LAWS OF THE SPECIAL SESSION.

Code of Procedure.

AN ACT to amend the Code of Procedure. Passed July 10, 1851.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows:

§ 1. The following sections and sub-divisions of sections of the Code of Procedure passed April 11, 1849, are hereby amended so that the same shall respectively read as follows, namely:

§ 11. The Court of Appeals shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made at a General Term by the Supreme Court, or by the Superior Court of the City of New-York, or Court of Common Pleas for the City and County of New-York, in the following cases, and no other:

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

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment, from which an appeal might be taken;

3. In a final order, affecting a substantial right, made in a special pleading, or upon a summary application to an action, after judgment;

4. In an order granting a new trial, but such an appeal shall not be allowed in an action originally commenced in a Court of a Justice of the Peace, or in the Marine Court of the City of New-York, or in an Assistant Justice's Court of that City, or in a Justice's Court of any of the cities of this State.

§13. There shall be four terms of the Court of Appeals, in each year, to be held at the Capitol in the City of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the third Tuesday of September, and continued for as long a period as the public interest may require.

Additional terms shall be appointed and held at the same place by the Court when the public interest requires it. The Court may, by general rules, provide what causes shall have a preference on the calendar.

§ 14. The concurrence of five Judges is necessary to pronounce a judgment. If five do not concur, the case must be re-heard. But no more than two re-hearings shall be had, and if, on the second re-hearing five Judges do not concur, the judgment shall be affirmed.

§ 16. The Court of Appeals may be held in other buildings than those designated by law as places for holding Courts, and at a different place in the same city from that at which it is appointed to be held. Any one or more of the Judges may adjourn the Court, with the like effect as if all were present.

§ 24. The places appointed within the several Counties for holding the General and Special Terms, Circuit Courts, and Courts of Oyer and Terminer, shall be those designated by statute for holding County or Circuit Courts. If a room for holding the Court in such place shall not be procured by the Supervisors, it may be held in any room provided for that purpose by the Sheriff, as prescribed by section twenty-eight.

General or Special Terms of the Supreme or County Courts, and Circuit Courts and Courts of Oyer and Terminer, may be adjourned to be held on any future day, by an entry to be made in the minutes of the Court; and Juries may be drawn and summoned for an adjourned Circuit or County Court, or an adjourned Court of Oyer and Terminer, and causes may be noticed for trial at an adjourned Circuit or County Court in the same manner as if such Courts were held by original appointment.

§ 30. The County Court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

1. Civil actions in which the relief demanded is the recovery of a sum of money, not exceeding five hundred dollars, or the recovery of the possession of personal property not exceeding in value five hundred dollars, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement; subject to the right of the Supreme Court upon special motion for good cause shown to remove any such action to the Supreme Court before trial;

2. The exclusive power to review in the first instance a judgment rendered in a civil action, by a Justice's Court in the county, or by a Justices' Court in cities, and to affirm, reverse or modify such judgment;

3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county, and the collection of any deficiency on the mortgage remaining unpaid after the sale of the mortgaged premises;

4. The partition of real property situated within the county;

5. The admeasurement of dower in land situated within the county;

6. The sale, mortgage, or other disposition of the real property situated within the county, of an infant or a person of unsound mind;

7. To compel the specific performance, by an infant, heir or other person, of a contract made by a party who shall have died before the performance thereof;

8. The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county;

9. The mortgage or sale of the real property, situated within the county of a religious corporation, and the disposition of the proceeds thereof;

10. To exercise the power and authority heretofore vested in such Courts of Common Pleas, over judgments rendered by Justices of the Peace, transcripts of which have been filed in the offices of the County Clerks in such counties;

11. To exercise all the powers and jurisdiction conferred by statute upon the late Courts of Common Pleas of the county, or the judges or any judge thereof respecting ferries, fisheries, turnpike roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed or non-resident debtors, jail liberties, the removal of occupants from State lands, the laying out of railroads through Indian lands, and upon appeal from the determination of Commissioners of Highways, and all other powers and jurisdiction conferred by statute, which has not been repealed on the late Court of Common Pleas of the county, or on the County Court, since the late Courts of Common Pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction when the provisions of any statute are inconsistent with the organization of the County Court;

12. To remit fines and forfeited recognizances in the same cases and like manner as such power was given by law to Courts of Common Pleas. But the first subdivision of this section shall not apply to the County Court of the Counties of Kings, Albany, Monroe and Erie.

13. To grant new trials, or affirm, modify or reverse judgments in actions tried in such Court upon a bill of exceptions or case made subject to an appeal to the Supreme Court.

§31. The County Court is always open for the transaction of any business for which no notice is required to be given to an opposing party. At least two terms in each County for the trial of issues of law or fact, and as many more as the County Judge shall appoint, shall be held in each year at the places in the Counties respectively designated by statute for holding County or Circuit Courts, on such days as the County Judge shall from time to time appoint, and may continue as long as the Court deem necessary.

Notice of such appointment shall be published in the State paper at least four weeks before any such term, and also in a newspaper, if any, printed in the County; so many of such terms as the County Judge shall designate for that purpose, in such notice, may be held for the trial of issues of law, and hearing and decision of motions and other proceedings at which no jury shall be required to attend.

§ 53. Sub. 3. An action for a penalty, not exceeding one hundred dollars.

Sub. 9. An action for damages for fraud in the sale, purchase or exchange of personal property if the damages claimed do not exceed one hundred dollars.

§ 56. At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice to the effect that if the plaintiff shall, within thirty days thereafter, deposite with the justice a summons and complaint in an action in the County Court, for the same cause, the defendant will, within ten days after such deposite, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will, 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. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

§ 57. Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the County Courts. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 60. When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in section fifty-five, fifty-six and fifty-seven, the plaintiff may prosecute an action for the same cause of action only on which he relied before the justice; and the answer of the defendant shall set up the same defense only which he made before the justice.

§ 61. If the judgment in the County Court be for the plaintiff, he shall recover costs; if it be for the defendant he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

§ 62. If, in an action before a justice, the plaintiff have several causes of action, to one of which the defense of title to real property shall be interposed, and as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections fifty-five and fifty-six, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the County Court. As to the other causes of action, the justice may continue his proceedings.

§ 64. Sub. 11. The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

§ 68. The provisions of sections fifty-five to sixty-four, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketting transcripts of judgments, to their effect, and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the Courts embraced in this title; except that after the discontinuance of the actions in the inferior court upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof, and except also that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketted in the office of the clerk of that county shall have the same effect as a lien, and be enforced in the same manner as and be deemed a judgment of the Court of Common Pleas for the City and county of New York.

§ 74. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section 73. But the objection that the action was not commenced within the time limited, can only be taken by answer.

§ 99. An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the Sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; as if a corporation be defendant, to the Sheriff, or other officer of the county, in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days.

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

§ 101. If a person entitled to appeal or bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued, either:—

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

2. Insane; or

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

4. A married woman:—

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

§ 111. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

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

§ 114. When a married woman is a party, her husband must 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 where her husband cannot be joined with her, as herein provided, she shall prosecute or defend by her next friend.

§ 116. The guardian shall be appointed as follows:

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

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one, if he has none, then to the infant himself if over fourteen years of age, or if under that age to the person with whom such infant resides.

§122. The Court may determine any controversy between the parties before it, when it can be done whitout prejudice to the rights of others, or by saving their rights, but when a complete determination of the controversy can not be had without the presence of other parties, the Court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person, not a pary to the action, but having an interest in the subject thereof, makes application to the Court, to be made a party, it may order him to be brought in by the proper amendment.

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

§126. If the County designated for that purpose in the complaint, be not the proper County, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that the trial be had in the proper County, and the place of trial be thereupon changed by consent of parties, or by order of the Court, as is provided in this section.

The Court may change the place of trial in the following cases:

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

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

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

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

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

§ 131. In the case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering, he shall, in writing, demand the same. If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

§ 132. In an action affecting the title to real property, the plaintiff at the time of filing the complaint, or at any time afterwards, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

§ 134. The summons shall be served by delivering a copy thereof as follows:

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

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

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

4. In all other cases to the defendant personally.

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

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

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

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

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

5. Where the action is for divorce, in the cases prescribed by law.

The order must direct the publication to be made in two newspapers 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. In case of publication the Court or Judge must also direct a copy of the summons and complaint to be forthwith deposited in the Post-Office, directed to the person to be served at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposite in the Post-Office.

The defendant against whom publication is ordered or his representatives, on application, and sufficient cause shown, at any time before judgment, must be allowed to defend the action; and except in an action for divorce, the defendant, against whom publication is ordered or his representatives, may in like manner upon good cause shown be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition on such terms as may be just; and if the defense be successful, and the judgment, or any part thereof, have been collected, or otherwised enforced, such restitution may thereupon be compelled as the Court directs; but the title to property sold under such judgment to a purchaser in good faith, shall not be thereby affected. And in all cases where publication is made the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

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

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

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

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

§ 138. Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same must be as follows:

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

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

3. In case of publication, the affidavit of the printer, or his foreman, or principle clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, as required by law, 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 the service.

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

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

§ 149. The answer of the defendant must 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 consise statement of any new matter constituting a defense or set off without unnecessary repetition.

§ 152. Sham and irrelevant answers and defenses may be stricken out on motion and upon such terms as the Court may in their discretion impose.

§ 153. When the answer contains new matter constituting defense or set off the plaintiff may, within twenty 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 may allege, in a plain and concise manner without unnecessary repetition, any new matter, not inconsistent with the complaint, constituting a defense 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 defenses and set off set up in the answer and reply to the residue.

§ 156. Every pleading in a Court of Record must be subscribed by the party, or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

§ 157. The verification must be to the effect, that same is tried to the knowledge of the person making it except as to those matters stated on information and belief and as to those matters he believes to be true, and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, and such instrument be in possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by an officer thereof; and when the State 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 can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

§ 158. It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney to the effect that he believes it to be true, or be precluded from giving evidence thereof.—The Court, or a Judge thereof, or a County Judge, 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.

§ 162. 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 defense, 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 state that there is due to him thereon from the adverse party, a specified sum which he claims.

§ 172. 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 expires, or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it made to appear to the Court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which it is or may be noticed, and if it appear to the Court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the Court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the Court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead in upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth sub-division of section one hundred and forty-four, the Court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many sections as may be necessary to the proper determination of the causes of action therein mentioned.

§ 173. 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 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 defense by conforming the pleading or proceeding to the facts proved.

§ 174. 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; and may supply an omission in any proceeding; and wherever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the Court may in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

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

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

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

2. Upon the production of a copy of the undertaking and Sheriff's certificate, a Judge of the Court, or County Judge, 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 such application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in Subdivision 3, of Section 179, so as to discharge the bail from an undertaking given to the effect provided by section 211.

§ 193. On the receipt of such notice, the Sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same, or other bail, (specifying the places of residence and occupation of the latter,) before a Judge of the Court or County Judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section one hundred and eighty-seven.

§ 231. The warrant 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, or so much thereof as may be sufficient to satisfy the plaintiff's demand together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the Sheriffs of different Counties.

§ 244. A Receiver may be appointed:

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

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

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

4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

5. In such other cases as are now provided by law or may be in accordance with the existing practice except as otherwise provided in this act.

The Court may grant the other provisional remedies now existing according to the present practice except as otherwise provided in this act.

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

Whenever, in the exercise of its authority, a Court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the Court besides punishing the disobedience, as for contempt, may make an order, requiring the Sheriff to take the money or thing and deposit or deliver it, in conformity with the direction of the Court.

When the answer of the defendant admits part of the plaintiff's claim to be just, the Court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a provisional remedy.

§ 246. Sub. 2. In other actions the plaintiff may, upon like proof apply to the Court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the Court may order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days notice of the time and place of application to the Court for the relief demanded by the complaint.

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

§ 252. An issue of law must be tried by the Court, unless it be referred, as provided in sections 270 and 271. An issue of fact, in action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultry, must be tried by a Jury, unless a Jury trial be waived, as provided in section 266, or a reference be ordered as provided in sections 270 and 271.

§ 255. All issues of fact, triable by a Jury or by Court, must be tried before a single Judge. Issues of fact in the Supreme Court must be tried at a Circuit Court when the trial is by Jury, otherwise, at a Circuit Court or Special Term, as the Court may by its rules prescribe. Issues of law must be tried at a General Term, unless the Court order the trial to be had at a Special Term.

§ 258. Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the Court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants, may be allowed by the Court, whenever, in its opinion, justice will be thereby promoted.

§ 259. When the issue shall be brought to trial by the plaintiff, he shall furnish the Court with a copy of the summons and pleadings with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the Court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

§ 262. When a verdict is found for the plaintiff, in an action for the 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 must also assess the amount of the 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. If a set off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

§ 264. Upon receiving a verdict, the Clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the Jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the cause be reserved for argument or further consideration. The Justice trying the cause may, in his discretion and upon such terms as may be just, stay the entry of judgment and further proceedings until the hearing and final decision of a motion for new trial, or to set aside the verdict or judgment upon the grounds of surprise or irregularity, or upon a case or bill of exceptions.

The Court shall have power to order a verdict to be entered, subject to the opinion of the Courts thereon. The Judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or as being against evidence or for insufficient evidence, or for excessive damages; but such motions in actions hereafter tried shall only be heard upon the minutes at the same term or circuit at which the trial is had, and if not heard at the same term or circuit in actions hereafter tried, the motion must be made upon a case or bill of exceptions or upon appeal. When such motion is heard and decided upon the minutes of the Judge, an appeal may be taken from such decision, and in case of appeal, a case or bill of exceptions must be prepared and settled in the usual form, and upon which case or bill of exceptions the argument of appeal must be had.

After the trial of a cause, either party may in the manner prescribed by law and the rules of the Court in which the action is pending, make and settle a case, or bill of exceptions, which when settled shall be filed, and when filed after judgment, shall be attached to and become a part of the judgment roll.

§ 265. Motion for a new trial on a case or bill of exceptions, motions for judgment on a special verdict or case reserved subject to the opinion of the Court, shall in the first instance be heard and decided at a Special Term, unless the Justice trying the cause shall order it to be heard in the first instance at a General Term. If such order is granted, directing it to be heard at a General Term, such motion may then be noticed and brought on to argument by either party at a General Term of such Court, and the Court shall hear and decide the same.

§ 268. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing, of the judgment in the same manner, and with the same effect as upon a trial by jury. And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the Court, make a bill of exceptions or case containing so much of the evidence, and such exceptions as may be material to the question to be raised. The bill of exceptions or case shall be settled as provided by the rules of the Court, and the Judge in settling such case shall briefly specify the facts found by him and his conclusions of law.

§ 269. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two sub-divisions of section two hundred and forty-six, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and taking of an account, or the proof of any fact be necessary to enable the Court to complete the judgment, a reference or assessment by a jury may be ordered, as in that section provided.

§ 272. The trial by referees is conducted in the same manner as a trial by court. They have the same power to grant adjournments as the court upon such trial. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands 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 has the effect of special verdict.

§ 273. In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person, or persons, not exceeding three, and the reference shall be ordered accordingly; and, if the parties do not agree, the Court shall appoint one or more referees, not exceeding three, who shall be free from exception.

§ 278. Judgment upon an issue of law not tried at a general term, or an issue of fact, or upon confession, or upon failure to answer, (except where the clerk is authorized to enter the same by the first sub-division of section two hundred and forty-six, and by section three hundred and eighty-four,) shall in the first instance be entered upon the direction of a single Judge, or report of referees, subject to a review at the general term, on the demand of either party, as herein provided.

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

§ 282. On filing a judgment roll upon a judgment, directing in whole or in part the payment of money, it may be docketed with the clerk of the County where it was rendered, and in any other County, upon the filing with the Clerk thereof a transcript of the original "docket," and shall be a lien on the real property in the County where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the County in which such real estate is situated, or which he shall acquire at any time thereafter for ten years from the time of docketing the same in the County where it was rendered. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the Court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment in such terms as they shall see fit, direct an entry to be made by the Clerk on the docket of said judgment that the same is "secured on appeal," and thereupon it shall cease during the pendency of the appeal to be lien on the real property of the judgment debtor as against purchasers and mortgages in good faith.

§ 284. After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the Court, upon motion, with personal notice to the adverse party, unless he be absent or non resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the Court shall direct. Such leave shall not be given, unless it be established by the oath of the party or other satisfactory proof that the judgment, or some part thereof remains unsatisfied and due.

When judgment shall have been rendered in a Court of Justice of the Peace, or in a justice's or other inferior court in a city, and docketed in the office of the Clerk of the County, the application for leave to issue execution must be to the County Court of the county where the judgment was rendered, or in the City and County of New York, to the Court of Common Pleas of that city and county.

§ 287. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it must be issued to the Sheriff of the County where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold, must be sold in the county where it lies, by the Sheriff of the County, or by a referee appointed by the Court for that purpose, and thereupon the Sheriff, or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged by the decree to be sold.

§ 291. Until otherwise provided by the Legislature, the existing provisions of law not in conflict with this chapter, relating to executions and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

§ 292. When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the Sheriff of the County where he resides, or if he do not reside in the State, to the Sheriff of the County where a judgment roll, or a transcript of a justice's judgment, for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a Judge of the Court, or a County Judge of the County to which the execution was issued, or a Judge of the Court of Common Pleas for the City and County of New-York, when the execution was issued to such City and County, requiring such judgment debtor to appear and answer concerning his property, before such Judge, at a time and place specified in the order, within the County to which the execution was issued. After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the Court, or a Judge thereof, or County Judge, or any Judge of the Court of Common Pleas for the City and County of New-York, that any judgment debtor, residing in the County where such Judge or officer resides, has property, which he unjustly refuses to apply toward the satisfaction of the judgment, such Court or Judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided, upon the return of an execution. On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. Instead of the order requiring the attendance of the judgment debtor, the Judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the Sheriff of any County where such debtor may be, to arrest him and bring him before such Judge. Upon being brought before the Judge, he may be examined on oath, and if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking, he may be committed to prison, by warrant of the Judge, as for a contempt. No person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

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

§ 298. The Judge may also by order appoint a receiver of the property of the judgment debtor, in the same manner and with the like authority as if the appointment was made by the Court according to section to 244. But before the appointment of such receiver, the Judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The Judge may also by order forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith.

§ 302. If any person, party or witness, disobey an order of the Judge or referee duly served, such person, party or witness may be punished by the Judge as for a contempt. And in all cases of commitment under this chapter, to the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment, by the Court or Judge committing him, or the Court in which the judgment was rendered, on such terms as may be just.

§ 306. In other actions costs may be allowed or not, in the discretion of the Court.

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

In the following cases the costs of an appeal shall be in the discretion of the Court:

1. When a new trial shall be ordered.

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

§ 307. Sub. 6. To either party on appeal, except to the Court of appeals, before argument, fifteen dollars; for argument thirty dollars; but the provision shall not apply to Appeals from an order granting or denying a non-enumerated motion.

§ 317. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right, but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. But this section shall not be construed to allow costs against executors or administrators, while they are now exempted therefrom, by section forty-one, of title three, chapter six, of the second part of the Revised Statutes, and whenever any claim against a deceased person shall be referred pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law.

§ 339. Whenever an appeal is perfected as provided by sections three hundred and thirty-five, three hundred and thirty-six, three hundred and thirty-seven and three hundred and thirty-eight, it stays all further proceedings in the Court below, upon the judgment appealed from or upon the matter embraced therein; but the Court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the Court below may, in its discretion, dispense with or limit the security required by sections three hundred and thirty-five, three hundred and thirty-six and three hundred and thirty-eight, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections three hundred and thirty-six, three hundred and thirty-seven, three hundred and thirty-eight, where it would otherwise, according to those sections, exceed that sum.

§ 348. In the Supreme Court, the Superior Court of the City of New-York, and Court of Common Pleas for the City and County of New-York, an appeal may be taken to the general term from a judgment entered upon the report of the referees or the direction of a single Judge of the same Court, in all cases. Such an appeal, however, does not stay the proceedings, unless the Court, or a Judge thereof, so order, which order may be made upon such terms, as to security or otherwise, as may be just, said security not to exceed the amount required on an appeal to the Court of Appeals. In the Supreme Court the appeal must be heard in the same manner as if it were an appeal from an inferior Court.

§ 349. An appeal may in like manner and within the same time be taken from an order made at a special term or by a single Judge of the same Court, or a County or special County Judge, in any stage of the action, including proceedings supplementary to the execution, and may be thereupon reviewed in the following cases:

1. When the order grants or refuses a provisional remedy, or grants, or refuses or dissolves an injunction;

2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer;

3. When it involves the merits of the action, or some part thereof;

4. When the order in effect determines the action, and prevents a judgment from which an appeal may be taken;

5. When the order is made upon a summary application in an action after judgment, and affects a substantial right.

§ 353. The appellant shall, within twenty days after judgment, make, or cause to be made, an affidavit, stating the substance of the testimony and proceeding before the Court below, and the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to make and serve the affidavit and notice of appeal provided for in this and the next section.

§ 354. The affidavit and notice of appeal must, within the same time, be served on the Justice, and a notice of the appeal on the respondent, personally, or by leaving it at his residence with some person of suitable age and discretion, or in case the respondent is not a resident of the County, in the same manner on the attorney or agent, if any, who is a resident of such City or County, who appeared for him on the trial; and the appellant must, at the time of the service of the notice of appeal on the Justice, pay to him the costs of the action included in the judgment, together with two dollars costs of the return, which shall be restored to him in case the judgment is reversed, and be included in the judgment for costs on reversal.

§ 366. Upon the hearing of the appeal, the Appellate Court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the Court may affirm or reverse the judgment of the Court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the Justice, the Court may determine the alleged error in fact on affidavits, and may in its discretion inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the Justice, and it is shown by the affidavits served, or otherwise, that manifest injustice has been done, and the defendant satisfactorily excuses his default, the Court may in its discretion set aside or suspend judgment, and order a new trial before the same or any other Justice, at such time and place, and on such terms as the Court may deem proper. The parties must appear before the justice according to the order of the Court, and the same proceedings must thereupon be had in the action, as on the return of a summons personally served.

§371. The following fees and costs and no other, except fees of officers and disbursements, shall be allowed on appeals:

To the appellant on reversal fifteen dollars.

To the respondent on affirmance, twelve dollars.

To a Justice of the Peace, for his return, two dollars.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party, shall be such sum as the Appellate Court may award, not exceeding ten dollars.

If the appeal be dismissed for want of prosecution, as provided by section three hundred and sixty-four, no costs shall be allowed to either party.

§ 384. The statement may be filed with a County Clerk or with a Clerk of the Superior Court of the City of New-York, who shall indorse upon it and enter in the judgment book a judgment of the Supreme or said Superior Court, for the amount confessed with five dollars cost, together with disbursements. The statement and affidavit with the judgment endorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such Courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon by the Attorney or person issuing the same, a direction to the Sheriff to collect the amount due on such judgment with interest and costs, which amount shall be stated with interest thereon and the cost of such judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due, and whenever any further installments become due, execution may in like manner be issued for the collection and enforcement of the same.

§ 385. The defendant may at any time before the trial or verdict serve upon the plaintiff, an offer in writing to allow judgment to be taken against him, for the sum or property, or to the effect therein specified with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an