

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 31st, 1854.

TITLE 1.

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.

TITLE 2.

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.

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.

Elections, when and where held.

Officers to be elected.

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.

Appointment of judges of election.

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.

The clerks of election.

Their term of office.

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:—

Notice of elections.

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

Form of notice

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.

Oath, 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.

Proviso.

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.

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.

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.

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.

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.

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.

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

Duty of Judge on receiving ballot.

Elector's name to be entered.

Where to vote.

Challenge.

Oath.

Vote when rejected.

False oath.

Unqualified voting.

Ballot box.

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.

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 kept; 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,

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. 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.

Destruction of certain ballots. 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:

Count votes. 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.

Certificate. 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 3.

Canvass.

Double ballots.

Destruction of certain ballots.

When ballots exceed poll lists.

Count votes.

Certificate.

Poll books, how disposed of.

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.

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.

Abstract to secretary of territory.

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.

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.

Resignation of officers.

Writs of election.

Appointment of sheriff *pro tem*.

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

Joint certificates by clerks of 2 counties, when given.

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.

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.

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.

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.

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.

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.

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.

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,

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

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.

SEC. 45. Each party shall be entitled to subpoenas, and subpoenas *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.

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.

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 1.
In case of township officers.

Jurisdiction of judge of probate.

Trial, how conducted.

Appeal.

This chapter how construed.

Resignations

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 du-

ties of the office to which he shall be appointed, until such vacancy shall be regularly supplied as provided by law.

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 Tillamook and Yamhill, Coss and Umpqua attached for judicial purpose.

8. This act when to take effect.

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.

Time and places of holding supreme court.

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.

First 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.

Second district.

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

Third district.

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.

Time for holding district court in the different counties.

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.

Trial of criminal offences.

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.

Powers of judges at chambers.

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;
Coos & Ump-
qua to be at-
tached.
Act to take
effect.

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.

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.

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

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

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.

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.

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

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.

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.

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.

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.

Form of ac-
tions at law
abolished.
4 How 427.

Parties how
designated.

Action in
name of
party in in-
terest.
6 How 161.

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

Executor &c
or trustee
may sue.
4 Mill 196.

Husband,
when to be
joined.

4 Pr. R. 206;
2 Sanf. 715.

6 Pr. R. 52.

Infant to ap-
pear by guar-
dian.
11 Wen. 164;
12 Wen. 191;
3 Mill. 407;
8 Sanf. 385.

2 Page 374.

TITLE 2.

Prosecution for the seduction of daughter or ward.

When female may prosecute for her seduction.

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

Action when not to abate.

Proceedings in case of death.

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

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.

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.

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.

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.

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

TITLE 2.

like power of the court to change the place of trial in the cases provided by statute:

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.

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.

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.

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.

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.

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.

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.

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

18 Wen. 85, 266.

Actions according to defendant's residence.

Change of venue. 4 Hill 62, n.

Application for change of venue, &c. 1 Denio 690.

Order of change: Affidavit to be sent to clerk.

Duty of clerk

Applicant to pay costs.

When order

TITLE 2. 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.

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, 24.

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 per-

son 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.

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:

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;

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.

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.

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.

Summons & complaint, how served.

5 How, 155.

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

Publication when defendant cannot be found.
3 How, 416;
4 How, 151;
5 How, 3.

Publication, how made.

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 clerk 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 ser-
vice.

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

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.

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 5, 6.
2 HBU, 362.
When juris-
diction of ac-
tion acquir-
ed.

TITLE IV.

Of the Pleadings in Actions of Law.

SEC. 37. Forms of pleading inconsistent with this act abolished.

38. What pleadings are allowed.

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.

Forms of
pleading in-
consistent
with this act
abolished.
7 Barb. 80;
8 Barb. 103;
500.

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.

Pleadings,
names of.

TITLE V.

The Complaint.

SEC. 39. First pleading to be complaint.

40. Complaint what to contain.

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

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. 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.

First plead-
ing to be
complaint.
Complaint,
what to con-
tain.
4 Coms. 253.

2 Coms. 132;
7 Barb. 204;
8 Barb. 217;
570; 8 Sanf.
623, 734.

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.

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

When de-
fendant may

TITLE VII. 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
 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.

5 Sanf. 230;
1 Sedl. 357;
7 How. 4;
7 Barb. 204.

Demurrer
must specify
grounds of
objection to
complaint.
7 Barb. 204;
1 Sedl. 357.
How to proceed if complaint be amended.

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.

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.

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.

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.

Objection
when taken
by answer.

Objection
when deemed
waived.
6 Barb. 554;
7 Barb. 551.

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.

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.

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.

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

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.

Answer,
what to contain. 8 Page 310; 8 Barb. 189; 1b. 250;
3 Sanf. 733;
8 How. 193;
14 Barb. 523.

Different
defences 7 Barb
54.

Demurrer to
some causes
of action and
answer as to
others.
Sh in defences to be stricken out.
1 Hill, 672;
4 How. 155;
5 Sanf. 669; 3 Sanf. 733.

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.

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.

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.

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.

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

When defendant
may move
for judgment on
answer.

Demurrer to
reply.

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.

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.

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

Pleadings.

Verification
of pleadings.

3 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. 197.

state that there is due to him thereon from the adverse party a specific sum which he claims. **TITLE 9.**

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. Private statutes.

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. Statement of libelous matter. 5 How. 171.

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 thereto.

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. Answer of defendant in actions to recover property distrained.

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

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.

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 counterveil it by proofs, either in direct denial or by way of avoidance. Allegation not denied, deemed true.

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. Material allegation.

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, 713.

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. 303.

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.

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.

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.

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. Surrender of defendant.
 88. Bail, how proceeded against.
 89. Bail, how exonerated.
 90. Sheriff, when to file order of arrest and undertaking. Plaintiff must except to undertaking within ten days.
 91. Notice of justification. New undertaking, if other bail.
 92. Qualifications of bail.
 93. Justification and allowance of bail.
 94. Deposit of money with sheriff.
 95. Payment of money by sheriff into court.
 96. Substituting bail for deposite.
 97. Money deposited, how applied, or disposed of.
 98. Sheriff, when liable as bail; and his discharge from liability.
 99. Proceedings on judgment against sheriff.
 100. Bail liable to sheriff.
 101. Fees of sheriff for keeping prisoner; and liability of plaintiff therefor.
 102. Prisoner may be discharged on plaintiff neglecting after demand, to pay sheriff's fees.
 103. Motion to vacate order of arrest, or reduce bail; and affidavits on motion.
 104. Order of arrest when vacated; bail when reduced.

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.

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.

Suing a party by a fictitious name when allowed.

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

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

Arrest on civil process.

When defendant may be arrested. 6 Barb. 569.

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. 145,
827; 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. 100. 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.

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.

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

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.

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.

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.

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.

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

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.

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

Service of affidavit & order.

Arrest. 5 J. R. 182.

Defendant when to be discharged.

Bail, how given.

Surrender of defendant.

Bail, how proceeded against. How exonerated.

Order of arrest, under.

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.

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

Qualifications of bail. 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.

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.

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.

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.

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.

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.

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.

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.

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.

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 11. Substitution of bail for deposit.

Deposit how applied.

Sheriff when liable as bail, his discharge from liability.

Proceedings against sheriff.

Bail liable to sheriff.

Sheriff's fees for keeping prisoner.

Discharge for non-payment of fees by plaintiff.

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

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

Order of arrest when vacated; bail when reduced.

TITLE 12.

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.

Affidavit, its requisites.

3 How. 297.

Requisition to sheriff to take and deliver property.

Security on the part of the plaintiff and justification. 15 Wen. 581; 1 Barb. 20.

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.

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

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.

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.

TITLE 13.

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.

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.

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.

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.

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.

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.

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

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

Defendant when entitled to re-delivery.

Justification of defendant's sureties.

Qualification and justification of sureties.

Property how taken when concealed in building or inclosure.

Property, how kept. 5 Denio, 21.

Claim of property by third person.

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.

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.

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 herein-after prescribed, as a security for the satisfaction of such judgment as he may recover.

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.

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.

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.

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.

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

TITLE 13.
Writ of attachment, by whom granted, & when.

Affidavit to be attached to writ.

Undertaking by plaintiff.

Warrant to whom directed, and what to require.

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

Writ, how executed.

TITLE 13. 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 persons 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.

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.

TITLE 13. property, collection of debts, &c.

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.

When sheriff may deliver property attached to 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.

Action on undertaking, a defence for defendant.

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.

When sheriff to summon jury to try right of property.

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.

Order of examination when issued to third persons.

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.

Interrogatories to 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.

Answer of 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

Judgment against garnishee.

TITLE 13. 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. **TITLE 13.**

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. 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.

TITLE I.

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 is-
sues.

SEC. 1. Issues arise upon the pleadings when a fact or conclu-
sion 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 com-
plaint, 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
Sauf. 635.

SEC. 4. Issues, both of law and of fact may arise upon differ-
ent 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 re-
ferred 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 ab-
sence of evidence, shall only be made upon affidavit showing the
materiality of the evidence expected to be obtained, and what dili-
gence has been used to procure it, and also the name and residence

of the witness or witnesses. The court may also require the mov-
ing party to state upon affidavit, the evidence which he expects to
obtain, and if the adverse party thereupon admit that such evi-
dence 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.

SEC. 7. When the action is called for trial, the clerk shall pre-
pare 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 ne-
cessary to complete the jury. The jury shall consist of twelve per-
sons, 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.

Jurors how
chosen.

SEC. 8. Either party may challenge the jurors, but when there
are several parties on either side, they shall join in a challenge be-
fore it can be made. The challenges shall be to individual jurors,
and shall be peremptory, or for cause. Each party shall be enti-
tled to three peremptory challenges.

Challenge.

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

Challenge
for cause.
4 Denio 9.

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 381;
21 Wen. 502.

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 af-
firmation 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 dis-
charged;
consequence
thereof.

SEC. 14. If, after the impaneling 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 impaneled.

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.

Papers
which the
jury may re-
fer 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

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 3.

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.

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 BH 634.

A General and
special ver-
dicts.

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.

Verdict in
action for
personal
property.

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 juror
may render
either spe-
cial or gen-
eral 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.

When spe-
cial controls
general ver-
dict.

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.

In actions
for recovery
of money,
jury when to
assess dama-
ges.

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.

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

TITLE 4, 5.

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 refer-
ences may
be compul-
sarily or-
dered.

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 of 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.

Qualifica-
tions of re-
ferees
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.

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 6, 7.

Trial by and
report of re-
ferees. 3
Barb. 119;
3 Comst.
168.

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.

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.

Exceptions
must be ma-
terial. 3
Hill 159; 4
do. 119.

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.

How stated.

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.

Form of ex-
ception. 23
Wen. 316.

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.

Report of re-
ferees when
deemed ex-
cepted to
without spe-
cial notice of
exception.

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.

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.

Definition
new trial.

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 :

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

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;

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;
6 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 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.

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

Judgment, what.

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.

Judgments may be for or against several defendants.

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.

Ib.

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

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

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.

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

Judgment on the merits.

TITLE X.

Judgment upon Failure to Answer.

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

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:

Judgment on failure to answer.

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.

1b.; 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.**

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

Statement to
be in writ-
ing.

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.

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.

Filing state-
ment and
entering
judgment.

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.

Executions
how issued.

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.

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.

Controversy
submitted
without
action.

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
same as in
other cases,
but without
costs.

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.

Judgment
may be en-
forced or ap-
pealed from.

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.