ch. 71, married women.

[Infant appear by guardian—When court appoint.]

SEC. 7. (8.) When an infant is a party he shall appear by next friend of his own selection, or by guardian who may be appointed by the court in which the action was prosecuted, or by a judge thereof, or a county judge.

See s. 4, ch. 48, Gen. Stat.—Sec. 13, ibid.
Testamentary guardian, ss. 17 to 20, ibid.

[When and how guardian appointed.]

SEC. 8 (9.) The guardian shall be appointed as follows: First, 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 a relative or friend of the infant; second, when the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

See ch. 48, guardian and ward, Gen. Stat.

[What action survives to parent or guardian.]

SEC. 9. (10.) A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward.

See ss. 1 to 4, ch. 27, damages, Gen. Stat.

[Parties interested join as plaintiffs, except.]

SEC. 10. (11.) 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 act.

[Who may be made defendants.]

SEC. 11. (12). Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

[What parties may be made plaintiff or defendant—Suing on behalf of others.]

SEC. 12. (13). Of the parties to the action, those who are united in interest shall 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 numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended.

See s. 5, ch. 36, evidence, Gen. Stat., as to action by partners, etc.
Actions for possession, etc., may be brought by tenants in common against each other, s. 277, ch. 23, post.
In partition any one interested may appear and answer, etc., sec. 286, chap. 24, partition, post.

[Joint and several liability on bills, notes, etc.]

SEC. 13. (14). Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

As to proof of joint liability of defendants, see s. 6, ch. 36, evidence, Gen. Stat.
Persons associated may be sued by common name, sec. 14, below.

[Associates under common name—How sued—Judgment—Effect.]

SEC. 14. (417). When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common

name, the summons in such cases being served on one or more of the associates; but the judgment in such cases shall bind only the joint property of the associates, and the separate property of the party served.

[When actions not abate—Transfer of interest.]

SEC. 15. An action shall not abate by the death 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 the death or other disability of a party, the court, on motion, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

When death caused by negligence, etc., action survives, ch. 27, damages, Gen. Stat.

[Court may order parties brought in.]

SEC. 16. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in.

[Order of court—Party brought in—Service on adverse party.]

SEC. 17. When in a civil action a person not a party thereto, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, and upon due service upon the adverse party of his complaint, or answer, the same proceedings shall be had as if he had been an original party to the action.

See sec. 22, post, as to intervening; also ss. 23-24.

[Order for substitution of party—Discharge—Deposit.]

SEC. 18. A defendant against whom an action is pending upon a contract, or to recover 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.

See sec. 448, ch. 40, post, as to contracts, etc.

[Successive actions on same transaction—When.]

SEC. 19. Successive actions may be maintained upon the same contract or transaction, whenever after the former action a new cause of action arises therefrom.

[Consolidation of actions.]

SEC. 20. Whenever 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 into one.

[Suit by debtor or obligee—When plaintiff is bound for third person.]

SEC. 21. An action may be brought by one person against another for the purpose of determining a claim, which the latter makes against the for-

mer for money or property, upon an alleged liability, and also against two or more persons for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

Decisions—Demand due plaintiff in his own right, and as survivor, may be joined; Smith vs. Salom Col. 176.

[When third person may intervene against one or both parties.]

SEC. 22. (420.) Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either in 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 defendant.

[Intervention before or after issue.]

SEC. 23. (421.) Any third person may intervene, either before or after issue has been joined in the action.

[Intervention by petition—Copy served—Answer.]

SEC. 24. (422.) The intervention shall be by petition, filed in the court in which the action is pending, and it must set forth the grounds upon which the intervention rests. A copy of the petition shall be served upon the parties to the action against whom anything is demanded, who shall answer as if it were an original complaint in the action.

[Intervention—When decided—Costs.]

SEC. 25. (423.) The court shall determine upon the intervention at the same time that the action is decided. If the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention.

CHAPTER II.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

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" 32. Exceptions—who may be affiants—one change only.

[Venue—Actions affecting realty—In what county.]

SEC. 26. (22.) Except when otherwise provided, actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this act; 1st, For the recovery of real property or of an interest therein, or for the determination in any form of such right or interest, and for injuries to real property. 2d, For the partition of real property. 3d, For the foreclosure of a mortgage of real property; *Provided*, that where such real property is situated partly in one county and partly in another, the plaintiff shall bring his action in the county where the greater portion of such real estate is situate, and the county so selected shall be the proper county for the trial of any or all such actions as are mentioned in this section.

[Venue—For penalties, forfeitures—Except- Against public officers.]

SEC. 27. (23.) Actions for the following causes shall 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; 1st, For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed. 2d, Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

[Residence—Departing from State—Contracts—Torts.]

SEC. 28. (24.) In all other cases the action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, or where the defendant may be found; or, if none of the defendants reside in the State, or if residing in the State, the county in which they reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the State, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contracts may be tried in the county

in which the contract was to be performed; actions upon notes or bills of exchange in the county where the same are made payable; and actions for torts in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this act.

[Counties attached—Jurisdiction.]

SEC. 29. (25.) When a county shall be attached to another county for judicial purposes, actions arising or triable therein, of which a district court shall have exclusive jurisdiction, shall be commenced and tried in the county to which such county may be so attached.

[Change of venue—Causes, proviso.]

SEC. 30. (26.) The court may, on good cause shown, change the place of trial in the following cases: 1st, When the county designated in the complaint is not the proper county. 2d, When there is reason to believe that an impartial trial cannot be had therein. 3d, When the convenience of witnesses and the ends of justice would be promoted by the change. 4th, When, from any cause, the judge is disqualified from acting in the action; *Provided*, the court shall not change the place of trial for the disqualification of the district judge in any case where a competent judge of another district court will appear and try the action.

[Interest or prejudice of judge—Of inhabitants—Affidavit—Contents—Notices.]

SEC. 31. (27.) If either party, in any civil action which may be depending in any district or county court, shall fear that he will not receive a fair trial in the court in which the action is pending, on account that the judge is interested or prejudiced, or is related to, or shall have been of counsel for either party, or that the adverse party has an undue influence over the minds of the inhabitants of the county wherein the action is pending, or that the inhabitants of the county wherein the action is pending are prejudiced against the applicant, so that he cannot expect a fair trial, such party may apply to the court in term time, or the judge thereof in vacation, by petition, setting forth the cause of application, and praying a change of venue, accompanied by an affidavit, verifying the facts in the petition stated, and reasonable notice of the application having been given to the other party or his attorney.

[Exception to ruling of court—Error—Affiantsnot parties—One change only.]

SEC. 32. (2.) If the court to which, or the judge to whom, such application is addressed shall be of opinion that the cause alleged in the petition as a ground for changing the venue exist, the venue shall be changed; but if the court or judge shall be of opinion that such cause does not exist, the application shall be denied, and in that case the petitioner may except to the ruling of the court, and assign error therein in the supreme court; and such petition may be supported by the affidavit of persons who are not parties to the cause, if the petitioner shall desire to file such affidavits, and there shall be but one change of venue in any action. [Sec. 2, pp. 53-4, acts 1881; subs. for sec. 28, p. 10, orig. act.]

CHAPTER III.

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[Actions, how commenced—Summons—Appearance.]

SEC. 33. (29.) Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons therein; *Provided*, that after the filing of the complaint a defendant in the action may enter his appearance therein, personally or by attorney, which appearance shall be equivalent to personal service of the summons upon him.

For bringing suits on mechanics' liens, see ch. 65, liens, General Statutes.

[Summons within month—Summons, how signed, sealed, directed.]

SEC. 34. (30.) The clerk shall endorse on the complaint the day, month and year the same is filed; and at any time within one month after the filing of the same, the plaintiff may have a summons issued. The summons shall be signed by the clerk and directed to the defendant, and be issued under the seal of the court.

Clerk keep register of actions, etc., sec. 407, ch. 38, post.

[Summons—Contents—Clerk endorse attorney's name.]

SEC. 35. (31.) The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the

complaint, briefly stating the sum of money or other relief demanded in the complaint; and the clerk shall also endorse on the summons the names of the plaintiff's attorneys.

Summons in condemnation proceeding, sec. 240, ch. 21, post.

[Time allowed for answering—Ten, twenty, forty days.]

SEC. 36. (32.) The time in which the summons shall require the defendant to answer the complaint shall be as follows: 1st, If the defendant is served within the county in which the action is brought, ten days. 2d, If the defendant is served out of the county but in the district in which the action is brought, twenty days. 3d, For all other cases, forty days.

See ss. 20-21, ch. 41, General Statutes, as to service in forcible entry and detainer.

[Notice inserted in summons—Contents.]

SEC. 37. (33.) There shall also be inserted in the summons a notice in substance as follows:

First—In an action arising on contract, for recovery of money or damages only, that the plaintiff will take judgment for a sum specified therein if the defendant fail to answer the complaint.

Second—In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein. [Sec. 3, p. 54, acts 1881; subs. for section 33, original act.

When defendant deemed to appear, etc., section 405, ch. 38, post.
When non-resident defendant has appeared how notice, etc., served, sec. 406, ch. 38, post.

[Notice of lis pendens—Contents, when, how filed—Effect.]

SEC. 38. (34.) In an action affecting the title to real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties to and the object of the action, and a description of the property in that county affected thereby, and the defendants may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing such notice only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

[Summons, by whom served—Return—Appointee.]

SEC. 39. (35.) The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought. When the summons is served by the sheriff or his deputy, it shall be returned with the certificate of the officer of its service to the office of the clerk from which the summons issued. When the summons is served by any other person, as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of such person of its service.

See sec. 49, post.

[Summons, how served—Several defendants—Corporations—Foreign—Insane.]

SEC. 40. (37.) A summons shall be served, except as otherwise provided by law, as follows: By delivering a copy thereof to the defendant, or by leaving a copy of the writ at the usual place of abode of the defendant, with

some member of his family, over the age of fifteen years; when there are several defendants, residents of the same county, by delivering to each defendant a copy of the writ, and to such as may be subsequently summoned a copy of the writ, or by leaving such copy at the usual place of abode of the defendant with some member of his family over the age of fifteen years. If the suit be brought against a corporation, service shall be made by delivering a copy of the summons to the president, or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof; but if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation. If the suit be against a foreign corporation, or a non-resident joint stock company or association, doing business within this State, service shall be made by delivering a copy of the writ to an agent, cashier or secretary thereof; in the absence of such agent, cashier, treasurer or secretary, to any stockholder. If the suit be against a minor under the age of fourteen years, service shall be made by delivering a copy of the writ to such minor, personally, and also to his or her father, mother or guardian, or if there be none in the State, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed. If the suit be against a person judicially declared to be of unsound mind, or incapable of conducting his or her own affairs, and for whom a guardian has been appointed, service shall be had by delivering a copy of the writ to such guardian.

[Summons to different counties.]

SEC. 41. (38.) When there are several defendants residing in different counties, a separate summons may be issued to each county, including all the defendants residing therein.

[Acknowledgment of service.]

SEC. 42. (39.) A written acknowledgment of service of summons upon him by a defendant shall be deemed valid and sufficient service.

[Offer of copy and refusal—Sufficient.]

SEC. 43. (40.) In all cases when the defendant shall refuse to receive a copy of the summons upon the offer of the officer or other person to deliver a copy thereof, such offer and refusal shall be sufficient service of such summons.

[Order for publication—In what cases.]

SEC. 44. (41.) When the person on whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit filed in the office of the clerk of the court in which the action is pending, and it shall in like manner appear that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a necessary or proper party to the action, the clerk of such court may grant an order that the service be made by publication of the summons.

Publication in condemnation proceedings, see sec. 240, ch. 21, eminent domain, post.

[Order—Contents—Publication—Clerk send by mail—Personal service out of State.]

SEC. 45. (42.) The order shall direct the publication to be made in a public newspaper, published in this State, to be designated as most likely to

give notice to the person to be served; and such publication shall be made at least once a week for four successive weeks. In case of publication, where the residence of a non-resident or absent defendant is known, the clerk thereof shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons out of the State shall be equivalent to publication and deposit in the post-office. In case of such personal service, the service of summons shall be deemed complete at the expiration of forty days thereafter; and in case of publication, the service of summons shall be deemed complete at the expiration of ten days after the expiration of the time prescribed for publication.

[Several defendants, part not served—Proceedings.]

SEC. 46. (43.) 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: First—If the action be against defendants jointly indebted upon a contract, he may proceed against the defendants 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. Second—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.

[Proof of service—Of publication.]

SEC. 47. (44.) Proof of the service of the summons shall be as follows: First—If served by the sheriff or his deputy, the certificate of such sheriff or deputy. Second—If by any other person, his affidavit thereof. Third—In case of publication, the affidavit of the editor, publisher, or his foreman, or his principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited. Fourth—The written admission of defendant.

See sec. 39, ante.

[Time, place and manner must be stated.]

SEC. 48. (45.) In case of service otherwise than by publication, the certificate or affidavit shall state the time, place and manner of the service.

[Jurisdiction, when takes effect—Appearance—Unknown parties, publication—Effect.]

SEC. 49. (46.) From the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him. If any plaintiff shall allege that there are, or that he verily believes that there are, persons interested in the subject matter of the complaint, whose names he cannot insert therein because they are unknown to him, and shall describe the interest of such persons and how derived, so far as his knowledge extends, the court, or the judge thereof in vacation, shall make an order, as in case of non-residents, for publication of the summons, reciting, moreover, the substance of the allegations of the complaint in relation to the interest of such unknown parties, and after the completion of service by such publication, the

court shall have jurisdiction of such person, and any judgment or decree rendered in the action. The action shall apply to and conclude such persons with respect to such interest in the subject matter of the action.

[Clerk make copies—Allow parties and attorneys to copy.]

SEC. 50. (36.) It shall be the duty of the clerk issuing the summons, at the request of either party therefor, to make out a copy or copies of any paper or pleading filed in the action, and to allow parties or their attorneys to make such copies themselves.

CHAPTER IV.

THE PLEADINGS IN CIVIL ACTIONS.

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" 76. What is a material allegation.
" 77. Amendments of course and effect of demurrers—waiver—terms of replying—supl. pleadings—entry.
" 78. Conditions of amendments—corrections of mistakes—surprise—extend time to plead—relief from judgment in certain cases.
" 79. Fictitious name when true name unknown.
" 80. Pleadings—construed liberally.
" 81. Substantial rights—imm. defects.

[Pleadings, what constitute.]

SEC. 51. (47.) The pleading in an action are the formal allegations by the parties of their respective claims and defenses for the judgment of the court.

The Pleadings in Civil Actions.]

[Shall conform to this act.]

SEC. 52. (48.) The mode of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be as prescribed in this act and not otherwise.

[What pleadings allowed—Plaintiff—Defendant.]

SEC. 53. (49.) The only pleadings on the part of the plaintiff shall be the complaint, demurrer, or replication to the defendant's answer; and the only pleadings on the part of the defendant shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint. The pleadings shall be filed with the clerk.

[Complaint—Title—Names—Facts—Prayer.]

SEC. 54. (50.) The complaint shall contain: 1st, The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant. 2d, A statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. 3d, A demand for the relief which plaintiff claims, and if the recovery of money or damages be demanded the amount thereof shall be stated.

[Defendant—Causes of demurrer.]

SEC. 55 (51.) The defendant may demur to the complaint within the time required in summons to answer, when it appears upon the face thereof; either, 1st, That the court has no jurisdiction of the person of the defendant or the subject of the action; or, 2d, That the plaintiff has no legal capacity to sue; or, 3d, That there is another action pending between the same parties for the same cause; or, 4th, That there is a defect or misjoinder of parties, plaintiff or defendant; or, 5th, That several causes of action have been improperly united; or, 6th, That the complaint does not state facts sufficient to constitute a cause of action; or, 7th, That the complaint is ambiguous, unintelligible or uncertain.

[Demurrer must show cause.]

SEC. 56 (52.) The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken; unless it do so, it may be disregarded.

[Demurrer—Causes—Answer to part—Fine—Not both to same matter—Frivolous.]

SEC. 57. (1.) The defendant may demur to the whole complaint or to one or more of several causes of action stated therein, and answer the residue, or may demur and answer at the same time: *Provided*, that a demurrer and answer shall in no case be filed at the same time to the same cause of action; but demurrers must be disposed of before any other pleading to the same cause of action shall be filed. Upon the determination of any demurrer or motion to strike out the whole or any part of any pleading of fact in any cause originally brought in any district court, the unsuccessful party should be adjudged to pay not less than five dollars, nor more than ten dollars, into court for the use of the successful party, and the same shall be actually paid before such unsuccessful party shall be permitted to proceed any further in the prosecution or defense of said case, and neither party nor the court shall have power to waive or remit such payment unless such unsuccessful party

shall have been or shall be, upon sufficient showing, permitted to prosecute or defend as a poor person. Every such sum paid into court, if not claimed by the party or parties entitled thereto, or their attorney, within thirty days after such payment, shall be deemed a fine to the county, and shall be so reported and paid over by the clerk, as in the case of other fines and penalties.

[Complaint—Amendments—Default in answering.]

SEC. 58. (54.) If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases.

[Objections by answer, when.]

SEC. 59. (55.) When any of the matters enumerated in section fifty-one [55] do not appear upon the face of the complaint, the objection may be taken by answer.

Sec. 51, above referred to, is sec. 55 (51) of this chapter.

[Waiver of objections—Jurisdiction—Want of facts.]

SEC. 60. (56.) 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, which objections may be raised at any time.

[Answer, contents—Denial, avoidance—Counter claim—Want of knowledge.]

SEC. 61. (57.) The answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant and may contain a statement of any matter in avoidance or a counter claim constituting a defense, or the subject matter of cross complaint which may entitle the defendant to relief against the plaintiff alone or against a defendant or co-defendants. In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a belief.

[Counter claim—What constitutes.]

SEC. 62. (58.) The counter claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First—A cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action. Second—In an action arising upon contract, any other cause of action arising also upon contract and existing at the commencement of the action.

[Cross-demands, when compensated.]

SEC. 63. (59.) When cross demands have existed between persons under such circumstances that if one had brought an action against the other, a

counter claim could have been set up, neither shall be deprived of the benefit thereof by the assignment or death of the other; but the two demands shall be deemed compensated so far as they equal each other.

[Defenses, legal, equitable—Separately stated.]

SEC. 64. (60.) The defendant may set forth by answer or cross-complaint as many defenses and counter claims or set-offs, as he may have, whether the subject matter of such defenses be such as was heretofore denominated legal or equitable, or both—they shall each be separately stated; and the several defenses shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished.

[Replication, demurrer to answer—Causes—Time—Striking out.]

SEC. 65. (61.) When the answer contains new matter, constituting a defense, or a counter-claim, or cross-complaint, or set-off, the plaintiff shall, within ten days (said days to be computed from the time of the filing of such answer), reply or demur to the same for insufficiency, stating in his demurrer the grounds thereof; and he may also, within the same time, demur to one or more defenses set up in the answer; sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, immaterial or insufficient, may be stricken out on motion, and upon such terms as the court, in its discretion, may impose. [Sec 1, p. 215, acts 1879—Substitute for sec. 61, p. 20, original act—As amended, sec. 1, pp. 57-8, Acts 1881.

[Verification—By whom—Corporation—When by attorney—What must show.]

SEC. 66. (2.) Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the State, or any officer of the State, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or unless an officer of the State, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except, as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true; and when a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties.

When a corporation is a party, the verification may be made by any officer, stockholder, agent, superintendent, or attorney thereof, and shall state that the facts stated in the pleadings are true, to the best knowledge and belief of such affiant. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified. [Sec. 2, pp. 215-16, acts 1879—As amended, sec. 1, pp. 57-8, acts 1881—Subs. for sec. 63, p. 21, original act.

[Items of account need not be stated, but notice in five days to adverse party.]

SEC. 67. (64.) 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 five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account when the one delivered is too general, or is defective in any particular.

[Real property—Description.]

SEC. 68. (65.) In an action for the recovery of real property, such property shall be described by legal sub-divisions, or by its metes and bounds in the complaint.

[Pleading on judgment—Jurisdiction need not be stated.]

SEC. 69. (66.) In pleading a judgment or other determination of a court or officer of especial 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.

[Pleading on contract—Performance how stated.]

SEC. 70. (67.) 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 establish on the trial the facts showing such performance.

[Pleading private statute.]

SEC. 71. (68.) 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 approval, and the court shall thereupon take judicial notice thereof.

[Pleading—Libel or slander.]

SEC. 72. (69.) 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 establish on the trial that it was so published or spoken.

[Libel—Defense—Truth alleged.]

SEC. 73. (70.) 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.

JOINDER OF CAUSES OF ACTION.

[Several causes in same action, when allowed.]

SEC. 74. (71.) The plaintiff may write [unite] several causes of action in the same complaint when they all arise out of any one of the following named

classes: *Provided*, they affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity: *And provided*, they do not require different places of trial, to-wit:

[Specific real property, rents, damages, profits.]

CLASS FIRST—Actions to recover specific real property, whether the same be claimed by virtue of superiority of title or by superiority of possessory right, or on account of unlawful detainer or forcible entry; and with such claims may be united any and all claims for damages, for rents in arrear, for profits during any unlawful occupation thereof, and for any waste committed thereon; *Provided*, that all such claims arise from the same property for the recovery of which the suit is brought.

[Specific personalty—Detention, conversion.]

SECOND CLASS—Actions to recover specific personal property, with which may be joined any and all claims for damages for the unlawful detention of the same, or for the forcible taking of the same, including in proper cases claims for exemplary damages, and in case the property cannot be recovered in specie, damage for the unlawful conversion thereof.

[Damages, contract, injuries—Separate statements—Equitable relief.]

CLASS THIRD—All actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for injuries to property, person or character, or for any two or more of these causes, and in all cases it shall be necessary to state separately in the complaint the different causes for which the action is brought, and in all cases equitable relief may be granted.

[See as to class first, seventh paragraph sec 265, ch 23, post.
Sec. 253, ch. 22, post.

[Allegations not denied admitted—Replication deemed denied.]

SEC. 75. (72.) Every material allegation of the complaint or answer, not controverted by the answer or replication thereto, shall, for the purposes of the action, be taken as true. The statement in the replication of matter in avoidance shall, on the trial, be deemed controverted by the adverse party.

[Material averments, test.]

SEC. 76. (73.) A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

[Demurrer—Copy—Vacation—Waiver—Terms of replying—Suppl. pleadings—Amendments—Entry.]

SEC. 77. (74.) After the demurrer and before the trial of the issue of law therein, the pleadings demurred to may be amended as of course, and without costs, by filing the same as amended, and serving a copy thereof on the adverse party, or his attorney, within ten days, who shall have ten days thereafter in which to demur or answer thereto, if in vacation; but if during the term of court, the court shall fix the time by order to expedite the trial, but the party shall not so amend more than once. A demurrer shall be deemed waived by the filing of an answer to the same cause of action at the same time of filing the demurrer, and when the demurrer to a complaint is overruled, and there is no answer filed, the court may, upon terms, allow the

answer to be filed. If the demurrer to the answer be overruled, and there be no replication then filed, the court may, upon terms, allow a replication to be filed. When a demurrer to a replication is overruled, new matter in the replication shall be taken as denied. Where facts occurring subsequent to the commencement render it proper, the same may, by leave of court, be presented by supplemental pleadings, and issue taken thereon in the same manner as in the case of original pleadings.

If a demurrer, heard in vacation, shall be sustained at the hearing, the opposite party may amend in such time and upon such terms as the judge by order shall prescribe, and the amended pleading shall be answered or demurred to within ten days after such amendment. If the demurrer shall be overruled, the party demurring shall file further pleadings within five days after the demurrer shall be overruled, unless further time be granted. At the hearing either party may argue the demurrer orally, or submit it on written argument. The judge shall immediately transmit the order made at the hearing to the clerk, who shall at once enter the same in the records of the court If any pleading shall not be filed within the time as prescribed and provided for in this section respectively, default shall be entered against the defaulting party as in other cases. [Sec. 3, pp. 216-17, acts 1879—Subs. for sec. 74, pp. 23-4, orig. act.

[Amendments—Surprise—Relief against judgment.]

SEC. 78. (75.) The court may, on motion, in furtherance of justice, and on such terms as may be proper, amend any pleading 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 respects [respect], and may upon like terms enlarge the time for an answer, replication upon demurrer, or demurrer to an answer filed. The court may likewise, upon affidavit, showing good cause therefore [therefor], after notice to the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in any other particulars [particular]; and may, upon like terms, allow an answer to be made after the time limited by this act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment order or other proceeding, taken against him through mistake, inadvertence, surprise or excusable neglect: and when for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court or judge at chambers, in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

[Unknown defendants.]

SEC. 79. (76.) When the plaintiff is 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 is discovered the pleadings or proceedings may be amended accordingly.

[Pleadings—Liberal construction.]

SEC. 80. (77.) In the construction of a pleading for the purpose of determining its effects [effect] its allegations shall be liberally construed with a view to substantial justice between the parties.

[Substantial rights—Immaterial defects—Surprise.]

SEC. 81. (78.) The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. If upon the trial of an action before the court or jury, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed, on motion, and showing cause therefor, and on such terms as the court may prescribe, to amend his pleading to conform to the proof.

Decisions—affidavit, 1-33, Und. vs. Sloan.

CHAPTER V.

OF PROVISIONAL AND AUXILIARY REMEDIES IN CIVIL ACTIONS.

CLAIM AND DELIVERY OF PERSONAL PROPERTY

SECTION 82. Delivery of personal property—when it may be claimed.
" 83. Affidavit and its requisites.
" 84. Security and justification—requisition to sheriff—service.
" 85. Exception to sureties and proceedings thereon, or on failure to except—liability of clerk.
" 86. Defendant—when entitled to re-delivery.
" 87. Justification of defendant's sureties.
" 88. Responsibility of sheriff.
" 89. Qualification and justification of sureties.
" 90. Property—how taken when concealed in building or enclosure.
" 91. Property—how kept.
" 92. Claim of property by third person.
" 93. Notice and affidavit—when and where to be filed—20 days.

[Plaintiff may replevy personalty at any time before judgment.]

SEC. 82. (79.) The plaintiff, in an action to recover possession of personal property, may, at the time of issuing the summons, or at any time before judgment, claim the delivery of such property to him as provided in this chapter.

[Replevy—Causes—Affidavit—Contents.]

SEC. 83. (80.) Where a delivery is claimed, an affidavit shall be made by the plaintiff, or some one in his behalf, showing: First—That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof. Second—That the property is wrongfully detained by the defendant. Third—The alleged cause of the detention thereof, according to his best knowledge, information and belief. Fourth—That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by the statute exempt from such seizure; and, Fifth—The real value of the property, which affidavit shall be filed with the clerk of the court.

[Replevy—Undertaking—Writ—Service of copy.]

SEC. 84. (4.) The plaintiff, or his agent, shall file with the clerk of the court a written undertaking, executed by two or more sufficient sureties, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action without delay, and with effect, and 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 from any cause be recovered against the plaintiff. The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody until delivered as hereinafter provided. The sheriff shall also, without delay, serve on the defendant a copy of

the writ, by delivering 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 abode of the defendant with some person of suitable age and discretion; or, if he has no place of abode, by putting said copy in the nearest post-office, directed to the defendant. [Sec. 4, p. 217, acts 1879—Subs. for sec. 81, p. 28, orig. act.

As to sureties justifying and justifying in part, see s. 444, ch. 40.

Exceptions to sureties—Justification—Liability of clerk—When defendant cannot reclaim property.]

SEC. 85. (5.) The defendant may, within two days after the service of a copy of a writ, give notice to the clerk that he excepts to the sufficiency of the sureties on plaintiff's undertaking. If he fails to do so within two days after such service, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify, on notice before the clerk of the court, within two days after such notice, and if they fail to justify in said time the property shall be returned by the sheriff to the defendant. The clerk shall be responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify.

If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section. [Sec. 5, p. 218, acts 1879—Subs for sec. 82, orig. act.

When defendant demand return—Bond.]

SEC. 86. (6.) At any time within forty-eight hours from the time of the taking of the property and the service of the writ, the defendant may, if he do not except to the sureties of the plaintiff, require the return of the property, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound to the plaintiff 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 in such time, it shall be delivered to the plaintiff, except as provided in this chapter. [Sec. 6, p. 218, acts 1879—Subs. for sec. 83, orig. act

Sureties must justify, s. 444, ch. 40, post.

Defendant's sureties justify—Sheriff deliver.]

SEC. 87. (7.) The defendant's sureties, upon notice to the plaintiff, and within twenty-four hours, shall justify before the clerk of the court in the same manner as is in this chapter provided for the plaintiff's sureties to justify, and upon such justification the sheriff shall deliver the property to the defendant. [Sec. 7, pp. 218-19, acts 1879—subs. for sec 84, orig. act.

[Responsibility of sheriff.]

SEC. 88. (85.) The sheriff shall be responsible for the defendant's sureties until they justify, or until the 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.

See s. 444, ch. 40, this code.

[Qualifications of sureties—New bonds.]

SEC. 89. (86.) The qualification of sureties and their justification shall be such as are prescribed by this act in respect to sureties on attachment bonds or undertakings.

"The court shall allow, upon such terms and within such time as may be just, the giving of amended or additional undertakings in place of defective or insufficient ones given under the provisions of this chapter." [Sec. 86, as amended, sec 4, p. 54, acts 1881.

[Sheriff may break buildings, when.]

SEC. 90. (87.) If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or enclosure 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.

[Duty of sheriff in holding goods.]

SEC. 91. (88.) When the sheriff shall have taken property, as in this chapter 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.

[Claim by third person—Indemnity to sheriff—His duties.]

SEC. 92. (89.) If the property taken be claimed by any other person than the defendant, or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, 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, indemnify the sheriff against such claim by an undertaking with 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, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the State: and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made.

[Sheriff file papers in twenty days.]

SEC. 93 &c., The sheriff shall file the notice and all undertakings and affidavits 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.

CHAPTER VI.

ATTACHMENTS.

SECTION 94. Attachment—when issued.
" 95. Affidavit required—causes.
" 96. Undertaking required—amount—conditions—sureties justify.
" 97. Attachment upon debt not due.
" 98. Attachment—how traversed—trial—effect.
" 99. Writ of attachment—to whom directed—contents—several writs.
" 100. Shares of stock and debts may be attached.
" 101. Writ—how executed—defendant give bond.
" 102. Recorder file copy of writ to be subject to inspection.
" 103. Intervention, verification and trial.
" 104. Garnishment—notice—when served—corporation.
" 105. When garnishee liable to plaintiff—how.
" 106. Garnishee and defendant may be examined—order.
" 107. Inventory of attached property—sheriff return.
" 108. Perishable property—sale—sheriff collect debts.
" 109. If plaintiff obtain judgment—how satisfied.
" 110. If balance due—how collected.
" 111. When suit may be commenced on undertaking.
" 112. If defendant recovers judgment.
" 113. Attached property—how released.
" 114. Undertaking required—appraisal—liability of sheriff.
" 115. Defendant may move to discharge attachment.
" 116. How discharged.
" 117. How writ returned.
" 118. Pro rata distribution of proceeds—pursuing creditor.
" 119. Additional undertaking may be required—notice.
" 120. When writ executed on the Sabbath day.
" 121. Insufficiency of affidavit and bond—how cured.

[Attachment at any time before judgment—Defendant replevy.]

SEC. 94. (91.) The plaintiff, at the time of issuing the summons in an action on contract, express or implied, or at any time afterwards before judgment, may have the property of the defendant not exempt from execution attached as security for any judgment that may be recovered in such action, in the manner prescribed in this chapter, unless the defendant shall give good and sufficient security to secure the payment of such judgment.

[Affidavit—Causes.]

SEC. 95. (1.) No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of a district court, or in the office of the clerk of a county court in the State, or with the judge of said county court where no clerk is provided, in cases where said courts have jurisdiction given to them by law, an affida-

vit setting forth that any person is indebted to such creditor, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment, viz:

[Non-residence.]

First—That the defendant is not a resident of this State.

[Foreign corporations.]

Second—That the defendant is a foreign corporation.

[Office out of State.]

Third—That the defendant is a corporation whose chief office or place of business is out of the State.

[Defendant conceals himself—Absence.]

Fourth—That the defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him, or that the defendant has for more than four months been absent from the State, or that for such length of time his whereabouts have been unknown, and that the indebtedness mentioned in the affidavit has been due during all the said period.

[Removal of goods.]

Fifth—That the defendant is about to remove his property, or effects, or a material part thereof, out of this State, with intent to defraud, or hinder or delay his creditor [creditors], or some one or more of them.

[Transferring property.]

Sixth—That the defendant has fraudulently conveyed, or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them.

[Concealment, removal, disposal of goods.]

Seventh—That the defendant has fraudulently concealed or removed or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them.

[About to convey, or assign.]

Eighth—That the defendant is about to fraudulently convey or transfer, or assign his property or effects, so as to hinder or delay his creditors, or some one or more of them.

[About to conceal or dispose of—About to depart.]

Ninth—That the defendant is about to fraudulently conceal or remove or dispose of his property or effects, so as to hinder or delay his creditors; or that such debtor has departed or is about to depart from this State, with the intention of having his effects removed from this State.

[Failure to pay on delivery.]

Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof.

Attachments.]

[Failure to pay on performance of labor.]

Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff, at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered.

[Debt contracted in fraud—False pretenses.]

Twelfth—That the defendant fraudulently contracted the debt, or fraudulently incurred the liability respecting which the suit is brought, or by false representations or false pretenses, or by any fraudulent conduct, procured money or property of the plaintiff.

[Clerk issue writ—Contents.]

Thirteenth—In every case where an affidavit shall be made and filed as aforesaid, it shall be lawful for such clerk to issue a writ of attachment, directed to the sheriff of the county, or to any other county as hereinafter provided, returnable like other writs or process in this act, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs of suit, in whose hands or possession the same may be found.

[Overdue notes, accounts for money.]

Fourteenth—In all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section. [Sec. 92, pp. 32-3, original act —As amended, sec. 1, pp. 36-8, acts 1881.

This sec. is referred to in s. 97 as "the preceding section."

[Clerk require bond—Approval—Conditions—Sureties.]

SEC. 96. (8.) Before issuing the writ of attachment the clerk shall require a written undertaking on the part of the plaintiff, with sufficient sureties, to be approved by the clerk, in a sum not less than double the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the wrongful suing out of the attachment, not exceeding the sum specified in the undertaking. Said sureties may be required by the defendant to satisfy the clerk of the court that each for himself is worth the amount for which he is willing to become security in the undertaking over and above his just debts and liabilities in property not by law exempt from execution in this State. [Sec. 8, p. 219, acts 1879—Subs. for sec. 93, pp. 33-4, orig. act.

As to duty of officer and justification of sureties, see s. 444, ch. 40, this code.
See s. 440 as to Sundays and holidays.

Debts not due—Rebatement of interest.]

SEC. 97. (94.) Actions may be commenced and writs of attachment issued as prescribed in this chapter, upon debts or liabilities not yet due, if the affidavit states any of the cases [causes] mentioned in the preceding sections except the first (1), second (2), and third (3) subdivisions of said sec-

tion; *Provided*, that any judgment, obtained under the provisions of this section, shall be with a rebatement of the interest from the time such judgment is rendered until the time at which said debt or liability would have become due.

The "preceding section" mentioned in above section is sec. 95 of this chapter, with its several paragraphs.

[Traverse of affidavit—Issue—Trial—Effect.]

SEC. 98. (9.) The defendant against whom a writ of attachment has issued, or his agent or attorney, may at any time within ten days from the service of the writ of attachment, by an affidavit, traverse and put in issue the matters alleged in the affidavit upon which the attachment is based, and if the plaintiff shall substantiate either one of the causes alleged in his affidavit, the said attachment shall be sustained, otherwise the same shall be dissolved; and if the debt for which the action is brought is not due, such action shall be dismissed. The trial of the issue formed by the affidavits shall be by jury, unless a jury is waived by the parties. But if the debt is due, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued. [Sec. 9, pp. 219-20, acts 1879—Subs. for sec. 95, pp. 34-5, orig. act.

Such traverse is plea in abatement, etc., 1 Col. Rep., 91

Writ—Contents—Several writs.]

SEC. 99. (96.) The writ shall be directed to the sheriff of any county in which the property of such defendant may be, and require him to serve a copy of the writ on the defendant, and 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 shall be stated in conformity with the affidavit, and alias writs may issue at any time, unless the defendant deposit the amount or give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand besides costs, or in amount equal to the value of the property which has been, or is about to be attached, in which case the sheriff shall take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.

[What property subject—Rights—Shares—Stock.]

SEC. 100. (97.) The rights or shares which the defendant may have in the stock of any corporation or company, together with the interests and profits thereon, and all debts due such defendant, and all other property in this State of such defendant, not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

[Sheriff execute unless defendant give bond.]

SEC. 101. (10.) The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in this chapter be not given by the defendant, then as follows:

[Real property, how attached—Sheriff file copy.]

First—Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

Attachments.

[Property held in name of other person.]

Second—Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing upon the records of the county in the name of any other person (but belonging to the defendant) shall be attached by leaving with such person or his agent a copy of the writ and a notice that such real property (giving a description thereof) and any interest therein belonging to the defendant, are attached, pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

[Personal property.]

Third—Personal property capable of manual delivery shall be attached by taking it into custody.

[Debts and credits, notice—To whom—Contents.]

Fourth—Debts and credits and other personal property not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession or under his control, such credits, and other personal property, or with his agent, a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached, in pursuance of the writ of attachment issued in said cause. [Sec. 10, p. 220, acts 1879—Subs. for sec. 98, pp. 35-6, orig. act.

Recorder file copy—Keep open for inspection—Fees.]

SEC. 102. (100.) It shall be the duty of the county recorder to file and safely keep such copy of the writ and description of the property subject to the inspection of all persons, and record the same in a book to be kept for that purpose, and to index the same in the records; and such recorder shall receive a fee of twenty-five cents for such filing and safe-keeping of said lists, and the further fee for recording as is prescribed by law, to be paid by the plaintiff in the action, and taxed and allowed to him as other costs and disbursements in the action.

[Intervention—Verification—Trial.]

SEC. 103. (2.) In all cases of attachment, any person other than the defendant, claiming any of the property attached, on any lien thereon, or interest therein, may intervene without giving bail, but the property attached shall not thereby be replevined or released. Such intervention shall be by verified petition, stating the right or interest which the intervenor claims in or to such property, and the same may be filed in said cause at any time before the trial of the cause upon its merits, and as soon as notice of the intervention shall be given to the interested parties to the action, or their attorneys, with reasonable opportunity to them to defend against the same, the same shall be tried as follows: If the intervenor claim the absolute title or ownership to the property, either party shall be entitled to trial by jury, but if the claim be by mortgage or some interest less than full title or ownership, the trial [shall] be by the court unless the court shall direct an issue to a jury. In case the verdict or finding shall be for the intervenor, the damages which he has suffered by reason of the attachment of the property may be assessed in such verdict or findings, and the intervenor shall recover the same, together with his costs, of the plaintiff in the attachment, and the court shall render

such judgment in reference to the attached property as will secure the right of the intervenor thereto or therein according to such verdict or finding; and in case the verdict or finding shall be for the plaintiff, he shall recover costs against such intervenor; and the court may require the intervenor to give security for costs for like causes and in like manner as plaintiff may be required to give security for costs in civil actions. [Sec. 2, p. 113, acts 1883.

Garnishment—Sheriff when serve notice—On whom—Municipal corporations—Officers.]

SEC. 104. (11.) Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a notice that such credits or other property or debts, as the case may be, are attached in pursuance of the writ of attachment issued in said cause, and every municipal or other corporation, or *quasi* corporation, sheriff, or other public officer or trustee shall be liable to garnishment under the provisions of this chapter. [Sec. 11, pp. 220-1, acts 1879—Subs. for sec. 101, pp. 36-7, orig. act.

For garnishment in case of judgment at law, see ch. 46, Gen. Stat., garnishment.

Liability of garnishee.]

SEC. 105. (12.) All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of the notice, as provided in the last section, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property or debts until the attachment be discharged, or any judgment recovered by him in the action be satisfied. [Sec. 12, p. 221, acts 1879—Subs. for sec. 102, p. 37, orig. act

Defendant and garnishees summoned—Court order delivery—Liens, claims.]

SEC. 106. (103.) Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff upon such terms as may be just, having reference to any liens thereon, or claims against the same; and a memorandum to be given of all other personal property, containing the amount and description thereof.

[Sheriff make inventory—Return—Demand statement—Refusal—Costs.]

SEC. 107. (13.) The sheriff shall make a full inventory of the property attached and return the same upon the writ.

To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt, or having the credit, to give him a statement, which statement shall be sworn to by the party, his agent or attorney, stating the amount and description of each, and if such statement be refused, he shall return the fact of refusal with the writ.

Attachments.]

The party refusing to give the statement may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amount of such debt or credit, and may be ordered to furnish such statement under penalty of contempt. [Sec. 13, p. 221, acts 1879—Subs. for sec. 104, pp. 37-8, orig. act.

In cases of garnishment on judgment, see ch. 46, garnishment, Gen Stat.

[Perishable goods—Sale—Proceeds—Sheriff collect debts—Discharge.]

SEC. 108. (105.) If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt shall be a sufficient discharge for the amount paid.

But see sec. 445, ch. 40; court must order sale.

[Application of proceeds—Duty of sheriff.]

SEC. 109. (107.) If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose.

[Proceeds to plaintiff.]

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

[Balance due—Further sale—Notice.]

Second—If any balance remain due, and an execution shall have been issued on the judgment, he shall sell, under the execution, so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given and the sales conducted as in other cases of sales on execution.

[Balance due, sheriff collect—Surplus property and proceeds.]

SEC. 110. (108.) If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

[Suit on bond—Proceedings.]

SEC. 111. (109.) If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to the provisions of this chapter, and he may proceed as in other cases upon the return of an execution unsatisfied.

[Judgment for defendant—Goods and proceeds delivered back—Order discharged.]

SEC. 112. (110.) If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent, the order of attachment shall be discharged and the property released therefrom.

[Defendant may release goods, etc., by bond.]

SEC. 113. (111.) The defendant may at any time release any property in the hands of the sheriff, by virtue of any writ of attachment, by executing an undertaking as provided for in the next section; and all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in his hands, shall be released from the attachment, and delivered to the defendant upon the justification of the sureties in the undertaking.

[Defendant—Forthcoming bond—Conditions—Appraisal—Liability of sheriff.]

SEC. 114. (112.) Before releasing such attached property, as aforesaid, to the defendant, the sheriff shall require an undertaking executed by the defendant to the plaintiff, and at least two sureties, residents and freeholders, or householders in this State, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, re-deliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof, the defendant and sureties will pay to the plaintiff the full value of the property so released. The sheriff may fix the sum for which the undertaking shall be executed, and if necessary, in fixing such sum, to know the value of the property released, the same may be appraised by three disinterested persons, to be appointed by the sheriff; and if any sheriff shall release any property held by him, under or by virtue of any writ of attachment, without first taking such bond as herein required, or shall take an insufficient bond, he and his sureties shall be liable for the value of such property so released.

[See sec. 444, ch. 40, this code, as to liability, etc; justifying of sureties, etc.

Application to discharge attachment.]

SEC. 115 (113.) The defendant may also, at any time before the time for answering expires, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the attachment be discharged on the ground that the writ was improperly issued for any reasons appearing upon the face of the papers and proceedings in the action.

[Discharge.]

SEC. 116. (114.) If, on such application, it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

[Sheriff return writ, etc.—20 days—Certificate.

SEC. 117. (115.) The sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise within twenty days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto.

Attachments.]

[Several attachments to same term—Distribution—Pursuing creditor, priority.]

SEC. 118. (116.) In all cases where more than one attachment shall be issued against the same person or persons and returned to the same term of the court to which they are returnable, or when a judgment in a civil action shall also be rendered at the same term against the defendant, who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to, out of the property of the defendant attached, either in the hands of the garnishee or otherwise, after the sale and receipt of the proceeds thereof by the sheriff, calculating such amount in proportion to the amount of their several judgments, with costs, as the same will respectively bear to the amount of the sum received, so that each attaching and judgment creditor will receive his just part thereof in proportion to his demand; the clerk shall thereupon certify the several amounts thereof to the sheriff, who shall pay over to the respective parties the several sums so certified, and endorse such payments on their respective executions: *Provided*, That when the property sought to be attached, shall have been removed from the county in which the attachment issued, and shall be overtaken and returned to such county, the claim of such attaching creditor or creditors shall have priority over other attachments or judgment.

[New bond ordered—Notice—Failure, writ quashed.]

SEC. 119. (117.) If at any time pending a suit, where attachment has been issued in aid thereof, as provided in this chapter, it shall appear to the court or judge thereof in which the suit is pending, that the bond or undertaking given is insufficient, or that any security therein has died, or has removed from this State, or has become, or is likely to become, insolvent, said court, or the judge thereof in vacation, shall order another bond or undertaking, or such other and further security to be given as shall seem proper, ten (10) days' previous notice in writing having been given to the plaintiff, or any one of the plaintiffs, his or their agent or attorney, of the application for such order, and if the plaintiff or plaintiffs, his or their agent or attorney, or other person for him or them, shall fail to comply with such order within twenty (20) days after the same shall be made, all or any writs of attachment issued therein shall be quashed The additional undertaking herein required shall be the same, and executed in the same manner as the original, required in this chapter, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

[See sec. 444, ch. 40, post.

[Executing writ on Sunday—Affidavit.]

SEC. 120. (118.) If the plaintiff, his agent or attorney, shall make and file with the clerk, an affidavit in the action, stating that it is necessary to execute the writ of attachment on the Sabbath day to secure property sufficient to secure the judgment to be obtained, the clerk shall endorse on the writ an order to the officer directing the writ to be executed on the Sabbath day.

[Amendment of writ—New bond—Affidavit.]

SEC. 121. (120.) No writ of attachment shall be quashed, nor any garnishee discharged, nor any undertaking given by any person or persons

[Attachments.

under proceedings by attachment be rendered invalid, nor any rule entered against a sheriff discharged on account of any informality or insufficiency of the original affidavit, or of the original undertaking given for the attachment, if the plaintiff or plaintiffs, or some credible person, or his or their agent or attorney for him or them, shall file a sufficient affidavit in the cause, or if the plaintiff or plaintiffs, or some credible person, or his or their agent or attorney for him or them, shall make, with such security as is required by this act, an undertaking to be approved by the court in which said suit may be pending. And when a writ of attachment shall be held to be defective, the same shall be allowed by the court, to be amended in such time and manner as it may direct, and thenceforth the suit shall proceed as if such defective proceedings had been originally sufficient. And if on the trial of the issues formed by the traversing of the allegations in the affidavits for attachment it shall appear that the evidence introduced by the plaintiff does not prove the cause or causes of attachment alleged in the affidavit, but the evidence does tend to prove some other cause of attachment mentioned in this act, then the plaintiff may, on motion, showing good cause therefor, be allowed to amend his affidavit to correspond to the proof, the same as pleadings by this act are allowed to be amended in case of variancies.

CHAPTER VII.

OF INJUNCTIONS.

SECTION 122. What is—by what courts granted.
" 123. In what cases granted.
" 124. At what time may be granted—cause shown.
" 125. To stay suit or judgment—proceedings where had.
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" 134. Order how addressed—service—effect.
" 135. Dissolving—continuing in vacation.
" 136. Injunction bond—additional security.
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" 138. When defendant may have injunction.
" 139. Mining property—affirmative relief—causes—proceedings—proofs—time—restrictions.
" 140. Writ void without notice—when.
" 141. Bond—principal and surety sue together.
" 142. Repeal—saving clause.

[Mandatory writ—Power of court—When county judge may grant—Judge of other district—County judge.]

SEC. 122. (121.) An injunction is generally an order requiring a person to refrain from doing a particular act, but where simply refraining from doing a particular act will not effectuate the relief to which the plaintiff is entitled, the injunction may be made mandatory, and require such acts to be done as will give the plaintiff the full protection which he may be entitled to. The district court in term time, and any judge thereof in vacation, shall have power to grant and to dissolve writs of injunction, except as hereinafter limited. In case of a vacancy in the office of any district judge, or in case of his absence from his district, or in case such judge has an interest in the subject matter of litigation, or if from sickness, or any other cause, he is unable to discharge the duties of his office, then the district judge of any other district may grant and dissolve such writs, or upon the happening of either of the events above enumerated, or in case of the absence of the district judge from any county of his district, then the county judge of such county, in causes of action arising therein, may grant such writs, which writ shall issue out of the district court the same as though granted by the court or district judge, except that the county judge shall not have power to grant any such writ against the working of any mining claims.

[No county judge may issue writ to stay proceedings, except in matters in his own court and appeals thereto. 483, s. 3, ch. 22, county courts.

Nor order out of district court any mandatory writ or writ to stay proceedings in district court, 484, s. 4, ibid.

Causes for injunction.]

SEC. 123. (122.) An injunction may be granted in the following cases:

[When plaintiff entitled to relief.]

First—When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or some part thereof, consists in restraining the commission or continuance of the act complained of, during the pendency of the litigation, or for a limited period, or perpetually.

[Irreparable injury.]

Second—When it shall appear by the complaint or affidavit that the commission or continuance of some act would produce great or irreparable injury during the litigation.

[Threats of injury—To defeat judgment—Equity.]

Third—When it shall appear at any time in any character of an action during the litigation, by affidavit or otherwise, that the defendant is doing, or threatens, or is about to do, some act, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights respecting the subject matter of the action, and tending to render the judgment ineffectual, and in such other cases as courts of equity have heretofore granted relief by injunction, or which may be specially provided for in this act.

[Affirmative relief in mining cases, ss. 139-40, this chap.

When granted—Cause shown in complaint and affidavits—Verification—Of answers.]

SEC. 124. (123.) The injunction may be granted at or before the time of filing the complaint and issuing the summons, or at any time afterwards before judgment, upon affidavits. The complaint in the one case and the affidavits in the other shall show that satisfactory grounds exist therefor. The complaint shall be verified by the oath of the plaintiff, or some one in his behalf, as other complaints are required to be by this act. Also answers filed under this chapter shall be verified as other answers are required to be in this act.

[To stay proceedings at law—Venue—In justices' courts, limit $20.]

SEC. 125. (124.) When any injunction shall be granted to stay a suit or judgment at law, the proceedings shall be had in the county where the judgment was obtained or the suit is pending, or the writ or summons may be sent in the first instance into any other county in this State, where the defendant resides. No writ of injunction shall be granted to stay proceedings under a judgment obtained before a justice of the peace, for a sum not exceeding twenty dollars, exclusive of costs.

[Amount—Release of errors—Bond—Conditions—Damages.]

SEC. 126. (125.) No injunction shall be granted to stay judgment at law for a greater sum than the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs. Every injunction, when granted, shall operate as a release of all errors in the proceedings at law that are prayed to be enjoined. No injunction shall be issued in such cases, unless the complainant, or some person in his, her or their behalf, shall have previously executed an undertaking, with sufficient surety

to the defendant, approved by the court, district, or county judge, or the clerk, where the court, or judge granting such injunction so orders, and filed with the clerk, in double the sum directed to be enjoined, conditioned for the payment of all money and costs due, or to be due, to the plaintiff in the action of law, and also all such costs and damages as shall be awarded against the complainant in case the injunction shall be dissolved. If the injunction be dissolved, in whole or in part, the complainant shall pay, exclusive of legal interests and costs, such damages as the court shall award, not exceeding ten per centum on such part as may be released from the injunction; and the clerk shall issue execution for the same when he issues on such judgment.

[Matters in pais—Bond—Amount—Conditions.]

SEC. 127. (126) In case of granting a writ of injunction other than those to stay a suit or judgment at law, the court, district, or county judge granting the writ, shall make an order fixing the amount of the undertaking, which shall be in a reasonable sum; and no injunction shall be issued until the complainant or complainants, or some one for him, her or them, shall have previously executed such undertaking with sufficient surety, payable to the defendant or defendants, approved by the court or judge granting the writ, or the clerk of the court out of which the writ is to issue when the order so directs, and filed with the clerk; which undertaking shall be conditioned to pay all such cost and damages as shall be awarded against the complainant or complainants, in case the injunction shall be modified or dissolved, in whole or in part.

[Application for writ, notice—Cases of urgency—Ex parte order—Mining cases—Temporary—Bond.]

SEC. 128. (127.) Whenever application shall be made for a writ of injunction, the party intending to make such application, except as hereinafter provided, shall give notice to the opposite party of the time and place of making such application prior to making the same: *Provided*, that if such application shall be made to the court in term time, in a cause pending in such court, in which the defendant or defendants shall have been served with process ten days prior to the term at which such application shall be made, or if the complainant shall file an affidavit showing that irreparable mischief or injury will result to him, if notice be given, or that the case is too urgent to admit of the delay incident to giving notice, or where it appears from the bill of complaint that the defendant or defendants may commit the acts concerning which injunctive relief is sought, before the motion can be heard, no such notice shall be required, but the court or judge shall proceed to hear the application *ex parte*; *And provided further*, that any writ of injunction issued against the working and mining of a lode or mining claim without notice to the opposite party shall be void. The notice to be given shall be in proportion to the urgency of the case If the party against whom the writ is to run desires further time to prepare his defense, the court, or judge, may grant such time as may seem proper, not exceeding in any case five days; and may in the meantime issue a temporary injunction until the determination of said application; and the court, or judge, may require complainant or complainants to give an undertaking during the existence of such temporary injunc-

tion, conditioned as in section one hundred and twenty-six [127] of this act. No motion to dissolve an injunction shall be heard in vacation when granted upon mining claims after answer filed.

[Section 126 mentioned in last above section, is sec. 127 of this chapter.

Breach of injunction—Attachment—Contempt—Jail.]

SEC. 129. (128.) If any person against whom a writ of injunction, or temporary injunction shall be issued shall, after the service thereof, be guilty of disobedience to and breach of the injunction, or temporary injunction, it shall be lawful for the judge granting the same, or for the judge of the district in which the writ or order issued, or if the same were granted in open court, then for any district judge in vacation, to issue an attachment against said person or persons for a contempt. Upon his or their being brought before the said judge, unless he or they shall disprove or purge the said contempt, the said judge may in his discretion commit him or them to jail until the sitting of the court in which the said injunction is pending, or take bail for his appearance at the said court at the next term thereof to answer for the said contempt, and to abide the order of the court thereon.

[Ex parte injunction, motion to dissolve—Notice.]

SEC. 130. (129.) In all cases in which injunction shall be issued *ex parte*, the defendants may, at any time after filing a demurrer or answer to the complaint, move the court, or judge thereof, upon five days' notice to the opposite party, to dissolve or modify the injunction.

[Answer before writ allowed—Oral testimony.]

SEC. 131. (130.) Upon the hearing of an application to grant an injunction on notice, where the defendant files his answer before the hearing, or on motion of the defendant to dissolve an injunction on filing an answer, either party may examine witnesses orally before the court or judge, and the application for an injunction, or the motion to dissolve an injunction, may be supported or opposed by affidavits, as prescribed in the next section.

[Notice of application—Of motion to dissolve—What evidence to be used—Oral testimony.]

SEC. 132. (131.) The party, in his notice of application for an injunction, or in his notice of motion to dissolve, shall state whether he proposes to rest his application on the complaint, answer or demurrer, or to introduce affidavits in support of his application, or to introduce oral testimony; and the hearing shall be confined to the character of testimony stated in such notice, except as herein mentioned; but if the party on whom notice is served desires to introduce different evidence from that proposed in such notice, he may serve notice on the opposite party, stating what evidence he proposes to introduce in opposing the application or motion, and that shall entitle him to introduce the character of testimony stated in his notice, and entitle the adverse party to oppose it with the same character of evidence. And if oral testimony is to be introduced, it shall be the duty of the court or judge before whom application for an injunction or a motion to dissolve, as prescribed in this section and the next, is made, to hear the testimony of witnesses and other competent evidence as speedily as practicable, and without unnecessary delay, to decide whether or not an injunction shall issue or be continued.

Of Injunctions.]

[Motion to dissolve ex parte writ—Testimony—Continuance—Cause—Affidavits—When no dissolution in vacation.]

SEC. 133. (132.) In all causes in which writs of injunction may be issued without notice, defendant or defendants may at any time after filing a demurrer or answer to the complaint, and whether in term time or in vacation, move the court, or if application shall be made in vacation, the judge thereof, to dissolve the injunction. If the defendant or defendants shall have filed an answer to the complaint, it shall be lawful for the parties respectively, upon the hearing of such motion, to introduce testimony in support of the complaint or answer, and the court or judge shall decide such motion upon the weight of testimony, without being bound to regard the answer as absolutely true. If, at or before the time designated for the hearing of such motion, either party, or some credible person for him, shall make and file in the court an affidavit showing that such party hath a witness or witnesses by whom he can disprove the complaint or answer (as the case may be), or some material part thereof, giving the name or names of such witness or witnesses, his or their place of abode, and the particular facts which the party will prove by him or them, and that such party has had no opportunity to procure the testimony of such witness since the coming in of the answer, the court or judge, if satisfied that the testimony of such witnesses will be material upon the hearing of such motion, shall grant a continuance of the hearing for such reasonable time as may be necessary to enable the party to procure the testimony of such witnesses. Affidavits filed with the complaint or answer, and the deposition of witnesses in writing, taken and certified as in other cases in chancery proceedings, may be heard, and shall be considered by the court or judge upon the hearing of such motion, and depositions taken for the purpose of being read at such hearing may be read on final hearing of the cause in which they have been taken: *Provided*, that in any cause where any injunction shall have been awarded after notice, as provided by section one hundred and twenty-seven [128] of this act, no motion for the dissolution of such injunction shall be heard or made in vacation.

[Sec. 127, mentioned in last above section, is sec. 128 of this chap.

To whom order addressed—Service—Effect.]

SEC. 134. (133.) The order of injunction shall be addressed to the party enjoined, and shall be issued by the clerk in accordance with the direction of the court or judge. The order of injunction may be served in the same manner, and by any person or officer authorized to serve a summons. And an order of injunction shall bind the party from the time of such service, or from the time he has actual notice that it is ordered by the judge or court.

[Dissolving, continuing in vacation.]

SEC. 135. In all cases in which an application to dissolve an injunction shall be made to the judge of any district court in vacation, as provided in this act, it shall be lawful for such judge to continue such injunction or to dissolve the same, in the same manner and with like effect as if application was made to the court in term time. [Sec. 1359 (8), p. 510, G. L.

Injunction bond—Additional security.]

SEC. 136. (134.) On granting an injunction, the court or judge shall require, except where the State or a county in the State or a municipal corporation is the party, a written undertaking on the part of the party in whose

favor an injunction is granted, with one or more sufficient sureties, to the effect that the plaintiff will pay to the party enjoined all damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decides that the party in whose favor the injunction was issued was not entitled thereto. A party enjoined may at any time before judgment, upon reasonable notice to the party who has obtained the injunction, move the court or judge for additional security. And if it appear that the surety has removed from the State, and the security is thereby impaired, or is otherwise insufficient, the court may vacate the injunction unless in a reasonable time sufficient surety is given.

[Order to issue writ on filing bond.]

SEC. 137. (135.) It shall not be necessary to the granting of an injunction that the complaint be first filed in the court out of which such writ is prayed; but the order of the judge, or any court to whom any complaint is presented praying such injunction, may direct the same to issue, upon the filing of the complaint with the undertaking required by sections 125 [126] and 127 [128] (as the case may be).

[Sections 125 and 127, referred to in last above section, are sections 126 and 128 of this chapter.

When defendant may have injunction.]

SEC. 138. (136.) The defendant may, at any time during the pendency of a suit against him, by setting forth in his answer subject matter in the nature of a cross complaint which shows that he is entitled to an injunction against the plaintiff, or by filing affidavits showing that he is entitled to such relief, apply for and obtain an injunction in the same manner as prescribed in this chapter for the plaintiff to obtain an injunction.

[Mining property, affirmative relief—Causes—Notices—Answer—Proceedings—Proofs—Time—Fraud—Appeal—Restrictions.]

SEC. 139. (137.) The said district court [courts] of the State, or any judge thereof, shall have, in addition to the power already possessed, power to issue writs of injunction, for affirmative relief, having the force and effect of a writ of restitution, restoring any person or persons to the possession of any mining property or premises from which he or they may have been ousted by fraud, force or violence or from which he or they are kept out of possession by threats, or by words, or actions, which have a natural tendency to excite fear or apprehension of danger, or whenever such possession was taken from him or them by entry of the adverse party on Sunday, or a legal holiday, or while the party in possession was temporarily absent therefrom; the granting of such writ to extend only to the right of possession under the facts of the case in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions as though no such writ had been issued; *Provided*, that no such writ shall issue except upon notice in writing to the adverse party of at least five days, of the time and place of making such application, if made in vacation, and if made in term time, not before defendant or defendants have been duly served with process, and required to appear and answer by virtue of such service. And if the defendant or defendants shall file an answer to the complaint upon which such application is founded, denying under oath the material averments in said complaint contained, the said court or judge thereof shall hear evidence in support in said complaint or answer or may cause the said application to be referred

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to a referee, to take such proofs in support of said complaint and answer and shall direct the said referee to report the proofs to the said court or judge within a reasonable time, allowing to the complainant and defendant a reasonable time in which to take proofs; and the time so allowed by said court or judge for the purpose of taking testimony shall be equally divided between said complainant and defendant; and it shall be the duty of the complainant or complainants to take his, her or their testimony first, and the defendant or defendants shall proceed to take his, her or their proof within the last half of said time so allowed, and the said court or judge shall adjourn the hearing of said application until some day within a reasonable time after the time of taking and completing said proofs, and at such time, upon the hearing of said referee's report, shall grant or refuse said writ, as the pleadings and evidence in said cause or proceedings may warrant or require; *And provided further*, that no such writ shall issue in favor of any person or persons, to restore to such person or persons possession of any mining property, if the said person or persons shall have obtained or procured possession of said property by violence, or by fraud, or by taking possession of the same while the adverse party in possession was temporarily absent therefrom; *And provided further*, that appeal, as in other cases, shall be allowed from any final order or decree granting an injunction under the provisions of this section; but such appeal shall not have the effect to suspend the operation of said writ after an order or decree is made by the court or judge granting the same, nor to continue one in force after an order or decree is made dissolving any injunction pending the appeal. When application is made for such an injunction for affirmative relief, as contemplated in this section, the court or judge shall immediately, on the filing of the complaint, issue a temporary injunction, as provided for in section 126 [127] of this act.

[Sec. 126, referred to in last above section, is section 127 of this chap.]

Writ void without notice.]

SEC. 140. (138.) No writ of injunction for affirmative relief, having the force and effect of a writ of restitution, shall be valid or have any force whatsoever, if issued without notice and without complying with the provisions and conditions of the preceding section.

[Bond—Principal and surety sued together.]

SEC. 141. (139.) That in suing on any undertaking provided for in this act, it shall not be necessary to bring suit in the first instance against the principal on such undertaking to ascertain the amount of damages sustained or awarded by the court, but the principal and surety may be sued together, and at the trial damages may be assessed and awarded against principal and surety in the action.

[Repeal—Saving clause.]

SEC. 142. (13.) That chapter 43 of the Revised Statutes, entitled "injunctions," be and the same is hereby repealed. Also, section 2 of an act concerning mines, approved February 13, 1874. Also, an act to amend an act entitled an act concerning mines, approved February 13, 1874, approved February 11, 1876, be and the same are hereby repealed, and all other acts repugnant to or inconsistent with the provisions of this act, be and the same are hereby repealed. But the repeal of said statutes shall in no wise abate or affect any writ issued under any of said statutes or any action or proceeding instituted

or pending under any of the provisions of the statutes so repealed, or deny, abridge, divest or impair any right accrued or arising while the same remained in force, or to divest or impair any remedy given thereby to enforce any order, judgment or decree of the court under any such statute so repealed, or to punish any person or persons for the violation of any such writ issued under or pending at the time of the repeal of said statutes, but as to all rights and titles accrued, and all acts done and completed while same remained [in] force, in all such acts and parts of acts heretofore repealed shall be construed to be and remain in force, notwithstanding such repeal. [Sec. 1364 (13), p. 513, G. L.

For repeals enacted in code of civ. proc. act, see end of this code.

CHAPTER VIII.

DEPOSIT IN COURT AND RECEIVER.

SECTION 143. Deposit in court.
" 144. Appointment of receiver.
" 145. How application made.
" 146. Bond required of receiver—oath.

[Party holding funds—Deposit in court.]

SECTION 143. (140.) When it is admitted by the pleadings or examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of 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, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

[Receiver—When appointed.]

SEC. 144. (141.) A receiver may be appointed by the court in which the action is pending, or by a judge thereof:

[Before judgment.]

First—Before judgment, provisionally, on application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired.

[After judgment.]

Second—After judgment, to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and

[Other cases.]

Third—In such other cases as are in accordance with the practice of courts of equity jurisdiction.

[Petition, contents—Verification—Answer.]

SEC. 145. (142.) The application for the appointment of a receiver shall be made by filing a petition at any time in the action in which a receiver is desired, setting forth the facts upon which the application is based, which petition shall be verified as complaints are required to be by this act. And the party opposing the appointment of a receiver shall do so by filing an answer to the petition, verified as answers to complaints are required to be by this act. And the court or judge may hear evidence to determine the issues made by such petition and answer, and decide the same like any issues formed by pleadings in a cause.

[Receiver—Oath, bond, conditions.]

SEC. 146. (143.) Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved

[Deposit in Court and Receiver.

by the court or judge, execute an undertaking to such person and in such sum as the court or judge shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

CHAPTER IX.

DISMISSALS AND NON-SUITS.

SECTION 147. Action may be dismissed or non-suit entered.
" 148. Judgment on the merits—when.

[When dismissed.]

SECTION 147. (148.) An action may be dismissed, or a judgment of non-suit entered, in the following cases:

[By plaintiff, when.]

First—By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional or ancillary remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon.

[By consent.]

Second—By either party, upon the written consent of the other.

[By the court, when.]

Third—By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

[By the court on trial, abandonment.]

Fourth—By the court when, upon trial, and before the final submission of the case, the plaintiff abandons it.

[By the court on motion—Entries.]

Fifth—By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury.

The dismissal mentioned in the first two sub-divisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

[Dismissal for want of cost bond, pp. 397-8, ss. 1-2, ch. 20, Gen. Stat., costs.

Judgment on merits.]

SEC. 148. (149.) In every case, other than those mentioned in the last section, the judgments shall be rendered upon the merits.

CHAPTER X.

JUDGMENTS ON FAILURE TO ANSWER.

SECTION 149. When money or damages only by clerk.
" 149. In other actions default—judgment by court.
" 149. Assessments of damages.
" 149. When service is by publication.
" 150. Relief not exceed case made in complaint.

[Judgments.]

SECTION 149. (5.) Judgment may be had if the defendant fail to answer the complaint, as follows:

[When money or damages only—By clerk—Costs.]

First—In an action arising upon contract for the recovery of money or damages only, if no answer, demurrer or motion has been filed with the clerk of the court within the time specified in the summons, or such future time as may have been granted, the clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in the first sub-division of section thirty-three [37], chapter three, of this act.

[Section 33, referred to in last above paragraph, is section 37 of this chapter.
For time mentioned in summons, see s. 36, ch. 3, ante; how served, s. 40 to 44, ibid.

In other actions—Default—Judgment by court—Assessment of damages.]

Second—In other actions, if no answer, demurrer or motion has been filed with the clerk within the time specified in the summons, or such further time as may have been granted, the clerk shall enter the default of the defendant, and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint.

If the taking of an account, or the proof of any fact, be necessary to enable the court to assess the damages or 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 damages in whole or in part, the court may order the damages to be assessed by a jury, or they may be assessed by the court, or if to determine the amount of damages, the examination of a long account be necessary, by a reference, as above provided.

[When service by publication—When default—When part answered.]

Third—In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer, demurrer or motion has been filed, apply for judgment, and the court shall thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the State, shall require the plaintiff or his agent to be examined, on oath, respecting any payments that have been made

Judgments on Failure to Answer.]

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. If the answer in any case denies or controverts only a part of the cause or causes of action alleged in the complaint, the plaintiff may take judgment by default for the undisputed portion, leaving the action to proceed as to the part controverted by the answer. [Sec. 150, pp. 58-9, orig. act.—As amended, sec. 5, pp. 54-5, acts 1881.

Publication, sec. 45, chap. 3, ante.

Relief not to exceed case made in complaint.]

SEC. 150. (147.) The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

CHAPTER XI.

OF ISSUES AND OF THEIR DISPOSITION.

SECTION 151. Issue—when arises.
" 152. Issue of law.
" 153. Issue of fact.
" 154. Issue of law—how tried- and of fact—reference.
" 155. Issue of law first disposed of.
" 156. Causes to be entered on calendar according to date.
" 157. Either party may bring issue to trial.
" 158. Motion to postpone—affidavit.

[Issues—Definition—Law and fact.]

SECTION 151. An issue arises when a fact or conclusion of law is maintained by the one party and is controverted by the other. Issues are of two kinds:

First—Of law; and

Second—Of fact.

[Issue of law.]

SEC. 152. An issue of law arises upon a demurrer to the complaint or answer, or replication, or to some part thereof.

[Issue of fact.]

SEC. 153. An issue of fact arises:

First—Upon a material allegation in the complaint, controverted by the answer, and

[Issue of fact.]

Second—Upon new matter in the answer controverted by the replication, or upon new matter in the replication, except when an issue of law is joined thereon.

[Issues of law—Of fact, how tried—Reference.]

SEC. 154 (14.) An issue of law shall be tried by the court, unless it be referred, as provided in the title in regard to references. In actions for the recovery of specific, real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived or a reference is ordered, as provided in the code. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code. [Sec. 14, p. 222, acts 1879—Subs. for sec. 154, p. 60, orig. act.

Issues of law first disposed of.]

SEC. 155. When there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of.

Of Issues and of their Disposition.]

[Causes entered on calendar—Continuance.]

SEC. 156. The clerk shall enter causes upon the calendar of the court, according to the date of the issue Causes once placed upon the calendar for a general or a special term, if not tried or heard at such term, shall remain upon the calendar from court to court until finally disposed of.

[Either party may bring on trial.]

SEC. 157. Either party may bring the issue to a trial or to a hearing, 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 action or verdict or a judgment as the case may require.

[Postponement—Affidavit, contents.]

SEC. 158. A motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it.

The court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed; and, upon terms, the court may, in its discretion, upon good cause shown, and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence.

CHAPTER XII.

FORMATION OF THE JURY.

SECTION 159. Waiver of jury.
" 160. Jury—how drawn.
" 161. Oath.
" 162. Challenge, peremptory.
" 163. Challenge for cause.
" 164. Challenge for cause—how tried.
" 165. Challenging—order of.
" 166. Vacancy—how filled.
" 167. Challenge to array.

[Waiver of jury.]

SECTION 159. (184.) Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract, and with the assent of the court; in other actions in the manner following:

First—By failing to appear at the trial.

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

Third—By oral consent, in open court, entered in the minutes. The court may prescribe, by rule, what shall be deemed a waiver in other cases.

[Drawing jurors—Number.]

SEC. 160. (3.) For the trial of a civil action by jury the jurors shall be drawn by chance from the whole number summoned and in attendance except those who may be engaged in considering any other cause. Six persons shall constitute the jury, unless the parties consent to a less number or the court in its discretion allows a greater number, not exceeding twelve.

[For qualifications of jurors, see Gen. Stat., ch. 61, div. 1; Challenges, exemptions, etc., ib.; Election, div. 2; Grand jurors, div. 3; same chap.

In cases of condemnation, see sec. 244, ch. 21, eminent domain; in force May 13, 1877.

Oath of jurors.]

SEC. 161. (160.) As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance: That they, and each of them, will well and truly try the matter at issue between ———, the plaintiff, and ———, the defendant, and a true verdict render according to the evidence.

[Challenges—Peremptory—For cause.]

SEC. 162. (161.) Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and shall be either peremptory or for cause. Each party shall be entitled to four peremptory challenges.

[See div. 1, ch. 60, Gen. Stat.

Challenges, grounds therefor.]

SEC. 163. (162.) Challenges for cause may be taken on one or more of the following grounds:

Formation of the Jury.]

[Qualifications.]

First—A want of any of the qualifications prescribed by statute to render a person competent as a juror.

[Consanguinity—Affinity.]

Second—Consanguinity or affinity within the third degree to either party.

[Social and business relation.]

Third—Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal or agent to either party, or being a member of the family of either party, or a partner in business with either party, or being security on any bond or obligation for either party.

[Previous service in same matter.]

Fourth—Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

[Interest—Except public.]

Fifth—Interest on the part of the jurors in the event of the action, or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

[Opinion formed.]

Sixth—Having formed or expressed an unqualified opinion or belief as to the merits of the action.

[Enmity—Bias.]

Seventh—The existence of a state of mind in the juror evincing enmity against or bias to either party.

[Challenges, how tried.]

SEC. 164. (163.) Challenges for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

[Order of challenging.]

SEC. 165. (164.) The plaintiff first, and afterwards the defendant, shall complete his challenges for cause. They may then alternately, in the same order, have the right to challenge peremptorily.

[Order of filling panel.]

SEC. 166. (165.) After each challenge sustained, the vacancy shall be filled before further challenges are made, and any new juror introduced may be challenged for cause; or if the party shall not have exhausted the number of peremptory challenges to which he is entitled, he may be challenged peremptorily.

[Challenge to the array—Petition—Issue.]

SEC. 167. (166.) Either party, in an action, may challenge the array of jurors for any legal cause, which shall be done by petition, setting forth particularly the causes of challenge; and the party opposing the challenge may join issue of law or fact on such petition, and the issue so formed shall be tried and decided by the court.

CHAPTER XIII.

CONDUCT OF TRIAL.

SECTION 168. Order of procedure—evidence—instructions.
" 169. Exceptions to instructions—formal bill not required.
" 170. Jury may view property or place.
" 171. If juror becomes sick, how to proceed.
" 172. Jury to be kept together after retiring.
" 173. What papers may be taken by jury.
" 174. If jury disagree as to testimony.
" 175. If jury disagree, action to be tried again.
" 176. Adjournment of court, sealed verdict, etc.
" 177. When jury have agreed—call.
" 178. Verdict—if informal or insufficient.
" 179. Verdict—when complete—record.

[Order of proceeding.]

SECTION 168. (167.) When the jury has been sworn, the trial shall proceed in the following order, unless the court, for good cause and reasons, otherwise directs:

[Statement of case.]

First—The party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it.

[Statement by adverse party.]

Second—The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it.

[Evidence—Order.]

Third—The party on whom rests the burden of the issues must first produce his evidence: the adverse party will then produce his evidence.

[Rebutting—Further evidence.]

Fourth—The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

[Special instructions—Written, numbered, signed.]

Fifth—When the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court.

[Court instruct—Written, numbered, signed.]

And before the argument of the cause is begun, the court shall give such instructions upon the law to the jury as may be necessary, which instructions shall be in writing, and be numbered and signed by the judge.

Conduct of Trial.]

[Duty of court—Marking instructions—Filing.]

Seventh—Where either party asks special instructions to be given to the jury, the court shall either give such instructions as requested, or positively refuse to do so, or give the instructions with the modifications, and shall mark or endorse upon each instruction so offered in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may except to the instructions as given or refused or modified, or to the modification. All instructions given by the court must be filed together with those refused as a part of the record.

[Matters of evidence, see chap. 36, Gen. Stat., evidence.
Lost papers and giving secondary evidence, 1321, s. 14, ch. 36, Gen. Stat., evidence.
Party postponing trial must consent to take deposition of witnesses present, sec. 450, ch. 40, post.

Exceptions—How noted.]

SEC. 169. (168.) A party excepting to the giving of the instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken, the words "excepted to," which shall be signed by the judge.

[Court may order jury to view premises—Caution.]

SEC. 170. (169.) Whenever, 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.

[Sick juror may be discharged—How proceed by consent.]

SEC. 171. (170.) If, after the empaneling the jury and before 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 a new jury may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterwards empaneled, as the parties may agree.

[Jury retire—Duty of officer.]

SEC. 172. (171.) After hearing the charge, the jury may either decide in court, or retire for deliberation.

If they retire they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court.

The officer shall, to the utmost of his ability, keep the jury together separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

[What papers jury may take.]

SEC. 173. (172.) Upon retiring for deliberation, the jury may take with them all papers except depositions, accounts or account books, which have

been received as evidence in the case, 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.

[Jury may return for instructions.]

SEC. 174. (173.) After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court; upon their being brought into court, the information required shall be given in presence of, or after notice to, the parties or counsel.

[When no verdict, new trial.]

SEC. 175. (174.) In all cases where a 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 shall direct.

[Court, adjournment of—Sealed verdict.]

SEC. 176. (175.) While the jury are absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed 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 court in case of an agreement during a recess or adjournment for the day.

A final adjournment of the court for the term shall discharge the jury.

[Jury return—Verdict—Call—Foreman answer.]

SEC. 177. (176.) When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge.

Their names shall then be called, and they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they shall, on being required, declare the same.

[Correction of verdict.]

SEC. 178. (177.) If the verdict be informal or insufficient, in not covering the whole issue or issues submitted, or in any particular, the verdict may be corrected by the jury, under the advice of the court, or the jury may be again sent out.

[Clerk record verdict—Read to jury—Disagreement.]

SEC. 179. (178.) When the verdict is given and is not informal or insufficient, the clerk shall immediately record it in full in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict.

If any juror disagree, the jury shall be again sent out; but if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case.

CHAPTER XIV.

THE VERDICT.

SECTION 180. Verdict general—special.
" 181. Special verdict when—court direct.
" 182. Excess of counter claim, verdict for surplus.
" 183. Specific property—verdict—value—damages.
" 184. Clerk enter verdict—time—names, etc.
" 184. Entry of special verdict—order.

[Verdict general—Special.]

SECTION 180. (179.) The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

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

[What verdict shall specify in actions for possession, etc., 7th par. sec. 271, ch. 23, post.
Report of commissioners—or verdict—in condemnation, 240 to 244, ch. 21, post.

Special verdict, when proper—Court may direct—Inconsistency.]

SEC. 181. (180.) In an action for the recovery of money only, or specific 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 question of fact, to be stated in writing, and may direct a written finding thereon.

The special verdict or finding shall be filed with the clerk and entered upon the minutes.

Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

[Excess of counter claim—Verdict for overplus.]

SEC. 182. (181.) 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 shall also find the amount of the recovery.

[Specific property—Verdict of return—Value—Damages.]

SEC. 183. (182.) 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, shall find the value of the property; (but failure to find all of the facts mentioned in this section shall not invalidate the ver-

dict) 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.

[Clerk enter verdict, time, names, special or general.]

SEC. 184. (183) Upon receiving a verdict an entry shall be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors, and witnesses, and the verdict; 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.

CHAPTER XV.

REFERENCES AND TRIALS BY REFEREES.

SECTION 185. Reference—when ordered by consent.
" 186. When court may direct reference without consent.
" 187. Reference—to whom ordered—residence—oath.
" 188. Objections—on what ground.
" 189. Objections—how disposed of.
" 190. Referees—when to report—exceptions.
" 191. How brought to hearing—notice—order.

[Reference by agreement.]

SECTION 185. (187.) A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered on the minutes:

[To try issues.]

First—To try any or all of the issues in action or proceeding, whether of fact or of law, and to report a finding and judgment thereon.

[To ascertain a fact.]

Second—To ascertain a fact necessary to enable the court to proceed and determine a case.

[When court may order reference.]

SEC. 186. When the parties do not consent thereto, the court may, upon application of either, or upon its own motion, direct a reference in the following cases:

[Accounts—Try issues.]

First—When the trial of an issue of fact requires the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein

[For information of court.]

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

[Fact not in pleadings.]

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

[In special proceedings.]

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

[Referee, appointment—Number—Residence—Oath.]

SEC. 187. (189.) 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 shall appoint one or more referees, not exceeding three,

who reside in the county where the action or proceeding is triable, and against whom there is no legal objection; or the reference may be made to a referee of the county where the cause is pending. Every referee, before acting as such, shall take and subscribe an oath or affirmation before some authorized officer, which shall be filed with the clerk of the court by which he is appointed, that he will honestly, impartially and faithfully perform the duties of referee in the action or matter referred to him, as required by law, to the best of his knowledge and ability.

[When three referees or arbitrators, two may do any act to be done by all, sec. 408, ch. 38, post.

Objections to appointment—Grounds.]

SEC. 188. (190.) Either party may object before hearing on reference to the appointment of any person as referee, on one or more of the following grounds:

[Qualifications.]

First—A want of any of the qualifications prescribed by statute to render a person competent as a juror.

[Consanguinity, affinity.]

Second—Consanguinity or affinity within the third degree to either party.

[Social and business relation.]

Third—Standing in the relation of guardian and ward, master and servant, employe and clerk, or principal and agent to either party, or being a member of the family of either party, or a partner in business with either party, or being security on any bond or obligation for either party.

[Previous service as juror in same matter.]

Fourth—Having served as a juror or been a witness on any trial between the same parties for the same cause of action.

[Interest.]

Fifth—Interest on the part of such person, in the event of the action, or in the main question involved in the action.

[Opinion—Belief.]

Sixth—Having formed or expressed an unqualified opinion or belief as to the merits of the action.

[Enmity, bias.]

Seventh—The existence of a state of mind in such person, evincing enmity against, or bias to, either party.

[Objections disposed of—Affidavit.]

SEC. 189. (191.) The objection taken to the appointment of any person as a referee shall be heard and disposed of by the court, or judge thereof in vacation. Affidavits may be read, and any person examined as a witness, as to such objections.

[Finding, report, effect—Exceptions—Review—Effect of finding.]

SEC. 190. (192.) The referees shall report their findings, together with all the evidence and objections thereto, in writing to the court, within ten days, (or within such further time as may be allowed by the court), after the testimony shall have been closed and the facts found, and the conclusions of

law shall be separately stated therein. The finding of the referees upon the whole issue shall stand as the finding of the court, unless excepted to by either party and received [reviewed] by the court, and upon filing the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The finding of the referees may be excepted to and reviewed by the court, on the filing of exceptions to the report and findings by either party. When the reference is to report the facts, the finding reported shall have the effect of a special verdict.

[Either party may bring on hearing—Notice—Court order.]

SEC. 191. (193.) After a cause or question of fact has been referred to referees, either party may bring the matter to a hearing on giving the opposite party five days' notice, and the court or judge may, on motion, fix a time when the testimony shall be closed, and the report made.

CHAPTER XVI.

NEW TRIALS.

SECTION 192. New trial—what is.
" 193. Former verdict or decision—how vacated—causes.
" 194. Applications—when made on affidavit.
" 195. What notice required—motion—filed.
" 196. What papers used on argument.
" 197. Judge shall give grounds of decision.

[New trial defined.]

SECTION 192. (198) A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees.

[New trial, causes.]

SEC. 193. (199.) The former verdict or other decision, or judgment of the court, 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 said party:

[Irregularity—Abuse.]

First—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.

[Misconduct of jury.]

Second—Misconduct of the jury, and when any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavits of any one or more of the jurors.

[Accident—Surprise.]

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

[Newly discovered evidence.]

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

[Excessive damages.]

Fifth—Excessive damages appearing to have been given under the influence of passion or prejudice.

[Verdict against law—Insufficient evidence.]

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

[Error excepted to.]

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

New Trials.]

[When affidavit required.]

SEC. 194. (200.) When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it shall be made upon affidavit; for any other cause it shall be made upon a statement prepared as provided in the next section.

[New trial—Notice—Contents—When motion filed—Notices.]

SEC. 195. (201.) The party intending to move for a new trial shall give notice of the same as follows: When the action has been tried by a jury, within five days after the rendition of the verdict, and when tried by a referee or by the court, within ten days after receiving written notice of the filing of the finding of the referee or court, when written findings are filed by the court, or upon the rendering of the decision of the court, when no findings are filed, provided the decision be rendered in open court; *Provided always*, the motion for a new trial and decision thereon shall be made and had at the same term the findings were made or the verdict rendered, and if rendered in vacation, within ten days after receiving written notice of the filing thereof; and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments. The notice shall state, generally, that a motion for a new trial will be made. Within five days after giving such notice, or within such further time as the court or judge thereof may grant, the said party shall prepare and file with the clerk a motion in writing, stating the reasons for a new trial; *Provided*, if either party will give notice to the court, at the time of its decision, or that of the referee, or at the time the verdict is received, that he will move for a new trial, then no further notice need be given, and the motion may be supported by affidavits if the party so desire.

[Pleadings, minutes—Counter affidavits—Filing—When.]

SEC. 196. (202.) On the argument of the motion for a new trial, reference may also be made to the pleadings, depositions, and evidence, and to the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the clerk one day at least previous to the hearing.

[Diligence—Court state grounds of ruling.]

SEC. 197. (203.) The application for a new trial shall be made at the earliest period practicable after filing of the motion, and the court or judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused.

CHAPTER XVII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

JUDGMENT IN GENERAL.

SECTION 198. Judgment—definition of—term—vacation.
" 199. Judgment may be for or against either of the parties.
" 200. Judgment may be against one party and action proceed as to the others.
" 201. When entered—24 hours.
" 202. When case reserved for argument may be brought up by either party.
" 203. If counter claim established; for excess.
" 204. Judgment for value in case delivery cannot be had.
" 205. Judgment book—clerk shall keep.
" 206. If party die after verdict.
" 207. Clerk enter judgment—transcript filed—lien.
" 207. Lien—how long to continue.
" 208. Docket—what constitutes—what entries.
" 209. Docket shall be kept open.
" 210. Transcript may be filed with county recorders.
" 211. Satisfaction of judgment—attorney enter.
" 212. Transcript from justice's docket—when shall become lien.

PROCEEDINGS AGAINST JOINT DEBTORS.

SECTION 213. Parties not summoned in action on joint contract may be summoned after judgment.
" 214. Summons, in that case—what to contain and how served.
" 215. Affidavit to accompany summons.
" 216. Answer—when filed and what it may contain.
" 217. What will constitute the pleadings in the case.
" 218. Issues, how tried, and verdict, what to be.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SECTION 219. Judgment may be confessed for debt due, or contingent liability.
" 220. Statement in writing, and form thereof.
" 221. Filing statement and entering judgment.

[Judgment—Term or vacation.]

SECTION 198. (144.) A judgment is the final determination of the rights of the parties in the action or proceedings, and may be entered in a term or vacation.

[Personal property may be sold to satisfy judgment, 1835, s. 1, ch. 60, Gen. S at., judg. and ex.

For or against one or more and between parties on same side.]

SEC. 199. (145.) Judgment may be given for or against one or more of several plaintiffs; and for or against one or more of several defendants; and it may, when the justice of the case require it, determine the ultimate rights of the parties on each side as between themselves.

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[Against one or more and case proceed as to others.]

SEC. 200. (146.) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, allowing the action to proceed against the others, whenever a several judgment is proper.

[To be entered within twenty-four hours after verdict.]

SEC. 201. (204.) When trial by jury has been had, judgment shall be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

[When case reserved either party may move.]

SEC. 202. (205.) When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

[For excess of counter claim—For other relief to defendant.]

SEC. 203. (206.) If a counter claim, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

[For goods or value—For return—Damages.]

SEC. 204. (207.) In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has 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.

[Plaintiff recovering judgment in action for possession of lands, etc., entitled to special execution, sec. 275, ch. 23, post.

Judgment book, clerk to keep.]

SEC. 205. (208.) The clerk shall keep among the records of court a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted or other determination of the action.

[Judgment after death of party—How payable.]

SEC. 206. (209.) 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 shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

[See also 1842, s. 8, ch. 60, Gen. Stat., judgments and executions.

Death of judgt. debtor after judgment, 1871, s. 37, ch. 60, Gen. Stat., judgments and executions; 1869, s. 35, same.

Clerk enter judgment—Transcript—When filed becomes lien—Six years.]

SEC. 207. (211.) Immediately after entering the judgment, the clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him; from the time the judgment is docketed and a transcript of the docket filed with the recorder of the county, it shall become a

lien upon the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until said lien expires. The lien shall continue for six years from the entry of judgment, unless the judgment be previously satisfied. [Sec. 16, pp. 222-3, acts 1879—Subs. for sec. 211, pp. 82-3, orig. act.

[Interest on judgments, 1844, s. 10, ch. 60, Gen Stat. Also, 1707, s. 2, ch 56, Gen. Stat., interest.
See 1835, s. 1, chap. 60, judgments and executions, Gen. Stat.

Judgment docket, form, contents—Money, relief—Names.]

SEC. 208. (212.) The docket mentioned in the last section is a book which the clerk shall keep in his office with each page divided into eight columns and headed as follows: Judgment debtors; judgment creditors; judgment; time of entry; when entered in the judgment book; motion for new trials and appeals; when taken; judgment of appellate court; satisfaction of judgment; when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgments; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.

[Docket shall be kept open for inspection—Arrangement.]

SEC. 209. (213.) The docket kept by the clerk shall be open at all times, during office hours, for the inspection of the public, without charge; and it shall be the duty of the clerk to arrange the several dockets kept by him in such manner as to facilitate their inspection.

[Transcript filed in any other county—Lien on realty, six years.]

SEC. 210. (214.) A transcript of the original docket entry as contemplated by section two hundred and six [207], certified by the clerk, may be filed with the recorder of any other county; and from the time of filing, the judgment shall become a lien upon all the real property of such judgment debtor not exempt from execution in such county, owned by him, or which he may afterwards acquire until the said lien expires. The lien shall continue for six years from the entry of judgment, unless the judgment be previously satisfied.

[The sec. 203, referred to in last above sec., is sec. 207 (211) of this chapter; the orig. reference, 206, was error.
Sheriff file certificate of levy, 1884, s. 50, ch. 60, judgments and executions.

Satisfaction of judgment—Creditor—Attorney—Acknowledgment.]

SEC. 211. (215.) Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor; or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

[For sale of lands under execution, see 1848-49, ss. 14-15, ch. 60, judgments and executions, Gen. Stat.
For redemption, 1851 to 1854, ss. 16 to 20, same chap.
Exemptions, 1864 to 1867, ss. 30 to 34, same chap.

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Transcript from docket of J. P. filed with recorder—Lien on realty, six years.]

SEC. 212. (216.) A transcript of any judgment rendered by any justice of the peace, duly certified by said justice, may be filed with the recorder of the county in which such judgment shall have been rendered: and from the time of filing such transcript such judgment shall become a lien upon all of the property of the judgment debtor, except personal property and property exempt from execution, in such county, in the same manner and to the same extent as if such judgment had been originally rendered in a court of record. said lien shall continue for six years from the entry of judgment unless the judgment be previously satisfied.

[When defendant dies before execution, 1843, s. 8, ch. 60, judgments and executions.
Transcript from justice's docket may be filed in district court and execution against lands, 1977, sec. 54, ch. 82, Gen. Stat., justices and constables.
Every interest in lands may be sold on execution, 1883, s. 49, ch. 60, judg and ex., Gen. Statutes.
Sheriff file certificate with recorder, 1884, s 50, ch. 60, same.
Form of certificate, 1886, s. 52, same.

PROCEEDINGS AGAINST JOINT DEBTORS.

[When one or more summoned—Scire facias to others.]

SEC. 213. (267.) When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in section 43, [46], chapter 3, of this act, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

[Sec 43, referred to in last above sec., is sec. 46 of this act.

Scire facias—Contents.]

SEC. 214. (268.) The summons, as provided in the last section, shall describe the judgment and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner and returnable within the same time as the original summons.

It shall not be necessary to file a new complaint.

[Affidavit of part unpaid.]

SEC. 215. (269.) The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment or some part thereof remains unsatisfied, and shall specify the amount due thereon.

[Answers—Defenses—Cannot plead limitation.]

SEC. 216. (270.) Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently, or he may deny his liability on the obligation upon which the judgment was recovered, for any cause except a discharge from such liability by the statute of limitation.

[Subsequent defense—Denial of liability—Allegations.]

SEC. 217. (271). If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the allegations in the case if he deny his liability on the obligation upon which the judgment was

recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations.

[Trial—Verdict or liability—Amount.]

SEC. 218. (272.) The issues formed may be tried as in other cases, but when the defendant denies, in his answer, any liability on the obligations upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

JUDGMENT BY CONFESSION.

[Judgment without suit—For security.]

SEC. 219. (273.) A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liabilities, on behalf of the defendant, or both, in the manner prescribed by this chapter.

[Statement by defendant—Contents.]

SEC. 220. (274.) A statement in writing shall be made and signed by the defendant, and verified by his oath, to the following effect:

[Amount.]

First—It shall authorize the entry of judgment for a specified sum.

[State facts of debt.]

Second—If it be for money due or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due or to become due.

[For security—State facts of liability.]

Third—If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

[Statement filed—Judgment—Roll—Indorsed—Entered.]

SEC. 221. (275.) The statement shall be filed with the clerk of the court in which the judgment is to be entered, who shall endorse upon it and enter in the judgment book a judgment of such court for the amount confessed, with costs. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll.

CHAPTER XVIII.

REVIVAL OF JUDGMENTS.

SECTION 222. Petition—what state.
" 223. Order to show cause—service—time.
" 224. Answer—issue—trial.
" 225. Judgment roll—entry—liens—execution.

[Revival—Petition—Amount.]

SECTION 222. (217.) A judgment in a civil action may be revived by filing a petition in the action alleging the time the judgment was rendered, that it remains unsatisfied in whole or in part, stating the amount it is claimed the judgment should be revived for; which petition shall be verified as complaints are required to be by this act.

[Order to show cause—Service—Time.]

SEC. 223. (218.) Upon filing such petition, the clerk shall issue an order to show cause why such judgment shall not be revived, if any there be, which order to show cause shall be directed to and served on the defendants in the same manner as summons are required to be served. The order to show cause shall require the defendants to appear and show cause within ten days after service on them.

[Answer- Issue—Trial.]

SEC. 224. (219.) The defendant may appear and answer the petition in the same manner complaints are required to be answered, and the court shall try and determine any issue so formed the same as any issues made by pleadings are required to be tried and decided, and hear any evidence necessary to decide the same.

[Judgment roll—Entry—Liens—Execution.]

SEC. 225. (220.) If the court decide to revive the judgment in whole or in part, it shall so order, and the papers and proceedings shall be attached to the original judgment roll and the entry of revivor made in the judgment docket and judgment book, and if the petition is filed before the liens created by the original judgment have expired, all rights under such judgment shall continue, and execution may issue on such revived judgment the same as on the original judgment.

CHAPTER XIX.

PROCEEDINGS SUBSEQUENT TO EXECUTION.

SECTION 226. Requiring judgment debtor to appear and answer before judge or referee—not out of his county.
" 227. Affidavit—order—examination—bail.
" 227. Arrest—bond—conditions—imprisonment.
" 228. Debtor of judgment debtor may pay to sheriff.
" 229. Order for appearance of such debtor.
" 230. Witnesses in such case.
" 231. Order for property of debtor to be turned over—exemption of earnings.
" 232. Order allowing creditor to sue third parties.
" 232. Restraint of transfer, etc.
" 233. Disobedience of orders by party or witnesses—contempt.

[Requiring judgment debtor to appear before judge or referee—What county.]

SECTION 226. (221.) When an execution against property of the judgment debtor or any of several debtors in the same judgment issued to the sheriff of the county where he resides, or if he does not reside in this State, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor at any time after such return is made, shall be entitled to an order from the judge of the court or county judge, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor shall be required to attend before a judge or referee out of the county in which he resides, when proceedings are taken under the provisions of this chapter.

[Affidavit—Order—Examination—Arrest—Bond—Conditions—Prison.]

SEC. 227. (222.) After issuing an execution against property and upon proof by affidavit by a party, or otherwise to the satisfaction of the court, or a judge thereof, that any judgment debtor 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 before such judge or referee appointed by him, to answer concerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor, toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before the judge. On being brought before the judge, he may be ordered to enter into an undertaking, with surety that he will attend from time to time before the judge or referee, as shall be directed, during the pendency of the proceedings, and until the final determination thereof; and will not, in the meantime, dispose of any portion of his property not exempt from execution.

In default of entering into such undertaking, he may be committed to prison.

Proceedings Subsequent to Execution.]

[Debtor of judgment debtor may pay to sheriff—Discharge.]

SEC. 228. (223.) After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

[Order for appearance of debtors of judgment debtor.]

SEC. 229. (17.) After issuing or return of an execution against property of a judgment debtor, or any one of several debtors in the same judgment, and upon proof, by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding twenty-five dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear, at a specified time or place, before him or a referee appointed by him, and answer concerning the same. [Sec. 17, p. 223, acts 1879—Subs. for sec. 224, pp. 87-8, orig. act.

Gold, silver and current money may be levied on, 1876, s. 42, ch. 60, Gen. Stat., judgments and executions.

Witnesses in such case.]

SEC. 230. (225.) Witnesses may be required to appear and testify before the judge or referee upon any proceeding under this chapter, in the same manner as upon trial of an issue.

[Order for property of debtor to be turned over on judgment—Earnings.]

SEC. 231. (18.) The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, except that the earnings of the debtor, for his personal services, to the amount of twenty-five dollars, shall not be so applied when it shall be made to appear by the debtor [debtor's] affidavit or otherwise that such earnings are necessary for the use of a family supported wholly or partly by his labor. [Sec. 18, p. 223, acts 1879—Subs. for sec. 226, p. 88, orig. act.

Order allowing creditor to sue third parties—Restraint of transfer.]

SEC. 232. (227.) If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claim an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interests or debts.

And the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment.

Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

[Disobedience of order by party or witness—Contempt.]

SEC. 233. (228.) If any person, party or witness disobey an order of the referee, properly made, in the proceeding before him under this chapter, he may be punished by the court or judge ordering the reference for a contempt. Nothing in this act shall be so construed as to prevent the bringing of an action in the nature of a creditor's bill. [Sec. 1, p. 62, acts 1881—Subs. for sec. 228, orig. act.

CHAPTER XX.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

SECTION 234. Proceedings in foreclosure suits—judgment for balance—parties.
" 235. Surplus money to be deposited in court.
" 236. Proceedings where debts secured fall due at different times.

[Decree of sale—Judgment for balance—Parties.]

SECTION 234. (19.) In actions for the foreclosure of mortgages, the court shall have the power, by its judgment, to direct a sale of the encumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment shall be docketed for such balance against the defendant or defendants personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor, or of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear on record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered and the proceedings therein had shall be as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to said action, and shall, in all respects, have the same force and effect. [Sec. 19, pp. 223-4, acts 1879—Subs. for sec. 229, pp. 89-90, orig. act.

Redemption of lands sold under mortgage, 1860, s. 26, ch. 60, Gen. Stat., judgments and executions.

Surplus moneys—Payment, deposit.]

SEC. 235. (230.) If there be surplus money remaining after payment on the amount due on the mortgage, lien or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

[When only part of debt due—Sale of part—Sale of all with rebate.]

SEC. 236. (231.) If the debt for which the mortgage, lien or encumbrance is held, be not all due, so soon as sufficient of the property has been sold to pay the amount due with costs, the sale shall cease, and afterwards as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

CHAPTER XXI.

EMINENT DOMAIN.

[CHAPTER XXXI., GENERAL LAWS.]

An act to provide for the exercise of the right of eminent domain.

[Approved February 12, 1877—In force May 13, 1877—pp. 396-405, G. L.]

SECTION 237. Compensation—commissioners—jury.
" 238. Damages—non-residents, incapable owners.
" 238. Petition—parties—unknown parties.
" 239. Day appointed—summons—publication.
" 240. Summons—return 30 days.
" 240. Not found—affidavit—publication.
" 241. Trial in vacation—separate lands.
" 241. Amendments—new parties—rules.
" 242. Adjournments—commissioners.
" 242. Oath—certificate—rule.
" 242. Compensation—possession—deposit.
" 242. Failure or defect of title.
" 243. Demand of jury—order for selecting.
" 244. Selection of jurors—six—venire.
" 245. Challenge of jurors—talesmen.
" 246. Oath—evidence—disagreement.
" 246. New jury—new trial—exceptions.
" 247. Order of possession on payment.
" 248. Interpleader allowed.
" 249. Appeal—writ of error.
" 250. Possession on payment into court.
" 250. Bond of owner to refund.
" 251. Compensation paid to clerk or owner.
" 252. Verdict recorded.
" 253. Computing damages on lands not taken.
" 254. Report of commissioners—verdict.
" 254. Bills of exceptions.
" 256. Repeal—effect—proviso.

[Compensation for lands—Commissioners—Jury.]

SECTION 237. (1.) That private property shall not be taken or damaged for public or private use without just compensation; and in all cases in which compensation is not made by the State in its corporate capacity, such compensation shall be ascertained by a board of commissioners of not less than three freeholders, or by a jury when required by the owner of the property, as hereinafter prescribed. [Sec. 1058 (1), of said act, p. 396, G. L.

See ss. 14, 15, art. 2, bill of rights, constitution.

Damages—Non-residents—Incapable owners—Petition—Parties.]

SEC. 238. (2.) That in all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume or other public or private work or improvement, or which may damage property not actually taken, has been heretofore or shall hereafter be conferred by general law or special charter, upon any corporate or municipal authority, public body, officer or agent, person or persons, commissioner or corporation, and the compensation to be paid for, or in respect of the property sought to be appropriated or damaged, for the purposes above mentioned, cannot be agreed upon by the parties interested; or in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is non-resident of the State, it shall be lawful for the party authorized to take or damage the property so required, or to construct, operate, and maintain any railroad, public road, toll road, ditch, bridge, ferry, telegraph, flume or other public or private work or improvement, to apply to the judge of the district or county court, either in term time or vacation, where the said property or any part thereof is situate, by filing with the clerk a petition, setting forth by reference his or their authority in the premises; the purpose for which said property is sought to be taken or damaged; a description of the property, the names of all persons interested therein as owners or otherwise, as appearing of record, if known, or if not known, stating that fact and praying such judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property of persons under guardianship, the guardians or conservators of persons having conservators, shall be made parties defendant, and if of married women, their husbands shall also be made parties. Persons interested whose names are unknown may be made parties defendant by the description of the unknown owners; but in all such cases an affidavit shall be filed by, or on behalf of the petitioner, setting forth that the names of such persons are unknown. In cases where the property is sought to be taken or damaged by the State for the purpose of establishing, operating or maintaining any State house, or charitable or other State institution or improvement, the petition shall be signed by the governor or such other person as he shall direct, or as shall be provided by law. [Sec. 1059 (2) of said act, p. 397, G. L.

Taking for streets, etc., under city or town ordinance, two-thirds of council must vote for ordinance. 3325, s. 27, ch 109, towns and cities, Gen. Stat.

Condemning right of way for ditches, see 1715, s. 5, ch. 57, irrigation, General Statutes

Day appointed—Summons—Advertisement.]

SEC. 239. (3.) If such petition be presented to a judge in vacation, the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issuance of summons to each resident defendant, and the publication of notice to each non-resident defendant, and the clerk of the court shall at once issue the summons and give notice accordingly. [Sec. 1060 (3) of said act, p. 397, G. L.

Summons—Affidavit—Notice—30 days or more.]

SEC. 240. (4.) Such summons shall be made returnable on such day and hour as the court or judge may fix and determine, not less than thirty days after the issuance of such summons, and the same shall be served in the

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same manner as in other cases, at least ten days before the return day thereof. When it appears that the owners, or any of them, of the property sought to be condemned, are non-residents, or have been returned by the sheriff of the county as not found, and in case said summons is so returned "not found," an affidavit shall likewise be filed in said cause by the plaintiff or his attorney, setting forth that the person making such affidavit had made diligent inquiry and had been unable to learn of the whereabouts of such person, the court or judge shall order a notice to be published in some newspaper published in said county, addressed to such owner or owners, in which notice shall be stated the name of the petitioner or petitioners, a full and accurate description of the property sought to be taken or condemned, the purpose for which such condemnation is asked, and the time and place when such owner or owners are required to appear, and the title of the court, or name of the judge, before whom said application is to be heard. The court or judge shall also fix and determine when said notice shall be made returnable, but in no case shall it be made returnable in less than thirty days, and the same shall be published at least four (4) times in some weekly newspaper before the return day thereof. If there shall be no weekly newspaper published in the county in which such proceedings are had, the court or judge shall direct that said notice be published in some newspaper named by him, published in the nearest convenient place to such county. [Sec. 1, p. 58, acts 1879, amending sec. 1061 (4) of said act, p. 398, G. L.

Trial in vacation—Separate lands—Amendments—New parties—Rules—Process.]

SEC. 241. (5.) Causes may be heard by such judges in vacation as well as in term time, but no cause shall be heard earlier than ten (10) days after service upon defendant, or upon due publication against non-residents. Any number of separate parcels of property situate in the same county may be included in one petition, and the compensation for each shall be assessed separately, by the same or different commissions or juries, as the court or judge may direct. Amendment to the petition, or to any paper or record in the cause, may be permitted whenever necessary to a fair trial and final determination of the questions involved. Should it become necessary at any stage of the proceeding to bring a new party before the court or judge, the court or judge shall have the power to make such rule or order in relation thereto as may be deemed reasonable and proper; and shall also have power to make all necessary rules and orders for notice to parties of the pendency of the proceeding, and to issue all process necessary to the execution of orders and judgments as they may be entered. [Sec. 1062 (5) of said act, p. 398, G. L.

Adjournment — Commissioners—Oath—Profit — Certificate— Rule – Entry— Compensation — Mines—Possession—Deposit—Defective title—Lien— Delay.]

SEC. 242. (6.) The court or judge may adjourn the proceedings from time to time, shall direct any future notice thereof to be given that may seem proper, shall hear proofs and allegations of all parties interested touching the regularity of the proceedings, and shall, by an entry in its minutes, appoint a board of commissioners of not less than three freeholders, to ascertain and determine the necessity for taking such lands, franchises or other property, and to appraise and determine damages, and compensation to be allowed to the owner and person interested in the real estate or property proposed to be

taken or damaged in such county, for the purposes alleged in the petition, and said court or judge shall fix the time and place for the first meeting of such commissioners. The said commissioners, before entering upon the duties of their office, shall take an oath to faithfully and impartially discharge their duties as said commissioners, and any one of them may administer oaths to witnesses produced before them; they may issue subpœnas and compel witnesses to attend and testify, and may adjourn and hold meetings for that purpose. They shall hear the proofs and allegations of the parties, and after viewing the premises, shall, without fear, favor or partiality, ascertain and certify the compensation proper to be made to said owner or parties interested, for the lands, real estate or claims to be taken or affected, as well as all damages accruing to the owners or parties interested in consequence of the condemnation of the same, taken or injuriously affected, as aforesaid. They shall make, subscribe, and file with the clerk of the court in which such proceedings are had, a certificate of their said ascertainment and assessment, in which such lands, real estate or claims shall be described, with convenient certainty and accuracy. The court or judge, upon such certificate or verdict of a jury as hereinafter provided, and due proof that such compensation and separate sums, if any be certified or found to have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in court, or with the clerk of the court, for that purpose, shall make and cause to be entered in its minutes, a rule, describing such lands, real estate or claims in manner aforesaid, such ascertainment of compensation, with the mode of making it, and each payment or deposit of the compensation as aforesaid, a certified copy of which shall be recorded and indexed in the recorder's office of the proper county, in like manner and with like effect as if it were a deed of conveyance from the said owners and parties interested, to the proper parties. Upon the entry of such rule the said petitioner shall become seized in fee except as hereinafter provided, of all such lands, real estate or claims described in said rule, as required to be taken as aforesaid, and may take possession of, and hold and use the same for the purposes specified in said petition, and shall thereupon be discharged from all claims for any damages by reason of any matter specified in such petition, certificate or rule of said court or judge: *Provided*, any such right of way shall never give the petitioner any right, title or interest to any vein, ledge, lode or deposit found or existing in the premises condemned. And if at any time after an attempted or actual ascertainment of compensation under this act, or any purchase or by donation to said petitioner, of any lands, real estate or claims, for purposes specified in the petition, it shall appear that the title acquired thereby, to all or any part of such lands for the use of such petitioner, or if said assessment shall fail or be deemed defective, the said petitioner may proceed and perfect such title by procuring an ascertainment of the compensation proper to be made to any person who has title, claim or interest in, or lien upon such lands, real estate or claims, and by making payment thereof in the manner hereinafter provided, as near as may be, and at any stage of such new proceedings, or of any proceedings under this act, the court or judge may by rule in that behalf made, authorize the said petitioner, if already in possession, and if not in possession to take possession of and use said premises during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against such petitioner on account thereof. *Pro-*

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vided, such petitioner shall pay a sufficient sum into court, or to the clerk thereof, to pay the compensation in that behalf when ascertained. *Provided further*, that the judge of the court before or wherein any such proceedings are had shall determine the amount such petitioner shall be required to pay or deposit pending any such ascertainment; and in every case where possession shall be so authorized, it shall be lawful for the owner to conduct the proceedings to a conclusion, if the same shall be delayed by the petitioner. The said commissioners shall each receive four (4) dollars per day as compensation for each day actually employed, such compensation to be taxed by the court or judge. If any commissioner so appointed shall die, be unable or fail to serve, the court or judge may appoint another in his place, on reasonable notice of the application. [Sec. 1063 (6) of said act, pp. 399-400, G. L.

Demand of jury—By whom—Order—Drawing.]

SEC. 243. (7.) Any person, persons or company whose estate or interest is to be affected by the proceeding, may demand at the time of any hearing of such petition, and before the appointment of the commissioners herein provided, a jury of six freeholders residing in the county where such petition is filed, to ascertain, determine and appraise the damages or compensation to be allowed therefor, and thereupon said court or judge shall make an order for the drawing of such jury as herein provided. [Sec. 1064 (7) of said act, p. 401, G. L.

See ss. 14, 15, art. 2, bill of rights, constitution.

Selection of jurors—Six—Venire.]

SEC. 244. (8.) In cases fixed for hearing of petition in vacation, it shall be the duty of the clerk of the court in whose office the petition is filed, at the time of issuing summons or making publication, to write the name of twenty-four disinterested freeholders of the county, on twenty-four separate slips of paper, each slip to contain but one name, and shall cause to be selected from said twenty-four names, six of said persons to serve as jurors; such selection to be made by lot and without choice or discrimination: and the said clerk shall thereupon issue *venire* directed to the sheriff of his county, commanding him to summon the six persons so selected as jurors to appear at the court house in said county, at a time to be named in the *venire*. [Sec. 1065 (8) of said act, pp. 401-2, G. L.—Approved Feb 12, 1877—In force May 13, 1877.

Constitution, sec. 15, art. 2, says "a jury."

See Sec. 160, ch. 12, ante—Approved March 17, 1877—In force Oct. 1, 1877.

Challenge of jurors—Talesmen.]

SEC. 245. (9.) The petitioner and every party interested in the ascertaining of compensation, shall have the same right of challenge of jurors as in other civil cases in the district and county court. If the panel be not full by reason of non-attendance, or be exhausted by challenges, the judge hearing such petition shall designate by name the necessary number of persons of proper qualification, and the clerk or judge shall issue another *venire* returnable instanter, and until the jury be full. [Sec. 1066 (9) of said act, p. 402, G. L.

For qualifications of jurors, see ch. 60, jurors, Gen. Stat., div. 1, for exemption and challenges, same.

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Oath—Evidence—Verdict—Disagreement—New trial—Causes—Error.]

SEC. 246. (10.) When the jury shall have been so selected and taken an oath to faithfully and impartially discharge their duties, said jury shall at the request of either party go upon the land sought to be taken or damaged, in person, and examine the same, and shall then return into court, if the proceedings be in term time, and if in vacation, then before the judge, and the said court or judge shall preside in the same manner and with like power as in other cases; evidence shall be admitted or rejected by the court or judge, according to the rules of law, and at the conclusion of the evidence the matters in controversy may be argued by counsel to the jury, and at the conclusion of the arguments the court or judge shall instruct the jury in writing in the same manner as in cases at law. The jury shall retire for deliberation in charge of a sworn officer the same as in other cases. When such jury shall have agreed upon a verdict, the same shall then be returned into court. If any such jury shall be unable to agree, it may be discharged by such court or judge; and thereupon another jury shall be summoned as soon as practicable, in the same manner as before, and said court or judge shall have power, and it is hereby made the duty of such court or judge, to continue the proceedings and to summon and impanel a jury or juries until a verdict can be had. Any person, party or corporation feeling aggrieved by any such verdict may move before such court or judge for a new trial in the same manner and for the same causes as in action at law, and the refusal of such court or judge to grant a new trial may be excepted to and assigned for error. [Sec. 1067 (10) of said act, pp. 402-3, G. L.

Order of possession on payment—Justification.]

SEC. 247. (11.) The judge or court shall, upon such verdict, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same, upon payment of full compensation as ascertained as aforesaid; and such order, with evidence of such payment, shall constitute complete justification of the taking of such property. [Sec. 1068 (11), of said act, p. 403, G. L.

Inter-pleader allowed.]

SEC. 248. (12.) Any person not made a party may become such by filing his cross petition, setting forth that he is the owner or has an interest in the property sought to be taken or damaged by the proposed work; and the rights of such last named petitioner shall thereupon be fully considered and determined. [Sec. 1069 (12) of said act, p. 403, G. L.

Appeal to supreme court—Writ of error.]

SEC. 249. (13.) In all cases, upon final determination thereof in either the district or county court, or before a district or county judge in vacation, an appeal may be taken to the supreme court in the same manner as provided by law for taking of appeals from the district court to the supreme court; and a writ of error from the supreme court shall lie in every case to bring in review the proceedings therein, after such final determination. [Sec. 1070 (13) of said act, p. 403, G. L.

Possession on paying into court—Deposit—Owner elect—Appeal—Bond of owner—Amount.]

SEC. 250. (14.) In cases in which compensation shall be ascertained as aforesaid, if the owner or owners of the property taken or affected shall

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appeal or prosecute a writ of error, the petitioner may pay into court or to the clerk thereof the amount of compensation so ascertained and awarded for the use of the owner or owners, and shall thereupon be entitled to take possession and use the property taken or affected, the same as if no such appeal or writ of error had been taken, The said money so deposited as aforesaid shall remain on deposit until such appeal or writ of error shall have been heard and determined; *Provided, however*, that if the owner or owners shall elect to receive such money before the determination of said appeal or writ of error, said appeal or writ of error shall thereupon be dismissed, so far as such owner or owners are concerned. If the appeal or writ of error shall be taken by the petitioner, the amount of compensation shall nevertheless be paid into court or to the clerk thereof, for the use of the owner or owners of the property condemned or affected before such petitioner shall have the right to take possession of and use said property so condemned or affected; and such compensation may be paid to such owner or owners, at any time before the determination of such appeal or writ of error, upon the execution and delivery of a good and sufficient bond by such owner or owners, with good and sufficient surety or sureties, to be approved by said court or judge, in a sum double the amount of such compensation, conditioned that such owner or owners will pay and refund to such petitioner all or such part of said sum as said owner or owners may be required or adjudged to pay said petitioner, together with the cost of said appeal or writ of error. [Sec. 1071 (14) of said act, pp. 403-4, G. L.

Compensation paid to clerk or owner.]

SEC. 251. (15.) Payment of compensation adjudged may in all cases be made to the court or the clerk thereof, who shall on demand pay the same to the party entitled thereto, taking receipt therefor; or payment may be made to the party entitled thereto, his, her or their conservator or guardian. [Sec. 1072 (15) of said act, p. 404, G. L.

Verdict recorded.]

SEC. 252. (16.) The court or judge shall cause the verdict of the jury and the judgment of said court to be entered upon the records of said court. [Sec. 1073 (16) of said act, p. 404, G. L.

Computing damages on property not taken—Property taken.]

SEC. 253. (17.) In estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisement shall be allowed and awarded, and no deduction therefrom shall be allowed for any benefit to the residue of said property; but in estimating damages occasioned to other portions of claimant's property, or any part thereof other than that actually taken, the value of the benefits, if any, may be deducted therefrom; *Provided, however*, that in all cases the owner or owners shall receive the full and actual value of all property actually taken, and in case the benefit to the property not actually taken exceed the damage sustained by the owner to property not actually taken, the owner or owners shall not be required to pay, or allow credit for such excess. [Sec. 1074 (17) of said act, pp. 404-5, G. L.

Report of commissioners—Verdict.]

SEC. 254. (18.) The report of the commissioners or the verdict of the jury in every case shall state:

First—An accurate description of the land taken.

Second—The value of the land or property actually taken.

Third—The damages, if any, to the residue of such land or property; and

Fourth—The amount and value of the benefit. [Sec. 1075 (18) of said act, p. 405, G L.

Bills of exception.]

SEC. 255 (19.) Bills of exception shall be allowed, signed and sealed by the court or judge, as in cases in law, within such reasonable time as shall be fixed by such court or judge. [Sec. 1076 (19) of said act, p. 405, G. L.

See ch. 39, appeals, post.

Repeal—Effect—Proviso.]

SEC. 256. (20.) All laws and parts of laws in conflict with the provisions of this act are hereby repealed; but such appeal shall not impair or affect any act done or any right accrued or acquired under the law so repealed, and all proceedings commenced or pending by virtue of the law so repealed may be prosecuted and defended to final determination in the same manner and with the same effect as they might under such laws, notwithstanding such appeal; *Provided*, that this act shall not be construed to repeal any law or part of law upon the same subject passed by this general assembly, but in all such cases this act shall be construed as providing a cumulative remedy. [Sec. 1077 (20) of said act, p. 405, G. L.

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CHAPTER XXII.

ACTION TO QUIET TITLE.

SECTION 257. Who may bring action.
" 258. Disclaimer or default, no costs.

RECOVERY OF REAL PROPERTY.

SECTION 259. When right terminates during suit.
" 259. Verdict—damages.
" 260. Damages for ouster, detention.
" 260. Offset of improvements—mines excepted.
" 261. Order for entry and survey.
" 262. Order describe property--injury—damages.
" 263. Mortgage not deemed conveyance.
" 263. When absolute deed deemed mortgage.
" 264. Mortgagee restrained from injuring, etc.
" 265. Execution purchaser recover damage from tenant.
" 266. Alienation before or after suit, not prejudice, if defendant in possession.

[Who may bring action.]

SECTION 257. (237.) An action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

[Disclaimer or default of answer, no costs.]

SEC. 258. (238.) 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 shall not recover costs.

RECOVERY OF REALTY.

[When right terminates lite pendente, verdict—Damages.]

SEC. 259. (239.) If [in] an action for the recovery of real property, where the plaintiff shows the 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 shall be according to the fact, and the plaintiff may recover damages for withholding the property.

[See sec. 74, class first, chap. 4, pleadings, etc., ante.

Damages for ouster or detention—Offset of improvements—Mines excepted.]

SEC. 260. (1.) When damages are claimed for withholding the property recovered or for ouster upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages, except improvements made upon mining property, and if damages are or are not

claimed for withholding the property recovered, or for ouster, the defendant may counter-claim the value of improvements made by him, or those under whom he claims, if made under color of title and in good faith. [Sec. 1, p. 61, acts 1881, subs. for sec. 240, p. 94, orig. act.

Order for entry and survey.]

SEC. 261. (241.) The court in which action is pending for recovery of real property, or a judge thereof, may, on motion, upon notice by either party, for good cause shown by affidavit, grant an order allowing such party the right to enter upon the property and make a survey and measurement thereof, for the purpose of action.

[Order, description, service—Injury, damages.]

SEC. 262. (242.) The order shall describe the property, and a copy thereof shall be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and may make such survey and measurement; but if any unnecessary injury be done to the property he shall be liable therefor.

[Order for survey, etc., of mines, 2413, s. 29, ch. 74, Gen. Stat., mines.

Mortgage not deemed conveyance—Deed, when mortgage in effect—Parol testimony.]

SEC. 263. (243.) A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without foreclosure and sale, and the fact of a deed being a mortgage in effect may be proved by oral testimony; but this section shall not apply to trust deeds with powers of sale.

[Lands sold under mortgage may be redeemed, 1860, s. 26, ch. 60, judg. and ex., Gen. Statutes.

Mortgagee, restrained from injuring.]

SEC. 264. (244.) 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 foreclosure of a mortgage thereon, or after a sale on execution before a conveyance.

[See ch. 7, Injunctions, ante.

When execution purchaser recover damages to land by tenant.]

SEC. 265. (245.) When real property shall have 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 a sale and before possession is delivered under the conveyance.

Alienation before or after suit, not prejudice action.]

SEC. 266. (246.) 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.

CHAPTER XXIII.

ACTIONS FOR POSSESSION AND DAMAGES.

SECTION 267. When action lies.
" 268. Who be made defendants.
" 269. Complaint, requisites—mines—U. S. lands.
" 270. Answer, deny or disclaim—set out defendant's claim.
" 271. Verdict in different cases.
" 272. Death of parties-- action not abate.
" 273. Judgment specify findings—damages.
" 274. Second trial of rights—rents, mines, improvements.
" 275. Writ of possession—damages, costs.
" 276. Lands of United States—possession of---evidence---title.
" 277. Action by tenant in common, on actual ouster.
" 278. Disclaimer---proof of possession not required.
" 279. All rules of this act apply to this chapter.

[In what cases action lies—Concurrent remedies.]

SECTION 267. (247.) An action to recover the possession of real property may be brought in any case when an action of ejectment or a writ of right might have been brought at common law, and in any case where the plaintiff claims a legal estate in real property or lands, in fee, or for life, or for years, or claims the legal right to occupy and possess the same; *Provided, however*, in all actions relating to the possession of real estate, those of forcible entry or unlawful detainer shall be deemed and held concurrent remedies herewith, and may be prosecuted in accordance with the law of this State relating to forcible entry and detainer.

[See 1495-6-7, ss. 9-10-11, ch. 41, forcible entry and detainer, Gen. Stat.

In county court proceedings governed by rules of act concerning justices and constables, 1498, s. 12, ch. 41 Gen. Stat.—For entry and detainer, s. 12, p. 395, R. S.—As amended, sec. 2, p. 100, acts 1872.—In force July 1, 1868.

Against whom—When lands occupied—Unoccupied.]

SEC. 268. (248.) If the premises for which the action is brought are continually occupied such actual occupant shall be made defendant in the action, together with any person claiming title to or any interest in the premises adversely to the plaintiff. If the premises are not occupied the action shall be brought against any person exercising acts of ownership on or over the premises claimed, or who claims title thereto, or some interest therein at the time of the commencement of the action.

[Settlers on public land may maintain actions, 2681, s. 8, ch. 90, Gen. Stat., public lands.

Extent of claim, evidence, etc., 2482-3, ss. 9-10, same chap.

Complaint—Requisites—Mines—Lands of U. S.—Estate.]

SEC. 269. (249.) The plaintiff, in his complaint, shall set forth the nature and extent of his estate in the property, and state whether it be in fee, for life, or for the life of another, or for a term of years, and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado, or otherwise, the com-

plaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase or by right of actual prior possession on the public domain of the United States. If the plaintiff claims any undivided interest in the premises, as tenant in common or otherwise, he shall state particularly the interest he claims. The plaintiff shall also state that he is entitled to the possession of the premises, and that the defendant wrongfully ousted the plaintiff, or wrongfully withholds the premises from him, or both, as the facts may be, and state the damages claimed for the ouster, or detention or both, which damages shall be recovered and assessed by the court or jury in the same action.

[See chap. 90, div. 1, rights of occupants. Gen. Stat., 2674 to 2694.
All rules of practice and pleading of this code apply to this action, sec. 279, post.

Answer shall deny or disclaim Shall set out defendant's claim.]

SEC. 270. (250.) The answer to a complaint filed under this chapter shall either specifically deny the material allegations of the complaint, or may disclaim any interest in or possession of the property claimed, or any part thereof. The answer may also state, generally, as in the complaint, the character of the estate in the premises, or any part thereof, which the defendant claims, or any right of possession or occupancy he claims.

[What verdict proper in different cases.]

SEC. 271. (251.) The verdict may be for or against either of the plaintiffs or defendants, and shall be rendered as follows:

[When for plaintiff generally.]

First—If it be shown on the trial that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally.

[For one or more plaintiffs.]

Second—If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

[Against which defendants.]

Third—If the verdict be for any plaintiff and there be several defendants the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action.

[For all the premises.]

Fourth—If the verdict be for all the premises claimed, as specified in the complaint, it shall in that respect be for such premises generally.

[For part of premises.]

Fifth—If the verdict be for a part of the premises described in such complaint the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed.

[For undivided share.]

Sixth—If the verdict be for an undivided share or interest in the premises claimed it shall specify such share or interest, and if for an undivided share in a part of the premises claimed it shall specify such share, and shall describe such part of the premises as hereinbefore required.

Actions for Possession and Damages.]

[Shall specify estate—Duration—Right—Damages.]

Seventh—The verdict shall specify the estate which shall have been established on the trial by the plaintiff in whose favor it shall be rendered, whether such estate be in fee for his own life or for the life of another, stating such lives, or whether it be for a term of years, specifying the duration of such term, or whether the plaintiff hath established only his right to the possession and occupancy of the premises in controversy. The verdict shall also, if for the plaintiff, find the amount of damages he is entitled to for the ouster or detention or both.

[See class first, sec. 69, chap. 4, ante.

Not abate by death—Revival.]

SEC. 272. (252.) The action for the recovery of real property shall not abate by the death of either or all the parties thereto, but may be revived in the name of the heirs, representatives or successors in interest in the manner other civil actions are revived by this act.

[For survival of actions in such case see sec. 14, chap. 1.
For revival of judgments see ss. 222 to 225, ch. 18, ante.

Judgment—Shall specify findings—Damages.]

SEC. 273. (253.) The judgment in an action brought under this chapter shall be in accordance with the verdict, or if tried by the court the judgment shall particularly specify the findings of the court the same as the jury are by this chapter required to specify in their findings in the verdict, and if judgment be rendered for the plaintiff it shall specify the amount of damages to be recovered.

[Verdict in action for recovery of personal property, sec. 183, ch. 14, ante.

New trial—Rents and profits—Mines—Improvements.]

SEC. 274. (254.) Whenever judgment shall be rendered against either party under the provisions of this chapter it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case; but neither party shall have but one new trial, in any case, as of right without showing cause. And after such judgment is vacated the cause shall stand for trial the same as though it had never been tried. And in case possession may have been recovered under the action for possession or title, brought or prosecuted under the provisions of this chapter, the plaintiff may bring his action for the rents and profits thereof, and in such action the measure of damages shall be the same as in action of trespass for mesne profits at common law. And in case such premises recovered be a lode, vein, or mining claim, the defendant shall not be entitled to any offset for any timbering, cribbing, improvements or developments made upon the same, neither shall the damages be abated or lessened by reason of such improvements or developments.

[New trials for cause, see ch. 16, new trials, ante.

Writ of possession—Description—Damages—Costs.]

SEC. 275. (255.) The plaintiffs who recover, or either of them, shall be entitled to a special execution in the nature of a writ of possession, directing the sheriff to put them or him into the immediate possession of the premises

recovered, describing the premises, with the certainty required in the complaint, and which execution shall also direct the sheriff to make any sum or sums of money adjudged to be paid the plaintiff as damages or costs. The defendants, or either of them, who recover shall be entitled to their costs.

[See 400, s. 4, ch. 20, costs, Gen. Stat.—Number of witnesses to be certified, 408, s. 12, same chap.

Lands of United States—What evidence—Title.]

SEC. 276. (256.) In every action hereafter brought for the recovery of lands, the legal fee title to which remains in the United States, the plaintiff and defendant shall be confined in their evidence to their respective rights and claims and the rights and claims of their grantors and privies in interest, and the action shall not be affected by any right or claims of third persons not in privity with either party to the premises, or by reason of the fee remaining in the United States; *Provided*, the fee being in the United States shall not prevent a person from recovering lands, premises, lodes, ledges or mining claims upon the receiver's duplicate receipt.

[For action concerning rights and claims on public lands see 2681, s. 8, ch. 90, Gen. Stat., public lands. As to such rights see div. 1. Rights of occupants throughout, same chap.

Action by tenant in common—Proof of actual ouster.]

SEC. 277. (257.) The action may be brought by one or more tenants in common against their co-tenants, and in that case the plaintiff shall, in addition to other evidence, be required to prove that he actually ousted such plaintiff, or did some act or acts amounting to a denial of his right as such co-tenant.

[Answer—Other than disclaimer, proof of possession not required.]

SEC. 278. (258.) If the defendant files or makes any other answer or defense than a disclaimer of title or right of possession it shall not be necessary for the plaintiff to prove him in possession of the premises at the time of the commencement of the action or at any time.

[All rules of this act apply to this chapter—Notice lis pendens.]

SEC. 279. (259.) All the rules of practice and pleading and proceedings prescribed in this act of civil procedure, and not otherwise specially provided in this chapter, shall be applicable to actions brought under this chapter, and notice of pendency of action must be filed with the recorder, as prescribed in this act.

CHAPTER XXIV.

PARTITION.

[CHAPTER LXVII, REVISED STATUTES; GENERAL LAWS, CHAPTER LXXIV, WITH SECTIONS OF LATER ACTS AS NOTED.]

SECTION 280. Jurisdiction—petition—what county.
" 281. Petition, contents—describe land—parties, affidavits.
" 282. Who shall be made parties.
" 283. Unknown parties—unknown interests.
" 284. How such parties brought in.
" 285. How summons issue—publication—guardian *ad litem*.
" 286. Parties claiming interest may appear.
" 287. Duty of court—what to be determined.
" 288. Commissioners—oath—partition—report.
" 289. Duty of commissioners in setting apart.
" 290. When several tracts are to be partitioned.
" 291. Laying out in lots, streets, etc.—report—map.
" 292. Confirmation, judgment.
" 293. Copy of report recorded.
" 294. Report shall show lots of each party.
" 295. Map submitted to city authorities—filed, recorded.
" 296. Heirs, devisees, conservators, made parties.
" 297. Pay of commissioners.
" 298. Sale of lands—orders—notice—distribution.
" 299. Money of non-residents put in state treasury.
" 300. Order of court to receive money.
" 301. No plea in abatement allowed.
" 302. Powers of court—settling titles.

[Jurisdiction—Petition—What cases—Venue—Sale.]

SECTION 280. (1.) When any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common or coparcenary, whether such right or title be derived by purchase, devise or descent, or whether any, all or a part of such claimants be of full age or minors, it shall be lawful for one or more of the persons interested, by themselves, if of full age, or by their guardians, if minors, to present to the district court of the county where such lands or tenements lie; or where the lands and tenements lie in different counties, in the district court of the county in which the major part of such lands lie; but if the major part of such lands do not lie in any one county, then to the district court of any county in which any of such lands lie, their petition praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice to the owners. [Sec. 1965 (1), p. 674, G. L.

Contents—Description of lands—Parties—Affidavit.]

SEC. 281. (2.) The petition shall particularly describe the premises sought to be divided or sold, and shall set forth and make exhibit of the rights and titles of all parties interested therein, so far as the same are known to the petitioners, including tenants for years, for life, by the courtesy or in dower, and of persons entitled to the reversion, remainder or inheritance, and of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises, so far as the same are known to the petitioners; and such petition shall be verified by affidavit. [Sec. 1966 (2), p. 674, G. L.

Who shall be made parties.]

SEC. 282. (3.) Every person having such interest as is specified in this chapter, whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, shall be made a party to such petition. [Sec. 1967 (3), p. 675, G. L.

Heirs and devisees mentioned in sec. 296, post.

Unknown parties—Unknown interests—To be stated.]

SEC. 283. (4.) In case where one or more of such parties shall be unknown or the share or quantity of interest of any of the parties is unknown to the petitioner, or where such share or interest shall be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition. [Sec. 1968 (4), p. 675, G. L.

Unknown persons how brought in.]

SEC. 284. (5.) All persons interested in the premises of which partition is sought to be made according to the provisions hereof, whose names are unknown, may be made parties to such petition by the name and description of unknown owners or proprietors of the premises, or as the unknown heirs of any person who may have been interested in the same. [Sec. 1969 (5), p. 675, G. L.

Unknown parties—Guardians—Summons—Publication—Guardian ad litem.]

SEC. 285. (6.) All persons having such interest as is specified in this chapter in any premises of which partition is sought to be made, or the guardians of such as are under age, who shall not have joined in the petition (and if any person so interested be under age and without guardian the court shall appoint guardian *ad litem* for such minor) shall have notice of such application by summons duly served, which summons shall issue against such persons by the name and description given in the petition; and when the names of persons having any such interest in such premises are unknown, and when parties whose names are known do not reside in this State, or cannot be found, they shall have further notice by advertisement, as provided by law; and after such advertisement the court shall proceed to act in the premises as though the parties had been duly served with summons, or had been notified by their proper names. [Sec. 1970 (6), p. 675, G. L.

See sec. 45, ch. 3, ante, for order of publication, etc.

Partition.]

Parties claiming interest may appear.]

SEC. 286. (7.) During the pendency of any such suit or proceedings any person claiming to be interested in the premises to be assigned or parted, may appear and answer the petition, and assert his or her rights by way of interpleader; and the courts shall decide upon the rights of persons appearing as aforesaid, as though they had been made parties in the first instance. [Sec. 1971 (7), pp. 675-6, G. L.

See sec. 17, ch. 1, ante.

Duty of court—What determined.]

SEC. 287. (8.) The court shall ascertain from the evidence in case of default, or from the confession by plea of the parties, if they appear, or from the verdict by which any issue of fact shall be determined, and shall declare the rights, titles and interests of all the parties to such proceedings, petitioners as well as defendants, and give such judgment as may be required by the rights of parties. [Sec. 1972 (8), p. 676, G. L.

Commissioners—Oath—Partition—Report.]

SEC. 288. (9.) The court, when it shall order a partition of any premises to be made under the provisions hereof, shall appoint three commissioners not connected with any of the parties, either by consanguinity or affinity, and entirely disinterested, each of whom shall take an oath before the court, or some justice of the peace, fairly and impartially to make partition of said lands in accordance with the judgment of the court as to the rights and interests of the parties, if the same can be done consistently with the interests of the estate, and the said commissioners shall go upon the premises and make partition of said lands, tenements and hereditaments, assigning to each party his or her share by metes and bounds, or other appropriate description; and make report, which shall be under their hands and seals, to the court during the same or next succeeding term at which they were appointed; and the court may, at the term when such report shall be made, make all such orders upon such reports as may be necessary to a final disposition of the case. [Sec. 1973 (9), p. 676, G. L.—With amendments of 1876, p. 98—sec. 9, p. 492, R. S.]

An act to amend chapter lxxiv. of the General Laws of 1877, concerning the partition of estates.

[Approved Feb. 14, 1879—In force May 15, 1879—p. 145, acts 1879.]

[Duty of commissioners.]

SEC. 289. (1.) That in making partition of any estate, it shall be the duty of the commissioners appointed by any court for such purpose, to set apart the same in such lot or lots as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts of such estate or estates. [Sec. 1, p. 145, acts 1879.

How lands may be set off in several tracts.]

SEC. 290. (2.) That when partition of two or more tracts of real estate is demanded in the petition, the whole share in and to all the several tracts of any party may, according to the best judgment and discretion of said commissioners, be set off to him, in one or more of said tracts, as the said party's interests may appear. [Sec. 2, p. 145, acts 1879.]

[Partition.

An act to amend chapter lxxiv. of the General Laws of this State, of the year A. D. 1877, entitled "Partition."

[Approved Feb. 5, 1881—In force May 6, 1881—pp. 196-8, acts 1881.]

[Laying out in lots, streets and alleys—Report—Map—Setting aside.]

SEC. 291. (1.) Whenever, in the opinion of the commissioners appointed by the court to make partition of lands, it will be to the interest of the parties interested in such lands to divide the same into lots, and to lay out streets or avenues and alleys, they may cause the same to be done, and in such case they shall return, with their report, a map or plot of the land so laid out, which shall, however, be subject to the rejection or confirmation of the court; and upon good cause shown by any of the parties the court may set aside the report, and appoint other commissioners as often as may be necessary to substantial justice between the parties, who shall proceed in the manner hereinbefore directed. [Sec. 1, p. 196, acts 1881.

Confirmation—Judgment.]

SEC. 292. (2.) If no such cause be shown, the report of the commissioners shall be confirmed and final judgment rendered thereon, which judgment shall be binding and conclusive upon all the parties to the proceedings, and all other persons claiming under them. [Sec. 2, p. 197, acts 1881.

Copy of report recorded.]

SEC. 293. (3.) A copy of such report and of such confirmation and judgment, duly certified under the seal of the court by the clerk thereof, shall be recorded in the office of the recorder of deeds of the county in which such lands or any part thereof may be situated. [Sec. 3, p. 197, acts 1881.

Report shall show the lots of each party.]

SEC. 294. (4.) The report of commissioners, in cases where lands shall be divided into lots, as provided in the first section of this amendment to said act, shall set forth the lots or parts of lots assigned to each party interested in the partition, with reference to the blocks in which the same are situated, with such other description as may be necessary to designate the same, if any shall be necessary. [Sec. 4, p. 197, acts 1881.

Map filed with recorder—Submitted to city authorities.]

SEC. 295. (5.) When commissioners in pursuance of this act shall have laid out land into lots, streets or avenues, and alleys, and returned a plat of the land so divided to the court, and their report is confirmed, and final judgment rendered thereon as herein provided, they or a majority of their number shall file a copy of the plat or map of the land so divided in the office of the recorder of deeds of the county where the same is situated, for record, as now provided by law for the filing of plats of towns and cities, or additions thereto, upon which they shall certify, under their hands and seals, that the plat or map by them filed has been confirmed by the court in which such proceedings were had, and when the said map or plat shows that the same is an addition to a city or town, they shall submit the same before such filing to the proper authorities of such city or town, for its approval, as prescribed in article second of chapter "C," section twenty-six hundred and forty-eight [3305] of the General Laws of the State, of the year A. D. 1877. [Sec. 5, pp. 197-8, acts 1881.

Sec. 2648 referred to in last above sec. is 3305, sec. 7, of ch. 109, towns and cities, Gen. Stat.

Partition.]

Heirs—Devisees—Conservators, made parties.]

SEC. 296. (6.) In all cases when the partition of lands is sought the heirs or devisees of deceased persons interested therein shall be made parties to the proceeding; and if any person interested in such land shall have been declared lunatic, insane or distracted, the conservator of the estate of such lunatic, insane or distracted person shall be made a party to the same, served with the process issued against such lunatic, insane or distracted person, and it is made his duty to appear and to take such course therein as will best protect the interest of the estate under his contract as conservator. [Sec. 6, p. 198, acts 1881.

Pay of commissioners.]

SEC. 297. (10.) The commissioners to be appointed under this chapter shall be allowed as a compensation for their services two dollars and fifty cents per day each, to be taxed as other costs. [Sec. 1974 (10), p. 676, G. L.

Sale of lands—Orders—Notice—Distribution.]

SEC. 298. (11.) When any lands, houses or lots are so circumstanced that a division thereof cannot be made without manifest prejudice to the proprietors of the same, and the commissioners appointed to divide the same shall so report to the court, the court shall thereupon give an order to said commissioners, or other person or persons, to sell such lands, houses or lots, or houses and lots, at public vendue, upon such terms, and by giving notice of sale as the court shall direct, and who shall make and execute good and sufficient conveyance or conveyances to the purchaser or purchasers thereof, which shall operate as an effectual bar, both in law and equity, against such owners or proprietors, and all persons claiming under them; and the commissioners or persons making such sale shall report their proceedings to the court, and shall pay over the moneys arising therefrom to the parties entitled to receive the same, under the direction of the court; the court to make such order in relation to costs as shall seem right. [Sec. 1975 (11), pp. 676-7, G. L.

Money of non-residents put into State treasury—How paid out.]

SEC. 299. (12.) When a sale of any lands or premises shall be made in accordance with the preceding section, and no person shall appear to claim such portions of the money as may belong to any non-resident, or person whose name is unknown, the court shall thereupon require the money belonging to the persons not claiming as aforesaid, to be deposited in the treasury of the State, subject to the further order of the court; and all money required to be deposited as aforesaid shall be received by the State treasurer and paid out upon the order of the court. [Sec. 1976 (12), p. 677, G. L.

Order of court to receive money—Proof.]

SEC. 300. (13.) When money shall be deposited in the State treasury under the provisions of this chapter, the person or persons entitled to the same may at any time apply to the court making the order of sale, and obtain an order for the same, upon making satisfactory proof to the court of his or her or their right thereto. [Sec. 1977 (13), p. 677, G. L.

No plea in abatement allowed.]

SEC. 301. (14.) No plea in abatement shall be received in any suit for partition, nor shall such suit abate by the death of any tenant. [Sec. 1978 (14), p. 677, G. L.

Powers of court of chancery—Settling title—Encumbrance.]

SEC. 302. (15.) The courts of chancery of this State shall have power, upon bills for the partition of lands, to proceed according to the usual practice of courts of chancery, or according to the provisions of the preceding sections; they shall also have power upon bill or petition for the partition of lands, to investigate and determine all questions of conflicting or controverted titles, and to remove clouds upon the title to any of the premises whereof partition is sought; to invest titles by their decrees, without the form of conveyances by infants and unknown heirs or persons; to order a sale of the premises where for any reason the same cannot conveniently be partitioned, and by the decree to invest the purchaser with title; and where partition is made of premises which are subject to any encumbrance, to apportion such encumbrance among the persons to whom partition is made. [Sec. 1979 (15), pp. 677-8, G. L.]

CHAPTER XXV.

SUBMITTING CONTROVERSY WITHOUT SUIT.

SECTION 303. Controversy—how submitted without action.
" 304. Judgment on, as in other cases, but without costs prior to notice of trial—costs.
" 305. Judgment may be enforced or appealed from, as in an action.

[Case made—Must be real—Affidavit—Hearing, judgment.]

SEC. 303. (276.) 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 proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon, as if an action were depending.

[Costs—Judgment roll.]

SEC. 304. (277.) Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial.

The case, the submission and a copy of the judgment shall constitute the judgment roll.

[Enforcement—Appeal.]

SEC. 305. (278.) The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

CHAPTER XXVI.

DEFENDANT MAY OFFER COMPROMISE.

[Defendant may offer judgment for a certain amount—Acceptance—Notice—Filing summons—Costs.]

SEC. 306. (289.) The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; but if the plaintiff fail to obtain a more favorable judgment he shall not recover costs, but shall pay the defendant's costs from the time of the offer.

CHAPTER XXVII.

OF ARBITRATIONS.

AN ACT CONCERNING ARBITRATIONS AND AWARDS, AND TO REPEAL A CERTAIN STATUTE OF THE STATE OF COLORADO INCONSISTENT WITH THE PROVISIONS HEREOF.

[Approved February 4, 1881—In force May 5, 1881—pp. 59-61, acts 1881.]

SECTION 307. Controversies which may be subject of civil action may be submitted to.
" 308. Agreement necessary to make arbitration obligatory.
" 309. Arbitrators to be sworn.
" 310. Powers of arbitrators—subpœnas—oath—award.
" 311. Judgment and execution, may be entered by clerk upon award.
" 312. Compensation of arbitrators.
" 313. Decision of arbitrators not subject to review.
" 314. Repeal of chapter 29 of civil code, concerning.

[All controversies.]

SECTION 307. (1.) That all controversies which may be the subject of a civil action may be submitted to the decision of one or more arbitrators, in the manner and with the effect indicated in this act.

[Written submission—Contents.]

SEC. 308. (2.) In order to make future arbitrations obligatory and binding upon the parties they shall, before they make their submission, make and subscribe a written article of agreement, in and by which they shall agree to submit all matters, or some particular matter of difference, to the arbitrators named, and to abide their award; and also that the award when made may be filed by the successful party with the clerk of the district court, as a basis of a judgment, and that an execution may be issued for its collection.

[Oath of arbitrators.]

SEC. 309. (3.) Arbitrators shall not have power hereafter to act until they take an oath, before some person authorized by law to administer oaths, to the effect that they will well and truly try and impartially and justly decide the matter in controversy, according to the best of their ability.

[Two arbitrators or referees may do all acts to be done by all, sec. 408, ch. 38, post.

[Powers of arbitrators—Subpœnas—Oaths—Award.]

SEC. 310. (4.) Arbitrators duly sworn and entered upon their duties shall have power to issue subpœnas for witnesses, and to enforce the same by attachment in like manner as district courts; to administer oaths to witnesses and others in the case, and after a trial and hearing to decide the matter, in writing, according to the very right of the cause.

[Award filed—Judgment—Execution.]

SEC. 311. (5.) The party in whose favor any award shall be made may file the same with the clerk of the district court of the county wherein the matter was arbitrated, who shall be authorized to enter a judgment thereon,

and if such award requires the payment of any sum of money, it shall be lawful for the clerk to issue an execution out of, and under the seal of the court, for the collection of the judgment.

[Fees of arbitrators—Stated in award—Prepaid.]

SEC. 312. (6.) Arbitrators shall be entitled to receive from the parties in whose favor the award is made three dollars per day each for their services, and the amount of their compensation shall be included in their award, and in the judgment entered thereon by the clerk. The arbitrators shall not be required to deliver their award to such successful parties until their said compensation shall have been paid.

[Matters arbitrated, held adjudicated.]

SEC. 313. (7.) Whenever it shall appear upon the trial of an action at law, or in equity, or in any legal proceeding, in or before any court of competent jurisdiction, that the subject matter of such action or proceeding, or any part thereof, or the defense thereto, or of any part thereof, has been submitted to and decided by arbitrators according to the terms of this act, such matter so arbitrated shall be held to have been adjudicated and settled, and not open, either directly or indirectly, for review.

[Repeal of chapter xxix. of civ. proc.]

SEC. 314. (8.) That chapter twenty-nine of an act entitled "an act providing a system of procedure in civil actions in courts of justice in the State of Colorado, approved March 17, A. D. 1877, be and the same is hereby repealed. [Sec. 8, p. 61, acts 1881—Approved Feb. 14, 1881—In force May 5, 1881.

CHAPTER XXVIII.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

SECTION 315. Action may be brought, any party usurping, etc., any office or franchise.
" 316. Name of person entitled to office may be set forth in complaint.
" 317. Judgment may determine the rights of both incumbent and claimant.
" 318. When rendered in favor of applicant—oath—bond.
" 319. Damages may be recovered by successful applicant.
" 320. When several persons claim the same office their rights may be determined by a single action.
" 321. If defendant found guilty, what judgment to be rendered against him.

[Action when by district attorney—When by party.]

SECTION 315. (260.) An action may be brought by the district attorney, in the name of the people of this State, upon his own information, or upon the relation and complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the State, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held or exercised by any person, or when he is directed to do so by the governor, and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party, upon his own relation, in the name of the people of the State.

[Complaint—Shall state name of party entitled.]

SEC. 316. (261.) Whenever such action is brought the district attorney or relator, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his rights thereto.

[Judgment as to right of both parties.]

SEC. 317. (262.) In every such case judgment may 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.

[If in favor of party entitled he shall take oath and give bond.]

SEC. 318. (263.) 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.

[Party entitled recover damages.]

SEC. 319. (264.) If judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person he may recover by action the damages which he shall have sustained by reason of the usurpation of the office by the defendant.

[One action against all claimants.]

SEC. 320. (265.) When 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.

[Judgment of exclusion—Costs—Fine.]

SEC. 321. (266.) When a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and that he pay the cost of the action.

The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine when collected shall be paid into the treasury of the State.

CHAPTER XXIX.

OF THE WRIT OF CERTIORARI AND PROHIBITION.

SECTION 322. The writ of certiorari—denomination of.
" 323. This writ may be issued by a superior court to an inferior tribunal--in what cases.
" 324. The application shall be made on affidavit with notice or without.
" 325. The writ to be directed to the inferior tribunal.
" 326. The contents of the writ.
" 327. Proceedings in the inferior court, etc., may be stayed or not.
" 328. Service of the writ.
" 329. The review upon the writ—extent of.
" 330. A defective return of the writ may be perfected--hearing and judgment.
" 331. Copy of judgment shall be sent to the inferior tribunal, etc.
" 332. Judgment roll—appeals may be taken as in civil cases—disobedience--contempt.

[Denomination of writ.]

SECTION 322. (290.) The writ of certiorari may be denominated the writ of review.

[How and when granted—What tribunals.]

SEC. 323. (291.) The writ may be granted on application by any court of this State except a justice's, county or mayor's court. The writ shall be granted in all cases where an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

[Application—Affidavit—Notice—Order.]

SEC. 324. (292.) The application shall 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.

[To whom directed—Return.]

SEC. 325. (293.) The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk thereof, if there be one, shall return the writ with the transcript required.

[Exigency of writ—Contents.]

SEC. 326. (294.) The writ of review shall command the party to whom it is directed, or tribunal, 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 or tribunal in the meantime to desist from further proceedings in the matter to be reviewed.

[Stay of proceedings—When omitted—Effect.]

SEC. 327. (295.) If a stay of proceedings be not intended, the words requiring the stay shall 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 officers shall not be suspended nor the proceedings stayed.

[How served.]

SEC. 328. (296.) The writ shall be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the court.

[Extent of review.]

SEC. 329. (297.) The review upon the writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

[Return if defective—Further return—Hearing—Judgment.]

SEC. 330. (298.) 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 shall proceed to 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.

[Copy certified to lower tribunal.]

SEC. 331. (299.) A copy of the judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up.

[Judgment roll—Appeal—Disobedience—Contempt.]

SEC. 332. (300.) A copy of the judgment, signed by the clerk, entered upon or attached to the writ and returned, shall constitute the judgment roll.

If the proceeding be had in any other than the supreme court an appeal may be taken from the judgment in the same manner and upon the same terms as from a judgment in a civil action. The judgment rendered under the provisions of this chapter, if disobeyed, may be enforced by proceedings for contempt; *Provided*, nothing herein shall prevent or interfere with removing a judgment from an inferior to a superior court, by appeal, writ of error or certiorari, as provided by any other law of the State.

CHAPTER XXX.

THE WRIT OF MANDAMUS.

SECTION 333. The writ may be issued by a superior court to an inferior tribunal, etc.—in what cases.
" 334. The writ shall issue on affidavit where there is no adequate remedy in the ordinary course of law.
" 335. Shall be either alternate or peremptory substance of the writ.
" 336. If the application be without notice the alternative writ shall issue; otherwise the peremptory—notice and default.
" 337. The adverse party may answer under oath.
" 338. If an essential question of fact is raised the court may order a jury trial.
" 339 The applicant may demur to the answer or controvert it by proof.
" 340. Either party may move for a new trial—two verdicts for the same party shall be conclusive.
" 341. The clerk shall transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.
" 342. If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the court.
" 343. If the applicant succeed he may have damages, costs and a peremptory mandate.
" 344. Service of writ.
" 345. Penalty for disobedience to the writ of mandate.
" 346. Writ may restrain acts.

[What court issue writ—To whom—What to compel.]

SECTION 333. (301.) The writ of mandamus may be issued by any court or judge thereof in this State, except a justice's, county, or mayor's court, to any inferior tribunal, corporation, board, officer 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, officer or person.

[In what cases—Petition—Affidavit.]

SEC. 334. (302.) The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.

It shall be issued upon petition and affidavit on the application of the party beneficially interested.

[Alternative—Peremptory—Form in each case.]

SEC. 335. (303.) The writ shall be either alternative or peremptory. The alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after 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 or judge, at a specified time and place, why he has not done so.

The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.

[Without notice, alternative first—When notice—Not granted upon default.]

SEC. 336. (304.) When the application to the court or judge is made without notice to the adverse party, and the writ be allowed, the alternative shall 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, shall be at least ten days.

The writ shall not be granted by default.

The case shall be heard by the court or judge, whether the adverse party appear or not.

[Showing cause—Time—Answer sworn.]

SEC. 337. (305.) On the return of the alternative, or the day on which the application of the writ is noticed, or such further day as the court or judge may allow, the party on whom the writ or notice shall have been served, may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

[Jury, verdict—Certified—Order—County designated—Damages.]

SEC. 338. (306.) If an answer is 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 the allegation on which the application for the writ is based, the court or judge 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 or judge.

The question to be tried shall be distinctly stated in the order for trial, and the county shall 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.

[Trial—Sufficiency of answer—Proof.]

SEC. 339. (307.) On the trial the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may controvert it by proof, either in direct denial or by way of avoidance.

[New trial—Motion, notice—Jury—One new trial only—When.]

SEC. 340. (308.) If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in the chapter on new trials of this act.

The motion for a new trial may, upon reasonable notice, be brought on before the judge of the court in which the cause was tried either in term or vacation.

If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree upon a longer time, be summoned to try the issues. After a second verdict in favor of the same party a new trial shall not be had.

[Clerk transmit copy of verdict—Argument—Notice.]

SEC. 341. (309.) If no notice for a new trial be given, or if given, it be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall 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.

[If no answer—If answer—Hearing—Time to reply.]

SEC. 342. (310.) If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned above in this chapter, but only such matters as may be explained or avoided by a reply, the court or judge may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements not affecting the substantial rights of the parties, the court or judge shall proceed to hear or fix a day for hearing the argument of the case.

[Judgment—Damages—Costs—Execution—Mandate.]

SEC. 343. (311.) If the judgment be given for the applicant he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the court, judge or referees upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue and a peremptory mandate shall also be awarded without delay.

[Service of writ—Court may order.]

SEC. 344. (312.) The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court or judge.

[Neglect to obey mandate—Penalty—Contumacy—Imprisonment.]

SEC. 345. (313.) When a peremptory mandate 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 a persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the judgment.

[Mandate may restrain.]

SEC. 346. (314.) The writ of mandate may also, in the court's discretion, restrain the person or tribunal against whom or which it is issued, from doing or exercising any act or acts to prevent the object for which it issues, and to give full effect to the judgment of the court.

CHAPTER XXXI.

OF CONTEMPTS AND THEIR PUNISHMENTS.

SECTION 347. Contempts—what shall be deemed.
" 348. A contempt committed in the presence of the court may be punished summarily—when not so committed, an affidavit or statement shall be made.
" 349. A warrant of attachment to answer may issue, or notice to show cause.
" 350. Bail may be given by a person arrested under such warrant.
" 351. Sheriff shall, upon executing the warrant, arrest and detain the person until discharged.
" 352. Bail bond—form and condition of.
" 353. Officers shall return warrant and bail bond, if any.
" 354. Hearing—witnesses.
" 355. Judgment and penalty, if guilty.
" 356. If the contempt is the omission of any act, the person may be imprisoned until performed.
" 357. Person in contempt may also be indicted, if an indictable offense.
" 358. If the party fail to appear, proceedings.
" 359. Illness sufficient excuse for non-appearance of party arrested—confinements under arrest for contempt.
" 360. Judgments and orders in such cases final—extent of punishment.

[What acts constitute.]

SECTION 347. (321.) The following acts or omissions shall be deemed contempt:

[Disorderly behavior.]

First—Disorderly, contemptuous or insolent behavior towards the judge whilst holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators, while sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration or other judicial proceedings.

[Disturbance in court or vicinity.]

Second—A breach of the peace, boisterous conduct or violent disturbance in the presence of the court, or its immediate vicinity, tending to interrupt the due course of a trial or judicial proceedings,

[Disobedience to order, writ.]

Third—Disobedience or resistance to any lawful writ, order, rule or process, issued by the court or judge at chambers.

[Disobeying subpœna.]

Fourth—Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness.

[Rescue of person, property.]

Fifth—Rescuing any person or property in the custody of an officer, by virtue of an order of [or] process of such court or judge at chambers.

Of Contempts and their Punishments.]

[Contempt, manifest—Proceedings—Punishment—When not manifest.]

SEC. 348. (322.) When a contempt is committed in the immediate view and presence of the court or judge at chambers, it may be punished summarily, for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

[Attachment—When warrant may issue.]

SEC. 349. (323.) When the contempt is not committed in the immediate view and presence of the court or judge, a warrant or [of] attachment may be issued to bring the person charged to answer; or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

[Judge endorse order for bail.]

SEC. 350. (324.) Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge shall direct, by an endorsement on such warrant, that the person charged may be let to bail for his appearance in an amount to be specified in such endorsement.

[Duty of sheriff—Detain prisoner.]

SEC. 351. (325.) Upon executing the warrant of attachment, the sheriff shall keep the person in custody, bring him before the court or judge, and detain him until an order may be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

[When sheriff take bond—Conditions.]

SEC. 352 (326.) When a direction to let a person arrested to bail is contained in the warrant of attachment, or endorsed thereon, he shall be discharged from the arrest upon executing and delivering to the officer, at any time before return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant, and abide the order of the court or judge thereon, or that they will pay, as may be directed, the sum specified in the warrant.

[Officer's Return.]

SEC. 353. (327.) The officer shall return the warrant of arrest and undertaking, if any received by him from the person arrested, by the return day specified therein.

[Hearing—Witnesses.]

SEC. 354. (328.) When the person arrested has been brought up or appeared, the court or judge shall proceed to investigate the charge, and shall hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time if necessary.

[Judgment—Fine—Limit.]

SEC. 355. (329.) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed upon him, not exceeding five thousand dollars.

[Imprisonment till performance—Commitment specify.]

SEC. 356. (330.) When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he shall have performed it, and in that case the act shall be specified in the warrant of commitment.

[Liability on indictment for same offense.]

SEC. 357. (331.) Persons proceeded against, according to the provisions of this chapter, shall also be liable to indictment for the same misconduct if it be an indictable offense, but the court before which a conviction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted.

[Alias warrant—Arrest—Action on bond—Damages.]

SEC. 358. (332.) When the warrant of arrest has been returned served, if the person arrested do not appear on return day, the court or judge may issue another warrant of arrest or may order the undertaking to be prosecuted, or both.

In an action upon the undertaking, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceedings.

[Illness of prisoner—Necessary restraint only.]

SEC. 359. (333.) Whenever, by the provisions of this chapter, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or a judge, the inability from illness or otherwise of the person to attend shall be a sufficient cause for not bringing him up, and the officer shall not confine a person arrested upon the warrant in a prison or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

[Judgment final—Punishment.]

SEC. 360. (334.) The judgment and orders of the court or judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or imprisonment, but no fine shall exceed the sum of five thousand dollars.

CHAPTER XXXII.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

SECTION 361. Authorizing certain persons to administer oaths.
" 362. A witness may, instead of taking the oath, make affirmation.

[Officers empowered to administer oaths.]

SECTION 361. Every court of this State, every judge or clerk of any court, every justice of the peace, and every notary public, county clerk, and every officer authorized to take testimony or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations.

[Other officers empowered to administer oaths, 2473-4, ss. 3-4, ch. 80, Gen. Stat., oaths and affirmations. Chairmen of legislative committees, see 2474, same. Form of lawful oath, 2471, s. 1, same ch.

Affirmation—Form of administering.]

SEC. 362. A witness who desires it, may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting when addressed in the following form:

You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between ———————— and ————————, shall be the truth, the whole truth, and nothing but the truth.

Assent to this affirmation shall be made by answer:

"I do."

A false affirmation or declaration shall be deemed perjury equally with a false oath.

[See 2472, s. 2, ch. 80, oaths and affirmations, Gen. Stat.]

CHAPTER XXXIII.

OF AFFIDAVITS.

SECTION 363. Affidavits to be used in this State; before whom may be taken in this State.
" 364. If made in another State of the United States; before whom taken.
" 365. If made in a foreign country; by whom taken.
" 366. Certificate of clerk, if taken before a judge of a court out of this State.

[Before whom taken.]

SECTION 363. An affidavit, to be used before any court, judge or officer of this State, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this State.

[Affidavit defective in title of cause, etc., when good, sec. 410, ch. 38, post.

Taken in other States—Before whom.]

SEC. 364. An affidavit taken in another State or Territory of the United States, to be used in this State, shall be taken before a commissioner appointed by the governor of this State to take affidavits and depositions in such other State or Territory, or before any notary public or judge of a court of record having a seal.

[Taken in foreign countries.]

SEC. 365. An affidavit taken in a foreign country, to be used in this State, shall be taken before an ambassador, minister or consul of the United States, or before any judge of a court of record having a seal in such foreign country.

[Authentication—Other State—Foreign country.]

SEC. 366. When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such a judge is a member thereof, shall be certified by the clerk of the court, under the seal thereof.

CHAPTER XXXIV.

OF DEPOSITIONS TAKEN IN THIS STATE.

SECTION 367. Depositions of witnesses in this State may be taken in certain cases.
" 368. Depositions may be taken before a judge, etc., upon notice to the adverse party.
" 369. Manner of taking depositions—may be used by either party on the trial.
" 370. A deposition may be read at any stage of the action or proceeding.
" 371. May compel attendance of witness out of county.
" 372. When may be taken on commission.
" 373. Compelling attendance of witness.

[When and in what cases taken.]

SECTION 367. The testimony of a witness in this State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

[When witness is party or beneficiary.]

First—When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

[Or resides out of county.]

Second—When the witness resides out of the county in which his testimony is to be used.

[Or about to leave county.]

Third—When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

[Infirm witness.]

Fourth—When the witness, otherwise liable to attend the trial, is, nevertheless, too infirm to attend.

[Deposition—Before whom—When—Notice—Time - When copy served—Distance.]

SEC. 368. Either party may have the deposition taken of a witness in this State before any judge or clerk, or any justice of the peace or notary public in this State, on serving on the adverse party previous notice of the time and place of examination, together with a copy of an affidavit of the party, his agent or attorney, showing that the case is one mentioned in the last preceding section. At any time during the last forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice and affidavit required by this section may be served on the clerk of the court where the action is pending. Such notice shall be at least five days, and, in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

[Parties attend—Mode—Sealing up—Return—Objections—In what case used.]

SEC. 369. Either party may attend such examination, and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness, and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the judge or officer taking the deposition, enclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by reason of the absence, or intended absence, from the county, of the witness, or because he is too infirm to attend, proof, by affidavit or oral testimony, shall be made at the trial that the witness continues absent or infirm, to the best of deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of a witness.

[May be read at any stage—Evidence.]

SEC. 370. When a deposition has once been taken, it may be read in any stage of the same action or proceeding, by either party, and shall then be deemed evidence of the party reading it.

[Subpœnas to other counties—Affidavit—Order.]

SEC. 371. The several district and county courts of this State shall in all cases have power to compel the attendance of witnesses residing beyond the county in which the court is held; *Provided*, that no subpœnas shall be issued in any cause to any foreign county, except upon the order of the court in term time, or of the judge thereof in vacation, granted upon showing by affidavit that it is necessary to the ends of justice that the witness be personally present at the trial.

[Commission—Interrogatories.]

SEC. 372. Depositions of witnesses in this State may also be taken by the issuing of commissions, with direct and cross interrogatories attached, in the same manner as provided in the next chapter, for taking depositions of witnesses residing out of the State.

[Person authorized to take depositions may compel attendance of witnesses.]

SEC. 373. (12.) Each and every person authorized, and who may be required to take depositions in any case, shall have power and authority to issue subpœnas, and, if necessary, to compel the attendance of all such witnesses as may be named in the commission or by the parties litigant, where no commission is necessary; in the same manner, and under the same penalties, as is provided in other cases where witnesses are directed to be subpœnaed. [Sec. 12, p. 313, chap. Ev. & Dep. R. S; not in "code" or G. L.

CHAPTER XXXV.

OF DEPOSITIONS TAKEN OUT OF THIS STATE.

SECTION 374. Testimony of a witness out of the State may be taken after service of summons or issue joined.
" 375. Such deposition shall be taken upon commission issued under seal, upon notice—to whom to issue.
" 376. Proper interrogatories, direct and cross, may be prepared, or may be waived by the parties.
" 377. Authorities and duties of commissioner.
" 378. Trial not postponed except in certain cases.
" 379. Objections disposed of before trial.
" 380. Adverse party and attorney non-resident, notice, how given.

[When may be taken.]

SECTION 374. (373.) The testimony of a witness out of the State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen therein.

[Commission—How issued—To whom—Interrogatories—Cross interrogatories.]

SEC. 375. (374.) The deposition of a witness out of the State shall be taken upon commission issued by the clerk of the court under the seal of the court where the suit is pending, on the application of either party, upon five days' previous notice to the other, which notice shall be accompanied by a copy of the interrogations [interrogatories] to be attached to the commission. It shall be issued to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor of the State, to take affidavits and depositions in other States and Territories, or to a notary public. The adverse party may file and have attached to the commission such cross-interrogatories as he may desire.

[Written stipulation without interrogatories.]

SEC. 376. (375.) Such interrogatories, direct and cross, as the respective parties may prepare, may be annexed to the commission; or when the parties agree to that mode, by written stipulation, the examination may be without written interrogatories.

[Commission—What it shall authorize.]

SEC. 377. (376.) The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court in a sealed envelope directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channels of conveyance.

[Of Depositions taken out of this State.

[Diligence—Postponement of trial.]

SEC. 378. (377.) A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

[Objections must be disposed of before trial.]

SEC. 379. (21.) In all trials in the district and county courts of this State, where depositions may be used, in such trials all objections and exceptions to such depositions shall be made and disposed of before the trial. [Sec. 21, p. 224, acts 1879.

Adverse party and attorney non-resident, notice—Posting.]

SEC. 380. (21.) Whenever the deposition of any witness or witnesses is desired to be read in evidence in any civil cause depending in any court of this *Territory*, whether in law or equity, in accordance with the provisions of this chapter, when neither the adverse party in such cause, nor his attorney, resides within the limits of this *Territory*, after affidavit of such non-residence being filed with the clerk of the court in which the cause is pending, the notices provided for in this chapter, may be given by posting said notices at the door of the court house of the county where the suit is pending; and filing interrogatories when required by this chapter in the office of the clerk of said court, at least four weeks prior to suing out a commission, or taking depositions, as the case may be. [Sec. 21, p. 315, R. S., chap. Ev. & Dep.—Not in G. L. nor Code.]

CHAPTER XXXVI.

INSPECTION OF DOCUMENTS, AND MISCELLANEOUS PROVISIONS AS TO RECORDS, WRITINGS, ETC.

SECTION 381. The court may, upon notice, order a party to grant an inspection of a book, etc., relating to the merits of a case.
" 382. When there may be evidence of the contents of a writing other than itself.
" 383. Introduction in evidence of a writing altered in a material part.
" 384. Proof of a judicial record of this State or of the United States.
" 385. Proof of the records, etc., of any other state or territory of the United States.
" 386. Proof of a copy of a judicial record of a foreign country.
" 387. Printed copies of statutes, etc., of another territory, state or government, admitted as presumptive evidence.
" 388. Impression of a seal of a court or public officer.
" 389. Actions respecting mining claims.
" 390. Inspection, examination or survey of mining claims—notice—affidavits—hearing—order.

[Notice—Order for inspection—Non-compliance, jury may presume—Contempt.]

SECTION 381. (378.) Any court in which an action is pending, or a judge thereof, may, upon 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 book document or paper 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 exclude the book, document or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.

EVIDENCE—RECORDS.

[Evidence of contents other than the writing.]

SEC. 382. (379.) There shall be no evidence of the contents of a writing other than the writing itself, except in the following cases:

[Lost or destroyed.]

First—When the original has been lost or destroyed, in which case proof of the loss or destruction shall first be made.

[In possession of adverse party.]

Second—When the original is in possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

[Record or document in custody of officer.]

Third—When the original is a record or other document in the custody of a public officer.

[Copy evidence by statute.]

Fourth—When the original has been recorded, and a certified copy of the record is made evidence by statute.

[Numerous accounts, etc., when.]

Fifth—When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

[Party producing must explain alterations.]

SEC. 383. (380.) The party producing a writing as genuine which has been altered, or appears to have been altered after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that he may give the writing in evidence, but not otherwise.

[Judicial record—Original—Copy.]

SEC. 384. (381.) A judicial record of this State, or of the United States, may be proved by the production of the original, or a copy thereof, certified by the clerk or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record.

[See 1308, sec. 1, chap. 36, Gen. Stat., evidence.
See 446, chap. 40, post.

Judicial records of other States.]

SEC. 385. (382.) The records in judicial proceedings of the courts of any other State or Territory of the United States, may be proved or admitted in the courts of this State by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, as the case may be, that the said attestation is in due form.

[Judicial records of foreign countries—Copy compared—Authenticated.]

SEC. 386. (383.) A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal, or by the legal keeper of the record with the seal of his office annexed, if there be a seal, to be a true copy of such record, together with a certificate of a judge of the court, that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also, together with the certificate of the minister or ambassador of the United States, or of a consul of the United States in such foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and verifying the signature of the judge and clerk, or other legal keeper of the record.

A copy of the judicial record of a foreign country shall be admissible in evidence upon proof:

First—That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

Second—That such original was in custody of the clerk of the court or other legal keeper of the same; and,

Third—That the copy is duly attested by a seal which is proved to be the seal of the court where the records remain, if it be the record of a court, or if there be no such seal, or if it be not the record of a court, by the signature of the legal keeper of the original.

[Printed copies of statutes, etc.—States—Foreign.]

SEC. 387. (384.) Printed copies in volumes, of statutes, codes or other written law, of any Territory or any other State or foreign government purporting or proven to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such State, Territory or governments, shall be admitted by courts and officers of this State on all occasions as presumptive evidence of such laws.

[Seal, how impressed, attached.]

SEC. 388. (385.) A seal of a court or public officer, when required to any writ, or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

CONCERNING MINES.

[Mining claims—Customs, usages.]

SEC. 389. (386.) In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations established and in force in the mining districts embracing such claim; and such customs, usages and regulations, when not in conflict with the laws of this State, or of the United States, shall govern the decision of the action.

[Inspection of mines—Petition—Contents—Notice—Affidavits—Hearing—Order contempt—Witnesses—Costs.]

SEC. 390. (387.) Whenever any person, company or corporation shall have any right to, or interest in any mine, lead, lode or mining claim, which is in the possession of another person, company or corporation, and for which a cause is pending in a court of record, bringing into question the right or title to the same, and it shall be necessary for the ascertainment, enforcement or protection of such right or interest, that an inspection, examination or survey of such mine, lead, lode or mining claim, should be had or made, or whenever an inspection, examination or survey of any mine, lead, lode or mining claim shall be necessary to ascertain, protect or enforce the right or interest of any person, company or corporation, in another mine, lead, lode or mining claim, and the person, company or corporation in possession of such mine, lead, lode or mining claim, of which an inspection, examination or survey is necessary, shall refuse, after three days' demand thereof, in writing, to allow or permit such inspection, examination or survey to be had or made, the party, company or corporation desiring an inspection, examination or survey of such mine, lead, lode or mining claim, may present to the district court, or the judge thereof, of the county wherein the mine, lead, load or min-

ing claim, of which an inspection, examination or survey is desired, is situated, a petition under oath, setting out his or their right to, or interest in, such mine, lead, lode or mining claim, describing it, the possession thereof, or of another mine, lead, lode or mining claim, of which an inspection, examination or survey is necessary by another company or corporation, the reason why it is necessary that such inspection, examination or survey should be had or made, the demand made on the person, company or corporation in possession to allow or permit such inspection, examination or survey, and his or their refusal to allow or permit the same, and asking an order for the inspection, examination or survey of such mine, lead, lode or mining claim, the court or judge may thereupon appoint a time and place for hearing such petition, and shall order notice thereof to be served on the adverse party, company or corporation, which notice shall be served at least three days before the day of hearing.

At the time and place appointed the court or judge shall proceed to hear the petition. Either party may read affidavits on the hearing in the same manner and subject to the same rules as on application to dissolve an injunction. If the court or judge be satisfied that the facts stated in the petition are true, an order shall be made for an inspection, examination or survey of the mine, lead, lode or mining claim in question, in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode or mining claim, for the purpose of such inspection, examination or survey in conformity with the order of the court or judge, and any interference with such persons while acting under such order, shall be a contempt of court and punished accordingly; *Provided*, that only three witnesses beside the surveyor shall be admitted on the part of the petitioner, and the costs of the proceeding shall abide the result of the suit.

[See 2413, ch. 75, Gen. Stat., mines.]

CHAPTER XXXVII

OF PROCEEDINGS TO PERPETUATE TESTIMONY.

SECTION 391. Testimony may be perpetuated.
" 392. The applicant shall present verified petition to a judge—granting and service of order.
" 393. Upon due service of notice the deposition of witness may be taken.
" 394. Manner of taking depositions and filing thereof.
" 395. Affidavits, etc., filed with depositions, shall be *prima facie* proof of the facts therein stated.
" 396. Manner of using such deposition, if trial be had.

[Manner of proceeding.]

SECTION 391. (315.) The testimony of a witness or witnesses may be taken and perpetuated as provided in this chapter.

[Petition verified—Averments.]

SEC. 392. (316.) The applicant shall present to a district or county judge a petition, verified by the oath of the applicant, stating:

[Names of adverse parties.]

First—That the applicant expects to be a party to an action in a court in this State, and in such case the name or names of the person or persons whom he expects will be adverse parties; or

[Facts material—Necessary.]

Second—That the proof of some fact or facts is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated; or, if anticipated, he may not know the parties to such suit; and,

[Names of witnesses—Facts—Order—Notice—Service—Publication.]

Third—The name or names of the witness or witnesses to be examined at his or their place of residence, and a general outline of the facts expected to be proved.

The judge to whom such petition is presented shall make an order allowing the examination, and prescribing the notice to be given; which notice, if parties are known to reside in this State, shall be personally served on them; and if unknown, each notice shall be served on the clerk of the county where the property to be effected [affected] by such evidence is situated, and notice thereof be published in some newspaper to be designated by the judge making the order.

[Proof of notice—Depositions.]

SEC. 393. (317.) Upon proof of the service of the notice, as provided in the last section, it shall be the duty of the judge before whom the depositions are taken, to proceed to take the depositions of the witnesses named in said petition upon the facts therein set forth; and the taking of the same may be continued from time to time in the discretion of the judge.

[Mode of taking depositions—Filing.]

SEC. 394. (318.) The examination shall be by question and answer unless the parties otherwise agree. The deposition, when taken, shall be carefully read to and subscribed by the witness, then certified by the judge, and immediately thereafter filed in the office of the clerk of the district court of the county where the same was taken, together with the order for the examination, the petition on which the same was granted, and the proof of service of notice.

[Affidavits prima facie evidence.]

SEC. 395. (319.) The affidavit or other proofs filed with the depositions, or certified copies thereof, shall be *prima facie* evidence of the facts therein stated.

[Depositions, how and in what case used—Objections.]

SEC. 396. (320.) If a trial be had between the parties named in the petition, as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such deposition prove or tend to prove, upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness or settled infirmity, the deposition or depositions, or certified copies thereof, may be used by either party subject to all legal objections.

But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the examination.

CHAPTER XXXVIII.

MOTIONS, ORDERS, NOTICES, SERVICE OF PAPERS, ETC., TIME.

SECTION 397. Order, motion, defined.
" 398. Motion—when made.
" 399. Notice—in same county twenty-four hours—otherwise three days.
" 400. Matter transferred to other judge.
" 401. Written notice—how served—proviso.
" 402. Personal service—party or attorney.
" 403. Service by mail.
" 404. By mail—time—distance—forty days.
" 405. What constitutes appearance—party appearing entitled to notice.
" 406. Non-resident who has appeared—service on clerk.
" 407. Clerk keep register of actions.
" 408. Majority of referees or arbitrators may act.
" 409. Computation of time—extension for cause—limit.
" 410. Want or defect of entitling affidavits, etc—when valid.

[Order, motion, defined.]

SECTION 397. (388.) Every direction of a court or judge made or entered in writing and not included in a judgment, is denominated an order. An application for an order is a motion.

[Powers of court at chambers; see section 432, ch. 40. post.

Motions, where made—Notice.]

SEC. 398. (8.) Motions shall be made in the county in which the section [action] is brought, or if at chambers, in any county in the same district. Written notice of motions shall be required in all cases, except those made during the progress of a trial. [Sec. 8, p. 56, acts 1881—Subs. for section 389, original act.

Orders refused by judge before whom action is pending shall not be asked for from another; contempt—Section 460, ch. 40, post.

Notice—In same county twenty-four hours—Otherwise three days.]

SEC. 399. (9.) Where the attorneys of both parties or the parties themselves reside in the same county, written notice of a motion shall be given twenty-four hours before the time appointed for the hearing, otherwise three days' actual notice will be given. [Sec. 9, pp. 56-7, acts 1881—Subs. for sec. 390, original act.

Transferred to another judge.]

SEC. 400. (391.) When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge before whom it might originally have been brought.

[Written notices—How served—Proviso.]

SEC. 401. (392.) Written notices and other papers, when required to be served on the party or attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceeding to bring a party into contempt.

[Personal service—Party or attorney.]

SEC. 402. (393.) The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

[On attorney, how served.]

First—If upon an attorney, it may be made during his absence from his office by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, enclosed in an envelope, into the post-office, directed to such attorney.

[Service on party.]

Second—If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope, into the post-office, directed to such party.

[Service by mail.]

SEC. 403. (394.) Service by mail may be made, when the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

[Service by mail—Time, distance, 40 days.]

SEC. 404. (395.) In case of service by mail, the notice or other paper shall 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. And in such case the time of service shall be increased one day for every twenty-five miles distance between the place of deposit and the place of address: *Provided*, that service in any case shall be deemed complete at the end of forty days from the date of its deposit in the post-office.

[What constitutes appearance—Party appearing entitled to notice, etc.]

SEC. 405. (396.) A defendant shall be deemed to appear in an action when he answers, demurs or gives the plaintiff a written notice of his appearance. After appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings of which notice is required to be given. But when a defendant has not appeared, service of notice or papers need not be made upon him.

[Non-resident who has appeared—Service on clerk—Except.]

SEC. 406. (20.) When a plaintiff or a defendant who has appeared resides out of the State, and has no attorney in the action or proceeding, the

service may be made on the clerk for him. But in all cases where the party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney, or upon the party himself, except of summons, writs and other process issued in the suit, and of papers to bring him into contempt, which shall be served on the party. [Sec. 20, p. 224, acts 1879—Subs. for sec. 397, original act.

Clerk keep register of actions.]

SEC. 407. (398.) The clerk shall keep, among the records of the court, a register of actions; he shall enter therein the title of the action, with brief notes under it from time to time, of all papers filed and proceedings had therein.

[Majority of referees or arbitrators may act.]

SEC. 408. (399.) When there are three referees, or three arbitrators, two of them may do any act which might be done by all.

[Computation of time—Extension for cause—Limit.]

SEC. 409. (7.) The time within which an act is to be done as provided in this act, shall be computed by excluding the first day and including the last; if the last day be Sunday or a legal holiday it shall be excluded.

When the act to be done relates to the pleadings in the action or the undertakings to be filed, or the justification of sureties, or the service of notices other than of appeal, or the preparation of statement, or of bills of exceptions, or of amendments thereto, the time allowed by this act may be extended upon good cause shown by the court in which the action is pending, or the judge thereof, or in the absence of such judge from the county in which the action is pending, by the county judge; but such extension shall not exceed thirty days beyond the time prescribed by this act without the consent of the adverse party. [Sec. 7, p. 56, acts 1881—Subs. for sec. 400, original act.

Want or defect of entitling affidavits, motions, etc.—When valid.]

SEC. 410. (401.) An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

CHAPTER XXXIX.

APPEALS IN GENERAL.

SECTION 411. Order out of court without notice, may be vacated.
" 412. Exceptions, when may be signed.
" 412. Refusal of judge—affidavits—filing.
" 413. Assignment of error on exception.
" 414. Non-suit—continuance—arrest of judgment—exceptions.
" 415. Appeals to supreme court—amount—time—bond—amendment.
" 416. When file copy of record—time dismissal.
" 417. Judgment—execution from sup. court—remander.
" 418. Affirmal or dismissal—district clerk issue execution.
" 419. One of several parties may appeal—error.
" 420. Partial reversal—judgment—decree—remander.
" 421. Limitation five years—saving clause.
" 422. Supersedeas—order of judge—bond—issuance.
" 423. Supreme court divided, judgment affirmed.
" 424. Dismissal of appeal—want of prosecution—damages.
" 425. *Scire facias* to hear errors—to several counties.
" 426. Defendant non-resident—concealed, etc.—affidavit—publication.
" 427. Error to district and county courts, since October 1, 1877.
" 428. Amendment of writ of error.
" 429. Repeal—proviso—attachments—replevin.
" 430. Further repeals.

[Order out of court without notice.]

SECTION 411. (336.) An order made out of court, without notice to the adverse party, may be vacated or modified by the judge who made it, on notice in the manner in which other motions are made.

[See ss. 397-8-9, ch. 38, ante, and following ss.

Exceptions, when may be signed—Refusal of judge—Affidavits—Filing.]

SEC. 412. (23.) In all cases in the district and county courts where either party shall except to any ruling, decision or opinion of the court, and shall reduce such exception or exceptions to writing, it shall be the duty of the judge to allow the same, and to sign and seal the same at any time during the term of the court at which such exceptions were taken, or at any time thereafter to be fixed by the court, and at any time when any judge shall neglect or refuse to allow and sign and seal such bill of exceptions, then it shall be lawful for the suitor, or his attorney, to make and attach to such bill of exceptions the affidavit of two or more attorneys of the court, or other persons who were present at the time of the trial and when such exceptions were taken, stating that such bill of exceptions is correct and true; and when such bill of exceptions is so allowed, and signed and sealed by the

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judge, or so attested and proved by affidavit, it shall thereupon be filed by the clerk, and shall become a part of the record of such cause. [Sec. 23, p. 225, acts 1879.

For writs of error in criminal cases, see 971-74, ss. 283-6, ch. 25, cr. code, gen. code, Gen. Stat.
In condemnation cases, see sec. 255, chap. 21, ante.

Assignment of error on exceptions—When trial by judge.]

SEC. 413. (24.) Exceptions taken to opinions and decisions of the district and county courts, upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error before the supreme court any decision or opinion so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence. [Sec. 24, pp. 225-6, acts 1879.

Non-suit, continuance, arrest of judgment—Exceptions.]

SEC. 414. (25.) Exceptions taken to opinions or decisions of the district and county courts overruling motions in arrest of judgments, motions for new trials, for continuance of causes, and in sustaining motions for non suit, shall be allowed, and the party excepting may assign for error any opinion so excepted to. [Sec. 25, p. 226, acts 1879.

Appeals to supreme court—Amount—Time—Bond—Conditions—Amendment.]

SEC. 415. (26.) Appeals to the supreme court from the district and county courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars, or relate to a franchise or freehold; *Provided*, such appeal be prayed for within three days after the time of rendering the judgment or decree; *And provided*, the party praying for such appeal shall by himself, or agent, or attorney, give bond with a sufficient surety, to be approved by the district or county court (or the clerk thereof, when the order granting such appeal may so direct), and filed in the office of the clerk of the district or county court within the time limited by the court; which bond shall be in a reasonable sum sufficient to cover the amount of the judgment appealed from, and costs, and conditioned for the payment of the judgment, costs, interest and damages, in case the judgment shall be affirmed, and also for the due prosecution of the appeal, and the obligee in such bond may at any time, on a breach of the condition thereof, have and maintain an action at law, as on other bonds. The supreme court may, in its discretion, allow defective appeal bonds to be amended. [Sec. 26, p. 226, acts 1879.

Writs of error lie to all judgments, sec. 427, post.

When file copy of record—Proviso—Time—Dismissal.]

SEC. 416. (27.) The appellant shall lodge in the office of the clerk of the supreme court an authenticated copy of the record of the judgment or decree appealed from, by or before the third day of the next term of said supreme court; *Provided*, that if there be not thirty days between the time of making the appeal and the sitting of the supreme court, then the record shall be lodged as aforesaid at or before the third day of the next succeeding term of the supreme court, otherwise the said appeal shall be dismissed, unless further time shall have been granted by the supreme court for good cause shown. [Sec. 27, pp. 226-7, acts 1879.

Judgment—Execution from supreme court—Remander.]

SEC. 417. (28.) In all cases of appeals and writs of error the supreme court may give final judgment and issue execution, or remand the cause to the district or county court in order that execution may be there issued, or that other proceedings may be had thereon. [Sec. 28, p. 227, acts 1879.

On affirmal or dismissal, district clerk issue execution.]

SEC. 418. (29.) When an appeal or writ of error shall be prosecuted from the judgment of any district or county court of this State to the supreme court, and said appeal or writ of error shall be dismissed, or the judgment of the district or county court affirmed, it shall be the duty of the clerk of the district or county court from which said appeal or writ of error was prosecuted, upon a copy of the order of the supreme court dismissing said appeal or writ of error, or affirming said judgment, being filed in his office, to issue execution upon said judgment, and to proceed thereon in all respects as though no appeal or writ of error had been prosecuted from said judgment. [Sec. 29, p. 227, acts 1879.

Opinions must be in writing, sec. 447, ch. 40, post.

One of several parties may have appeal or error.]

SEC. 419. (30.) In all cases where a judgment or decree shall be rendered in any district or county court, in any case whatever, either in law or in chancery, against two or more persons, either one of said persons shall be permitted to remove said suit to the supreme court, by appeal or writ of error, and for that purpose shall be permitted to use the names of all said persons, if necessary; but no costs shall be taxed against any person who shall not join in said appeal or writ of error, and all such cases shall be determined in said supreme court as other suits are, and in the same manner as if all the parties had joined in said appeal or writ of error. [Sec. 30, p. 227, acts 1879.

Partial reversal—Judgment, decree or remander.]

SEC. 420. (31.) The supreme court, in case of a partial reversal, shall give such judgment or decree as the inferior court ought to have given, or remand the cause to the inferior court for further proceedings, as the case may require. [Sec. 31, p. 227, acts 1879.

Limitation five years—Saving clause.]

SEC. 421. (32.) A writ of error shall not be brought after the expiration of five years from the rendition of the judgment complained of; but when a person thinking himself aggrieved by any judgment or decree that may be reversed in the supreme court, shall be an infant, *non compos mentis*, or imprisoned, when the same was rendered, the time of such disability shall be excluded from the computation of the said five years. [Sec. 32, pp. 227-8, acts 1879.

Supersedeas—Order of judge—Bond—Issuance—When clerk order.]

SEC. 422. (33.) No writ of error shall operate as a *supersedeas*, unless the supreme court, or, if application be made therefor in vacation, some justice of the supreme court, after inspecting a copy of the record in the cause, shall order such writ of error to be made a *supersedeas*; nor until the party applying for such writ shall file a bond in the office of the clerk of the supreme court, with the conditions required in cases of appeals, approved by the court

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or justice allowing such order for a *supersedeas*, or, if such order shall so direct, then by the clerk of some court of record; the clerk issuing such writ of error shall endorse thereon that it shall be a *supersedeas*, and operate accordingly; and the parties in writs of error shall be subject to the same judgment and mode of execution as provided in cases of appeal. [Sec. 33, p. 228, acts 1879.

Supreme court divided—Judgment affirmed.]

SEC. 423. (34.) Whenever the supreme court shall be equally divided in opinion, on hearing an appeal or writ of error, the judgment of the court below shall stand affirmed. [Sec. 34, p. 228, acts 1879.

Dismissal of appeal—Want of prosecution—Damages.]

SEC. 424. (35.) In all cases of appeals to the supreme court where the appellant shall fail to prosecute the appeal, the supreme court shall, upon dismissing the appeal, enter judgment against the appellant for not less than five or more than twenty per cent upon the amount of judgment for damages, in consequence of the delay occasioned by the appeal. [Sec. 35, p. 228, acts 1879.

Scire facias to hear errors—Contents—To several counties.]

SEC. 425 (36.) In all cases in which a writ of error shall be issued, the clerk of the supreme court shall also issue a *scire facias*, or summons to hear errors, directed to the sheriff or other officer of the proper county, where the defendant or defendants in error reside or may be found, commanding him to summon the defendant or defendants in error to appear at the next term of the supreme court, and show cause, if any he or they have, why the judgment or decree mentioned in the writ of error should not be reversed. If there are several defendants in error, residing in different counties, the plaintiff in error may have separate writs issued to each of the counties where such defendants reside. [Sec. 36, pp. 228-9, acts 1879.

Defendant, non-resident, concealed, etc.—Affidavit—Publication—Copy by mail.]

SEC. 426. (37.) If the plaintiff in error, or other person for him, shall at any time file in the office of the clerk of the supreme court an affidavit, setting forth that the defendant has gone out of this State, so that process cannot be served upon him, or that he is not a resident of this State, or, on due inquiry, cannot be found, or is concealed within this State, or evades service of process, or that process cannot be served on him, it shall be the duty of the clerk to cause publication of notice to such defendant, to be made in some newspaper published in this State, setting forth the pendency of the writ of error, the names of the parties, and the time when the *scire facias* or summons may be returnable, when [which] notice shall be published for four consecutive weeks; and if the first insertion of such notice shall not be made at least sixty days before the return day of the writ of error, the cause shall be continued to the next succeeding term of the supreme court, and it shall be the duty of the plaintiff in error or some one for him, to send, postpaid by mail, a copy of such notice to the defendant in error, if the place of residence of him shall be known to, or after diligent inquiry, can be ascertained by the plaintiff in error; and upon filing a certificate of the publication of such notice, made by the publisher of the newspaper in which the same shall be published, together with an affidavit that copies of such notice have been sent to the defendant in

error, as herein provided, or that the residence of such defendant is unknown to, and cannot, after diligent inquiry, be ascertained by the plaintiff in error, the cause shall proceed as if the defendant had been personally served with process. [Sec. 37, p. 229, acts 1879.

For computation of time, see 409, ch. 38, ante.

Writs of error to district and county courts—Since October 1, 1877.]

SEC. 427. (38.) Writs of error shall lie from the supreme court to every final judgment of the several district and county courts of this State, and such writs of error shall be amendable, and this section shall be deemed to apply to all judgments or decrees which have been rendered since the first day of October, A. D. 1877, by any district or county court. [Sec. 38, pp. 229-30, acts 1879.

Amendments of writs of error.]

SEC. 428. (39.) All writs of error wherein there shall be any variance from the original record, or any other defect, may be amended and made agreeable to such record, by the respective courts where such writs of error are or shall be made returnable. [Sec. 39, p 230, acts 1879.

Repeal of sections—Effect of—Proviso, attachments, replevin.]

SEC. 429. (40.) The repeal of any sections of the act to which this act is amendatory shall not abate or in any manner effect [affect] any repeal to the supreme court from the several district and county courts in this State, which have been taken prior to the time this act takes effect; nor shall the repeal of such sections abate or in any manner effect [affect] any suit in attachment and claim and delivery [which] shall be prosecuted to final judgment and determination under the sections so repealed: *Provided*, that in such suits in attachment and claim and delivery, appeals may be taken from the several district and county courts under the provisions of this act, and writs of error shall lie in all such cases as herein provided for cases generally. [Sec. 40, p. 230, acts 1879.

Repeals.]

SEC. 430. (41.) Sections sixty-two (62), one hundred and six (106), one hundred and nineteen (119), one hundred and eighty-five (185), one hundred and eighty-six (186), one hundred and ninety-four (194), one hundred and ninety-five (195), one hundred and ninety-six (196), one hundred and ninety-seven (197), two hundred and ten (210), three hundred and thirty-five (335), three hundred and thirty-seven (337), three hundred and thirty-eight (338), three hundred and thirty-nine (339), three hundred and forty (340), three hundred and forty-one (341), three hundred and forty-two (342), three hundred and forty-three (343), three hundred and forty-four (344), three hundred and forty-five (345), three hundred and forty-six (346), three hundred and forty-seven (347), three hundred and forty-eight (348), three hundred and forty-nine (349), three hundred and fifty (350), three hundred and fifty-one (351), three hundred and fifty-two (352), three hundred and fifty-three (353), three hundred and fifty-four (354), three hundred and fifty-five (355), three hundred and fifty-six (356), three hundred and fifty-seven (357), three hundred and fifty-eight (358), three hundred and fifty-nine (359), and three hundred and sixty (360) of said act are hereby repealed. [Sec. 41, pp. 230–1, acts 1879—Approved and in force February 24, 1879.

For other repeals, see last section of this code.]

CHAPTER XL.

MISCELLANEOUS PROVISIONS.

SECTION 431. Power of supreme and district courts to make rules of practice.
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SECTION 472. Rule of the common law construction not to apply to this act.
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" 474. When this act shall take effect.

[Power of courts to make rules.]

SECTION 431. (402.) The supreme court, and each of the district and county courts, shall respectively have power to make rules and regulations for governing their practice and procedure in reference to all matters not expressly provided for by law.

[See also 3227, sec. 3, chap. 104, Gen. Stat., supreme court.

At chambers—Hearings—Orders—Rules—Notice—General rule or district.]

SEC. 432. (22.) In vacation, at chambers, the judges of the district courts in their respective districts, and the judges of the county courts in their respective counties, may hear and determine any and all motions and demurrers; may upon good cause shown, enlarge the time to answer, reply or demur; may make and direct any and all interlocutory orders, rules or other proceedings preparatory to the trial and disposition of causes on the merits, in the same manner and with the like effect as the said courts could direct or make the same in term time, reasonable notice of the application for such rule or order being first given to the adverse party, or his attorney, and it shall be the duty of the district judges, each in his own district, by general rule, to prescribe the time or times and place or places, at which motions and demurrers in actions pending in his district may be brought on for hearing in vacation. [Sec. 22, pp. 224–5, acts 1879.

Judges and justices take acknowledgments, etc.]

SEC. 433. (403.) The judges of the supreme court, of the district courts, and of the county courts, shall have power, in any part of the State, and the justices of the peace within their respective counties, shall have power, to take and certify:

[Conveyances.]

First—The proof and acknowledgment of a conveyance of real property, or of any other instrument required to be proved or acknowledged.

[Affidavits.]

Second—An affidavit to be used in any court of justice in this State.

[Judicial office—Vacancy - Effect.]

SEC. 434. (404.) No action or proceeding in a court of justice in this State shall be affected by a vacancy in the office of all or any of the judges, or by a failure of a term thereof.

[English language—Abbreviations—Numerals—Figures.]

SEC. 435. (405.) Every written proceeding in a court of justice in this State, or before a judicial officer, shall be in the English language, but such abbreviations as are now commonly used in that language may be used and numbers expressed by figures or numerals, in the customary manner.

Miscellaneous Provisions.]

[Courts with seal.]

SEC. 436. (406.) Each of the following courts, and no others, shall have a seal:

First—The supreme court.

Second—The district court.

Third—The county court.

Fourth—Any criminal court established by law.

[Clerk keep seal.]

SEC. 437. (407.) The clerk of each court shall keep the seal thereof.

[Seal, how affixed.]

SEC. 438. (408.) The seal may be affixed by impressing it upon the paper, or on a substance attached to the paper and capable of receiving the impression.

[Juridical days.]

SEC. 439. (409.) The courts of justice may be held and judicial business may be transacted on any day except as provided in the next section.

[Juridical holidays—Except.]

SEC. 440. (410.) No court shall be opened, nor shall any judicial business be transacted, on Sunday, New Year's day, Fourth of July, Christmas day, Washington's birthday, Thanksgiving day, Fast day and Decoration day, or on a general election, except for the following purposes:

[Instructions.]

First—To give, upon their request, instructions to a jury then deliberating on their verdict.

[Receive Verdict.]

Second—To receive a verdict or discharge a jury.

[Criminal magistracy.]

Third—For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

[Replevying.]

Fourth—When it shall appear by the affidavit of the plaintiff, or some one in his behalf, in cases for the recovery of specific personal property, that the defendant is about to conceal, dispose of, or remove such property out of the jurisdiction of the court, an order for taking possession of the same may be issued and the writ or process executed on any day.

[Attachments—Adjournments by clerk, when judge absent.]

Fifth—When an application for a writ of attachment is made, if it shall appear by the affidavit of the plaintiff, or some one in his behalf, that the defendant is about to dispose of, conceal or remove property subject to execution or attachment, out of the jurisdiction of the court, a writ of attachment may be issued and executed on any day. When the day fixed for the opening of a court shall fall on any of the days mentioned in this section, the court shall stand adjourned until the next succeeding day. When, on the day appointed for the commencement of any term of the supreme or district court or county court, the judges or judge of such court being not present to hold

the same, the clerk of the court shall adjourn such term of court, from day to day, until the expiration of one week from the day appointed for the commencement of the term, noting such adjournment in the minutes each day; and if the judges or judge of such court be not then present to hold such term on the day one week from the time appointed for such term to commence, the clerk shall adjourn the court for the term and make an entry on the minutes thereof. If the judges or judge shall appear on any day to which the court has been adjourned by the clerk, as above provided, the court shall proceed in the same manner and with the same effect as if the judges or judge had been present and the court had been regularly opened on the day appointed for the term to commence.

[See 1077 to 1080, ss. 16 to 19, ch. 31, Gen. Stat., district courts.

Courts sit in county seat—No justice sit out of his county.]

SEC. 441. (411.) Every court of justice, except a justice's court, shall sit at the county seat of the county in which it is held, except as may be otherwise provided by law. No justice of the peace shall hold a court in any other county or city than the one for which he shall have been elected.

[Action against sheriff—Sureties on indemnity bond, liability on notice.]

SEC. 442. (412.) In an action brought against a sheriff for an act done by virtue of his office, if he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be sufficient evidence of his right to recover against such sureties; and the court, or judge in vacation, may on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

[Words—Present—Singular—Masculine—Writing—Oath—Signature.]

SEC. 443. (413.) Words used in this act in the present tense shall be deemed to include the future as well as the present; words used in the singular number shall be deemed to include the plural, and plural the singular; and words used to include the masculine gender shall include the feminine gender; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or subscription to include mark, when the person cannot or is unable to write, his name being written near it, and witnessed by a person who writes his own name as a witness.

[See 3141-43, ss. 1-2-3, ch. 101, Gen. Stat., statutes.

Undertaking, sureties must justify—When may justify for part.]

SEC. 444. (414.) In all cases where an undertaking, by the provisions of this act, is required, it shall be the duty of the person taking the same to use due diligence in ascertaining the responsibility of the person becoming surety, and to require each of the sureties to accompany the same with affidavit that he is worth the sum specified in the undertaking, over and above his just debts and liabilities, in property not exempt by law from execution; *Provided*, that when the amount specified in the undertaking exceeds one thousand dollars, and there are more than two sureties thereon, they may state, in their affidavits, that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to the sum specified in the undertaking.

Miscellaneous Provisions]

[Sale of attached property—Proceeds deposited—Notice to adverse party.]

SEC. 445. (415.) Whenever property has been taken by an officer, under a writ of attachment, in pursuance of the provisions of this act, and it shall be made to appear satisfactorily to the court or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold, in the same manner as property is sold under an execution, and the proceeds to be deposited in court, to abide the judgment in the action. Such order shall be made only upon notice to the adverse party or his attorney, in case such party has been personally served with summons in the action.

[Copies of United States records which may be read in evidence.]

SEC. 446. (416.) A copy of any record, or document, or paper in the custody of a public officer of this State, or of the United States within this State, certified under the official seal, or verified by the oath of such officer, to be a true, full, and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this State, in the like manner, and with the like effect, as the original could be if produced.

[Appellate court—Decisions of law—Written—Reasons.]

SEC. 447. (418.) All decisions given upon an appeal upon questions of law only in any appellate court in this State, shall be given in writing, with the reasons therefor, and filed with the clerk of the court.

[Defendant may have other claimant substituted—Notice—Deposit.]

SEC. 448. (419.) A defendant, against whom an action is pending upon a contract or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, without any collusion with him, a demand upon the same contract or for the same property, upon due notice to such person and the adverse party, apply to the court to substitute such person in his place, and discharge him from liability to either party, on his depositing in the court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct, and the court may, in its discretion, make an order.

[See sec. 18, chap. 1. ante, as to debt.

Trial—Court appoint person to write down testimony.]

SEC. 449. (424.) On the trial of any action in a court of record, at the request of either party, the court may, in its discretion, appoint a competent person to take down the testimony in writing.

[Trial, postponement—Witnesses present examined.]

SEC. 450. (425.) The party postponing a trial in any court of record shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken before any judge or clerk of the court in which the action is pending, or before any notary public or other officer authorized to take depositions, as the court may direct, which shall accordingly be done; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witness was produced.

[Execution for costs on remittitur filed—Other cases—Executions.]

SEC. 451. (426.) Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same on filing a remittitur with the clerk of the court below, and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution upon application therefor. And whenever costs are awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment.

[Courts of record.]

SEC. 452. (427.) The supreme court, the several district courts, and the several county courts and the criminal courts established by law, of this State, shall be courts of record.

[Sittings of court, public.]

SEC. 453. (428.) The sittings of every court of justice shall be public, except as provided in the next section.

[Scortatory testimony—Exclusion of public.]

SEC. 454. (429.) On the trial of any action, upon the suggestion to the court by any counsel engaged therein, that the evidence to be adduced in such action will be of such character that unnecessary publicity would operate injuriously on the public morals, it shall be the duty of the court to exclude from attendance on said trial all persons not officers of the court or connected with such case in any manner. [Sec. 1, pp. 58–9, acts 1881—Subs. for sec. 429, orig. act.

Powers of court.]

SEC. 455. (430.) Every court shall have power—

[To enforce order.]

First—To preserve and enforce order in its immediate presence.

[Or before person empowered to sit.]

Second—To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

[Compel obedience to process, judgment.]

Third—To compel obedience to its lawful judgments, orders, and process, and to the lawful orders of its judge out of court in an action or proceeding pending therein.

[Control conduct of its officers.]

Fourth—To control, in furtherance of justice, the conduct of its ministerial officers.

[When judge shall not act, unless by consent.]

SEC. 456. (431.) A judge shall not act as such in any of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; or when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all parties to the action.

Miscellaneous Provisions.]

[When not act as attorney.]

SEC. 457. (432.) A judge shall not act as attorney or counsel in a court in which he is a judge, or in an action or proceeding removed therefrom to another court for review; or in any action or proceeding from which an appeal may lie to his own court.

[When judge party to the record.]

SEC. 458. (433.) A judge of the supreme court, or of the district court, shall not act as attorney or counsel in any court, except in an action in which he is a party to the record.

[Judge, justice, not have partner attorney.]

SEC. 459. (434.) A judge or justice of the peace shall not have a partner acting as attorney or counsel in any court in his judicial district, county or precinct, nor shall any county, district or supreme judge make out the papers in any action to be tried before his court.

[On order refused in cause, no application to other judge allowed—Except.]

SEC. 460. (435.) If an application for an order made to a judge of a court in which the action or proceeding is pending, be refused in whole or in part, or be granted conditionally, no subsequent application for the same order shall be made to any other judge, except of a higher court; *Provided*, that nothing in this section shall be so construed as to apply to motions refused for any informalities in the papers or proceedings necessary to obtain an order.

[Violation of last section contempt—Revocation of order.]

SEC. 461. (436.) A violation of the last section may be punished as a contempt, and an order made contrary thereto may be revoked by the judge who made it or vacated by a judge of a court in which the action or proceeding is pending.

[Court and judges may issue proper writs.]

SEC. 462. (437.) The courts and judges thereof shall have power to issue all writs necessary and proper to the complete exercise of the power conferred on them by the constitution and laws of this State.

[Terms, when, where—Court may order sheriff to provide.]

SEC. 463. (438.) The terms shall be held at such times and places as provided by law. If a room for holding the court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, fuel, lights and stationery, and the expense shall be a county charge.

[Duty of judge to act at chambers—Powers.]

SEC. 464. (439.) The district judges shall, at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court. At chambers they may hear and dispose of all applications for orders and writs which are usually granted in the first instance upon an *ex parte* application, and may, in their discretion, also hear applications to discharge such orders and writs.

[Transfer of causes from district to county court.]

SEC. 465. (440.) When an action or proceeding is commenced in a district court in which a county court has concurrent jurisdiction, the district court may, if the parties agree, by order, transfer the same to the county court of the same county. Upon such transfer, the county court shall have and exercise over such action or proceeding the same jurisdiction as if originally commenced therein.

[This act applies to county courts.]

SEC. 466. (441.) The provisions of this act, as far as applicable, shall be applied and enforced in all of the county courts of this State.

[County judge disqualified—Transfer to district court.]

SEC. 467. (442.) If the county judge be disqualified for any cause from sitting on the determination of any action or proceeding pending before him, the cause shall be certified, with the original papers, to the district court of the same county, which shall proceed thereon to final judgment and determination

[Judges conserve the peace.]

SEC. 468. (443.) That all judges of courts of record shall be conservators of the peace.

[Powers of county courts and judges.]

SEC. 469. (444.) In all civil actions within their jurisdiction, the county courts and the judges thereof shall have the same power to grant all orders and writs and process which the district courts or the judges thereof have power to grant within their jurisdiction, and to hear and determine all questions arising within their jurisdictions, as fully and completely as the district courts or the judges thereof have power to do under the laws of this State, except as otherwise provided in this act.

[Subpœnas—Who may serve.]

SEC. 470. (1.) The service of any subpœna in any of the courts of record in this State may be made by any person of full age not a party to the action or proceeding. Proof of service so made shall be by the affidavit of the person making the same, showing the time, place and manner in which, and the person upon whom, such services [service] shall have been made. [Sec. 1, p. 105, acts 1881.

Rules of construction of this act.]

SEC. 471. (445.) In the construction of this act the following rules shall be observed when consistent with the context:

[Sheriff.]

The word "sheriff" means the sheriff of the county, or any other person authorized to perform his duties in any case.

[Clerk.]

The word "clerk" means the clerk of the court, or any person authorized to perform his duties in any case.

[Unsound mind.]

The phrase of "unsound mind" includes idiots, non-compotes, lunatics and distracted persons.

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[Oath—To swear.]

The word "oath" includes the word affirmation; and phrase "to swear" includes to affirm.

[Person.]

The word "person" extends to bodies politic and corporate.

[Legal disabilities.]

The phrase "under legal disabilities" includes persons within the age of twenty-one years, or of unsound mind, or imprisoned, or out of the United States.

[Bond, undertaking.]

The word "bond," or "undertaking," as used in this act, does not necessarily imply a seal, but in other respects means the same kind of instruments as heretofore.

[Land.]

The word "land," and the phrases "real estate" and "real property," include lands, tenements and hereditaments.

[Personal property.]

The phrase "personal property" includes goods, chattels, evidences of debt, and things in action.

[Property.

The word "property" includes personal and real property.

[Judgment.]

The word "judgment" means all final orders, decrees, and determinations in an action; also, all orders upon which executions may issue.

[Money demands on contract.]

The phrase "money demands on contract," when used in reference to an action, means any action arising out of contract, where the relief demanded is a recovery of money only.

[Attorney.]

The word "attorney" includes a counsellor, and every other person authorized to appear and represent a party in an action or special proceeding in any stage thereof.

[Verified.]

The word "verified," when applied to pleadings, means supported by oath or affirmation.

[Singular.]

Words importing the singular number only may also be applied to the plural of persons and things; and words importing the masculine gender only may be extended to females also.

[Liberal construction.]

The provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction.

[Common law rule not to apply to this code.]

SEC. 472. (446.) The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions, and all proceedings under it, shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice.

[Repeals—Revised statutes.]

SEC. 473. (447.) That the following several chapters and acts contained in the Revised Statutes of the Territory, now State of Colorado, entitled as follows, viz.:

CHAPTER I.—"Abatement."
CHAPTER IV.—"Amendmends and jeofails."
CHAPTER V.—"Arbitration and awards."
CHAPTER VI.—"Attachments."
CHAPTER XIII.—"Chancery."
CHAPTER XXVII.—"Ejectment."
CHAPTER XLIII.—"Injunctions."
CHAPTER LVII.—"Mandamus."
CHAPTER LXX.—"Practice."
CHAPTER LXXIII.—"Quo warranto."
CHAPTER LXXIV.—"Replevin."
CHAPTER LXXXVIII.—"Venue."

[Repeals—Acts 1870.]

Also, the following acts passed by the Legislative Assembly of the Territory, now State of Colorado, which convened at Denver on the third day of January, A. D. 1870, and entitled as follows, viz.: "An act to amend chapter 70 of 'Revised Statutes of Colorado Territory;'" also, "An act to amend chapter 88 of the Revised Statutes of Colorado, concerning venue;" also, "An act to amend an act entitled an act providing for changes of venue in civil cases;" also, "An act to amend chapter 70 of the Revised Statutes of Colorado Territory, entitled 'practice,'" on page 99 of the laws of 1872; also, "An act to amend chapter 27 of the Revised Statutes of Colorado, entitled 'ejectments,'" on page 101 of said laws; also, "An act concerning judgments and liens," on page 112 of said laws; also, "An act concerning actions on bonds, bills, notes, and other instruments in writing," on page 113 of said laws; also, "An act to amend chapters 6 and 48 of the Revised Statutes of Colorado," on pages 113 to 116; also, "An act defining further causes of attachment," on pages 116 and 117 of said laws; also, "An act concerning variances and amendments," on pages 118 and 119 of said laws; also, "An act to amend chapter 88 of the Revised Statutes, entitled 'venue,'" on pages 120, 121 and 122 of said laws.

[Repeals—Acts 1874.]

Also, the following acts passed by the legislative assembly of the Territory, now State, of Colorado, which convened at Denver on the fifth day of January, 1874, and entitled as follows, viz: "An act concerning actions on bonds, bills and promissory notes," on page 61 of the laws of 1874; also, "An act concerning cases pending in the district court, the venue of which has been changed thereto," on page 94 of said laws; also, "An act to authorize the courts to summon witnesses from foreign counties," on page 95 of said

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laws; also, "An act to amend an act entitled an act concerning judgments and liens, approved February 8, 1872," on pages 168 and 169 of said laws; also, "An act to authorize the allowance of the alternative writ of *mandamus* during vacation," on pages 180 and 181 of said laws; also, "An act concerning practice," on pages 208 and 209 of said laws; also, "An act concerning the practice of the courts," on page 210 of said laws; also, "An act concerning practice in courts of record," on page 211 of said laws.

[Repeals—Acts 1876.]

Also, the following acts passed by the legislative assembly of the Territory, now State, of Colorado, which convened at Denver on the third day of January, A. D. 1876, and entitled as follows, viz: "An act to allow the assignment of claims," on page 19 of said laws passed in 1876.

Also, "An act to amend chapter 6 of the Revised Statutes of Colorado Territory, entitled 'attachments,'" on pages 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 of said laws; also, "An act relating to bonds, bills of exchange and promissory notes," on page 30 of said laws; also, "An act in regard to bonds given in legal and equitable proceedings," on pages 31 and 32 of said laws; also, "An act to amend section 19 of chapter 17 of the Revised Statutes of Colorado, concerning conveyances," on page 40 of said laws; also, "An act concerning ejectments," on page 69 of said laws; also, "An act to amend chapter 30 of the Revised Statutes of Colorado, entitled 'evidence and depositions,'" on page 71 of said laws.

[Repeals—Saving clause.]

Also, "An act concerning equitable liens," on pages 90 and 91 of said laws; also "An act in regard to the foreclosure of mortgages," on page 95 of said laws; also, "An act concerning practice," on page 103 of said laws; also "An act concerning practice in the district and probate courts," on pages 103, 104, and 105 of said laws; also, "An act to amend chapter 70, of the Revised Statutes of Colorado Territory, entitled 'practice,'" on page 105 of said laws; also, "An act in regard to practice at law and in chancery," on pages 105 and 106 of said laws; also, "An act concerning replevin," on page 116 of said laws; also, "An act to amend an act entitled an act to amend chapter 88 of the Revised Statutes, entitled 'venue,'" pages 185 and 186 of said laws; and all other acts or parts of acts in conflict with the provisions of this act, be and the same are hereby repealed; *Provided*, that the repeal of such acts and parts of acts, or any of them, shall not be construed to abate or effect [affect] any suit, action or proceeding, instituted or pending in any court of this State or other tribunal, begun prior to the 1st day of October, A. D. 1877, under any of the laws so repealed; but all such suits, actions or proceedings may be prosecuted to final determination under the laws so repealed; neither shall the repeal of any such law or parts of law in anywise affect, deny, abridge, divest or impair any right, action or cause of action accrued or arising under the laws hereby repealed; but such right, action or cause of action so accrued or arising shall be brought and prosecuted to final determination under the laws so repealed, unless the provisions of this code give a remedy or prescribe a mode whereby such right, action or cause of action, may be brought and prosecuted to final determination.

[When this act takes effect.]

SEC. 474. (448.) This act shall take effect and be in force on and after the first day of October, A. D. 1877.

Approved March 17, 1877.

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