REVISED STATUTES

OF THE

TERRITORY OF OREGON.

AN ACT

TO RE-APPORTION THE MEMBERS OF THE COUNCIL AND HOUSE OF REPRESENTATIVES.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the council shall hereafter consist of nine members, who shall be apportioned among the different counties as follows:—One to the county of Jackson; one to the counties of Coos, Douglas, and Umpqua, jointly; one to the counties of Lane and Benton, jointly; one to the county of Linn; one to the county of Marion; one to the counties of Clackamas and Wasco, jointly; one to the counties of Washington and Columbia, jointly; one to the counties of Clatsop and Yamhill, jointly; and one to the counties of Polk and Tillamook, jointly.

Members of council: their apportionment.

SEC. 2. The house of representatives shall hereafter consist of thirty members, to be apportioned among the different counties as follows:—Four to the county of Jackson; one to the county of Douglas; one to the county of Coos; one to the county of Umpqua; two to the county of Lane; two to the county of Benton; three to the county of Linn; three to the county of Marion; three to the county of Clackamas; one to the county of Wasco; three to the county of Washington; one to the county of Columbia; one to the county of Clatsop; two to the county of Yamhill; one to the county of Polk; and one to the counties of Polk and Tillamook, jointly.

Members of the house of representatives: their apportionment.

Passed, January 31*st*, 1854.

CHAPTER I.

AN ACT RELATING TO ELECTIONS, AND THE MODE OF SUPPLYING VACANCIES IN OFFICE.

TITLE I. *Of the Qualification of Voters.*
TITLE II. *Of General Elections.*
TITLE III. *Of Canvass by the Judges.*
TITLE IV. *Of the Canvass by the Clerk of the Board of County Commissioners.*
TITLE V. *Of the Manner of Contesting the Elections of County, Town, District and Precinct Officers.*

TITLE I.

Of the Qualification of Voters.

SEC. 1. Persons entitled to vote.
2. Persons not entitled to vote.

Those entitled to vote.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That all white male inhabitants over the age of twenty-one years, who shall have resided within this territory for six months next preceding an election, shall be entitled to vote at any election for delegate to Congress, and for territorial, county and precinct officers; *Provided* that they shall be citizens of the United States, or shall have declared their intentions on oath to become such, and shall have resided six months in the territory, and fifteen days in the county where they offer to vote, next preceding the day of election.

Those not entitled to vote.

SEC. 2. No person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony or bribery, unless restored to civil rights, shall be permitted to vote at any election. Nor shall any officer or soldier of the United States army be permitted to vote at any election during the term of their enlistment, unless they were residents of the territory at the time of their enlistment.

TITLE II.

Of General Elections.

SEC. 3. The time of holding elections, and of officers to be elected.
4 & 5. Judges and clerks of election; their appointment, and term of office.
6. The notice of election, &c.
7. The publication of such notice.
8. Oath and affirmation of the judges and clerks.
9. Oath, how administered.
10. Time of opening and closing polls.
11. Poll books.
12. Manner of voting.
13. Duty of officers, on receiving a ballot.
14. Place of voting.
15. Challenge, and oath of the person challenged, &c.
16. Penalty for false oath and illegal voting.
17. Ballot box.
18. Ballot box to be examined before elections.

SEC. 19. Adjournment of the polls; clerks to compose poll lists.
20. Poll list to be locked in the ballot box, &c.
21. Judge to keep the key of ballot box; box how to be opened.
22. Duty of judge to challenge.
23. Judges, however, to fine, &c.

Elections, when and where held.

SEC. 3. A general election shall be held in the several election precincts in this territory, on the first Monday of June in each year, at which there shall be chosen so many of the following officers as are by law to be elected in such year; that is to say: A delegate to Congress, members of the territorial council and house of representatives, judges of probate, district attorneys, county superintendents, county commissioners, sheriffs, county treasurers, coroners, justices of the peace, county assessors, constables and all other county precinct and district officers not herein enumerated or otherwise provided for.

Officers to be elected.

Appointm'nt of judges of election.

SEC. 4. It shall be the duty of the county commissioners, at their regular session in April preceding the general election, to appoint three capable and discreet persons possessing the qualifications of electors to act as judges of the election at each election precinct, and said commissioners shall also set off and establish election precincts or districts when it may be necessary; and the clerk of the said board of commissioners shall make out and deliver to the sheriff of the county, immediately after the appointment of the said judges, a notice thereof in writing, directed to the judges so appointed; and it shall be the duty of the said sheriff within twenty days after the receipt of the said notices, to serve the same upon each of the said judges of the election. If in any precinct, any of such judges do not serve, the voters of said precinct may elect a judge or judges to fill the vacancy on the morning of the election.

Ib. clerks of election.

Their term of office.

SEC. 5. The said judges shall choose two persons having similar qualifications with themselves, to act as clerks of the election. The said judges shall be and continue judges of all elections of civil officers, to be held at their respective precincts, until other judges shall be appointed as hereinbefore directed; and the said clerks of election may continue to act as such during the pleasure of the judges of election; and the county commissioners shall from time to time fill all vacancies which may occur in the office of judges of election, at any election precinct within their respective counties.

Notice of elections.

SEC. 6. The clerks of the several boards of county commissioners shall, at least forty days before any general election, and at least twenty days previous to any special election, make out and deliver to the sheriff of his county, or to a justice of the peace of any county attached for judicial purposes, three written notices thereof for each election precinct, said notices to be as nearly as circumstances will admit, as follows:—

Form of notice

Notice is hereby given, that on the first Monday, the —— day of June next, at the house of ———, in the town, district, or precinct of ———, in the county of ———, an election will be held for territorial, county, town, or district officers, (naming the offices to be filled, as the case may be,) which election will be held at nine o'clock in the morning, and will continue until six o'clock in

TITLE 2. the afternoon of the same day. Dated this —— day of —— A. D., (as the case may be.)

(Signed,)
A. B., *Clerk*
of the Board of County Commissioners.

Notice to be posted by sheriff.

SEC. 7. The sheriff aforesaid, to whom such notices shall be delivered, as aforesaid, shall put up in three of the most public places in each town, or precinct, the notices referring to such town or precinct, at least twenty days previous to the time of holding any general election, and at least eight days previous to the time of holding any special election; and in cases where towns and precincts may not be set off by law as election precincts, said notices shall be posted as follows:—one at the house where the election is authorised to be held, and the others at two of the most public and suitable places in that vicinity or settlement.

Oath of judges and clerks.

SEC. 8. Previous to votes being taken, the judges and clerks of the elections shall severally take an oath in the following form; to wit, I, A.B., do solemnly swear (or affirm, as the case may be,) that I will perform the duties of judge of the election, (or clerk, as the case may be,) according to law and the best of my ability; that I will studiously endeavor to prevent fraud, deceit, and abuse, in conducting the same.

Ib., how administered.

SEC. 9. In case there shall be no judge, or justice of the peace, present at the opening of the election, or in case such judge or justice shall be appointed judge or clerk of the election, it shall be lawful for the judges of the election, and they are hereby empowered to administer the oath to each other, and to the clerk of the election, and the person administering the oaths shall cause an entry thereof to be made and subscribed by him, and prefixed to the poll books.

Opening and closing polls.

SEC. 10. At all elections to be held under this chapter, the polls shall be opened at the hour of nine o'clock in the forenoon, and continue open until six o'clock in the afternoon of the same day, at which time the polls shall be closed; *Provided*, that the judges of election, if they deem it necessary, for the purpose of receiving the votes of all the electors wishing to vote, may postpone the closing of the polls until seven o'clock, P.M.; and upon opening the polls, one of the clerks, under the direction of the judges, shall make proclamation of the same; and thirty minutes before the closing of the polls, proclamation shall be made in like manner that the polls will be closed in half an hour; but the board may in their discretion adjourn the polls at twelve o'clock at noon for one hour, proclamation of the same being made.

Proviso.

Clerk to furnish judges with 2 poll books.

SEC. 11. It shall be the duty of the clerks of the several boards of county commissioners to furnish one of the judges of every election precinct in the county with two poll books, at least five days before the time of holding any election.

Elector, how to deliver ballot.

SEC. 12. Every elector shall in full view, deliver to one of the judges of the election, a single ballot, or piece of paper, on which shall be written or printed the names of the persons voted for, with a pertinent designation of the office which he or they may be in-

tended to fill; said ballot may be open or folded, as the voter may choose. TITLE 2.

Duty of judge on receiving ballot.

SEC. 13. The judge, to whom any ticket may be delivered, shall, upon the receipt thereof, pronounce, with an audible voice, the name of the elector; and if no objection be made to him, and the judges be satisfied that the elector is legally entitled to vote, he shall immediately put the ticket in the box, without inspecting the names thereon, if it be a folded ballot; and the clerks of the election shall enter the name of the elector and number, in the poll book.

Elector's name to be entered.

Where to vote.

SEC. 14. It shall be lawful for any elector to vote for delegate to Congress, at any place of holding an election within this territory; for members of the council and house of representatives, at any place of holding an election in the district in which he may reside; for county officers, at any place of holding an election in the county in which he resides; but for town or precinct officers, he shall not vote out of the town or precinct in which he resides; provided that an elector qualified to vote for a part, and not all, of the officers to be chosen at any election, shall vote an open ticket, that the judges may determine the legality of such vote.

Challenge.

SEC. 15. If any person offering to vote shall be challenged as unqualified by any judge or clerk of the election, or by any other person entitled to vote at the same poll, the judges shall declare to the person so challenged, the qualification of an elector; if such person shall then state himself duly qualified, and the challenge shall not be withdrawn, one of the judges shall then tender to him the following oath: "You do solemnly swear, (or affirm, as the case may be,) that you are twenty-one years of age; that you are a citizen of the United States, (or that you have declared your intention to become a citizen, conformable to the laws of the United States and of this territory on the subject of naturalization;) and that you have resided six months in the territory, and fifteen days in the county next preceding the election; and that you have not voted at this election;" and if any person so challenged shall refuse to take such oath so tendered, his vote shall be rejected; *Provided* that in case any person wishes to vote for delegate only, the fifteen days residence in the county need not be sworn to.

Oath.

Vote when rejected.

SEC. 16. If any person so offering such vote shall take such oath, his vote shall be received, unless it shall be proven by evidence satisfactory to a majority of the judges that he does not possess the qualification of an elector, in which case a majority of said judges are authorized to reject such vote; and if any person shall take such oath, knowing it to be false, he shall be deemed guilty of wilful and corrupt perjury; and shall, on conviction, suffer such punishment as now is or hereafter shall be prescribed by law for persons guilty of perjury. And if any person shall vote at any election who is not a qualified voter, he shall forfeit and pay for the use of the county in which such election shall take place, a sum not exceeding fifty, nor less than twenty-five dollars, to be sued for and recovered in the name of the county commissioners by a civil action, before any justice of the peace in such county.

False oath.

Unqualified voting.

Ballot box.

SEC. 17. There shall be provided and kept by the judges of

TITLE 3.

each election precinct, (at the expense of the county,) a suitable ballot-box, with a lock and key.

How constructed.

SEC. 18. There shall be an opening through the lid of such box, of no larger size than shall be sufficient to admit a single folded ballot. Before opening the polls, the ballot-box shall be carefully examined by the judges of the election, that nothing may remain therein; it shall then be locked, and the key thereof delivered to one of the judges, to be designated by the board, and shall not be opened during the election, except in the manner and for the purposes hereinafter mentioned.

To be examined.

Adjournments; poll lists to be compared.

SEC. 19. At each adjournment of the polls, the clerks shall, in the presence of the judges, compare their respective poll lists, compute and set down the number of votes, and correct all mistakes that may be discovered, according to the decision of the board, until such poll lists shall be made in all respects to correspond.

Poll list to be placed in ballot box.

SEC. 20. The ballot-box shall then be opened, and the poll lists placed therein; and such box shall then be locked, and a covering with a seal placed on the opening in the lid of such box, so as to entirely cover the same, and the key delivered to one of the judges and the box to another, to be designated by the board.

Key of ballot box how, kept; box how opened.

SEC. 21. The judge having the key shall keep it in his own possession, and deliver it again to the board at the next opening of the poll: and the person having the care of the box, shall carefully keep it without opening it or suffering it to be opened, or the seal thereof to be broken or removed; and shall publicly in that condition deliver it to the board of judges at the next opening of the polls, when the seal shall be broken, the box opened, the poll lists taken out, and the box again locked.

Judge to challenge.

SEC. 22. It shall be the duty of each judge of the election to challenge every person offering to vote, whom he shall know or suspect not to be qualified as an elector.

Power of judge.

SEC. 23. For the preservation of order, the judges are hereby authorized to enforce a fine not exceeding fifty dollars, on any person or persons who shall conduct in a disorderly or riotous manner at the polls, and shall persist in such conduct after having been warned of the consequences, and on refusal to pay the same, to commit him or them to the common jail of the county for any time not exceeding six days, or until the fine shall be paid; and the constables, sheriffs, deputy sheriffs, and jailors, are hereby required to execute said order as though it had been issued by a magistrate in due form of law. If no constable, sheriff or deputy be present, the judges may appoint a special constable, or constables to execute their orders.

TITLE III.

Of the Canvass by the Judges.

SEC. 24. Canvass to be public.
25. How commenced; counting votes, &c.
26. When ballots exceed poll lists, excess of ballots to be destroyed.
27. Statement of result to be in writing.
28. Disposition of poll books, returns in unorganized counties.
29. Penalty for not delivering poll book to county clerk.

Canvass how conducted.

SEC. 24. As soon as the polls of the election shall be finally closed, the judges shall immediately proceed to canvass the vote given at

TITLE 3.

such election, and the canvass shall be public, and continue without adjournment until completed.

Canvass.

SEC. 25. The canvass shall commence by a comparison of the poll lists from the commencement, and a correction of any mistake that may be found therein, until they shall be found or made to agree. The box shall then be opened, and the ballots contained therein taken out and counted by the judges, unopened, except so far as to ascertain whether each ballot is single; and if two or more ballots shall be found so folded together as to present the appearance of a single ballot, they shall be laid aside until the count of the ballot is completed; and if, on a comparison of the count with the poll lists, and the appearance of such ballots, a majority of the judges shall be of opinion that the ballots thus folded together were voted by one elector, they shall be destroyed.

Double ballots.

Destruction of certain ballots.

When ballots exceed poll lists.

SEC. 26. If the ballots in the box shall be found to exceed in number the whole number of votes on the poll lists, they shall be replaced in the box, after being purged as above, and one of the judges shall publicly draw out, and destroy therefrom so many ballots unopened, as shall be equal to such excess.

Count votes.

SEC. 27. The ballot and poll lists agreeing, or being made to agree, the board shall then proceed to count and ascertain the number of votes cast, and the clerks shall set down in their poll books the name of every person voted for, written at full length, the office for which such person received such votes, and the number he did receive, the number being expressed at full length, such entry to be made as nearly as circumstances will admit, in the following form; to wit:

Certificate.

At an election held at the house of A.B., in the town, district, or precinct of ——, in the county of ——, and territory of Oregon, on the —— day of, —— A.D. ——, the following named persons received the number of votes annexed to their respective names, for the following described offices; to wit,

A.B. had —— votes for delegate to Congress;
C.D. had —— votes for member of the legislative council;
E.F. had —— votes for member of the house of representatives;
(and in like manner, for any other person voted for).
Certified by us, G.H., J.K., L.M., judges of election.
Attest A.B., C.D., clerks of election.

Poll books, how disposed of.

SEC. 28. The judges of election shall then enclose and seal one of the poll books under covers, directed to the clerk of the board of county commissioners of the county in which such election was held; and the packet thus sealed shall be conveyed by one of the judges or clerks of election, to be determined by lot if they cannot otherwise agree, or by some other person to be agreed upon by the judges, and delivered to the said clerk of the board of county commissioners, at his office, within ten days from the close of the polls; and the other poll book together with the ballot-box, deposited with one of the judges of election, to be determined by lot, if not otherwise agreed upon; and the said poll book shall be subject to the inspection of any elector, at any time thereafter, who may wish to examine the same. The returns of elections in unorganized counties shall be made to the clerk of the county to which they are attached for judicial purposes.

TITLE 4.

Penalty for not delivering poll book.

SEC. 29. If any judge or clerk of election, after being deputed by the judges of election to carry the poll-book of such election to the clerk of the county, shall fail or neglect to deliver such poll-book to the said clerk within the time prescribed by law, safe with the seals unbroken, he shall for every such offence, forfeit and pay the sum of five hundred dollars for the use of the county, to be recovered by a civil action in the name of the county commissioners in the district court.

TITLE IV.

Of the Canvass by the Clerk of the Board of Commissioners.

SEC. 30. Clerk to open returns, &c.; new election; when; compensation of judges and clerks.
31. Lots, when to decide election of precinct officers.
32. Abstract of votes to be sent to secretary of the territory; when governor may order new election.
33. If returns are not received by secretary in 30 days.
34. Resignation; writ of election; appointment of Sheriff *pro tem.*
35. When several counties form one council, &c.; district.
36. Salaries of messengers and clerks.
37. Malfeasance of judges or clerks; penalty.
38. When term of office begins to run.
39. Person having largest vote deemed elected.
40. Misspelling &c., of candidates' names to be disregarded.

Clerk to open returns and make abstracts.

SEC. 30. On the 10th day after the close of any election, or sooner, if all the returns be received, the clerk of the board of county commissioners, taking to his assistance two justices of the peace of the county, shall proceed to open said returns and make abstracts of the votes; such abstract of votes for delegate to Congress shall be on one sheet; the abstract of the votes for members of the legislative assembly shall be on one sheet; and the abstract of votes for county and precinct officers shall be on another sheet; and it shall be the duty of the said clerk of county commissioners, immediately to make out a certificate of election to each of the persons having the highest number of votes, for members of the legislative assembly, county and precinct officers respectively, and to deliver such certificate to the person entitled to it, on his making application to the clerk at his office; *Provided*, that when a tie shall exist between two or more persons for the council or house of representatives, the clerk of the board of commissioners shall give notice to the sheriff of the county, who shall immediately advertise another election, giving, at least, ten days notice. And it shall be the duty of the clerk of the board of commissioners of such county, on the receipt of the returns of any general or special election, to make out his certificate, stating therein the compensation to which the judges and clerks of election may be entitled for their services, and lay the same before the board of commissioners at their next session, and the said board shall order the compensation aforesaid to be paid out of the county treasury.

New election when.

Clerk's certificate for judges pay, &c.

Lots, when drawn.

SEC. 31. If the requisite number of county or precinct officers shall not be elected by reason of two or more persons having an equal, and the highest number of votes for one and the same office, the clerk, whose duty it is to compare the polls, shall give notice to the several persons so having the highest, and an equal number

TITLE 4.

of votes, to attend at the office of the proper clerk, at a time to be appointed by said clerk, who shall then and there proceed publicly to decide by lot which of the persons so having an equal number of votes, shall be declared duly elected; and the said clerk shall make and deliver to the person thus declared duly elected, a certificate of his election as hereinbefore provided.

Abstract to secretary of territory.

SEC. 32. The clerk of the board of county commissioners, immediately after making the abstract of the votes given in his county, shall make a copy of each of said abstracts, and transmit it by mail to the secretary of the territory at the seat of government, and it shall be the duty of the secretary of the territory, with the marshal of the territory or his deputy, in presence of the governor, to proceed, within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for delegate to Congress; and the governor shall grant a certificate of election to the person having the highest number of votes, and shall also issue a proclamation declaring the election of such person. In case there shall be no choice by reason of any two or more persons having an equal, and the highest number of votes, the governor shall, by proclamation, order a new election.

When governor shall order new election.

When returns not received in 30 days.

SEC. 33. If the returns of the election of any county in this territory shall not be received at the office of the secretary of the territory within thirty days after the election, the said secretary shall forthwith send a messenger to the board of commissioners of such county, whose duty it shall be to furnish the said messenger with a copy of such returns; and the said messenger shall be paid out of the county treasury of the said county, the sum of twenty cents for each mile he shall necessarily travel in going to and returning from said county.

Resignation of officers.

SEC. 34. Any person who shall receive a certificate of his election as a member of the council, or house of representatives of the legislative assembly, coroner, or county commissioner, shall be at liberty to resign such office, though he may not have entered upon the execution of its duties, or taken the requisite oath of office, and when any vacancy shall happen in the office of member of the council, or house of representatives, by death, resignation, or otherwise, and a session of the legislature is to take place before the next annual election, the governor shall issue a writ of election, directed to the sheriff of the county or district in which such vacancy shall happen, commanding him to notify the several judges in his county or district, to hold a special election to fill such vacancy or vacancies, at a time appointed by the governor. If a vacancy happen in the office of sheriff, the county commissioners shall appoint some one to fill such vacancy until the next election; and when a vacancy shall happen in the office of delegate to Congress from this territory, it shall be the duty of the governor to issue his proclamation appointing a day to hold a special election to fill such vacancy.

Writs of election.

Appointm'nt of sheriff *pro tem.*

Joint certificates by clerks of 2 counties, when given.

SEC. 35. When two or more counties are united in one council or representative district, the clerk of the board of county commissioners of the county last established, shall, on the tenth day after the election, unless a previous time is agreed upon, attend at the office of the clerk of the board of the senior county, and in conjunction with him, shall canvass the votes according to law, and

TITLE 5.

the certificate of election shall be signed by both clerks, and be delivered to the proper persons, at the office of the clerk of the senior county.

Salary of officers of election.

SEC. 36. There shall be allowed, out of the county treasury of each county, to the several judges and clerks of election, three dollars per diem, and to the person carrying the poll books from the place of election to the clerk's office, the sum of twenty cents per mile, for going and returning, to be paid out of the county treasury.

Official misconduct.

SEC. 37. If any judge, or clerk of election, or any other person, in any manner concerned in conducting the election, shall corruptly violate any of the provisions of this chapter, he shall forfeit and pay to the county, a sum not less than fifty nor more than five hundred dollars, to be recovered by a civil action, in the name of the county commissioners of the proper county.

Term of office

SEC. 38. The term of office of all officers elected, shall begin to run from the time of their election, unless some other express provision is made by law.

Person elected.

SEC. 39. In all elections, unless it is otherwise expressly provided, the person having the highest number of votes for any office shall be deemed to have been elected.

In counting votes, misspelling, &c., to be disregarded.

SEC. 40. In counting votes the judges of election shall disregard mis spelling, or abbreviations of the names of candidates for office, if it can be ascertained from such votes for whom they were intended.

TITLE V.

Of the Manner of Contesting the Election of County, Town, District, and Precinct Officers.

41. Notice to be given.
42. Service and return of notice; trial &c.
43. When the contest is between claimants of township, &c.; office.
44. Judge of probate has jurisdiction.
45. Witnesses; trial by court; appeal.
46. How this chapter is to be construed.

Who may give notice.

SEC. 41. Any person wishing to contest the election of any person to any county, district, township, or precinct office, may give notice in writing to the person whose election he intends to contest, that his election will be contested, stating the cause of such contest briefly, within thirty days from the time said person shall claim to have been elected.

Notice, how served.

SEC. 42. Said notice shall be served in the same manner as a summons, issued out of the district court, ten days before any hearing upon such contest as herein provided shall take place, and shall state the time and place that such hearing shall be had; upon the return of said notice served to the clerk of the district court of such county, he shall thereupon enter the same upon his issue docket as an appeal case, and the same shall be heard in its order by the court; *Provided* that if the case cannot be determined by the district court, in term time, within one month after the termination of such election, the judge of the district court may hear and determine the same at chambers, as soon thereafter as may be practicable, and shall make all necessary orders for the trial of the case,

Proviso.

TITLE 1.

and carrying his judgment into effect; *Provided* that this section shall not apply to township or precinct officers.

In case of township officers.

SEC. 43. In case of contest between any persons claiming to be elected to any township or precinct office, said notice shall be served in manner aforesaid, and shall be returned to the judge of probate of the county.

Jurisdiction of judge of probate.

SEC. 44. Upon the return of said notice to the said judge of probate, and on the day and at the place therein named, the said judge of probate shall hear and determine such contest, and make all necessary orders for the trial of the cause, and carrying his judgment into effect.

Trial, how conducted.

SEC. 45. Each party shall be entitled to subpœnas, and subpœnas *duces tecum*, as in ordinary cases at law, and the court shall hear and determine (without the intervention of jury) the same in such manner as shall carry into effect the expressed will of a majority of the legal voters as indicated by their votes for such office, not regarding technicalities or errors in spelling the name of any candidate for such office. And the clerk of said court or judge of probate shall issue a certificate to the person declared to be duly elected by said court, which shall be conclusive evidence of the right of said person to hold said office; *Provided* that the judgment or decision of the district court in term time, or a decision of a judge thereof in vacation, as the case may be, may be removed to the supreme court by writ of error, or in such other manner as is provided for removing causes from the district to the supreme court; and *provided further*, that appeals may be taken from the decision of a judge of probate to the district court as in probate cases; in all which cases the party removing any such judgment or decision by writ of error or appeal, shall file in the proper court a bond to the opposite party in such sum and with such sureties as shall be prescribed by a judge thereof, conditioned for the payment of all costs that may be properly taxed against him.

Appeal.

This chapter how construed.

SEC. 46. This chapter shall not be construed so as to impair in any way the right of any person to contest any election in the manner otherwise provided by statute.

CHAPTER II.

OF RESIGNATIONS, VACANCIES, REMOVALS, AND SUPPLYING VACANCIES.

TITLE I. *Of Resignations.*
TITLE II. *Of Vacancies and Removals.*
TITLE III. *Of Supplying Vacancies.*

TITLE I.

Of Resignations.

Resignations

SEC. 1. Resignations shall be made as follows:

1. By the treasurer of the territory, auditor of the territory, and by all officers elected by the legislature, to the governor;

2. By all officers who hold their offices by election, to the officer

TITLE 2. or officers respectively authorised by law to order a special election to fill such offices respectively;

3. By all other officers holding their offices by appointment, to the body, board, or officer that appointed them.

TITLE II.

Of Vacancies.

SEC. 2. Office when vacant.
3. When the governor shall declare an office vacant.

Vacancies.

SEC. 2. Every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:—

1. The death of the incumbent;
2. His resignation;
3. His removal;
4. His ceasing to be an inhabitant of the district, county, town, or village, for which he shall have been elected or appointed, or within which the duties of his office are required to be discharged;
5. His conviction of any infamous crime, or of any offence involving a violation of his oath;
6. His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law;
7. The decision of a competent tribunal declaring void his election or appointment.

Governor when to declare office vacant.

SEC. 3. The governor shall also declare vacant the office of every officer required by law to execute an official bond, whenever a judgment shall be obtained against such officer for a breach of the condition of such bond.

TITLE III.

Of Supplying Vacancies.

SEC. 4. When, and what vacant offices governor may fill by appointment.
5. What offices county commissioner may fill.
6. Officers appointed; how to qualify; their term of office.
7. This act, when to take effect.

During recess of legislature.

SEC. 4. Whenever a vacancy shall occur during the recess of the legislature in any office which the legislature are authorized to fill by election, the governor, unless it is otherwise specially provided, may appoint some suitable person to perform the duties of such office.

County commissioners may fill certain vacancies.

SEC. 5. When at any time there shall be in either of the offices of judge of probate, county clerk, sheriff, coroner, or any county or precinct office, no officer duly authorized to execute the duties thereof, some suitable person may be appointed by the county commissioners to perform the duties of either of said offices.

How to qualify: term of office.

SEC. 6. Every such person so appointed, in pursuance of either of the two last preceding sections, shall before proceeding to execute the duties assigned them, qualify in the same manner as required by law of the officers in whose place he shall be appointed; and he shall continue to exercise and perform the powers and duties of the office to which he shall be appointed, until such vacancy shall be regularly supplied as provided by law.

TITLE 3.

Act, when to take effect, &c.

SEC. 7. This act shall take effect, and be in force from and after its passage. *Passed, January 11th*, 1854.

An Act to provide for holding the Supreme and District Courts.

SEC. 1. Time and place of holding supreme court.
2. Counties composing first, second, and third judicial districts; residence of associate judges.
3. Time and place of holding district court.
4. Trial of criminal offences in district court.
5. What causes, &c., judge of district court at chambers may hear and determine.
6. When judges may exchange districts.
7. County of Tillamock and Yamhill, Coss and Umpqua attached for judicial purpose.
8. This act when to take effect.

Time and places of holding supreme court.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That a supreme court shall be held in Portland on the second Monday of June, and in Salem on the second Monday of December in each year.

First district

SEC. 2. The counties of Marion, Linn, Lane, Benton, and Polk, shall compose the first judicial district, and George H. Williams chief justice, is assigned to reside therein.

Second district.

The counties of Clatsop, Washington, Clackamas and Yamhill, shall compose the second judicial district, and Cyrus Olney, one of the associate justices, is assigned to reside therein.

Third district.

The counties of Umpqua, Douglas, and Jackson, shall compose the third judicial district, and Obediah B. McFadden, one of the the associate justices, is assigned to reside therein.

Time for holding district court in the different counties.

SEC. 3. District courts shall be held in the several counties, on the following Mondays, to wit: in Clatsop, the fourth in February and August; in Clackamas, the first in March and September; in Yamhill, the third in March and September; in Washington, the fourth in April and September; in Lane, the first in May and October; in Benton, the second in May and October; in Linn, the third in May and October; in Polk, the fourth in May and October; in Marion, the first in April and November; in Douglas, the third in May and November; in Umpqua, the fourth in May and November; in Jackson, the first in February, May, August, and November.

Trial of criminal offences.

SEC. 4. When any person shall be detained in prison or custody charged with a criminal offence, the judge of the district, and in case of vacancy, absence, or other inability, then any other judge may appoint and hold a district court for the indictment and trial of such prisoner, at which term all persons in actual custody shall be tried, who shall have received from the judge ten days notice of the time of holding such court for their trial, and any other business may be done by consent of parties.

Powers of judges at chambers.

SEC. 5. The judges at chambers may hear and decide all causes and matters at law and in equity arising or pending in their respective districts, which do not require the intervention of a jury, taking care that the parties have due notice of the time and place of hearing; and at the request of both parties, may hold jury-trials, and tax the expense as costs of suit.

TITLE 3.

Judges may exchange districts.

SEC. 6. The judges may exchange districts, and hold courts for each other at pleasure, and when a vacancy shall happen, or a judge shall be sick, absent, or otherwise unable to serve, it shall be the duty of the other judges to supply his place, so far as the same can be done without omitting any regular court in their own districts.

Tillamook & Yamhill; Coss & Umpqua to be attached.

SEC. 7. The county of Tillamook shall be attached to the county Yamhill for judicial purposes, and the county of Coos shall be attached to Umpqua for judicial purposes.

Act to take effect.

SEC. 8. This act to take effect from and after its passage.

Passed December 22d, 1853.

An Act supplemental to an act entitled, "an act to provide for holding the Supreme and District Courts.

SEC. 1. When term of supreme court to be held at Jacksonville; Proviso.
2. This act when to take effect.

Holding of supreme court at Jacksonville

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That there shall be held a term of the supreme court at Jacksonville, in Jackson county, on the second Monday of July of each year; *provided*, that if the clerk of the supreme court shall, within ten days next preceding the said second Monday of July, notify the judges of the supreme court that there are no writs of error pending for trial in said court, then it shall not be necessary for said judges to meet and hold a court at such term.

Act to take effect.

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

Passed, January 29th, 1854.

AN ACT TO REGULATE PROCEEDINGS IN ACTIONS AT LAW IN THE SUPREME AND DISTRICT COURTS.

CHAPTER I.

CIVIL ACTIONS.

TITLE I. *Of their Form.*
TITLE II. *Of the Place of Trial; Actions at Law.*
TITLE III. *Of the Manner of commencing Actions at Law.*
TITLE IV. *Of the Pleadings.*
TITLE V. *Of the Complaint.*
TITLE VI. *Of the Demurrer.*
TITLE VII. *Of the Answer.*
TITLE VIII. *Of the Reply.*
TITLE IX. *General Rules of Pleadings.*
TITLE X. *Of Mistakes in Pleadings and Amendments.*
TITLE XI. *Of Arrest and Bail.*
TITLE XII. *Of the Claim and delivery of.*
TITLE XIII. *Of Attachment.*

TITLE I.

Of the Form of Actions at Law, and the Parties thereto.

SEC. 1. Distinction between forms of civil actions abolished.
2. Parties to actions, how designated.
3. Actions, how commenced.

TITLE 1.

SEC. 4. Assignment of thing in action not to prejudice defence.
5. Executor or trustee may sue without the person beneficially interested.
6. When a married woman is a party, her husband to be joined, except, &c.
7. Infant to appear by guardian.
8. Guardian how appointed.
9. Father may sue for seduction of daughter.
10. When unmarried females may prosecute for their own seduction.
11. Plaintiff may sue in one action the different parties to commercial paper.
12. Action not to abate by death, marriage, or other disability, &c., proceedings in such case.
13. Court when to decide controversy, or order other parties to be brought in.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the distinction between the forms of actions at law heretofore existing is abolished; and there shall be in this territory hereafter, but one form of action at law for the enforcement or protection of private rights, except as otherwise expressly provided by statute.

Form of actions at law abolished. 4 How 427.

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

Parties how designated.

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

Action in name of party in interest. 5 How 161.

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 the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.

Assignment of thing in action not to prejudice a defence, 9 Cow. 10, Page 369; 1 San 23.

SEC. 5. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section.

Executor &c or trustee may sue. 4 Hill 186.

SEC. 6. When a married woman is a party, her husband shall be joined with her, except that,

Husband, when to be joined.

1. When the action concerns her separate property she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

4 Pr. R. 336; 2 Sanf. 715.

But when her husband cannot be joined with her, as herein provided, and she is an infant under twenty-one years of age, she shall prosecute or defend by her next friend.

6 Pr. R. 53.

SEC. 7. When an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is brought, or by a judge thereof.

Infant to appear by guardian. 11 Wen. 164; 12 Wen. 191; 3 Hill. 407; 3 Sanf. 385.

SEC. 8. The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relation or friend of the infant.

2. When the infant is defendant, upon an application of the infant, if he be of the age of fourteen years, and apply within twenty 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 relation or friend of the infant.

2 Page 374.

TITLE 2.

Prosecution for the seduction of daughter or ward.

SEC. 9. A father, or in case of his death or desertion of his family, the mother may prosecute as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or ward be not living with, or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

When female may prosecute for her seduction.

SEC. 10. An unmarried female over twenty-one years of age may prosecute as plaintiff an action for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female.

Persons severally liable on same bill of exchange may be joined. 5 How 5.

SEC. 11. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes may, all or any of them, be included in the same action, at the option of the plaintiff.

Action when not to abate.

SEC. 12. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, on motion, allow the action to be continued by or against his representatives or successor in interest.

Proceedings in case of death.

Court may decide controversy or order parties brought in. 5 How, 99, 142.

SEC. 13. 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.

TITLE II.

Of the Place of Trial; Actions at Law.

SEC. 14. Certain actions to be tried where the subject or some part is situated.
15. Other actions, where the cause or some part thereof arose.
16. Other actions according to defendant's residence.
17. When a change of venue may be had; proceedings of applicant, &c.
18. Application for change of venue; applicant not entitled to a second change.
19. When judge to transmit order of change, &c., to clerk.
20. Transcript of record to be sent by clerk of court where cause is pending, to the clerk of court where cause is to be tried.
21. Applicant to pay costs.
22. When order for change of venue may be cancelled.
23. Cause to be docketed, on filing of transcript, &c., in clerk's office.

Certain actions to be tried where subject is situated.

SEC. 14. 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, in the cases provided by statute:

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

Actions where cause arose.

SEC. 15. 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 in the cases provided by statute:

TITLE 2.

1. For the recovery of a penalty or forfeiture imposed by statute; except that when it is imposed for an offence 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 offence was committed:

2. Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office; or against a person who, by his command, or in his aid, shall do anything touching the duties of such officer. 13 Wen. 85, 266.

Actions according to defendant's residence.

SEC. 16. In all other cases, the action shall be tried in the county in which the defendants or either of them reside, or may be found, at the commencement of the action; or if none of the parties reside in this territory, the same may be tried in any county which the plaintiff may designate in his complaint; subject, however, to the power of the court to change the place of trial, as provided by statute.

Change of venue. 4 Hill 62, n.

SEC. 17. A change of venue, or the place of trial, may be had on the application of either of the parties in the following cases:

1. When the county in which the action is pending shall be a party thereto or interested therein:
2. When the judge shall be directly interested in the action, or connected by blood or affinity with any person so interested, nearer than in the fourth degree;
3. When the party applying for such change shall make and file an affidavit, stating that the judge or the inhabitants of the county are so prejudiced against him that he cannot expect an impartial trial, that the application for the change of venue is not made for the purpose of delay.

Application for change of venue, &c. 1 Denio 660.

SEC. 18. An application for the change of venue may be made, either to the court in term time or to a judge thereof in vacation, and the change shall be to the most convenient county in which there shall be no exception of the character of those above enumerated. But neither party shall be entitled to more than one change of venue, except for causes not in existence when the first change may have been taken.

Order of change: Affidavit to be sent to clerk.

SEC. 19. If the change of venue be ordered by the judge in vacation, he shall immediately transmit to the clerk of the court where the cause is pending, the affidavit if any, and the order for the change, who shall file the same in his office.

Duty of clerk

SEC. 20. In such cases, as well as where the order shall be made in open court, the clerk shall forthwith transmit to the clerk of the proper court, a transcript of the record and proceedings in such cause with all the original papers filed therein, having first made out and filed in his own office authenticated copies of all such original papers.

Applicant to pay costs.

SEC. 21. The costs of such change of venue shall be paid by the applicant therefor, and not taxed as a part of the costs of the case, and the clerk may require payment of such costs before the transcript and papers shall be transmitted as aforesaid.

When order

SEC. 22. If such transcript of the record and proceedings be not

TITLE 3.

transmitted to the clerk of the proper court within twenty days after the order for the change of venue shall be filed, (unless a longer time be allowed by the judge,) such order may be annulled by the court or judge who made the same, and in such case no other change of venue shall be allowed to such applicant.

of venue may be annulled.

Change of venue when consummated.

SEC. 23. Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed, and the same proceedings had as though it had originated in that court.

TITLE III.

Of the Manner of Commencing Actions at Law.

SEC. 24. Actions how commenced.
25. Summons when issued.
26. Summons, requisites of.
27. Notice to be inserted in certain actions.
28. Service and return of summons.
29. Summons and complaint how served.
30. Publication when defendant cannot be found.
31 & 32. Publication how made; defendant's rights in such cases.
33. When the clerk may issue a second summons.
34. Proceedings where there are several defendants, and part only are served.
35. Service of summons, &c., how proved.
36. When jurisdiction of action acquired.

How commenced.

SEC. 24. Actions at law in the several district courts of this territory, shall be commenced by the filing of a complaint with the clerk of the court, and the issuing of a summons thereon.

Summons when issued, &c.

SEC. 25. The clerk shall indorse on the complaint, the day, month, and year that the same shall be filed; and at any time thereafter, the plaintiff may have a summons issued, which shall be directed to the defendant, and shall be signed by the clerk, and issued under the seal of the court, and shall be made returnable on the first day of the next term of court.

Summons; its requisites

SEC. 26. The summons shall require the defendant to appear and answer the complaint, or that judgment by default will be taken against him.

1. If he be served within the county in which the action is brought, ten days before the term of the court; or if in any other county, thirty days before the court, he shall be required to appear and answer the complaint on the return day of the summons.

2. If he be served less than ten days, within the county in which the action is brought, or less than thirty days in any other county, he shall appear and answer the complaint on the first day of the term next after the return day of the summons.

Notice to be inserted.

SEC. 27. There shall also be inserted in the summons a notice, in substance as follows:

4 How, 94.

1. In an action arising on contract for the 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.

2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein.

Service and return of summons.

SEC. 28. 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 by a person appointed by the judge of the court in which the action is brought. The summons shall be returned to the office of the clerk from which it issued, with the certificate of the sheriff or his deputy, or the affidavit of the person appointed, of its service, and of the service of a copy of the complaint. When served out of the county in which the action is brought, the summons may be returned by mail, and the postage taxed with the costs of suit.

TITLE 3.

Summons & complaint, how served.

SEC. 29. The summons shall be served by delivering a copy thereof, together with a copy of the complaint prepared by the plaintiff, his agent or attorney, as follows:

5 How, 185.

1. If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof;

2. If against any county in this territory, to one of the board of commissioners of such county, or to the clerk of the commissioners;

3. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian; or if there be none within this territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed;

3 Page, 199; 5 Page, 489; 19 Wen. 649; 4 Denio, 162.

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

5. In all other cases to the defendant personally, or if he be not found, to some white person of the family, above the age of fourteen years, at the dwelling house or usual place of abode of the defendant.

Publication when defendant cannot be found.

3 How, 416; 4 How, 151; 5 How, 3.

SEC. 30. When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the territory, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, and it in like manner appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this territory, such court or judge may grant an order that the service be made by publication of a summons in either of the following cases:

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

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

3. When the defendant is not a resident of the territory but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action;

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

Publication, how made.

SEC. 31. The order shall direct the publication to be made in a newspaper published in the county where the action is brought, and if there be no newspaper published in the county, then in a

TITLE 3.

newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks; or in case the defendant be absent from, or residing out of this territory, not less than once a week for three months. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence, unless it shall appear that such residence is not known to the party making the application. When publication is ordered, personal service of a copy of the summons and complaint out of the territory, shall be equivalent to publication and deposit in the post office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed in the order for publication.

Defendant's rights in such cases.

SEC. 32. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives may in like manner, upon good cause shown, be allowed to defend after judgment, and within one year after the rendition of such judgment on such terms as may be just, and if the defence be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct.

When cl'rk to issue second, &c. summons

SEC. 33. Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve a summons, that he has not served it upon the defendants as prescribed in the twenty-ninth section, the clerk shall, at the request of the plaintiff, issue another summons, and so on until service be had; or the plaintiff may proceed by publication in the manner before stated, at his election.

Proceedings where there are several defendants & part only served.

SEC. 34. When the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

1. 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 defendant served, and if they are subject to arrest against the persons of the defendants served; or

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

Proof of service.

SEC. 35. Proof of the service of the summons and complaint shall be as follows:

1. If served by the sheriff or his deputy, the certificate of such sheriff or deputy; or

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

3. In case of publication, the affidavit of the printer or his foreman or his principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons and complaint in the post office, if the same shall have been deposited; or

TITLE 5, 6.

4. The written admission of the defendant. In case of service, otherwise than by publication, the certificate, affidavit or admission must state the time and place of service.

2 Hill, 362.

When jurisdiction of action acquired.

SEC. 36. From the time of the service of the summons and complaint in an action at law, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him.

TITLE IV.

Of the Pleadings in Actions of Law.

SEC. 37. Forms of pleading inconsistent with this act abolished.
38. What pleadings are allowed.

Forms of pleading inconsistent with this act abolished.

7 Barb. 80; 8 Barb. 103, 300.

SEC. 37. All the forms of pleading heretofore existing in actions at law, inconsistent with the provisions of this act, are abolished; and hereafter the forms of pleading, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by statute.

Pleadings, names of.

SEC. 38. The only pleadings on the part of the plaintiff shall be:

1. The complaint;
2. The demurrer; or
3. The reply.

And on part of the defendant:

1. The demurrer; or
2. The answer.

TITLE V.

The Complaint.

SEC. 39. First pleading to be complaint.
40. Complaint what to contain.

First pleading to be complaint.

SEC. 39. The first pleading on the part of the plaintiff, shall be the complaint.

Complaint, what to contain.

4 Coms. 253.

SEC. 40. The complaint shall contain:

1. The title of the cause, specifying the name of the court, and the name of the county in which the action is brought, and the names of the parties to the action, plaintiff and defendant.

2 Coms. 132; 7 Barb. 204; 8 Barb. 217, 570; 3 Sanf. 695, 736.

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

3. A demand of the relief which the plaintiff claims. If the recovery of money, or damages be demanded, the amount thereof shall be stated.

TITLE VI.

The Demurrer.

SEC. 41. When defendant may demur.
42. Demurrer must specify ground of objection to complaint.
43. How to proceed if complaint be amended.
44. Objection when taken by answer.
45. Objection when deemed waived.

When defendant may

SEC. 41. The defendant may demur to the complaint within the

TITLE 7.

time required in the summons to answer, when it appears upon the face thereof, either:

demur. 8 How. 177.

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

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

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

5 Sanf. 330; 1 Seld. 357; 7 How. 4; 7 Barb. 204.

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

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

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

Demurrer must specify grounds of objection to complaint. 7 Barb. 204; 1 Seld. 357.

SEC. 42. The demurrer shall distinctly specify the grounds of objection to the complaint, unless it does so it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

How to proceed if complaint be amended.

SEC. 43. If the complaint be amended, a copy thereof shall be served on the defendant or his attorney of record, and the defendant shall answer the same within such time as may be prescribed by the court, and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer.

Objection when taken by answer.

SEC. 44. When any of the matters enumerated in section forty-one do not appear upon the face of the complaint, the objection may be taken by answer.

Objection when deemed waived. 6 Barb. 564; 7 Barb. 581.

SEC. 45. If no 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.

TITLE VII.

The Answer.

SEC. 46. Answer what to contain.
47. May set forth as many grounds of defence as exist.
48. Demurrer as to some causes of action, and action as to others.
49. Sham defences to be stricken out.

Answer, what to contain. 8 Page 210; 8 Barb. 189; Ib. 250; 3 Sanf. 738; 8 How. 193; 14 Barb. 533.

SEC. 46. *The answer of the defendant shall contain:*

1. A specific denial of each material allegation of the complaint controverted by the defendant, according to his knowledge, information or belief, or of any knowledge or information thereof sufficient to form a belief.

2. A plain and concise statement of any new matter constituting a defence or set-off without unnecessary repetition.

Different defences 7Barb 84.

SEC. 47. The defendant may set forth by answer as many defences as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.

Demurrer to some causes of action and answer as to others.

SEC. 48. The defendant may demur to one or more of several causes of actions stated in the complaint, and answer the residue.

Sham defences to be stricken out. 1 Hill, 672; 4 How. 155; 5 Sanf. 660; 3 Sanf. 782.

SEC. 49. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in its discretion impose.

TITLE 9.

TITLE VIII.

Of the Reply.

SEC. 50. Reply, when put in, what to contain.
51. When defendant may move for judgment on answer.
52. Demurrer to reply.

Reply, what to contain. 6 Barb. 144; 8 Barb. 124; 8 How. 9.

SEC. 50. When the answer contains new matter constituting a defence or set-off, the plaintiff may, within ten days, reply to such new matter, denying specifically each allegation controverted by him according to his knowledge, information or belief, or any knowledge or information thereof sufficient to form a belief, and he may allege, in a plain and concise manner, without unnecessary repetition, any new matter, not inconsistent with the complaint, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof, and the plaintiff may demur to one or more of several defences or set-offs in the answer, and reply to the residue.

When defendant may move for judgment on answer.

SEC. 51. If the answer contain a statement of new matter constituting a defence, and the plaintiff fails to reply or demur thereto within the time prescribed by law, the defendant may move in court for such judgment as he shall be entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

Demurrer to reply.

SEC. 52. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

TITLE IX.

General Rules of Pleading.

SEC. 53. No pleading but complaint, answer, reply and demurrers.
54. Verification of pleadings.
55. How to state an account in pleadings.
56. Pleadings to be construed liberally.
57. Irrelevant and redundant matter to be stricken out.
58. Judgments how to be pleaded.
59. Conditions precedent, how to be pleaded.
60. Private statutes, how to be pleaded.
61. Libel and slander, how stated in complaint.
62. Answer in such cases.
63. Answer in actions to recover property distrained.
64. When several causes of action may be united in same complaint.
65. Allegation not denied; when to be deemed true.
66. Nature of a material allegation.

Pleadings.

SEC. 53. Every pleading shall be subscribed by the party or his attorney, and, except a demurrer, shall also be verified by affidavit, as set forth in the next section.

Verification of pleadings.

SEC. 54. The verification shall be to the effect that the same is true to the knowledge of the person making it, except as to matters stated on information and belief, and as to those matters that he believes it to be true. The affidavit shall be made by the party, or if there be several parties united in interest, and pleading together, by one of such parties if he be within the county in which the action is brought, and capable of making the affidavit, unless the action or defence be founded upon a written instrument for the

2 Sanf. 647.

TITLE 9.

payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney, in which case the affidavit may also be made by such agent or attorney. If the party pleading shall not be within the county in which the action is brought, such pleading may be verified by the party, his agent or attorney, or by any person having a knowledge of the facts, and when the affidavit shall be made by any other person than the party, he shall set forth in it his knowledge, or the grounds of his belief on the subject, and the reason why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof, and when the territory, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegations might subject the party to prosecution for felony. And no pleading shall be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

Account how stated.

SEC. 55. It shall not be necessary for a party to set forth in a pleading, a copy of the instrument of writing, or the items of an account therein alleged, but unless he file a verified copy thereof with such pleading, and serve the same on the adverse party, he shall within ten days after a demand thereof in writing, deliver to the adverse party, a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true; or be precluded from giving evidence thereof. The court, or a judge thereof may order a further account when the one delivered is defective, and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

Pleadings, how construed.

SEC. 56. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

Irrelevant & redundant matter stricken out. 5 How. 192; Sanf. 660.

SEC. 57. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

Pleading of judgments.

SEC. 58. In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Of conditions precedent.

SEC. 59. 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 allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to

5 How. 107.

TITLE 9.

state that there is due to him thereon from the adverse party a specific sum which he claims.

Private statutes.

SEC. 60. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

Statement of libelous matter. 5 How. 171.

SEC. 61. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken.

Answer thereto.

SEC. 62. 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.

Answer of defendant in actions to recover property distrained.

SEC. 63. In an action to recover the possession of property, distrained doing damage, an answer that the defendant or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

Joinder of causes of action.

SEC. 64. The plaintiff may unite several causes of action in the same complaint when they all arise out of

1. Contract, express or implied; or,
2. Injuries, with or without force, to the person; or,
3. Injuries, with or without force, to property; or,
4. Injuries to character; or,
5. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or,
6. Claims to recover personal property, with or without damage for the withholding thereof; or,
7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

Allegation not denied, deemed true.

SEC. 65. Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in a reply shall not in any respect conclude the defendant, who may on the trial countervail it by proofs, either in direct denial or by way of avoidance.

Material allegation.

SEC. 66. A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient.

TITLE 10.

TITLE X.

Mistakes in Pleadings and Amendments.

SEC. 67. Material variances, how provided for.
68. Immaterial variances, how provided for.
69. What to be deemed a material variance.
70. Amendments of course.
71. When a party may plead over, after decision on demurrer.
72. Amendments by the court.
73. Amendments after demurrer.
74. Suing a party by a fictitious name, when allowed.
75. No error or defect to be regarded unless it affects substantial rights.
76. Supplemental complaint, answer or reply.

Material variances, how provided for. 7 Barb. 18; 2 Sanf. 421, 719.

SEC. 67. No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.

Immaterial variances, how provided for. 6 Barb. 308.

SEC. 68. When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

What to be deemed a variance.

SEC. 69. When, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the two last sections, but a failure of proof.

Amendments of course.

SEC. 70. Any pleading may be once amended by the party of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it shall expire; in such case, a copy of the amended pleading shall be served on the adverse party.

When party may plead over.

SEC. 71. After the decision upon a demurrer, if it be overruled, and it appears that such demurrer was interposed in good faith, the court may in its discretion allow the party to plead over upon such terms as may be proper. If the demurrer be sustained, either party may amend any pleading demurred to, upon such terms as may be just, and he shall serve a copy of the same as amended, on the adverse party, within such time as may be prescribed by the court.

Amendments by the court.

SEC. 72. The court may, before or after judgment, 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 respect, or by inserting other allegations material to the case, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

Amendment after demurrer.

SEC. 73. The court may likewise in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this act, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

TITLE 11.

Suing a party by a fictitious name when allowed.

SEC. 74. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Error in pleading when to be disregarded. 4 Barb. 243.

SEC. 75. 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 adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Supplemental complaint, answer or reply. 5 How. 420; 4 Barb. 541.

SEC. 76. The plaintiff and defendant respectively, may be allowed on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply.

TITLE XI.

Provisional Remedy by Arrest and Bail.

SEC. 77. Arrest on civil process.
78. When defendant may be arrested in civil action.
79. Order of arrest, by whom made.
80. Affidavits to obtain order.
81. Security by plaintiff before order of arrest.
82. Order, when made, and its form.
83. Affidavit and order, to be delivered to sheriff, and copy to defendants.
84. Arrest, how made.
85. Defendant to be discharged on bail or deposite.
86. Bail, how given.
87, 88. Surrender of defendant.
89. Bail, how proceeded against.
90. Bail, how exonerated.
91. Sheriff, when to file order of arrest and undertaking. Plaintiff must except to undertaking within ten days.
92. Notice of justification. New undertaking, if other bail.
93. Qualifications of bail.
94, 95. Justification and allowance of bail.
96. Deposit of money with sheriff.
97. Payment of money by sheriff into court.
98. Substituting bail for deposit.
99. Money deposited, how applied, or disposed of.
100. Sheriff, when liable as bail; and his discharge from liability.
101. Proceedings on judgment against sheriff.
102. Bail liable to sheriff.
103. Fees of sheriff for keeping prisoner; and liability of plaintiff therefor.
104. Prisoner may be discharged on plaintiff neglecting after demand, to pay sheriff's fees.
105. Motion to vacate order of arrest, or reduce bail; and affidavits on motion.
106. Order of arrest when vacated; bail when reduced.

Arrest on civil process.

SEC. 77. No person shall be arrested in an action at law, except as prescribed by this act, but this provision shall not apply to proceedings for contempt.

When defendant may be arrested. 5 Barb. 509.

SEC. 78. The defendant may be arrested as hereinafter prescribed in the following cases:

1. In an action for the recovery of damages on a cause of action not arising out of contract, when the defendant is not a resident of the territory, or is about to remove therefrom, or when the action

TITLE 11. is for a wilful injury to person or to property, the defendant knowing the property to belong to another.

2. In an action for the recovery of money, or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the territory, with intent to defraud his creditors.

3. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by a public officer or officers of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such; or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment.

5 How. 148, 327; 3 Sanf. 707.

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

5 How. 143; 8 Barb. 169.

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

6. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

2 Sanf. 729.

But no female shall be arrested in any action, except for a wilful injury to person or property.

Order of arrest.

SEC. 79. An order for the arrest of the defendant shall be obtained from a judge of any district court in this territory.

How obtained.

SEC. 80. The order may be made when it shall appear to the judge, by the affidavit of the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section seventy-eight, which affidavit shall be supported by the additional affidavit of some other disinterested person, that the case is one of those mentioned in section seventy-eight. The affidavits shall be either positive, or upon information or belief, they shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavits shall be filed with the clerk of the court in which the action is brought.

Security by plaintiff.

SEC. 81. Before making the order the judge shall require a written undertaking on the part of the plaintiff with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars. If the undertaking be executed by the plaintiff without sureties, he shall annex thereto an affidavit that he is a resident and householder, or freeholder within the territory, and worth double the sum specified in the undertaking, over all his debts and liabilities.

Order when made.

SEC. 82. The order may be made to accompany the summons, or at any time afterwards before judgment. It shall require the sheriff of the county where the defendant may be found forthwith

to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending. TITLE 11.

Service of affidavit & order.

SEC. 83. The affidavit and order of arrest shall be delivered to the sheriff, who upon arresting the defendant shall deliver to him a copy thereof.

Arrest. 5 J. R. 182.

SEC. 84. The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law.

Defendant when to be discharged.

SEC. 85. The defendant at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest as provided in this act.

Bail, how given.

SEC. 86. The defendant may give bail, by causing a written undertaking to be executed in favor of the plaintiff by two or more sufficient sureties, stating their places of residence, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the fourth subdivision of section seventy-eight, an undertaking to the same effect as that provided by section one hundred and twelve.

Surrender of defendant.

SEC. 87. At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

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

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

Ib.

SEC. 88. For the purpose of surrendering the defendant, the bail at any time and place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower the sheriff or any other person of suitable age and discretion to do so.

Bail, how proceeded against.

SEC. 89. In case of the failure to comply with the undertaking, the bail may be proceeded against by action only.

How exonerated.

SEC. 90. The bail may be exonerated either by the death of the defendant or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

Order of arrest, under-

SEC. 91. Within the time limited for that purpose, the sheriff

TITLE 11.

shall file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a certified copy of the undertaking of the bail; or if the defendant be arrested, and bail be not given, he shall file a certified copy of the order of arrest, with his return indorsed thereon. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the court.

taking, when to be filed: plaintiff must except to undertaking within ten days.

Notice of justification.

SEC. 92. Within ten days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence of the latter,) before a judge of the district court, or the clerk of the court in which the action is pending, at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking in the form prescribed in section eighty-six.

New undertaking, if other bail.

Qualifications of bail.

SEC. 93. The qualifications of bail shall be as follows:

1. Each of them shall be a resident of the territory; but no counsellor or attorney at law, sheriff, clerk of the district court, or other officer of such court, shall be permitted to become bail in any action.

2. Each of them shall be worth the amount specified in the order of arrest, or the amount to which the order may be reduced as provided in this act, over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or clerk of the court on justification may allow more than two sureties to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Justification of bail.

SEC. 94. For the purpose of justification, each of the bail shall attend before the judge or clerk of the court, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk in his discretion may think proper. The examination shall be reduced to writing and subscribed by the bail, if required by the plaintiff.

Allowance of bail.

SEC. 95. If the judge or clerk find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk of the court in which the action is brought; and the sheriff shall thereupon be exonerated from liability.

Deposit instead of bail.

SEC. 96. The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. If the amount of the bail be reduced as provided in this act, the defendant may deposit such amount instead of giving bail. In either case the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

Payment by sheriff into court.

SEC. 97. The sheriff shall immediately after the deposit pay the same into court, and take from the clerk receiving the same two

TITLE 11.

certificates of such payment, the one of which he shall deliver or transmit to the plaintiff or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

Substitution of bail for deposit.

SEC. 98. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section eighty-six, at any time before judgment, and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

Deposit how applied.

SEC. 99. When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

Sheriff when liable as bail, his discharge from liability.

SEC. 100. If, after being arrested, the defendant escape or be rescued, the sheriff shall be liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

Proceedings against sheriff.

SEC. 101. If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency.

Bail liable to sheriff.

SEC. 102. The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for any damages which he may sustain by reason of such omission.

Shff's fees for keeping prisoner.

SEC. 103. The fees which shall be allowed to the sheriff for the food and maintenance of any defendant arrested under the provisions of this act, shall be at the rate of one dollar and twenty-five cents per day for every day that the defendant shall remain in custody; and the plaintiff shall be liable in the first instance for such fees, and if required by the sheriff, shall pay the same weekly in advance; and such fees so paid shall be added to the costs taxed or accruing in the case, and be collected as other costs.

Discharge for non-payment of fees by plaintiff.

SEC. 104. If the plaintiff shall neglect to pay the fees mentioned in the last preceding section for three days after a demand of payment, the sheriff may discharge the defendant out of custody.

Motion to vacate order of arrest, 4 How. 288.

SEC. 105. A defendant arrested may, at any time before the justification of bail, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest, or reduce the amount of bail. If the application be made upon affidavits on part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Affidavits on motion, 2, J. R., 100.

Order of arrest when vacated: bail when reduced.

SEC. 106. If, upon such application, it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

TITLE XII.

Provisional Remedy for the Claim and Delivery of Personal Property.

SEC. 107. Delivery of personal property, when it may be claimed.
108. Affidavit and its requisites.
109. Requisition to sheriff, to take and deliver the property.
110. Security on part of the plaintiff and justification.
111. Exception to sureties and proceedings thereon, or on failure to except.
112. Defendant when entitled to re-delivery.
113. Justification of defendant's sureties.
114. Qualification and justification of sureties.
115. Property, how taken when concealed in building or inclosure.
116. Property, how kept.
117. Claim of property by third person.
118. Notice of affidavit, when and where to be filed.

Delivery of personal property, when it may be claimed. 12 Barb. 347.

SEC. 107. The plaintiff in an action to recover the possession of personal property, may at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter.

Affidavit, its requisites.

SEC. 108. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

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

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

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

3 How. 297.

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

5. The actual value of the property.

Requisition to sheriff to take and deliver property.

SEC. 109. The plaintiff may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county, where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

Security on the part of the plaintiff and justification. 18 Wen. 581; 1 Barb. 20.

SEC. 110. Upon the receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or, if neither have any known place of abode, by putting them in the post office, directed to the defendant at the post office nearest to him.

Exception to sureties, and proceedings thereon, or on failure to except.

SEC. 111. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Defendant when entitled to re-delivery.

SEC. 112. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and seventeen.

Justification of defendant's sureties.

SEC. 113. The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two, nor more than six days, shall justify before a judge of the district court, or the clerk of the court in which the action is pending, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Qualification and justification of sureties.

SEC. 114. The qualification of sureties and their justification shall be as prescribed by sections ninety-three and ninety-four in respect to bail upon an order of arrest.

Property how taken when concealed in building or inclosure.

SEC. 115. If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Property, how kept. 5 Denio, 21.

SEC. 116. 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 of property by third person.

SEC. 117. 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 his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two

TITLE 13.

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 freeholders or householders of the county. And no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Notice and affidavit, when and where to be filed.

SEC. 118. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein; or, if the clerk reside in another county, shall mail or forward the same within that time.

TITLE XIII.

Provisional Remedy by Attachment.

SEC. 119. When plaintiff may have property attached.
120. Writ of attachment, when and by whom granted.
121. Affidavit to be attached to writ: undertaking by plaintiff.
122. Writ, to whom directed and what to contain.
123. What property may be attached.
124. Writ, how executed.
125. Proceedings when real estate is attached.
126. Third persons having property, &c., of defendant in their possession, when liable to plaintiff.
127. When certain persons must designate defendant's interest in corporation, to sheriff.
128. Perishable property must be sold: other property retained to answer judgment.
129. When sheriff may deliver property to defendant.
130. Action upon undertaking when a defence.
131. Sheriff, when to summon a jury to try the right of property.
132. Order of examination, when to issue to persons not parties to suit.
133. When plaintiff may exhibit interrogatories to garnishee.
134. Garnishee to answer plaintiff's interrogatories under oath.
135. Judgment against garnishee, not final until final judgment against defendant.
136. Plaintiff may except to garnishee's answer. Answer, on what terms amended.
137. Denial of answer by plaintiff: trial of issue: answer, when deemed true if not excepted to or denied.
138. When judgment may be given against garnishee, although his answer be not excepted or denied.
139. How garnishee may discharge himself from liability.
140. Debts not due defendant may be attached.
141. Costs between plaintiff and garnishee the same as in other actions.
142. Claimant of attached property may be examined.
143. Judgment, how satisfied.
144. Satisfaction of attachment and return of property.
145. Judgment for defendant and return of property.
146. Discharge by undertaking of attachment, and return of property.
147. Nature of undertaking by defendants.
148. Defendant may move to vacate attachment.
149. Plaintiff may oppose motion by affidavit.
150. Sheriff, when to return writ.

When plaintiff may have defendant's property attached. 7 Barb. 656.

SEC. 119. In an action for the recovery of money, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as he may recover.

TITLE 13.

Writ of attachment, by whom granted, & when.

SEC. 120. A writ of attachment shall be issued by the clerk of the court in which the action is brought, whenever the plaintiff, his agent or attorney shall make affidavit that a cause of action exists against such defendant, specifying the amount of such claim over and above all legal set-offs, and the nature thereof, and that as the affiant verily believes, the defendant is either,

1. A foreign corporation; or
2. That he is not a resident of this territory, or has departed therefrom with the intent to delay or defraud his creditors, or to avoid the service of a summons; or
3. That he has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of his property, or any part thereof, with the intent to delay or defraud his creditors; or
4. That the debt was fraudulently contracted.

Affidavit to be attached to writ.

Undertaking by plaintiff.

SEC. 121. The affidavit required by the last section shall be attached to the writ upon issuing the same. Before executing such writ, the sheriff to whom it is directed shall require a written undertaking on the part of the plaintiff, with one or more sureties, in a sum not less than two hundred dollars nor exceeding the amount claimed by the plaintiff, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Warrant to whom directed, and what to require.

SEC. 122. The writ shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

Interests in corporation, &c., liable to attachment.

SEC. 123. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, all debts due such defendant, and all other property, real or personal, in this territory, of such defendant, not exempt from execution, may be attached, and if judgment be recovered against him, be sold or collected to satisfy the judgment and execution.

Writ, how executed.

SEC. 124. The sheriff to whom the writ is directed and delivered, shall execute the same without delay, as follows:

1. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ and affidavit certified by the sheriff.
2. Personal property capable of manual delivery to the sheriff, shall be attached by taking it into his custody.
3. Stock or shares, or interest in stock or shares of any corporation or company, shall be attached by leaving with the president or other head of the same, or the secretary, cashier, or managing agent thereof, a copy of the writ and affidavit, and a notice that the stock or interest of the defendant is attached in pursuance of such writ.
4. 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, or other personal property, a copy of the writ and affidavit, and 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 such writ.

The sheriff shall note on the writ the day, month and year when the attachment was made, and shall make a full inventory of the property attached, and return the same, together with the undertaking of the plaintiff, with the writ of attachment.

Proceedings where real estate is attached.

SEC. 125. If real estate be attached by virtue of any writ of attachment, the sheriff shall make a certified copy of said writ and of his return thereon, and deliver it within ten days from the time of making such attachment, to the recorder of the county in which such real estate is situated, who shall file and record the same in a book to be kept for that purpose in the recorder's office. When so filed within ten days, the same shall be and continue a lien from the time of making the attachment, otherwise it shall be and continue a lien from the time it is filed, on all real estate mentioned or described in the return of the sheriff in such county, until the same shall be discharged; and when the said lien shall be discharged by the order of the court in which the action is pending, or by satisfaction of the judgment rendered in the suit, it shall be the duty of the recorder, when requested, to record the satisfaction piece, or transcript of the record of such order, in a book to be kept for recording such liens, and he shall enter on the margin of the page or pages where the said writ and return are so recorded, a minute of such discharge or satisfaction.

Liability of third pers'ns having property of defendant.

SEC. 126. 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 a copy of the writ, affidavit and notice, as provided in section one hundred and twenty-four, shall, unless such property be delivered up or transferred, or such debts be paid to the sheriff, be liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Certificate of defendant's interest in a corporation to be furnished.

SEC. 127. When the sheriff, with a writ of attachment against the defendant, shall apply to any person mentioned in the third and fourth subdivisions of section one hundred and twenty-four, for the purpose of attaching the property mentioned therein, such person shall furnish him with a certificate designating the number of shares of the defendant in the stock of the corporation or company, with any dividend or incumbrance thereon, or the amount and description of the property or credits held by such corporation, company, or person for the defendant, or the debt owing to the defendant. If such person refuse to do so, or if his certificate or statement be unsatisfactory to the plaintiff, he may be required by an order of the court in which the action is brought, or a judge thereof, to attend before such court or judge, and be examined on oath concerning the same, as hereinafter prescribed in this chapter; and disobedience to the order may be punished as a contempt.

Sale of perishable property, collection of debts, &c.

SEC. 128. If any of the property attached be perishable, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof, and other property attached, shall be retained by him to answer any judgment that may be recovered in the action, unless it be delivered over as prescribed in the next section, or unless sooner subjected to execution upon another judgment, recovered previous to the issuing of the writ of attachment. Debts and credits attached may be collected by the sheriff, if the same can be done without suit, and his receipt shall be a sufficient discharge for the amount paid.

When sheriff may deliver property attached to defendant.

SEC. 129. The sheriff may deliver any of the property attached to the defendant, or to any other person claiming it and in whose possession it was attached, upon his giving a written undertaking therefor, executed by two or more sufficient sureties, engaging to re-deliver it, or pay the value thereof to the sheriff, to whom execution upon a judgment obtained by the plaintiff in that action may be issued.

Action on undertaking, a defence for defendant.

SEC. 130. If an action be brought upon such undertaking against the principal or his sureties, it shall be a defence that the property for which the undertaking was given, did not at the execution of the writ of attachment, belong to the defendant against whom it was issued.

When sheriff to summon jury to try right of property.

SEC. 131. If any personal property attached, be claimed by a third person as his property, the sheriff may summon a jury to try the validity of such claim, and the same proceedings shall be had thereon with the like effect, as in case of seizure upon execution.

Order of examination when issued to third persons.

SEC. 132. Whenever the sheriff with a writ of attachment against the defendant, shall apply to any person mentioned in section one hundred and twenty-four, for the purpose of attaching the personal property therein mentioned, and such person shall deny that he has any personal property of the defendant, or shall refuse to give the certificate required in section one hundred and twenty-seven, or if such certificate be unsatisfactory to the plaintiff, he may be required by an order of the court in which the action is brought, or a judge thereof, to attend before such court, or judge at a time therein stated, not less than ten days thereafter, and be examined on oath concerning the same.

Interrogatories to garnishee.

SEC. 133. At any time after the allowance of such order, and before such person shall be required to attend, the plaintiff may exhibit written allegations and interrogatories touching the property, stock or credits of the defendant, in the possession of or held by such person as garnishee, or debts owing to the defendant by him, and such garnishee shall be required to make full, direct and true answers to the same on oath.

Answer of garnishee.

SEC. 134. On the day when the garnishee shall be required to attend before the court or judge, he shall exhibit on oath his answer to the allegations and interrogatories of the plaintiff, unless for good cause shown a further time shall be allowed; in default of such answer, the plaintiff may take judgment by default against him, or the court or judge may upon motion compel him to answer by attachment of his body.

Judgment against garnishee.

SEC. 135. Such judgment by default may be proceeded on to final judgment, in like manner as in actions against defendants, but no final judgment shall be rendered against the garnishee until there

shall be final judgment against the defendant, and in no case for a greater amount than that sworn to by the plaintiff with interest and costs.

Plaintiff may except to garnishee's answer.

SEC. 136. The plaintiff may except to the answer of any garnishee for insufficiency, and if the same shall be adjudged insufficient, the court or judge may allow the garnishee to amend his answer, in such time and on such terms as shall be just, or the plaintiff may take judgment by default, or move the court or judge to attach the body of the garnishee to compel a sufficient answer.

Answer taken as true, if not denied or excepted to.

SEC. 137. The plaintiff may deny the answer of the garnishee, in whole or in part, and the issues shall be tried as ordinary issues between plaintiff and defendant. If the answer be not excepted to or denied, in such time as the court or judge may deem proper, it shall be taken to be true and sufficient.

Judgment, when rendered although answer be not excepted to or denied.

SEC. 138. If by the answer not excepted to, nor denied, or if upon trial it shall appear that the garnishee is possessed of property or effects of the defendant, or is indebted to the defendant, the value of such property or effects, or if the debt, being ascertained, judgment may be rendered against the garnishee for the proper amount in money, and in such case the court may make him a reasonable allowance for his trouble in answering, to be paid out of the fund confessed in his hands.

How garnishee may discharge himself from liability before final judgment.

SEC. 139. Whenever any property, effects, money or debts, belonging or owing to the defendant, shall be confessed or found by the court, judge or jury, to be in the possession of the garnishee, he may at any time before final judgment, discharge himself by delivering the same to the sheriff.

Debts not due may be attached.

SEC. 140. Debts not yet due to the defendant may be attached, but no execution shall be awarded against the garnishee for such debts until they shall become due.

Costs against plaintiff for garnishee.

SEC. 141. In all cases of controversy between the plaintiff and garnishee, the parties may be adjudged to pay or recover costs, as in ordinary cases between plaintiff and defendant.

Claimant may be brought into court and examined.

SEC. 142. The defendant or claimant may be required to attend before the court, judge or jury, for the purpose of giving any necessary information respecting the property attached, and may be thereupon examined on oath concerning the same.

Judgment of plaintiff, how satisfied.

SEC. 143. If judgment be recovered by the plaintiff against the defendant in such action, the sheriff shall satisfy the same out of the property attached by him, if it be sufficient for that purpose:

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

2. 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; and in case of the sale of any rights or shares in the stock of a corporation or company, the sheriff shall execute to the purchaser a certificate of the sale, and the purchaser a certificate of the sale, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by the defendant. Notices of the sales

shall be given, and the sales conducted as in other cases of sales on execution.

Satisfaction of attachment and return of property.

SEC. 144. If, after selling all the property attached by him remaining in his hands and applying the proceeds to the payment of the judgment and costs, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment and all the costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

Judgment for defendant and recovery of property.

SEC. 145. 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, and the order of attachment shall be discharged.

Discharge of attachment by undertaking and release of the property. 7 Barb. 656.

SEC. 146. Whenever the defendant shall have appeared in the action, he may apply, upon reasonable notice, to the plaintiff to the court or judge for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be granted, all the proceeds of sales, and moneys collected by the sheriff, and all the property attached remaining in his hands, shall be released from the attachment and delivered to the defendant.

Undertaking of defendants.

SEC. 147. Upon such application, the defendant shall deliver to the court or judge an undertaking executed by at least two sureties, approved by the court or judge, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. The sureties may be required to justify, on application to the court or judge, and the property attached shall not be released from the attachment without their justification, if it be required.

Defendant may move to vacate the writ.

SEC. 148. The defendant may also, at any time before the time for answering expires, apply on motion to the court or judge to discharge the attachment, on the ground that the writ was improperly issued.

When plaintiff may oppose motion by affidavit.

SEC. 149. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the writ of attachment was issued. If upon such application it shall satisfactorily appear that such writ was improperly issued, it shall be discharged.

Sheriff when to return writ.

SEC. 150. When the writ of attachment shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

CHAPTER II.

OF THE TRIAL AND JUDGMENT IN ACTIONS AT LAW, ISSUES AND THE MODE OF TRIAL.

TITLE I. *Of Issues.*
TITLE II. *Trial by Jury.*
TITLE III. *Of the Verdict.*
TITLE IV. *Of Trial by the Court.*
TITLE V. *Of Trial by Referees.*
TITLE VI. *Of Exceptions.*
TITLE VII. *New Trial.*
TITLE VIII. *Of General Provisions.*
TITLE IX. *Of Judgments in General.*
TITLE X. *Of Judgment upon Failure to Answer.*
TITLE XI. *Of Judgment by Confession.*
TITLE XII. *Of Submitting a Controversy without Action.*
TITLE XIII. *Of the Manner of giving and entering Judgment.*

TITLE I.

Of Issues.

SEC. 1. The different kinds of issues.
2. Issue of law.
3. Issue of fact.
4. On issues both law and fact, the issue of law to be first law.
5. Issues how tried.
6. Motion to postpone trial, on the absence of witnesses how made.

The different kind of issues.

SEC. 1. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and
2. Of fact.

Issue of law.

SEC. 2. An issue of law arises upon a demurrer to the complaint, answer, or reply, or to some part thereof.

Issue of fact.

SEC. 3. An issue of fact arises.

1. Upon a material allegation in the complaint, controverted by the answer; or
2. Upon new matter or a set-off controverted by the reply; or
3. Upon new matter in the reply.

Issue of law to be first tried. 2 Sanf. 635.

SEC. 4. Issues, both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law shall be first tried, unless the court otherwise direct.

Issues how tried.

SEC. 5. An issue of law shall be tried by the court, unless referred upon consent as provided by statute. An issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered as provided by statute.

Motion to postpone trial on the absence of evidence, how made.

SEC. 6. A motion to postpone a trial on the ground of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and what diligence has been used to procure it, and also the name and residence

of the witness or witnesses. 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.

TITLE II.

Of Trial by Jury.

SEC. 7. Jurors how chosen.
8. Challenges how made.
9. Challenge for cause, for what taken.
10. Challenge for cause, to be tried by court.
11. Oath or affirmation to be administered to jurors.
12. Ballots when to be returned to the box.
13. Power of court over jurors.
14. When juror is taken sick, court how to proceed.
15. When jury retire under charge of an officer; duties of officer having charge of jury.
16. Papers which the jury may refer to.
17. Jury may return to court for information.

Jurors how chosen.

SEC. 7. When the action is called for trial, the clerk shall prepare separate ballots, containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders or citizens of the county, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial.

Challenge.

SEC. 8. 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 challenges shall be to individual jurors, and shall be peremptory, or for cause. Each party shall be entitled to three peremptory challenges.

Challenge for cause. 4 Denio 9.

SEC. 9. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror:
2. Consanguinity or affinity within the third degree to either party:
3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being a member of the family of either party; or a partner in business with either party; or being security on any undertaking or obligation for either party:
4. Having served as a juror, or been a witness on a previous trial between the same parties for the same cause of action:
5. Interest on the part of the juror in the event of the action, or in the main question involved in the action:

TITLE 2.

1 Denio 281; 21 Wen. 509.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action:

7. The existence of a state of mind in the juror evincing enmity against either party.

Challenge for cause, how tried.

SEC. 10. Challenges for cause shall be tried by the court. The juror challenged, and any other person as a witness, may be examined on the trial of the challenge.

Oath or affirmation of jurors.

SEC. 11. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance that they, each of them, will well and truly try the matter in issue between the plaintiff and the defendant, and a true verdict give according to the evidence.

Ballots how disposed of.

SEC. 12. When the jury is completed and sworn, the ballots containing the names of the jurors sworn shall be laid aside till the jury so sworn is discharged, and then they shall be returned to the box; and every ballot drawn containing the name of a juror not so sworn, shall be returned to the box as soon as the jury is completed.

Power of court over jurors.

SEC. 13. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of cause to the jury, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon until the case is finally submitted to them.

When juror may be discharged; consequence thereof.

SEC. 14. If, after the impanneling of the jury, and before a verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impanneled.

Deliberation of jury.

SEC. 15. After hearing the charge of the court, the jury may either decide in the court room 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. 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.

13 Wen. 55.

Papers which the jury may refer to.

SEC. 16. Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers (except depositions) which have been received as evidence on the trial, or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. 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, except by consent of the parties.

Instructions, how given.

SEC. 17. After the jury have retired for deliberation, if there be

TITLE 3.

a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to the parties or counsel.

TITLE III.

Of the Verdict.

SEC. 18. Verdict is either general, or special.
19. Verdict in action to recover personal property.
20. When jury may render special or general verdict.
21. When special verdict controls general verdict.
22. In action for the recovery of money, jury when to assess damages.
23. Informal verdict how corrected.

General and special verdicts.

SEC. 18. The verdict of a jury is either general or special. A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

5 Hill 634.

Verdict in action for personal property.

SEC. 19. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property.

When juries may render either special or general verdict.

SEC. 20. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes.

When special controls general verdict.

SEC. 21. When 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.

In actions for recovery of money, jury when to assess damages.

SEC. 22. When a verdict is found for the plaintiff in an action for recovery of money, or for the defendant when a set-off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of recovery; they may also, under the direction of the court, assess the amount of the recovery when the court give judgment for the plaintiff on the answer.

Informal verdict how corrected. 7 J. R. 32.

SEC. 23. If the verdict be informal, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. When rendered, the verdict shall be entered by the clerk on his minutes.

TITLE IV.

Trial by the Court.

SEC. 24. Trial by jury may be waived.
25. When question of fact is tried by court, decision when and how given.

Trial by jury how waived. 1 Sanf. 457.

SEC. 24. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

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

Trial of fact by the court. 2 Comst. 406.

SEC. 25. Upon the trial of an issue of fact by the court, its decision shall be given in writing and filed with the clerk within twenty days after the court at which the trial took place. In giving the decision, the facts found, and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly.

TITLE V.

Trial by Referees.

SEC. 26. All trials referable by consent.
27. When reference may be compulsorily ordered.
28. Number of referees, and how chosen.
29. Qualification of referees chosen by court.
30. Trial by referees, how conducted, report of referees, &c.

All issues referable by consent.

SEC. 26. All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties.

When references may be compulsorily ordered.

SEC. 27. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact shall require 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 to report upon any specific question of fact involved therein; or
2. When the taking of an account shall be necessary for the information of the court, before judgment upon an issue law, or for carrying a judgment or order into effect; or
3. When a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action; or
4. When it is necessary for the information of the court in a special proceeding.

Referees how chosen.

SEC. 28. 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 may appoint one or more, not exceeding three, who reside in the county in which the action is brought or the proceeding is triable.

Qualifications of referees chosen by the court.

SEC. 29. When the appointment of referees is made by the court or judge, each referee shall be:

1. Qualified as a juror as provided by statute;
2. Competent as a juror between the parties.

Trial by and report of referees. 3 Barb. 119; 3 Comst. 168.

SEC. 30. The trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to administer oaths to witnesses and to grant adjournments, as the court upon such trial. They shall state the facts found, and the conclusions of law separately, and their decision shall be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue, shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

TITLE VI.

Of Exceptions.

SEC. 31. Nature of an exception; must be material.
32. Exceptions how stated.
33. Exceptions require no particular form.
34. Report of referees when deemed excepted to, without special notice of exception.

Exceptions must be material. 3 Hill 159; 4 do. 119.

SEC. 31. An exception is an objection taken at the trial to a decision upon matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to the jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

How stated.

SEC. 32. The point of the exception shall be particularly stated, and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards, be corrected until made conformable to the truth.

Form of exception. 23 Wen. 316.

SEC. 33. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more.

Report of referees when deemed excepted to without special notice of exception.

SEC. 34. When a cause has been tried by the court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to on a motion for a new trial, or on appeal, without any special notice that an exception is taken thereto.

TITLE VII.

Of New Trial.

SEC. 35. Definition of new trial.
36. New trial, when granted.
37. Application for new trial, when to be on affidavit.
38. Motion for new trial, how made, and when heard.
39. Affidavits for new trials, may be refuted by counter affidavits.

Definition new trial.

SEC. 35. 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.

TITLE 8.

When granted.

SEC. 36. The former verdict or other decision may be vacated, and a new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

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

10 Wen. 595. 18 J. R. 489; 5 Wen. 114. 7 do. 331.

2. Misconduct of the jury or prevailing party;

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

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

15 Wen. 368; 5 Cow. 106; 2 J. R. 63; 2 Cow. 479; 12 Wen. 602; 1 Cain. 162.

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

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

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

Application when to be on affidavit.

SEC. 37. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it shall be upon affidavit, setting forth the facts upon which such application is based, which affidavit shall be filed with the clerk.

Motion how made and when heard.

SEC. 38. If, upon the giving of a verdict, or other decision, either party shall move for a new trial, the reasons for the same, and the affidavits, if any, in support thereof, shall be filed as soon as practicable, and the motion shall be heard when the parties shall have had a reasonable time to prepare therefor.

Affidavits and counter-affidavits.

SEC. 39. If the motion be supported by affidavits, counter affidavits may be offered by the adverse party; and if the cause be newly discovered evidence, the affidavits of any witness or witnesses showing what their testimony will be, shall be produced, or good reasons shown for their non-production; and in the consideration of any motion for a new trial, reference may be had to any proceedings in the case, prior to the verdict, or other decision sought to be set aside.

TITLE VIII.

Of General Provisions.

SEC. 40. Conclusions of law and fact, how submitted.
41. Provisions respecting trials by jury are applicable to trials by referees.

Conclusions of law and and fact how submitted.

SEC. 40. Any party may, and if required by the court shall, when the evidence is closed, submit in distinct and concise propositions, the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or at the option of the court, oral, and entered in the judge's minutes; but in either case they shall be entered with any exceptions that may be taken by either party.

Provisions of this chapter applicable to

SEC. 41. The provisions of this chapter respecting trials by jury shall be applied, so far as they are in their nature applicable, to trials by the court or referees, and in the same manner the provisions respecting trials by the court shall apply to trials by referees.

TITLE 9, 10.

trials by referees.

TITLE IX.

Judgment in General.

SEC. 42. Definition of judgment.
43 & 44. Judgment may be for or against any of the parties.
45. When an action may be dismissed; or new suit entered.
46. Judgment when to be rendered on the merits.

Judgment, what.

SEC. 42. A judgment is the final determination of the rights of the parties in the action.

Judgments may be for or against several defendants.

SEC. 43. 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 requires it, determine the ultimate rights of the parties on each side as between themselves.

Ib.

SEC. 44. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.

When action may be dismissed, or non-suit entered.

SEC. 45. An action may be dismissed, or a judgment of non-suit entered in the following cases:

1. By the plaintiff himself, at any time before trial, unless set-off be interposed as a defence. If the defendant shall have been arrested, or his property delivered to, or attached by, the plaintiff, by virtue of a provisional remedy which has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party, upon the written consent of the other;

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

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

5. By the court upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient cause for the jury.

Judgment on the merits.

SEC. 46. In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

TITLE X.

Judgment upon Failure to Answer.

SEC. 47. Judgment when it may be had, on proof of service and complaint.

Judgment on failure to answer.

SEC. 47. Judgment may be had on proof of the service of the summons and complaint, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money only, if no answer be filed with the clerk of the court within the time prescribed by law, or such further time as may have been granted, the court upon the application of the plaintiff, shall direct the clerk to enter the default of the defendant, and immediately

TITLE 11. thereafter enter judgment for the amount mentioned in the summons, including the costs against the defendant, or against one or more of several defendants, in the cases provided for in section thirty-four of the last chapter.

2. In other actions, if no answer be filed with the clerk of the court within the time prescribed by law, or such further time as may have been granted, the court shall in like manner, direct the clerk to enter the default of the defendant, and thereafter the plaintiff may apply at that, 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 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 when the action is for the recovery of damages only or of specific real or personal property, with damages for the holding thereof, the court may order the damages to be assessed by a jury, or if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided;

3. In actions when the service of the summons shall be by publication, the plaintiff may in like manner, 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 territory, shall require the plaintiff or his agent, to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment, the court may, in its discretion, require the plaintiff to cause to be filed, satisfactory security to abide the order of the court, touching the restitution of any property collected or received under the judgment, in case the defendant or his representatives shall be admitted to defend the action, and succeed in the defence.

4. The court may in its discretion, before final judgment, set aside any default upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable.

TITLE XI.

Judgment by Confession.

SEC. 48. Judgment by confession of claim in action.
49. Judgment by confession of claim not in action.
50. Statement in writing, what to contain.
51. Filing statement and entering judgment.
52. Executions how issued.

Confession by judgment of claims in action.

SEC. 48. Any defendant in an action pending in the district court, may personally appear before the clerk of such court, either in term time or in vacation, and with the assent of the plaintiff, or his attorney, confess judgment for the amount admitted to be due, whereupon judgment shall be entered accordingly by the clerk.

Ib.; not in action.

SEC. 49. A judgment by confession may also be entered without action, in term time or in vacation, either for money due, or to become due, or to secure any person against contingent liability on

behalf of the defendant, or both, in the manner prescribed in the next two sections. TITLE 12, 13.

Statement to be in writing.

SEC. 50. A statement in writing shall be made, signed by the defendant, and verified by his oath, to the following effect:

1. It shall authorize the entry of judgment for a particular sum;

2. 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 is justly due, or to become due;

3. 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.

Filing statement and entering judgment.

SEC. 51. The statement shall be filed with the clerk of the district court in which the judgment is to be entered, who shall indorse upon it and enter in the judgment book a judgment for the amount confessed, with five dollars cost. The statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll.

Executions how issued.

SEC. 52. Executions may be issued on judgments by confession as in other cases, and when such judgment is payable in instalments, the execution may issue for such instalments as have become due, with interest thereon and the costs of judgment; and whenever any other instalments become due, execution may in like manner be issued for the collection and enforcement of the same.

TITLE XII.

Submitting Controversy without Action.

SEC. 53. Controversy how submitted without action.
54. Judgment the same as other cases, but without costs.
55. Judgment may be enforced or appealed from as in an action.

Controversy how submitted without action.

SEC. 53. Parties to a question in difference, which might be the subject of an action at law, 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.

Judgment same as in other cases, but without costs.

SEC. 54. 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.

Judgment may be enforced or appealed from.

SEC. 55. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall in the same manner be subject to appeal.

TITLE XIII.

Manner of giving and entering Judgment.

SEC. 56. Judgments in trial by jury, when entered.
57. Case reserved for argument, how brought before the court.
58. When judgment shall be given for defendant.

TITLE 13.

SEC. 59. Judgments in action for the recovery of personal property.
60. Clerk to keep "judgment" book.
61. Judgment roll, and what constitutes it.
62. Judgment when docketed and when a lien on real property.
63. Judgment lien docket.
64. Satisfaction when to be entered in lien docket.

Judgment in in trials by jury, when entered.

SEC. 56. When a trial by jury has been had, judgment shall be entered by the clerk, in conformity to the verdict, within four days after the rendition thereof, unless an affidavit or statement of grounds for a new trial shall be filed, or unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

When case reserved for argument to be brought before court.

SEC. 57. 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, at the first special term thereafter.

Judgment for defendant.

SEC. 58. If a set-off 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.

Judgment in action for the recovery of personal property.

SEC. 59. 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 have been delivered to the plaintiff and the defendant claim a return thereof, judgment, for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Clerk to keep judgment book.

SEC. 60. The clerk shall keep among the records of the 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 roll.

SEC. 61. Immediately after entering the judgment, the clerk shall attach together, and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, with the proof of service, and memorandum, indorsed on the complaint, that the default of the defendant in not answering was entered, and a copy of the judgment;

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

Judgments, in what cases and how docketed. 6 Barb. 308; 7 do. 341.

SEC. 62. On filing a judgment roll, judgment shall be docketed by the clerk of the court in the county where it shall be rendered, and in any other county, upon filing with the clerk of the district court of such county, a transcript of the original docket, and thereupon it shall become a lien on all the real property of the judgment debtor, not exempt from execution, in any county where it shall be docketed, such lien shall extend to all the real property of the judgment debtor, owned by him at the time of docketing the judgment, or which he may afterwards acquire until the lien expires, such lien shall continue for five years from the time of the rendition of the judgment, unless it be previously satisfied.

TITLE 1.

Judgment lien docket.

SEC. 63. The docket mentioned in the last section, is a book which the clerk shall keep in his office, to be called the "judgment lien docket," with each page divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; amount of judgment; time of entry; when entered in judgment book; appeals when taken; judgment of appellate court; satisfaction when entered. The names of the judgment debtors shall be entered in the docket in alphabetical order.

Satisfaction when to be entered in lien docket

SEC. 64. Satisfaction of a judgment shall be entered by the clerk in the judgment lien docket, when an execution shall be 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, or made in the presence of the clerk, or within two years after the judgment by the attorney of record, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party or attorney to give such acknowledgement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

CHAPTER III.

EXECUTIONS.

TITLE I. *The Execution.*
TITLE II. *Proceedings Supplementary to the Execution.*

TITLE I.

The Execution.

SEC. 1. Execution may issue in five years.
2. Execution after five years, to be issued on the leave of court.
3. Other judgments how enforced.
4. Different kinds of executions.
5. Writ of execution; to whom directed, what to contain.
6. Execution may be issued to any county in territory.
7. To be returnable in sixty days.
8. Execution against the person, in what cases and when.
9. Arrest on execution; plaintiff when liable for costs.
10. Property liable to execution.
11. Property exempt from execution.
12. Sheriff, when to summon jury, to try right of property.
13. Verdict, to be in writing, when an indemnity to the sheriff.
14. Fees of sheriff jury, and witnesses, by whom paid.
15. Withdrawal of claim by claimant before verdict.
16. Sheriff may sell, notwithstanding verdict for claimant, if indemnified.
17. Return of undertaking and prosecution thereof, by claimant.
18. Notice of sale of real and personal property.
19. Penalty for selling without, or defacing notice.
20. Sales how made.
21. When defendant may retain personal property levied on.
22. When sheriff may postpone sale.
23. Delivery of property to purchaser.
24. Real property when and where not subject to redemption.
25. Who may redeem.

TITLE 1.

SEC. 26. When and on what terms, judgment debtor, or lien creditor redeemed.
27. Redemption after redemption.
28. Purchaser, when entitled to deed; deed to be approved by the court.
29. Payment for redemption and tender thereof to whom made.
30. Redemption by lien creditors; mode of procedure.
31. Order to prevent waste until time of redemption expired.
32. Purchaser and redemptioner when entitled to rents.
33. Liability of judgment creditor to purchaser in case of eviction.
34. Contribution among judgment debtors.

Execution within five years.

SEC. 1. The party in whose favor judgment is given, may at any time within five years after the entry thereof, issue a writ of execution for its enforcement as prescribed by statute.

After five years to be issued only by leave of court. 4 How. 257.

SEC. 2. After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof that the judgment, or some part thereof, remains unsatisfied and due. When the judgment shall have been rendered in a justice's court, and docketed in the office of the clerk of the district court, such application for leave to issue an execution shall be to the district court of the county where the judgment was rendered.

Other judgments how enforced.

SEC. 3. When a judgment requires the payment of money or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When it requires the performance of any other act, a certified copy of the judgment may be served on the party, against whom it is given, or the person or officer who is required thereby or by law, to obey the same, and his obedience thereto enforced. If he refuse he may be punished by the court as for a contempt.

Three kinds of executions.

SEC. 4. There shall be three kinds of executions: one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

Writ of execution.

SEC. 5. The writ of execution shall be issued in the name of the United States, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows:—

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

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

TITLE 1.

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

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

To what counties executions may be issued.

SEC. 6. When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in this territory. When it requires delivery of real or personal property, it shall be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

Returnable in 60 days

SEC. 7. The sheriff shall indorse upon a writ of execution, the time when he received the same, and such execution shall be returnable, within sixty days after its receipt by the sheriff to the clerk with whom the judgment roll is filed.

Execution against the person, in what cases and when.

SEC. 8. If the action be one in which the defendant might have been arrested as provided by statute, an execution against the person of the judgment debtor, may be issued to any county within the jurisdiction of the court, after the return of the execution against his property, unsatisfied in whole or in part.

Arrest on execution

SEC. 9. A person arrested on execution shall be imprisoned within the jail or the liberties thereof, and kept at his own expense until satisfaction of the execution, or his legal discharge, but the plaintiff shall be liable, in the first instance, for such expense as in other cases of arrest, in the same manner and to the same extent as prescribed in sections 103 and 104 of chapter one.

What property liable.

SEC. 10. All property, real and personal, of the judgment debtor, not exempt by law, and which is liable to an attachment, shall be liable to execution. Until a levy, property shall not be affected by the execution.

Property exempt from execution.

SEC. 11. The following property shall be exempt from execution, except as herein otherwise specially provided:—

1. All wearing apparel of every person or family;

2. The miscellaneous library and school-books of every individual and family, not exceeding in value one hundred and fifty dollars, and all family pictures.

11 Wen. 44; 21 do. 371; 5 Denio 119.

3. To each household, ten sheep with their fleeces and the yarn or cloth manufactured therefrom, two cows, five swine, and provision and fuel for the comfortable subsistence of such householder and family for six months.

4. To each householder all household goods, furniture and utensils, not exceeding in value three hundred dollars;

5. The tools, implements, material, stock, apparatus, team, vehicle, horses, harness, library or other things, to enable any person to carry on the profession, trade, occupation or business in which such person may be wholly or principally engaged, not exceeding in value four hundred dollars; the word team in this subdivision shall be construed to mean either one yoke of oxen, or a pair of horses or mules, as the case may be;

6. A sufficient quantity of hay, grain, and feed for keeping for three months, the animals mentioned in the several subdivisions of this section as exempted from execution. But no article of property mentioned in this section shall be exempt from an execution issued on a judgment, recovered for its price, or upon a mortgage thereon.

Jury to try the right of property, when.

SEC. 12. When personal property shall be seized by virtue of any execution, and any person other than the defendant, shall claim such property or any part thereof, and shall give notice thereof in writing, the sheriff may summon from his county six persons, qualified as jurors between the parties, to try the validity of the claim, giving five days' notice of the time and place of the trial to the plaintiff in the execution or his attorney.

Written verdict signed by foreman an indemnity to sheriff.

SEC. 13. The sheriff, at the request of either party, shall summon witnesses and compel them to attend and give testimony, and he shall administer the necessary oaths to the jurors and witnesses. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses, and the verdict of such jury being rendered in writing, and signed by the foreman, shall be a full indemnity to the sheriff, proceeding in accordance therewith.

Fees of sheriff, jury, and witnesses, by whom paid.

SEC. 14. The sheriff, jury and witnesses shall be allowed the like fees, as for similar cases in the district court, and shall be paid by the claimant if the verdict is against him, otherwise by the plaintiff, and the sheriff may levy all such costs, upon the goods and chattels of the party made liable to pay them, as on execution.

Withdrawal of claim.

SEC. 15. If at any time before the jury return, the claimant withdraw his claim, the trial shall proceed no further, and the claimant shall pay the costs of such unfinished trial.

Indemnity of sheriff by undertaking.

SEC. 16. Notwithstanding the verdict of the jury be for the claimant, yet the sheriff shall proceed to sell the property seized in satisfaction of the execution, if the plaintiff tender to him a written undertaking, executed by two or more good and sufficient sureties, residents of the county, in double the value of the property, to the effect that he will indemnify the sheriff against all damages and costs, which he may sustain in consequence of the seizure and sale of such property, and moreover, that he will pay to any person or persons claiming title to such property, all damages which he or they may sustain in consequence of such seizure and sale.

Return of undertaking, prosecution thereon by claimant.

SEC. 17. If such undertaking be given, it shall be returned by the sheriff, together with the execution, and filed with the clerk who issued the execution, and the claimant may prosecute his suit upon such undertaking, and recover such damages as a jury may assess.

Notice of sale.

SEC. 18. Before the sale of property on execution, notice thereof shall be given as follows:

1. In case of personal property, by posting written or printed notice of the time and place of sale, in three public places of the county where the sale is to take place, not less than ten days successively;

2. In case of real property, by posting a similar notice, particularly describing the property, for four weeks successively, in three public places of the county, where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in a newspaper of the county, if there be one, or if there be none, then in a newspaper published nearest to the place of sale;

Penalty for selling without or defacing notice.

SEC. 19. Any officer selling without the notice prescribed by the last section, shall forfeit one hundred dollars to the party aggrieved, in addition to his actual damages, and a person wilfully taking down, or defacing the notice posted, if done before the sale or satisfaction of the execution, and without the consent of the parties, shall forfeit fifty dollars to the party aggrieved, but the validity of the sale shall not be affected by either act.

Sales how made.

SEC. 20. All sales of property under execution shall be made by auction, between nine o'clock in the morning and sunset. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price, and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. Sales of real property shall be made on the premises, if occupied by the defendant or any person holding under him, otherwise such sales shall be made at the house door.

When personal property levied on may be retained by defendant.

SEC. 21. When the sheriff shall levy upon personal property by virtue of an execution, he may permit the defendant to retain the same, or any part thereof in his possession until the day of sale, upon the defendant executing a written undertaking to the sheriff with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale, and for non-delivery thereof, an action may be maintained upon such undertaking by the sheriff or the plaintiff in the execution.

Postponement of sale by sheriff.

SEC. 22. If at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or being present should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week, next after the day appointed, and so from time to time for the like cause, giving notice of every adjournment by public proclamation, made at the same time.

Delivery of property to purchaser.

SEC. 23. When the purchaser of any personal property capable of manual delivery, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired shall give him a certificate of the sale and payment. When such personal property shall not be capable of manual delivery, the sheriff shall execute and deliver to the purchaser a certificate of sale and payment.

TITLE 1.

When, and when not subject to redemption. Certificate.

SEC. 24. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption, as provided in this chapter. The sheriff shall give to the purchaser a certificate of the sale, containing:

1. A particular description of the property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it shall be so stated, a duplicate of which certificate shall be filed by the sheriff with the recorder of deeds of the county.

By whom property may be redeemed.

SEC. 25. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole, or any part of the property;[1]
2. A creditor having a lien by judgment, mortgage or otherwise in the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

The persons mentioned in the second subdivision of this section, after having redeemed the property, are termed redemptioners.

Judgment debtor or lien creditor may redeem.

SEC. 26. The judgment debtor or lien creditor may redeem the property from the purchaser within three months after the day of sale, on paying him the amount of his purchase with ten per cent. thereon in addition, together with the amount of any taxes which the purchaser may have paid thereon after the purchase, and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien with interest.

Redemption after redemption.

SEC. 27. If the property be so redeemed by a redemptioner, either the judgment debtor or any other lien creditor may within sixty days after the last redemption, again redeem it on paying the sum paid on the last redemption with interest, and the amount of taxes which the last redemptioner may have paid thereon, and unless his lien be prior to that of such last redemptioner, the amount of such lien with interest. The property may be again, and as often as the judgment debtor, or any lien creditor or redemptioner is disposed, redeemed from the last previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with interest, and the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner, prior to his own, with interest. Notice of redemption shall in all cases be given to the sheriff.

Sheriff's deed to be approved by the district court.

SEC. 28. If no redemption be made within three months after the sale, the purchaser shall be entitled to a conveyance; or if so redeemed, whenever sixty days shall have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner shall be entitled to a sheriff's deed. If the judgment debtor redeem, at any time before the time for redemption expires, the effects of the sale

[1] 2 Wen. 507; 15 do. 248; 22 do. 118; 3 Barb 70; 1 Barb Cl. 53.

TITLE 1.

shall be terminated, and he be restored to his estate. The sheriff before delivering a deed to any purchaser or redemptioner, shall submit the same to the district court for the county in which they lie, for its approval, and if there be no irregularity in the proceeding, concerning the sale, such court shall indorse thereon its approval, and thereupon the sheriff shall deliver such, and to the person entitled to the same.

Payment for redemption and tender thereof to whom made.

SEC. 29. The payment for the redemption of property may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale; and the tender of the money shall be equivalent to payment.

Redemption by lien creditors.

SEC. 30. A lien creditor, seeking to redeem property, shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court of the county where the judgment is docketed; if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;
2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; and
3. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

Order to stay waste till time of redemption expires.

SEC. 31. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or judgment creditor, but it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

Purchaser and redemptioner when entitled to rents.

SEC. 32. The purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof.

Liability of judgment creditor to purchaser in case of eviction.

SEC. 33. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid with interest, from the judgment creditor. If the recovery be in consequence of the irregularity of the proceedings concerning the sale, the judgment may, by order of the court, upon notice to the debtor, be revived, and a new execution issued for the price paid on the sale with interest. Such judgment shall be a lien on the real estate of a judgment debtor, only from the time of its revival.

Contribution among judgment debtors.

SEC. 34. When property liable to an execution against several persons is sold thereon, and more than a due proportion of the

TITLE 2. judgment is levied upon the property of one of them, or one of them pays without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel re-payment from the principal. In such cases, the person so paying or contributing, shall be entitled to the benefit of the judgment to enforce contribution or re-payment, if within thirty days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or re-payment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered.

TITLE II.

Proceedings Supplementary to the Execution.

SEC. 35. Order to examine judgment debtor.
36. Examination of judgment debtor.
37. When judge may issue warrant to arrest debtor.
38. Sheriff's receipt, when a discharge to debtor of judgment debtor.
39. When garnishee may be summoned to appear and answer.
40. Creditor may exhibit allegations to garnishee.
41. Answer of garnishee, consequence of default.
42. Judgment against garnishee.
43. When creditor may except to garnishee's answer.
44. Creditor may deny such answer, and issue thereon.
45. Judgment against garnishee: his allowance for trouble.
46. When garnishee may discharge himself.
47. Examination of judgment debtor or claimant.
48. Costs of judgment creditor and garnishee.
49. Execution, how issued against garnishee.
50. Certain earnings of judgment debtor exempt.
51. Public officers not liable to answer as garnishee.

Order to examine judgment debtor.

SEC. 35. After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the district court, or any judge thereof, that the judgment debtor has property or effects 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 and answer under oath concerning the same, before such court or judge, or before a referee appointed by such court or judge, at the time and place specified in the order, the place to be within the county in which the judgment debtor resides, and disobedience to such order may be punished as for a contempt.

Examination

SEC. 36. The judgment debtor on his appearance, may be examined on oath concerning his property, and his answers reduced to writing, and filed with the clerk of the court, by whom the execution was issued. Either party may also examine witnesses in his behalf, and if during such examination, any property, rights or credits of such judgment debtor, not exempt by law be discovered, they may be levied upon by execution.

Judge may issue warrant to arrest debtor.

SEC. 37. Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the court or judge may, upon proof by affidavit of a party or otherwise, to his satisfaction, that there is danger of the debtor leaving the

TITLE 2.

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

Sheriff's receipt, when a discharge.

SEC. 38. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Examination of persons, &c., indebted to judgment debtor. When garnishee may be summoned to answer, &c.

SEC. 39. After the issuing or return of an execution against property of a judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding twenty-five dollars, the district court, or any judge thereof, may by an order require such person or corporation, or any officer or member thereof to appear at a specified time and place, before such court or judge, or a referee appointed by such court or judge, and answer concerning the same. If before a referee, the examination shall be taken by the referee and certified to the court or judge. The court or judge may, also, in their discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

Allegations, &c. of creditor to garnishee.

SEC. 40. At any time after the making of such order, the judgment creditor may exhibit written allegations and interrogatories touching the property, stock or credits of the judgment debtor in the possession of, or held by such person or corporation as garnishee, or debts owing to the judgment debtor by him or it, and such garnishee shall be required to make full, direct and true answers to the same on oath.

Answer garnishee.

SEC. 41. On the day when the garnishee shall be required to attend before the court, judge or referee, he shall exhibit on oath his answer to the allegations and interrogatories of the judgment creditor, unless for cause shown a further time shall be allowed; in default of such answer the judgment creditor may take judgment by default against him, or the court or judge may punish him as for contempt.

Judgment.

SEC. 42. Such judgment by default may be proceeded on to final judgment, in like manner as actions against defendants, but no final judgment shall be rendered against the garnishee for a greater amount than that specified in the execution.

Creditor may except

SEC. 43. The judgment creditor may except to the answer of any garnishee for insufficiency, and if the same shall be judged

TITLE 2.

to garnishee's answer.

insufficient, the court or judge may allow the garnishee to amend his answer, in such time and upon such terms as shall be just, or the judgment creditor may take judgment by default, or move the court or judge to attach the body of the garnishee to compel a sufficient answer.

Denial of answer.

SEC. 44. The judgment creditor may deny the answer of the garnishee in whole or in part, and the issue shall be tried as ordinary issues between plaintiff and defendant. If the answer of the garnishee be not excepted to or denied in such time as the court or judge may deem proper, it shall be taken to be true and sufficient.

Judgment against garnishee; his allowance for trouble.

SEC. 45. If by the answer not excepted to nor denied, or if upon trial it shall appear that the garnishee is possessed of property or effects of the judgment debtor, or is indebted to him, the value of such property or effects, or of the debt, being ascertained, judgment may be rendered against the garnishee for the proper amount in money, but if such debt be not yet due, execution shall not be awarded against the garnishee until it becomes due; and in such cases the court may make him a reasonable allowance for his trouble in answering, to be paid out of the fund in his hands.

How garnishee may discharge himself.

SEC. 46. Whenever any property, effects, money or debts belonging or owing to the judgment debtor, shall be confessed or found by the court, judge, referee or jury, to be in the possession of the garnishee, he may at any time before final judgment, discharge himself by delivering the same to the sheriff.

Examination of debtor.

SEC. 47. The judgment debtor or claimant may be required to attend before the court, judge or jury, for the purpose of giving any necessary information respecting the property or effects alleged to be in the possession of the garnishee, and may be thereupon examined on oath concerning the same.

Costs of creditor and garnishee.

SEC. 48. In all cases of controversy between the judgment creditor and garnishee, the parties may be adjudged to pay or recover costs as in ordinary cases between plaintiff and defendant.

Execution against garnishee.

SEC. 49. Execution may be issued to collect any judgment rendered against a garnishee, as in ordinary cases of judgment against defendants.

Certain earnings of judgment debtor, exempt.

SEC. 50. The earnings of a judgment debtor for personal services, at any time within sixty days next preceding the judgment against a garnishee, shall not be included in such judgment, when it shall be made to appear by the affidavit of the judgment debtor, or otherwise, that such earnings are necessary for the use of a family, supported wholly or partly by his labor.

Public officers not liable to answer as garnishee.

SEC. 51. No territorial or county treasurer, sheriff, constable, or other public officer, shall be liable to answer as garnishee for moneys in his possession as such public officer, belonging to, or claimed by any judgment debtor.

TITLE 1.

CHAPTER IV.

OF EVIDENCE.

TITLE I. *Of the Competency of Witnesses.*
TITLE II. *Of the Manner of Compelling the Attendance of Witnesses.*
TITLE III. *Of Examination of Witnesses.*
TITLE IV. *Of Depositions taken in the Territory.*
TITLE V. *Of Depositions taken out of Territory.*
TITLE VI. *Of Proceedings to Perpetuate Testimony.*
TITLE VII. *Of Provisions Relating to Records, Documents and other Writings.*

TITLE I.

Of the Competency of Witnesses.

SEC. 1. Want of religious belief not to disqualify.
2. But belief in Supreme Being, who will punish perjury, necessary.
3. No person to be excluded on account of interest.
4. To whom last section inapplicable.
5. Conviction for crime to affect credibility only.
6. Persons incompetent to testify.
7. Certain persons not to be examined.

SEC. 1. No person if otherwise competent, shall be disqualified from being a witness on account of the want of religious belief.

What religious belief necessary.

SEC. 2. Every person believing in the existence of a Supreme Being, who will punish false swearing, if otherwise competent, may be a witness in any action or proceeding.

Competency of witness.

SEC. 3. No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action.

7 Barb. 120; 2 Sanf. 686, 732; 14 Barb. 637.

SEC. 4. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and he shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him, against any executor or administrator.

Conviction for crime affects witness' credibility.

SEC. 5. No person offered as a witness shall be excluded from giving evidence, by reason of conviction for crime, but such conviction may be shown to affect his credibility.

Persons incompetent to testify.

SEC. 6. The following persons shall not be competent to testify:

1. Those who are of unsound mind, or intoxicated at the time of their production for examination;

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3. Negroes, mulattoes and Indians, or persons one half or more of Indian blood, in an action or proceeding to which a white person is a party.

Persons not to be examined.

SEC. 7. In order to encourage confidence, and to preserve it inviolate, the following persons shall not be examined as witnesses:

TITLE 2.

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

2. An attorney or counsellor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

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

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

5. A public officer shall not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

TITLE II.

Manner of Compelling the Attendance of Witnesses.

SEC. 8. Witnesses not compelled to attend.
9. Subpœna, its requisites.
10. Subpœna, how issued.
11. Subpœna, how served.
12 & 13. Persons in court may be compelled to testify.
14. Penalty for disregarding subpœna.
15. Attachment, when to issue.
16. Order to examine a prisoner.
17. Order, how obtained.

When compelled to attend.

SEC. 8. No person shall be obliged to attend as a witness before any court of record, judge, justice of the peace, commissioner, referee, or other officer, in any civil action out of the county in which he resides, unless his residence be within twenty miles of such court, judge, justice of the peace, commissioner, referee or other officer. And no person shall be compelled to attend as a witness in any civil action or proceeding, unless the fees be paid or tendered to him, which are allowed by law for one day's attendance as a witness, and for travelling to and returning from the place where he is required to attend, provided such fees be demanded by him at the time of service of the subpœna.

Subpœna.

SEC. 9. The subpœna may require not only the personal attendance of the person to whom it is directed, at a particular time and place to testify as a witness, but may also require him to bring with him any books, documents, or other things under his control.

How issued.

SEC. 10. The subpœna shall be issued as follows:

1. To require attendance before a court of record, or at the trial of an issue therein, it shall be issued in the name of the United States, and be under the seal of the court, before which the attendance is required, or in which the issue is pending.

TITLE 3.

2. To require attendance out of such a court, before a judge, justice of the peace, commissioner, referee, or other officer, authorized to administer oaths, or take testimony in any matter under the laws of this territory, it shall be issued by such judge, justice of the peace, commissioner, referee, or other officer before whom the attendance is required:

3. To require attendance before a commissioner appointed to take testimony by a court of any other state, territory or country, it may be issued by any judge, or justice of the peace, in places within their respective jurisdictions.

How served.

SEC. 10. Such subpœna may be served by any white person over eighteen years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode.

Person in court compelled to testify.

SEC. 11. A person present in court or before a judical officer, may be required to testify in the same manner as if he were in attendance upon a subpœna issued by such court or officer.

Penalty for disregarding subpœna. 11 Wen. 636; 12 do. 147.

SEC. 12. If any person duly served with a subpœna, and obliged to attend as a witness shall fail so to do, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action.

SEC. 13. Such failure to attend, as required by the subpœna, shall also be considered a contempt, and upon due proof of the service thereof, the witness may be punished by a fine not exceeding fifty dollars.

Attachment.

SEC. 14. The court, judge, justice of the peace or other officer, in such case, may issue an attachment to bring such witness before them, to answer for the contempt, and also to testify as a witness in the cause in which he was subpœnæd.

Order to examine prisoner.

SEC. 15. If the witness be a prisoner confined in a jail or prison within this territory, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued.

Order how obtained.

SEC. 16. Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

TITLE III.

Examination of Parties.

SEC. 17. A party may examine his adversary.
18. Plaintiff may file interrogatories for discovery.
19. Answer to interrogatories to be filed.
20. Interrogator may examine adverse party.
21. Rebutting testimony.
22. Effect of refusal to testify.
23. Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.
24. Person for whom action is brought or defended, may be examined.

A party may examine his adversary.

SEC. 17. A party to an action or proceeding, may be examined as a witness, at the instance of the adverse party, or of one of several

TITLE 4.

adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, or he may be examined on a commission.

Sanf. 718.; 3 Comst. 489.

Interrogatories for discovery.

SEC. 18. Instead of the examination being had at the trial as provided by the last section, the plaintiff at the time of filing his complaint or afterwards, and the defendant at the time of filing his answer, or afterwards, may file in the clerk's office, interrogatories for the discovery of facts and documents material to the support or defence of the action, to be answered on oath by the adverse party.

Answer to interrogatories.

SEC. 19. Such interrogatories shall be answered, and such answers filed in the clerk's office, within twenty days after the same are served on the party interrogated, unless for cause shown a further time be allowed by the court, or judge thereof.

Interrogator may examine adverse party.

SEC. 20. A party to an action having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial.

Rebutting testimony.

SEC. 21. The testimony of a party either upon an examination at the trial, or upon interrogatories filed, may be rebutted by adverse testimony.

Effect of refusal to testify.

SEC. 22. If a party refuse to attend, and testify at the trial, or to be examined upon a commission, or to answer any interrogatories filed, his complaint, answer or reply, may be stricken out and judgment taken against him, and he may also in the discretion of the court, be proceeded against as in other cases for a contempt.

Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him. 2 Sanf. 399.

SEC. 23. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answer thereto; or to discharge when his answer would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be received.

Person for whom action is brought or defended, may be examined,

SEC. 24. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner, and subject to the same rules of examination as if he were named as a party.

TITLE IV.

Of Depositions taken in the Territory.

SEC. 25. Depositions when taken.
26. Depositions before whom taken; notice to be given.
27. Oath and examination of witnesses.
28. Deposition how taken.
29. Deposition to whom sent.
30. Deposition how received in evidence.
31. Deposition when not to be used.
32. When deposition taken in one action may be used in another action.
33. Deposition in court below, may be used in appellate court.
34. When person may be compelled to give deposition.

Depositions when taken.

SEC. 25. The testimony of a witness in this territory, may be taken by deposition, to be read in evidence in any action, suit or

TITLE 4.

proceeding commenced and pending in any court in this territory, in the following cases:

1. When the witness resides out of the county, and more than twenty miles from the place of trial;

2. When the witness is about to leave the county and go more than twenty miles from the place of trial, and there is a probability that he will continue absent when the testimony is required;

3. When the witness is sick, infirm or aged, as to make it probable that he will not be able to attend at the trial.

Before whom taken.

SEC. 26. Either party may have the deposition of a witness taken in this territory, before any judge of the district court, justice of the peace, clerk of the supreme or district courts, master in chancery, mayor of a city or notary public, on serving upon the adverse party, or his attorney of record, previous notice of the time and place of examination. Such notice shall be at least three days, and in addition one day, Sundays excepted, for every twenty miles of the distance of the place of examination, from the residence of the person to whom notice is given, unless for a cause shown, a judge of the district court prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

What notice to be given.

Oath and examination of witnesses.

SEC. 27. Before proceeding to the examination, the witness shall be sworn by the officer taking the deposition, to testify the truth, the whole truth, and nothing but the truth, relating to the cause for which such deposition is taken; he shall then be examined by the parties, or their attorneys, if they shall think fit, or by the officer, either upon verbal or written interrogatories, on all the points which they shall deem material.

Deposition how taken.

SEC. 28. The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person in the presence and under the direction of such officer. When completed it shall be carefully read to, or by the witness, corrected if desired, and subscribed by him, and certified by the officer substantially as follows:

Territory of Oregon,
County of ——— } *ss.*

Form of certificate.

I, A. B., justice of the peace, in and for the said county, (or judge, clerk, &c., as the case may be,) do hereby certify that the above deposition was taken before me, and reduced to writing by myself (or witness, &c., as the case may be,) at ——— in said county, on the ——— day of ———, 18—, at ——— o'clock, in pursuance of notice, that the above-named witness, before examination, was sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or by) said witness, and then subscribed by him.

Dated at ———, the ——— day of ———, 18—.

A. B., *Justice of the Peace.*

To whom sent.

SEC. 29. The deposition shall be enclosed and sealed by the officer taking the same, and directed to the clerk of the court, arbitrators, referees, or justice of the peace, before whom the action is pending, or to such person as the parties in writing may agree

TITLE 5.

upon, and either delivered to the clerk of the court, or other person, or transmitted through the mail or by some private opportunity.

How received in evidence.

SEC. 30. 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, to the competency or credibility of the witness, or the manner of taking the deposition. 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 taken at the time of the examination.

When not be used.

SEC. 31. No deposition shall be used if it shall appear that the reason for taking it no longer exists; *provided however*, that if the party producing the deposition in such case, shall show any sufficient cause then existing for using such deposition, it may be admitted.

When depositions may be used in another action.

SEC. 32. When the plaintiff in any action shall discontinue it, or when it shall be dismissed for any cause, and another action shall afterwards be commenced for the same cause, between the same parties or their respective representatives, all depositions lawfully taken in the first action, may be used in the other, in the same manner and subject to the same conditions and objections as if originally taken for such action; provided, that the deposition shall have been duly filed in the court where the first action was pending, and shall remain in the custody of the court, from the termination of the first action until the commencement of the other.

Ib. when in appellate court.

SEC. 33. When an action shall have been appealed from one court to another, all depositions lawfully taken to be used in the court below, may be used in the appellate court in the same manner, and subject to such exceptions for informality or irregularity, and none other, as were taken to such depositions in writing in the court below.

Witnessess how compelled, &c.

SEC. 34. Any witness may be subpœnæd and compelled by any officer authorized to take depositions, to appear and give his deposition at any place within twenty miles of the abode of such witness, in like manner and under the same penalties as he may be subpœnæd and compelled to attend as a witness in any court.

TITLE V.

Of Depositions taken out of the Territory.

SEC. 35. Depositions may be taken out of Territory.
36. Commission how to issue.
37. Interrogatories, how settled.
38. Authority of commissioner.
39. Trial not to be postponed by reason of commission not returned, except, &c.

Depositions.

SEC. 35. The testimony of a witness out of this territory may be taken by deposition, to be read in evidence in any action, suit or proceeding pending in any court in this territory.

Commission how to issue.

SEC. 36. The deposition of a witness out of the territory, shall be taken upon a commission issued by the clerk under the seal of the court, upon an order of the court, or a judge thereof, which order may be made on the application of either party, upon giving

TITLE 6.

to the adverse party ten days' previous notice in writing, together with a copy of the interrogatories intended to be put to such witness. It shall be issued to a person or persons, not exceeding three in number, agreed upon by the parties, or if they do not agree, to any judge, justice of the peace, notary public, or other competent person selected by the court or judge granting the order for the commission.

Interrogatories, how settled.

SEC. 37. Such proper interrogatories, as well on part of the plaintiff as on part of the defendant, as the respective parties may prepare, to be settled if they disagree as to form, by the court or judge thereof, granting the order for the commission, shall be annexed to the commission; or where the parties agree to that mode, the examination may be without written interrogatories.

Authority of commissi'nr.

SEC. 38. The commission shall authorize the commissioner or commissioners to administer an oath to the witness, and to take his deposition in answer to the several interrogatories annexed to such commission, or when the examination is to be without interrogatories in respect to the question in dispute; to certify the deposition to the court; and to direct it to the clerk of the court, or such other person designated or agreed upon, and forward it to him by mail or other usual channel of conveyance.

Trial not to be postponed by reason of commission not returned

SEC. 39. A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon affidavit or other evidence satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

TITLE VI.

Of Proceedings to Perpetuate Testimony.

SEC. 40. Testimony how perpetuated.
41. Proceedings of court preparatory to hearing application.
42. Commission, when to issue.
43. Deposition, how taken.
44. Deposition, where filed, where used.

Testimony how perpetuated.

SEC. 40. When any person shall be desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim, or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all persons interested or supposed to be interested therein; and also the name of the witness proposed to examined, which statement shall be under oath and filed in the district court. If the subject of the proposed deposition relate to real estate within this territory, the statement shall be filed in the county where the lands, or any part thereof lie, otherwise in the county where the parties, or some of them, reside. Upon such statement, an application may be made to such court, or a judge thereof, to allow the examination of such witness.

Proceedings preparatory to hearing application.

SEC. 41. The court or judge shall appoint a time and place for hearing such application, and shall order notice thereof, and of the statement to be served on all persons mentioned therein, as adversely interested in the matter. The notice shall be served personally on all those living in the territory, at least twenty days before the time of hearing the application. Upon those who are not

TITLE 7.

residents of the territory, it shall be served by publication, or otherwise, in the same manner as a summons is served upon a non-resident.

Commission when to issue.

SEC. 42. If upon such hearing of the parties, or of the applicant alone, should no adverse party appear, the court or judge shall be satisfied that there is sufficient cause for taking the deposition, an order shall be made, allowing the examination of the witness; and such court or judge shall direct a commission to issue therefor, in like manner as a commission to take the testimony of witnesses in other cases.

Depositions, how taken.

SEC. 43. The deposition of such witness, whether residing in this territory or not, shall be taken upon written interrogatories, filed by the applicant, and cross interrogatories filed by any party adversely interested, if he shall think fit; and it shall be taken and returned substantially in the same manner as if taken upon commission, to be used in any cause pending in the same court.

To be filed when used.

SEC. 44. The deposition, when returned, shall be filed in the office of the clerk of the court by whom the commission was issued, and if a trial be had between the person at whose request the deposition was taken, and the persons named in the statement, or any of them, or their successors in interest, upon proof of the death or insanity of the witness, or of his inability to attend the trial, by reason of age, sickness or settled infirmity, the deposition, or a certified copy 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 the interrogatory shall be made at the trial, unless the same were taken at the time of the examination.

TITLE VII.

Provisions relating to Records, Documents, and other Writings.

SEC. 45. Inspection of documents how obtained.
46. Alterations in written instruments to be explained.
47. Records of foreign courts how to be authenticated.
48. Certified copies of deeds, &c., when received in evidence.
49. Copies of papers in certain territorial offices, when evidence.
50. Certificate of residence, when evidence.
51. Seal of office how affixed.
52. Foreign Statues when evidence.

Inspection of documents, &c., how obtained. 1 Sanf. 698.

SEC. 45. 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 defence 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 as 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.

Alterations in writings.

SEC. 46. Any party producing a writing as genuine, which has been altered or appears to have been altered after its execution, in

CHAPTER V.

a part material to the question in dispute, and such alteration is not noted in 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.

Records of foreign courts.

SEC. 47. The records and proceedings of any court of the United States, or of any state or territory, shall be admissible in evidence, in all cases in this territory, when authenticated by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

Certified copies of deeds, &c.

SEC. 48. Whenever any deed, conveyance, mortgage, bond or other writing, shall have been recorded or filed in pursuance of law, copies of such deed, conveyance, mortgage, bond or other writing, duly certified by the officer having the lawful custody thereof, with the seal of office annexed, shall be received in evidence to all intents and purposes, as the originals themselves.

Copies of papers in certain territorial offices.

SEC. 49. Copies of all papers on file in the offices of the surveyor-general of Oregon, secretary of Oregon territory, territorial treasurer, territorial auditor, and any county treasurer, or any matter recorded in either of the said offices, duly certified by the respective officers, with the respective seals of office annexed, shall be evidence in all the courts of this territory.

Certificate of residence.

SEC. 50. Any certificate of residence and cultivation upon the public lands, issued by the surveyor-general of Oregon in pursuance of law, shall be evidence in all courts in this territory.

Seal of office how affixed.

SEC. 51. A seal of a court or public office, when required to any writ, process or proceeding, or to authenticate a copy of any record, or document, may be affixed by making an impression directly on the paper, which shall be as valid as if made upon a wafer or on wax.

Foreign statutes when admitted.

SEC. 52. Printed copies of the statute laws of any state, territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts in this territory, and on all other occasions as presumptive evidence of such laws.

CHAPTER V.

WRITS OF ERROR.

SEC. 1. What judgments re-examinable on writs of error.
2. Time for prosecuting such writ.
3. Writ of error when deemed to have been issued.
4. Notice by clerk to defendant.
5. Notice how served.
6. Transcript, what to contain.
7. Time of assigning errors, and filing joinders.
8. Judgment may be set aside, reversed, affirmed, or modified.
9. Additional undertaking to pay judgment damages, &c.
10. Form of undertaking.
11. Proceedings in case of death, &c., of parties, after filing undertaking.
12. Persons who may prosecute writ of error.
13. Sale of land in certain cases, not to be affected by reversal, &c.
14. Supreme court when equally divided, cause to stand over.
15. Special verdict when directed.

CHAPTER 5.

Judgments re-examinable on writ of error.

SEC. 1. Every final judgment, order or decision of a district court, except in chancery, may be re-examined upon a writ of error; in the same court for error in fact, and in the supreme court for error in law.

Time for prosecuting such writ.

SEC. 2. Every such writ shall be prosecuted within two years and not after. But if the party entitled to have such writ, shall be absent from the territory, and shall not have been personally served with process, nor appeared to the action, or if such party be an infant, married woman or imprisoned or insane, then such writ may be prosecuted within two years from the removal of such disability and not after; provided that the absence from the territory shall not entitle the party to a longer time than five years; the time limited shall include the day on which the judgment is rendered or the order or decision is made, or on which the disability ceases.

When deemed to have been issued.

SEC. 3. A writ of error shall be deemed to have issued on the day on which the plaintiff in error shall file in the office of the clerk, of the district court, when the record is a written undertaking, executed by two sureties, to be approved by the clerk for the payment of all the costs of such proceeding; and it shall not be necessary in any stage of the proceedings, actually to sue out the writ of error.

Notice by clerk to defendant.

SEC. 4. On the filing of such undertaking, the clerk shall issue a notice to the defendant in error, under the seal of the court, specifying the court in which, and the time when he is to appear to protect his interests: and if the præcipe direct the writ of error to be made returnable to the supreme court, he shall send thither a transcript of the record under the seal of the court. Such notice may be as nearly as applicable, in the following form:

Territory of Oregon, }
County of } *ss.*

To C—— D——

Form of notice.

You are hereby notified that A. B. has sued out a writ of error from the supreme court, to recover the judgment of the district court of said county, given in your favor against the said A. B., at the ———— term of 18——; and unless you appear in the said supreme court on the ——— Monday of ————, 18——, the cause will be heard in your absence.

[SEAL.] Witness the seal of the said district court, the—— day of ———, 18—.

E. F., *Clerk.*

Service of notice.

SEC. 5. The notice may be served on the defendant in error or his attorney of record, by any sheriff within his county, and shall be by delivering him a copy thereof, or it may be served by any other disinterested person; and the return of the sheriff indorsed thereon, or the affidavit of such other disinterested person shall be evidence thereof, and if served ten days before the return day, the cause may be heard at that term. If returned not found, the court of error may make such order for the service or publication of notice, as shall appear most likely in the particular case, to convey a knowledge of the proceeding to the defendant in error, and may then proceed as if the notice had been personally served.

By publication.

CHAPTER 5.

Transcript.

SEC. 6. The transcript shall contain a copy of the writ, and return, the pleadings, the journal entries and bills of exception, the execution and return, and such other matters as the court or judge shall have ordered to be made part of the record. Either party may have a *certiorari* to supply any diminution of the record.

Certiorari.

Assigning of errors and filing joinders.

SEC. 7. The court of error may affix the time for assigning errors and filing joinders. If errors in law be assigned, no joinder shall be necessary. One or more errors in fact may be assigned, and the defendant may put in the common joinder as a demurrer thereto, or may traverse or confess, and avoid the facts assigned for error, and a separate issue shall be made on each.

Judgment may be reversed or affirmed, &c.

SEC. 8. The judgment, or other matter complained of, may be affirmed, or may be reversed or set aside in whole or in part, or may be modified, or a different judgment or order may be substituted for that complained of, and the cause may be remitted to the district court, for such further proceedings as the supreme court by mandate shall direct. Execution may issue from the supreme court, or its judgments may be executed by the district court on a mandate for that purpose.

Additional undertaking &c.

SEC. 9. If the undertaking for costs contain an additional undertaking to pay the judgment, if affirmed, and damages, or any new or modified judgment that may be given against the plaintiff in error, then all further proceedings by way of executing the judgment, shall forthwith cease until the further order of the court of error. In such case, if the judgment be affirmed or modified, or any new judgment be given against the plaintiff in error, damages may be awarded to the defendant in error, not exceeding ten per cent., upon the amount of the judgment, exclusive of interest and costs, if it manifestly appears that the proceeding was without probable cause, and merely for delay. And in cases where judgment is rendered against the plaintiff in error, judgment shall also be rendered against the sureties in the undertaking, to the extent of their liability, and execution shall issue against them accordingly.

Damages to defendant.

Judgment against sureties.

SEC. 10. The undertaking for a writ of error may be in the following form:

A. B. }
vs. } District Court, County of ————. Judgment
C. D. } at ———— term, 18—.

Form of undertaking.

We promise to pay all costs that may be awarded against A. B. on his writ of error in this cause, (and also the judgment if affirmed, and the damages, or any new or modified judgment that may be given against him.)

E. F.
G. H.

Death, &c., of parties.

SEC. 11. If after the undertaking be filed, either party shall die, or being a single woman shall marry, the proper persons may on motion be made parties, and the cause shall proceed to judgment.

Who may prosecute writ.

SEC. 12. Any person who may be a party or privy in any judgment, order or decision, may prosecute a writ of error to reverse the same, and the reversal shall inure to the benefit of all parties and privies therein; and no other party or privy shall afterwards prosecute a writ of error for the same cause.

CHAPTER 6.

Sale of land, when not to be affected by reversal of judgment.

SEC. 13. The reversal of a judgment, order or decision shall not affect the title of property sold upon an execution issued upon such judgment, order or decision, if such property be purchased at the sale by a stranger, but if purchased by the judgment creditor, the plaintiff in error may bring an action for the recovery thereof, and the court may award restitution or render such other judgment as justice shall require.

When cause to stand over

SEC. 14. When the supreme court shall be equally divided in opinion, the cause shall stand continued until all the judges are present.

Special verdict when directed.

SEC. 15. Whenever on the trial of an action at law in the district court, it shall be found to turn on important or doubtful principles of law, the court may direct a special verdict to be found; and in all cases the parties may agree upon the facts, and such agreement in writing, signed by the parties or their attorneys, shall be made part of the record; and all questions of law arising on special verdicts, agreed cases, motions for new trials, and all others in any manner arising in the district courts, in law or equity, may be adjourned into the supreme court for decision; and the supreme court may give judgment, or remand the cause, or make any order according to the law and justice of the case.

CHAPTER VI.

OF MISCELLANEOUS PROVISIONS IN ACTIONS AT LAW.

SEC. 1. Definition of an order and motion.
2 & 3. Motions and orders how and when made.
4. When notice is necessary it must be ten days before hearing.
5 & 6. Notice and other papers how served.
7 & 8. Service by mail, how made.
9. When papers need not be served on defendant.
10. Service when party resides out of territory.
11. Party, under this chapter not liable to contempt.
12. Affidavits, &c., defectively entitled, valid.
13. Time how computed.
14. Debts barred by lapse of time in other states.

Definition of an order and motion.

SEC. 1. 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.

Motion how made.

SEC. 2. Motions may be made to the court at term, or to a judge in vacation, unless otherwise provided by statute.

5 How. 208; 2 Sanf. 703.

SEC. 3. Motions shall be made within the district in which the action is triable. Orders made out of court, without notice, may be made by a judge of the court in which the action is brought in any part of the territory. No order to stay proceedings for a longer time than twenty days, shall be granted by a judge out of court, except upon previous notice to the adverse party.

Of notice of motion.

SEC. 4. When a notice of a motion is necessary, it shall be served ten days before the time appointed for hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Notice, &c., how served.

SEC. 5. Notice shall be in writing, and notices and other papers

CHAPTER 6.

may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by statute.

Ib. 7 Cow. 416.

SEC. 6. 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:

1. 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 where there is no person in the office, by leaving them between the hours of six in the morning and nine in the evening, in a conspicuous place in the office, or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion;

3 Cai. 88.

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

20 John. 140.

Service by mail.

SEC. 7. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places between which there is a regular communication by mail.

Ib. 4 How. 246.

SEC. 8. 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 double that required in case of personal service.

When papers need not be served on defendant.

SEC. 9. Where a defendant shall not have demurred, answered, or given the plaintiff or his attorney written notice of his appearance, service of notice or papers in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of bail.

Service where party resides out of territory.

SEC. 10. Where a plaintiff or a defendant who has demurred, answered, or given notice of his appearance, resides out of the territory, and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party.

Party not liable for contempt.

SEC. 11. The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Affidavits defectively entitled, valid.

SEC. 12. 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 every purpose as if duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

Time how computed.

SEC. 13. The time within which an act is to be done, as provided in this chapter, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Debts barred by lapse of time in other states.

SEC. 14. When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof, an action thereon cannot there be maintained against a person, by reason of lapse of time, an action shall not be maintained against him in this territory, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

CHAPTER 7.

CHAPTER VII.

OF SET-OFF IN ACTIONS AT LAW.

SEC. 1. Set-offs, when allowed.
2. Against plaintiff or assignor of contract.
3. Against assignor of bills of exchange.
4. Against persons beneficially interested.
5. Set-off in actions brought by executors, &c.
6. Proceedings when balance is found for defendant.
7. Set-offs by trustees, &c.
8. Defendant must plead set-off.
9. When set-offs equal or exceed plaintiff's demand.
10. Judgment when to be rendered against plaintiff.

Set-offs.

SEC. 1. In the following cases, and under the following circumstances, a defendant, in an action at law, may set off demands which he has against the plaintiff:

Must be a demand on contract. 15 Wen. 559; 15 Wen. 54, 63; 6 Barb. 28.

1. It must be a demand arising upon judgment, or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having a penalty, the sum equitably due, by virtue of its condition only shall be set off;

Due to defendant in his own right. 10 Wen. 399; 1 Hill 164.

2. It must be due to him in his own right, either as being the original creditor or payee, or as being the assignee or owner of the demand;

Must be liquidated or for property.

3. It must be a demand for property sold, for money paid, or for services done; or if it be not such a demand, the amount must be liquidated, or be capable of being ascertained by calculation;

When it must have existed.

4. It must have existed at the time of the commencement of the action, and must then have belonged to the defendant;

In what actions allowed.

5. It shall be allowed only in actions founded upon demands which could themselves be the subject of set-off, according to law;

Several defendants.

6. If there be several defendants, the demands set off must be due to all of them jointly;

Must be against plaintiff. 7 Wen. 327; 15 do. 625.

7. It must be a demand existing against the plaintiff in the action, unless the action be brought in the name of a plaintiff who has no real interest in the contract upon which the action is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified.

Assignor of contract.

SEC. 2. If the action be founded upon a contract, other than a negotiable promissory note, or bill of exchange which has been assigned to the plaintiff, a demand existing against such plaintiff, or any assignor of such contract at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such assignor, while the contract belonged to him.

Or assignor of notes or bills.

SEC. 3. If the action be upon a negotiable promissory note, or bill of exchange assigned to the plaintiff after it became due, a set-off to the amount of the plaintiff's debt may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor while the note or bill belonged to him.

CHAPTER 8.

Or person beneficially interested in suit.

SEC. 4. If the plaintiff be a trustee for any other, or if the action be in the name of a plaintiff who has no real interest in the contract upon which the action is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested.

In actions by executors. 8 Wen. 530; 21 do. 675; 2 Hill 212; 6 Barb. 330.

SEC. 5. In actions brought by executors and administrators, demands against their testators or intestates, and belonging to defendant at the time of their death, may be set off by the defendant, in the same manner as if the action had been brought by, and in the name of the deceased.

Balance found for defendant.

SEC. 6. When a set-off shall be established in an action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered therefor against the plaintiffs, shall have the same effect as if the action had been originally commenced by the defendant.

Set-offs by executors, trustees, &c.

SEC. 7. In actions against executors and administrators, and against trustees and others sued in their representative character, the defendants may set off demands belonging to their testators or intestates, or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same, in an action against them.

Defendant must plead set-off.

SEC. 8. To entitle a defendant to a set-off, he must set the same forth in his answer.

When set-off equals or exceeds plaintiff's demand.

SEC. 9. If the amount of the set-off, duly established, be equal to the plaintiff's debt or demand, judgment shall be entered that the plaintiff take nothing by his action: if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

Judgment against plaintiff.

SEC. 10. If there be found a balance due from the plaintiff in the action, to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff, when the contract which is the subject of the action, shall have been assigned before the commencement of such action, nor for any balance due from any other person than the plaintiff in the action.

CHAPTER VIII.

OF COSTS IN ACTIONS AT LAW.

SEC. 1. Allowance, when termed costs.
2. Costs, when allowed of course to plaintiff.
3. Costs, when several actions are brought on one contract.
4. Costs, when allowed defendant.
5. When to one or more of several defendants.
6. Amount of costs allowed to either party.
7. Disbursements, in addition to costs.
8. Referee's fees.
9. Costs on postponement of trial.
10. Costs not allowed when tender has been made.
11. Plaintiff, when to pay costs from time of deposit, &c., by defendant.
12. Appellant from decision of a justice, when to pay costs.

CHAPTER 8.

SEC. 13. Guardian responsible for costs.
14. Costs by and against executors, &c.
15. Costs against assignee.
16. Costs against territory or county.
17. Costs on appeal in special pleading.
18 & 19. Costs, when in discretion of court.
20. Costs may be re-taxed on application.
21. When security for costs may be required by defendant.
22. Affidavit by sureties on undertaking.
23. Time this act takes effect.

Allowance when termed costs. 5 How. 339; 3 Sanf. 696, 762.

SEC. 1. The measure and mode of compensation of attorneys and counsellors shall be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

When allowed of course to plaintiff. 8 Barb. 567.

SEC. 2. Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

2. In an action to recover the possession of personal property, when the value of the property amounts to fifty dollars or more; such value shall be determined by the jury, court or referee by whom the action is tried;

3. In an action for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more;

4. In the actions of which a justice of the peace has not jurisdiction; but in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, in which a justice of the peace has not jurisdiction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages.

Costs when several actions are brought on one contract, &c.

SEC. 3. When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this territory; but the disbursements of the plaintiff shall be allowed in each action.

Costs when allowed defendant. 2 Sanf. 622, 670.

SEC. 4. Costs shall be allowed of course to the defendant in the actions mentioned in the second section, unless the plaintiff be entitled to costs therein.

When allowed to one or more of several defendants.

SEC. 5. In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them.

Amount of costs allowed to either party.

SEC. 6. When allowed to either party, costs shall be as follows:

1. In all actions settled before issue is joined, five dollars;

2. In all actions when judgment is rendered without a jury, ten dollars;

3. In all actions when judgment is rendered after empanneling a jury, fifteen dollars;

CHAPTER 8.

4. In all actions removed to the supreme court, and settled before argument, ten dollars;

5. In all actions when judgment is rendered in the supreme court, after argument, fifteen dollars.

Disbursements in addition to costs.

SEC. 7. The prevailing party, in addition to the allowances for costs, as provided in the last section, shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions by commission or otherwise, the compensation of referees, and the expense of printing the papers upon an appeal. The disbursements shall be stated in detail, and verified by affidavit, which shall be filed with the clerk of the court.

Referee's fees.

SEC. 8. The fees of referees shall be four dollars to each for every day spent in the business of the reference, but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

Cost on postponement of trial.

SEC. 9. When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement.

Costs not allowed after tender.

SEC. 10. When in an action for the recovery of money only, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, in such specie as by agreement ought to be tendered, and thereupon brings into court for the plaintiff, if in money, the amount so tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant.

Plaintiff when to pay costs from time of deposit.

SEC. 11. If the defendant in any action pending, shall at any time deposit with the clerk of the court for the plaintiff the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited.

Appellant from decision of justice when to pay costs.

SEC. 12. In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the district court, and the party appellant shall not recover a more favorable judgment in the district court, than before the justice of the peace, such appellant shall pay all costs accruing after the appeal.

Guardian when responsible.

SEC. 13. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action, shall be responsible therefor, and payment thereof may be enforced by attachment.

Costs by and against executors, &c.

SEC. 14. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by or against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon, or collected off the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence.

Against assignee.

SEC. 15. When the cause of action after the commencement of

CHAPTER 8. the action by assignment, or in any other manner, becomes the property of a person not a party thereto, and the prosecution or defence is thereafter continued, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

Against territory or county.

SEC. 16. In all actions prosecuted in the name, and for the use of the territory, or in the name and for the use of any county, the territory or county shall be liable for costs in the same cases and to the same extent as private parties.

On appeal in a special proceeding.

SEC. 17. When the decision of a court of inferior jurisdiction in an action of special proceeding, is brought before the supreme court, or a district court for review, such proceedings shall, for purposes of costs, be deemed an action at issue upon a question of law, from the time the same is brought into the supreme court or district court, and costs thereon may be awarded and collected in such manner as the court shall direct according to the nature of the case.

When in discretion of court.

SEC. 18. In the following cases the costs of an appeal to the supreme court, shall be in the discretion of the court:

1. When a new trial shall be ordered;

2. When a judgment shall be affirmed in part and reversed in part.

Ib.; apportionment of costs.

SEC. 19. In all other actions and proceedings than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court.

Costs may be re-taxed on application.

SEC. 20. Any party aggrieved by the taxation of costs by the clerk of the court, may, upon application, have the same re-taxed by the court in which the action or proceeding is had.

When security for costs may be required by defendant.

SEC. 21. When the plaintiff in an action resides out of the territory, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action shall be stayed, until an undertaking, executed by two or more persons be filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

7 Wen. 485.

Affidavit by sureties, &c.

SEC. 22. Each of the sureties on the undertaking mentioned in the last section, shall annex to the same an affidavit that he is a resident of the county, and worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of an undertaking, as required by the last section.

When this act takes effect.

SEC. 23. This act shall take effect, and be in force from and after the first day of May next. Passed Jan. 7th, 1854.

TITLE 1.

AN ACT TO REGULATE ACTIONS RELATING TO REAL PROPERTY.

CHAPTER I.

ACTIONS TO RECOVER THE POSSESSION OF REAL PROPERTY.

TITLE I. *Of Actions to Recover the Possession of Real Property.*
TITLE II. *Of Actions for Nuisances, Waste and Trespasses on Real Property.*

TITLE I.

Of Actions to Recover the Possession of Real Property.

SEC. 1. Who may be plaintiffs for the recovery of real property.
2. Substitution of landlord for tenant.
3. Proceedings against a non-resident.
4. Complaint, what to contain.
5. Answer, what to contain.
6. Judgment against tenant, when conclusive against landlord.
7. When plaintiff entitled to damages.
8. Judgment when plaintiff's right of property expires before trial.
9. When improvements may be set off against damages.
10. Order to survey property.
11. Order, what to contain.
12. Alienations by defendant not to prejudice action.
13. Mortgage not conveyance.
14. Stay of proceedings on payment of rent, &c., by tenant.

Who may be plaintiffs for the recovery of real property. 5 Denio, 121, 477; 3 Barb. 555.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon,* Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action, which may be brought against any person acting as owner, landlord or tenant of the property claimed.

Substitution of landlord for tenant.

SEC. 2. Whenever it appears that the defendant is only a tenant, the landlord may be substituted after ten days' notice to him that such action is pending, or upon such further notice as the court or judge thereof may think proper.

Proceedings against a non-resident

SEC. 3. When the defendant is a non-resident, service of the summons may be made upon his agent for the property residing in this territory, with the like effect as though made upon the principal, or service may be made by publication as in other cases.

Complaint.

SEC. 4. The plaintiff in his complaint shall state that he is entitled to the possession of the property, particularly describing it; the interest he claims therein; and that the defendant unlawfully keeps him out of the possession, and the damages, if any, which he claims for withholding the property.

Answer.

SEC. 5. The answer of the defendant shall set forth under what claim of right, if any, he holds possession, and if as tenant, the name and residence of his landlord shall be given, and if he does not defend for the whole of the property, he shall specify for what particular part he does defend.

Judgment against tenant.

SEC. 6. In an action against a tenant, the judgment shall be conclusive against a landlord who has received notice as hereinbefore provided.

TITLE 2.

Damages to plaintiff.

SEC. 7. If the plaintiff prevail in an action for the recovery of real property, he shall also in the same action be entitled to recover damages for withholding the property.

When plaintiff's right of property expires before trial.

SEC. 8. If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be returned according to the fact, and judgment shall be entered only for the damages and costs.

Set-off of improvements.

SEC. 9. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by the 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.

Order to survey.

SEC. 10. The court or judge thereof, on motion, and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy, and make survey and admeasurement thereof, for the purposes of the action.

SEC. 11. The order shall describe the property, and a copy thereof shall be served upon the owner or occupant, and thereupon the party may enter upon the property, and make such survey and admeasurement, but if any unnecessary injury be done to the premises, he shall be liable therefor.

SEC. 12. 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.

Alienations not to prejudice.

SEC. 13. A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.

Stay of proceedings on payment of rent, &c.

SEC. 14. When in case of a lease of real property, and the failure of the tenant to pay rent, the landlord has a right to re-enter for such failure, he may bring an action to recover possession of the property, but if at any time before judgment in such action, the lessee or his successor in interest pay to the plaintiff, or bring into court the amount of rent then in arrear with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to the possession, according to the terms of the lease.

TITLE II.

Actions for Nuisances, Waste and Trespasses on Real Property.

SEC. 15. Actions for nuisance, by whom brought.
16. Triple damages when in certain cases of waste.
17. Triple damages in certain cases of trespass.
18. Exceptions of certain cases.
19. Liability of tenant in possession to purchaser on execution.

Action for nuisance.

SEC. 15. Anything which is injurious to health or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may

CHAPTER 2.

be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Triple damages in certain cases of waste.

SEC. 16. If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, any person injured by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Ib. in certain cases of trespass. 8 J. R. 344; 8 Cow. 115; 2 Wen. 247; 4 Denio. 422.

SEC. 17. Every person who shall wilfully cut down, girdle, or otherwise injure any tree, timber or shrub on the land of another person, or in the street or highway in front of any person's house, village or city lot, or cultivated grounds, or on the commons or public grounds of any city, or town, or on the street or highway thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in an action in any court having jurisdiction.

Exception of certain cases.

SEC. 18. If upon the trial of such action, it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed, was his own, or that of the person in whose service, or by whose direction the act was done, or that such tree or timber was taken for the purpose of making or repairing any public highway or bridge, judgment shall be given for only the single damages assessed in the action.

Liability of tenant in possession to purchaser on execution.

SEC. 19. 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 the sale, and before possession is delivered under the conveyance.

CHAPTER II.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

SEC. 1. Who may apply for partition and to what court.
2. Complaint, what to contain.
3. Persons having liens, when to be parties.
4. Summons, how directed.
5. Publication of summons to unknown or absent parties.
6. Answer of defendant, what to contain.
7. Rights of the several parties in issue: ascertainment of title in case of sale.
8. Plaintiff to produce certificate of recorder, and clerk of district court.
9. Persons having liens, &c., to be made parties.
10. Service of notice on persons holding liens, not parties.
11. Order of sale, when made; when partition ordered.
12. Oath of referees to be filed.
13. Partition, how made.
14. Report of referees.
15. Setting aside report, &c. Judgment on report.
16. Persons and cases not affected.
17. Expenses of referees.
18. Liens, on an undivided interest, how assigned.
19. Set-off of estate for life, &c., in case of partial sale.

CHAPTER 2.

SEC. 20. Proceeds of incumbered property, how applied.
21. Marshalling securities of lien creditors.
22. Proceeds of sale, how distributed.
23. Proceeds if paid into court, action to continue.
24. Sale by referees, how made.
25. Sale may be on credit.
26. Mortgages, &c., how to be taken.
27. Estate for life or years, how disposed of.
28. Compensation to tenant in case of sale.
29. Investment when no consent is given.
30. Rights of unknown tenants how protected.
31. Contingent and future rights how provided for.
32. Terms of sale to be made known.
33. Referees not to purchase.
34. Referees to report sale.
35. Order to convey.
36. Receipt of incumbrancer, &c., to referees.
37. Conveyances when recorded, a bar to, &c.
38. Proceeds of sale for unknown non-residents, when invested.
39. Security for proceeds, &c., how taken.
40. Security, to be taken in name of parties and filed with clerk.
41. Clerk, to collect interest on securities, &c.
42. Partition made equal, by compensation.
43. Proceeds when paid guardian of infant.
44. Shares of insane, &c., person.
45. Consent to partition by guardian.
46. Costs of partition how allowed.
47. When court may appoint one referee.
48. This Act when to take effect.

Who may apply and to what courts. 2 Page 387; 3 do. 245; 4 J. Ch. 271; 19 Wen. 367; 5 Denio 385; 2 Barb. 599; 3 do. 576. 8 Cow. 363.

SEC. 1. When several persons hold and are in possession of real property as joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be brought by one or more of such persons, in the district court of the proper county, for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

Complaint, what to contain.

SEC. 2. The interest of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint, specifically and particularly as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

Persons having liens when to be parties.

SEC. 3. No persons who have or claim any liens upon the property, by mortgage, judgment or otherwise, need be made parties to the action, unless such liens be matters of record.

Summons how directed 11 Wen. 647; 17 do. 488; 1 Hill 141; 2 do. 267.

SEC. 4. The summons shall be directed to all the joint tenants and tenants in common, and all persons having any liens of record, by mortgage, judgment or otherwise, upon the property or upon any particular portion thereof, and generally to all persons unknown, who have or claim any interest in the property.

Publication of summons.

SEC. 5. If a party having a share or interest be unknown, or any of the known parties reside out of the territory, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such unknown or absent party, by publication as in other cases. When publication is made, the summons as published, shall be accompanied by a brief description of the property, which is the subject of the action.

CHAPTER 2.

Answer of defendants.

SEC. 6. The defendants shall set forth in their answers, fully and particularly, the nature and extent of their interest in the property, and if such defendants claim a lien upon the property by mortgage, judgment or otherwise, they shall state the date of the same, and the amount remaining due thereon, and whether the amount has been secured in any other way or not, and if so secured, the nature and extent of the security, or they shall be deemed to have waived their rights to such lien.

Right of the parties in issue.

SEC. 7. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action, and where a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of sale shall be made, and when service of the complaint shall have been made by publication, like proof shall be required of the rights of the absent or unknown parties, before such judgment shall be rendered, except that when there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

Certificate of recorder.

SEC. 8. The plaintiff shall produce to the court on the hearing of the case, the certificates of the recorder and the clerk of the district court, where the property is situated, showing whether there were or were not any liens of record upon the property or any part thereof, at the time of the commencement of the action.

Persons having lien to be made parties.

SEC. 9. If it appear by the certificate of the recorder or the clerk, that there were liens of record at the time of the commencement of the action, and the persons holding or claiming such liens, be not made parties to the action, the court shall either order such parties to be brought in by an amendment or supplemental complaint, or appoint a referee to ascertain whether their liens have been paid, or if not paid what amount remains due, and the date of their liens, and whether the amount remaining due thereon has been secured in any way, and if secured, the nature and extent of the security.

Ib. Service of notice.

SEC. 10. The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due contingently or absolutely thereon. In case such person be absent or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court or judge thereof, in such manner as may be proper. The report of the referee thereon shall be made to the court, and shall be confirmed, modified or set aside, and a new reference ordered as the justice of the case may require.

Order of sale. 19 Wen. 226.

SEC. 11. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise

CHAPTER 2.

upon the requisite proofs being made, it shall order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided, for the owners whose interests remain unknown or not ascertained.

Oath of referees.

SEC. 12. The referees before proceeding to the discharge of their duties, shall be sworn or affirmed before some officer competent to administer oaths, honestly and impartially to execute the trust reposed in them, which oath or affirmation shall be filed with the clerk of the court.

Partition.

SEC. 13. In making the partition, the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper land marks, and may employ a surveyor with the necessary assistants to aid them therein.

Report of referees.

SEC. 14. The referees or a majority of them shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share.

Setting aside report, &c. Judgment on report. 11 Wen. 647; 1 Hill 141; 2 do. 625.

SEC. 15. The court may confirm or set aside the report, and if necessary appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever, which judgment shall be binding and conclusive:

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

2. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the application for partition by publication, as directed by section five; and

3. On all other persons claiming from such parties or persons, or either of them.

Persons and cases not affected. 1 Barb. 560.

SEC. 16. But such judgment and partition shall not affect any tenants for years or for life to the whole of the property which is the subject of partition; nor shall such judgment and partition preclude any person, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made.

Expenses of Referees.

SEC. 17. The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as part of the charges.

Lien on an undivided interest.

SEC. 18. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thereafter be a charge only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition in preference to such lien.

CHAPTER 2.

Set-off of estate for life, &c., in case of partial sale.

SEC. 19. When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Proceeds of incumbered property how applied.

SEC. 20. The proceeds of the sale of the incumbered property, shall be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action:

2. To pay the costs of the reference;

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due, and to become due; the amount remaining due to be verified by affidavit at the time of payment:

4. The residue among the owners of the property sold, according to their respective shares.

Marshalling securities.

SEC. 21. Whenever any party to the action who holds a lien upon the property or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

Proceeds of sale, &c. how distributed.

SEC. 22. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no direction be given, all such proceeds and securities shall be paid into court, or deposited therein, or as directed by the court.

Ib. if p'd into court action to continue.

SEC. 23. When the proceeds of sales of any shares or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings as in original actions.

Sale how made.

SEC. 24. All sales of real property made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it is to be sold, subject to a prior estate, charge or lien, that shall be stated in the notice.

Ib., may be on credit.

SEC. 25. The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase-money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase-money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the territory.

Mortgages &c., how to be taken.

SEC. 26. The referees may take separate mortgages, and other securities for the whole, or convenient portions of the purchase-money, on such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the district court, and his successor in office; and for the shares of any known owner of

CHAPTER 2. full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant.

Estate of tenant, how disposed of.

SEC. 27. When the estate of any tenant for life or years, in any undivided part of the property in question, shall have been admitted by the parties, or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the action, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if in the judgment of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered.

Compensation to tenant in case of sale.

SEC. 28. Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed upon principles of law applicable to annuities, a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk shall enter the same in the minutes of the court.

Investments if no consent given.

SEC. 29. If such consent be not given, filed and entered, as provided in the last section, before the report of sale by the referees, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate for life or years, and shall order the same to be paid to such party or deposited in court for him as the case may require.

Rights of unknown tenants.

SEC. 30. If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights, in the same manner as far as may be, as if they were known and had appeared.

Contingent and future rights how provided for.

SEC. 31. In all cases of sales in partition, when it shall appear that any person has a vested or contingent future right, or estate in any part of the property sold, the court shall ascertain and settle the proportional value of such contingent or vested right or estate, according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner, as to protect the rights and interests of the parties.

Terms of sales to be made known

SEC. 32. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

Referees not to purchase.

SEC. 33. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall the guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section, shall be void.

Report of le.

SEC. 34. After completing a sale of the property, or any part thereof ordered to be sold, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any taken.

The report shall be filed in the office of the clerk of the district court, in the county where the property is situated. CHAPTER 2.

Order to convey.

SEC. 35. If the sale be confirmed by the court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Receipt of incumbrancer.

SEC. 36. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Conveyance recorded, a bar to, &c.

SEC. 37. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons have been served by publication, and against all persons claiming from them or either of them.

Proceeds of sale invested.

SEC. 38. When there are proceeds of a sale belonging to an unknown owner, or to a person without the territory, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

Security for proceeds how taken.

SEC. 39. When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

Security to be in name of parties and filed.

SEC. 40. When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of, and payable to the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

Clerk to collect interest.

SEC. 41. The clerk, in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Partition made equal by compensation.

SEC. 42. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another, on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

CHAPTER 2.

Infants' shares.

SEC. 43. When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the court.

Shares of insane persons

SEC. 44. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing with sufficient sureties, an undertaking, approved by a judge of the district court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

Consent to partition by guardian.

SEC. 45. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares of the parts to which they may respectively be entitled, upon an order of the court.

Costs of partition how allowed.

SEC. 46. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When however a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

When court may appoint one referee.

SEC. 47. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee when thus appointed, shall have all the powers, and perform all the duties required of the three referees.

SEC. 48. This act shall take effect and be in force from and after the first day of May next.

Passed, December 22d, 1853.

CHAPTER 1.

AN ACT REGULATING PROCEEDINGS TO VACATE CHARTERS AND LETTERS PATENT, AND TO PREVENT THE USURPATION OF AN OFFICE OR FRANCHISE.

CHAPTER I.

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

SEC. 1. *Scire facias* and *quo warranto* abolished.
2. Action by prosecuting attorney to vacate charter.
3. Action to annul a corporation.
4. Leave how obtained.
5. Action upon information or complaint.
6. Action to vacate letters patent.
7. Relator, when to be joined as plaintiff.
8. Complaint and action for usurping office.
9. Judgment in such action.
10. Assumption of office, &c., by relator.
11. Damages how recovered.
12. Action against several persons claiming office.
13. Penalty for usurping office.
14. Judgment of forfeiture against a corporation.
15. Costs against corporation.
16. Appointment of a receiver.
17. Copy of judgment roll where to be filed.
18. Act when to take effect.

Scire facias and quo warranto abolished.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished, and the remedies heretofore obtainable in those forms, may be obtained by actions at law under the provisions of this chapter.

Action to vacate a charter.

SEC. 2. An action may be brought into the district court by the prosecuting attorney of the district, in the name of the territory, whenever the legislative assembly shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion, or concealment of a material fact, by the persons incorporated or some of them, or with their knowledge and consent.

Action to annul a corporation. 23 Wen. 204, 223.

SEC. 3. An action may be brought by such prosecuting attorney, in the name of the territory, on leave granted by the district court or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation other than municipal, whenever such corporation shall:

1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or
2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or
3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or
4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or

CHAPTER 1.

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law. And it shall be the duty of such prosecuting attorney, whenever he shall have reason to believe that any of these acts or commissions can be established by proof, to apply for leave, and upon leave granted, to bring the action in every case of public interest, and also in every other case, in which satisfactory security shall be given to indemnify the territory against the costs and expenses to be incurred thereby.

Leave how obtained.

SEC. 4. Leave to bring the action may be granted upon the application of the prosecuting attorney; and the district court or judge may, in their discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Action upon information or complaint. 16 Wen. 656; 20 do. 18; 21 do. 235; 23 do. 193, 223, 550; 2 Barb. 513.

SEC. 5. An action may be brought by the prosecuting attorney of the district in the name of the territory, upon his own information, or upon the complaint of a private party against the party offending, in the following cases:

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

2. When any public officer, civil or military, has done or suffered an act, which by the provisions of the law makes a forfeiture of his office; or

3. When any association or number of persons act within this territory as a corporation, without being duly incorporated. And it shall be the duty of the prosecuting attorney to bring the action, whenever he shall have reason to believe that any of these acts can be proven, or when he shall have been directed to do so by a judge of the district court.

Action to vacate letters patent.

SEC. 6. An action may be brought by the prosecuting attorney of the district in the name of the territory, for the purpose of vacating or annulling letters patent, granted by the territory, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by a person to whom the same were issued or made, or with his consent or knowledge; or

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he shall have reason to believe that the patentee or those claiming under him have done, or omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Relator when to be joined.

SEC. 7. When an action shall be brought by the prosecuting attorney by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the territory as plaintiff.

Complaint and action for usurping office.

SEC. 8. Whenever such action shall be brought against a person for usurping an office, the prosecuting attorney, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the district court for the arrest of such defendant and holding him to bail, and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other actions at law where the defendant is subject to arrest.

CHAPTER 1.

Judgment in such action.

SEC. 9. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant as justice shall require.

Assumption of office, &c., by relator.

SEC. 10. If judgment shall be rendered upon the right of the person so alleged to be entitled, 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.

Damages how recovered.

SEC. 11. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he may have sustained by reason of the usurpation of the office by the defendant.

Action against several persons claiming office.

SEC. 12. When several persons claim to be entitled to the same office or franchise, an action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Penalty for usurping office.

SEC. 13. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding one thousand dollars, which fine when collected shall be paid into the territorial treasury.

Judgment of forfeiture against a corporation.

SEC. 14. If it shall be adjudged that a corporation, against which an action shall have been brought, pursuant to this chapter, has by neglect, abuse, or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Costs against corporation.

SEC. 15. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected, by execution, against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Appointment of receiver.

SEC. 16. When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and take an account, and make distribution thereof among its creditors, as a court of chancery possesses, and it shall be the duty of the prosecuting attorney, immediately after the rendition of such judgment, to institute proceedings for that purpose.

SEC. 17. Upon the rendition of such judgment against a corpora-

TITLE 1.

Copy of judgment roll where to be filed.

tion, or for the vacating or annulling of letters patent, it shall be the duty of the prosecuting attorney, to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of the territory.

SEC. 18. This act shall take effect and be in force, from and after the first day of May next.

Passed December 22d, 1854.

AN ACT RELATING TO WRITS OF MANDAMUS AND PROHIBITION

CHAPTER I.

OF THE WRIT OF MANDAMUS.

TITLE I. *Writs of Mandamus.*
TITLE II. *Writs of Prohibition.*

TITLE I.

Writs of Mandamus.

SEC. 1. Writ of mandamus to whom issued.
2. When to issue.
3. Nature of mandamus.
4. When peremptory mandamus may be allowed.
5. Proceedings.
6. Answer on return of writ.
7. If no answer, peremptory writ allowed.
8. Pleadings.
9. Issue when tried.
10. Issue where tried.
11. Trial, as in civil action.
12. Damages for plaintiff.
13. Court may fine or imprison.
14. Jurisdiction of district court.

To whom to issue. 2 J. Cas. 217.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon*, That the writ of mandamus may be issued to any inferior tribunal, corporation, board or person to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right, or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

When to issue. 1 Barb. 34.

SEC. 2. This writ shall only be issued in cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit on the application of the party beneficially interested.

Nature of mandamus.

SEC. 3. The writ shall be either alternative or peremptory. The alternative writ shall state concisely the facts, showing the obligation of the party to whom it is directed to perform the act, and his omission to perform it, and command him that immediately after the receipt of the writ, or some other specified time, he do the act

TITLE 1.

required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so, and that he then and there return the writ with his certificate of what he has done. 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.

When peremptory.

SEC. 4. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued.

Power of court.

SEC. 5. The motion for the writ, the allowance and the service thereof and the enforcement of obedience thereto, shall be such as the court may direct.

Answer on return of writ.

SEC. 6. On the return day of the alternative writ or such further day as the court may allow, the party on whom the writ shall have been served, may show cause by answer under oath, made in the same manner as an answer to a complaint in an action at law.

If no answer, peremptory writ allowed. 1 Barb. 34.

SEC. 7. If no answer be made, a peremptory mandate shall be allowed against the party on whom the writ shall have been served. If an answer be made containing new matter, the same shall not conclude the applicant, who may on the trial or other proceedings avail himself of any valid objection to its sufficiency, or may countervail it by proof, either in direct denial or by way of avoidance.

Pleadings.

SEC. 8. No other pleading or written allegation, shall be allowed than the writ and answer, and these pleadings shall have the same effect, and be construed and amended in the same manner, as proceedings in an action at law; and the issues thereby joined shall be tried, and the further proceedings had in the same manner as in an action at law.

Issue when tried.

SEC. 9. Issues of fact joined in the case of a writ of mandamus issued out of the supreme court, shall be tried as provided in the next section.

Ib.

SEC. 10. When the parties consent thereto, the court may try the issues of fact arising upon the pleadings of the parties, or the same may be referred as in actions at law in the district court; but when either party shall refuse to consent to a trial, other than a trial by jury, the supreme court may order a jury of twelve men, possessing the qualifications for jurors, in the district court, to be summoned to appear forthwith before the court to try such issue; and in case any of the jurors so summoned, should for any cause be rejected or be disqualified to act as a juror in the case, the court may order others to be summoned until a jury shall be obtained.

Trial as in civil action.

SEC. 11. When a jury shall be impanneled, the same proceedings shall be had as in the trial of an action at law in the district court.

Damages for plaintiff.

SEC. 12. If judgment be given for the applicant, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury, or by referees, as in an action at law, together with his costs and charges: and for such damages, costs and

TITLE 2.

charges an execution may be issued; and a peremptory mandamus shall also be awarded without delay.

Court may fine or imprison.

SEC. 13. Whenever a peremptory mandamus has been issued and directed to any inferior tribunal, corporation, board or person commanding the performance of any public duty, specially enjoined by law, if it appear to the court that any member of such inferior tribunal, corporation, or board, or such person upon whom the writ has been personally served, has without just excuse refused or neglected to perform the duty so enjoined, the court may impose on him a fine not exceeding five hundred dollars. Such fine when collected, shall be paid into the territorial treasury. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may take any orders necessary and proper for the complete enforcement of the writ.

Jurisdiction of district courts.

SEC. 14. The several district courts of this territory shall have original jurisdiction in cases of mandamus, except in cases when such writ is directed to one of the judges of the district court, in his official capacity, and the said court shall proceed upon all such cases in the same manner as in an action at law, unless otherwise provided by statute.

TITLE II.

Writs of Prohibition.

SEC. 15. Writs of prohibition to be issued from supreme court only.
16. Service and return of writ.
17. Proceedings upon return of writ.
18. Judgment when and how rendered by court.
19. Act when to take effect.

To be issued only from supreme court.

SEC. 15. Writs of prohibition shall only be issued out of the supreme court, and such writs shall be applied for, upon affidavits, by motion to the court or a judge thereof in vacation, in the same manner as writs of mandamus; and if the cause shown shall appear to the court or judge to be sufficient, a writ shall be thereupon issued, which shall command the court and party, or officer to whom it shall be directed, to desist, and refrain from any further proceedings in the suit, or matter specified therein, until the next term of the supreme court, or the further order of the court thereon; and to show cause at the next term of the said court, or some day to be named in the same term, at the option of the court, if issued in term time, why they should not be absolutely restrained from any further proceeding in such action or matter.

Service and return.

SEC. 16. Such writ shall be served upon the court and party, or officer to whom it shall be directed, in the same manner as a writ of mandamus; and a return shall in like manner be made thereto by such court or officer, which may be enforced by attachment.

Proceedings on return of writ.

SEC. 17. The court and party or officer on whom the writ shall have been served, may by the return or answer under oath, show cause why they should not be restrained as mentioned in the writ of prohibition; and the person prosecuting such writ may take issue or demur to the matters relied on in the return or answer by such court and party or officer; and the like proceedings shall be

CHAPTER 1.

had for the trial of such issues of law or fact, joined between the parties, and for the rendering of judgment thereon as in a mandamus.

Judgment rendered by court. 3 Barb. 146.

SEC. 18. The court after hearing the proofs and allegations of the parties, shall render judgment, either that a prohibition absolute restraining the said court and party or officer from proceeding in such action or matter, do issue, or authorizing the court and party or officer to proceed in such action or matter in question; and may make and enforce such order in relation to costs and charges, and the amount thereof as may be deemed just.

SEC. 19. This act shall take effect and be in force from and after the first day of May next.

Passed January, 5th, 1854.

AN ACT RELATING TO ACTIONS ON OFFICIAL SECURITIES FOR FINES AND FORFEITURES, TO ACTIONS BY AND AGAINST PUBLIC OFFICERS AND PUBLIC BODIES.

CHAPTER I.

ACTIONS ON OFFICIAL SECURITIES, AND FOR FINES AND FORFEITURES.

SEC. 1. Official bond how construed.
2. Who may bring an action thereon.
3. Leave how granted.
4. One judgment not to preclude a second action, on other delinquencies.
5. Amount recovered not to exceed undertaking.
6. Execution to be first enforced against principal.
7. Securities when and how apportioned.
8. Actions for fines and forfeitures, who may prosecute.
9. Amount recovered when penalty is limited.
10. Effects of recovery by collusion.
11. Certain fines to be paid into the treasury.

Official bond.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Oregon,* That the official bond or other security of a public officer to the territory, whether with or without securities, shall be construed as security to the territory, and also to all persons severally for the official delinquencies, against which it is intended to provide. If it be to a county, city, village or other municipal body, it shall, in like manner, be construed severally to all persons intended to be secured, as well as to the body politic named therein.

Who may bring an action thereon.

SEC. 2. When a public officer, by official misconduct or neglect of duty shall forfeit his official bond, or render his sureties liable upon an official security, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer and his sureties to recover the amount to which he may be entitled by reason of the delinquency.

Leave how granted.

SEC. 3. Before an action can be brought by the plaintiff, other than the territory or body politic named in the security, leave